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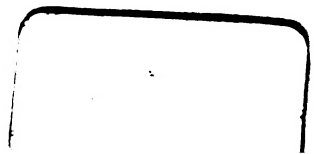
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THE  
AMERICAN AND ENGLISH  
ENCYCLOPÆDIA  
OF  
LAW.

COMPILED UNDER THE EDITORIAL SUPERVISION OF

JOHN HOUSTON MERRILL,

*Late Editor of the American and English Railroad Cases and the American and English Corporation Cases.*

VOLUME I.

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## PREFACE.

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IT is the purpose of this work to supply in convenient form the whole body of modern law. There are several excellent law dictionaries: but this is not a law dictionary. There are countless text-books upon every branch of the law, but only large law libraries can supply them all. Even in libraries the very wealth of material is confusing. Chief-Justice Sharswood once remarked, "The difficulty, in our profession, is not so much to know the law, as to know where to find it." The investigations of those engaged upon this work have led to the belief that it will be practicable to produce within the compass of comparatively few volumes a real Encyclopædia of Law. In so novel an undertaking the plan adopted should be entitled to explanation and consideration.

Even the best text-books devote valuable space to what is of little practical use to the profession. Page after page of argument, of the author's individual opinion, or of comparison of cases, the busy lawyer seldom reads. His search is for the fountain-heads of the law,—the cases themselves. However much he may respect, and on occasion carefully study, the arguments and opinions of the text-writer, the chief daily use of his library of text-books is as digests to the cases. It is therefore believed that among books which are the products of the ablest minds, and the results of years of study, a *practical law library* of accepted principles of law, supported by the citation of many if not of all the cases on the various subjects, will have its place. The accomplishment of this purpose within a reasonable compass involved a modification of the style in which most text-books are written. The whole body of the law is divided into such titles as seem

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## *PREFACE.*

capable of separate treatment. In the choice of these, prominence has been given to subjects upon which no text-book has been written, or which have received only incidental and perhaps meagre treatment in standard works. Every title which is not practical, or which belongs to the obsolete or purely local law, is rejected. In the subdivision of branches of the law the effort has been to make the arrangement of the work really alphabetical. Thus, instead of devoting a volume to the subject of CORPORATIONS, for example, what belongs to that law will be found under such heads as AMOTION, BENEFICIAL or BENEVOLENT ASSOCIATIONS, BUILDING ASSOCIATIONS, STOCK ASSESSMENT, STOCK TRANSFER, etc. So the reader need not search through a long title on INSURANCE to find a special treatment of ACCIDENT INSURANCE, nor through such titles as DEEDS, MORTGAGES, etc., for the law of ACKNOWLEDGMENTS. In the preparation of an article a careful and logical analysis is first insisted upon. This forms a summary of what follows and makes reference to the sub-headings easier. Further subdivisions in the notes are marked by catch-words at the beginning of paragraphs. The text itself is made as concise as a full and clear statement of the law will allow, the aim being to use not one unnecessary word, and to have the text occupy but a small portion of each page. The bulk of the work consists of notes. They fill so large a proportion of the space as to make the amount of material in a volume very large. They differ from the ordinary text-book notes in being much more than simple collections of cases which must be examined to determine the correctness of the statements in the text. A short summary of the facts of a case, an extract from an opinion, or the writer's own synopsis of the points decided will often furnish to the reader who has not time or opportunity to examine the report itself, all that he desires. In the skill and accuracy with which this is done will lie much of the value of the work. The space gained by these peculiarities of style makes possible a very complete collection of cases upon each topic treated. Where the cases upon a given point are so numerous as to render a selection necessary, choice is made

## PREFACE.

of such examples as will put the local practitioner in possession of the line of decisions of special value to him. The citations are made with great care, the aim being to collate as many of the cases as is possible, and particularly to secure all the leading and latest cases up to the date of publication. Conflicting decisions are noted and, if possible, the views held in the different States pointed out. Appended to every article of any length will be found a list of such text-books, law articles, notes to series of annotated reports, etc., as have been used in its preparation, which will serve the double purpose of making proper acknowledgment to authors and referring the reader to all sources of information.

A feature of the work which seems worthy of particular mention is the collection of adjudged words and phrases. Many of these will be found valuable as presenting an authoritative definition of the legal meaning of words and phrases.

The novelty of the plan and, it is believed, its practicability will be conceded. The work must speak for itself. It is only fair, however, to those engaged upon the undertaking, that the Editor should add a word of explanation. While the work only professes to be a compilation, and all original ideas and personal opinions are rigidly excluded, there is room left for the display of much literary skill in the selection and arrangement of material, and for the exercise of great industry and intelligence in opening up paths through what have proved in many cases to be almost untrodden fields. If the profession find in this work a value commensurate with the diligence and care bestowed upon it by a staff of writers most of whom have already met with a favorable reception, and some of whom have taken high rank as authorities upon particular branches, the credit is due to them.

J. H. M.

PHILADELPHIA. PA.

*April 1, 1887.*





# THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

“**A**”—The particle “A” is not necessarily a singular term; it is often used in the sense of “any,” and is then applied to more than one individual object.<sup>1</sup>

**ABANDON—ABANDONMENT.** See ADVERSE POSSESSION; DIVORCE; EASEMENT; EMINENT DOMAIN; FIXTURES; HIGHWAYS; HOMESTEAD; INSURANCE; MINES AND MINING; PERSONAL PROPERTY; PUBLIC LANDS; SHIPPING.

**1. Definition.**—The relinquishment or surrender of rights or property by one person to another.<sup>2</sup> A giving up; a total desertion.<sup>3</sup> Absolute relinquishment.<sup>4</sup> Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect.<sup>5</sup>

1. Nat. Union Bank v. Copeland, 141 Mass. 257.

“**A**” *See.*—After the sailing of a vessel, an agent for insurers inserted in the “live-cattle clause” of a policy issued to cover such vessel, among the dangers insured against, any loss occasioned by “a sea.” *Held*, that this did not limit insured to a loss occasioned by the force of a single wave, and that where cattle were carried between decks, and were injured by the tossing of the ship by heavy waves, it would render insurers liable. Snowden v. Guion, 101 N. Y. 458.

“**A**” *Room that is Improved and Suitable.*—A written contract to furnish “a room that is improved and suitable” for a certain purpose is fulfilled by furnishing such a room, and parol testimony is not admissible to show that some particular room was intended by the contracting parties. Thompson v. Stewart, 60 Iowa, 223.

“**A**” *Year's Rent.*—“One year's rent” and “a year's rent” are used in the statute to denote the amount of rent to be distrained for in the one case and to be paid or secured in the other. And it matters not for what year it accrued, or whether it was before or after the creation of the lien, or whether or not other rents may have accrued after the lien was created and been paid by the tenants. As long as any rent arising under the tenancy remains unpaid by the persons liable therefor, as soon as it becomes due the person entitled to it may distrain the goods for an amount not exceeding the

rent for a year. Wades v. Figgatt, 75 Va. 575.

“**A**” *Railroad leading to M.* embraces not only a railroad whose line reaches M. or “terminates” at that place, but a railroad connecting either directly or by way of another railroad whose line reaches M. and “terminates” at that place. State v. Hastings, 24 Minn. 78. See Hostrup v. Madison City, 1 Wall. (U. S.) 291.

2. Bouvier's Law Dict.

3. Stormonth's Dict.

4. Webster's Dict.

5. As where an article is thrown away. McGoon v. Ankeny, 11 Ill. 558. It may be inferred from mere lapse of time. Brentlinger v. Huchison, 1 Watts (Pa.), 46. See Smoot v. Wathen, 8 Mo. 522.

To constitute an abandonment there must be the concurrence of the intention to abandon, and the actual relinquishment of the property, so that it may be appropriated by the next comer. Judson v. Malloy, 40 Cal. 299.

**Intent.**—As intent is the essence of abandonment, the facts of each particular case are for the jury. 2 Washb. Real Prop. (4th ed.) 370; 40 Am. Dec. 464; n., Dyer v. Sanford, 9 Metc. (Mass.) 395; Clemmins v. Gotshall, 4 Yeates (Pa.), 330; Miller v. Cresson, 5 Watts & S. (Pa.) 284; Heath v. Biddle, 9 Pa. St. 273; Wiggins v. McCleary, 49 N. Y. 346; Bell v. Smith, 2 Johns. (N. Y.) 98; Wilson v. Pearson, 20 Ill. 81; McGoon v. Ankeny, 11 Ill. 558; Hazelbaker v. Goodfellow, 64 Ill. 238; Taylor v.

Property is said to be abandoned when it is thrown away, or its possession is voluntarily forsaken by the owner, in which case it will become the property of the first occupant; or when it is involuntarily lost or left without the hope and expectation of again acquiring it, and then it becomes the property of the finder, subject to the superior claim of the owner; except that in salvage cases, by the admiralty law, the finder may hold possession until he is paid his compensation, or till the property is submitted to legal jurisdiction for the ascertainment of the compensation.<sup>1</sup>

Hampton, 4 McC. (S. Car.) 96; Parkins v. Dunham, 3 Strob. (S. Car.) 224; Banks v. Banks, 77 N. Car. 186; Weill v. Lucerne M. Co., 11 Nev. 200; Myers v. Spooner, 55 Cal. 257; Marquart v. Bradford, 43 Cal. 526; Smith v. Cushing, 41 Cal. 97; Bell v. Red Rock, etc., Co., 36 Cal. 214; Moon v. Rollins, 36 Cal. 333; Davis v. Perley, 30 Cal. 630; Roberts v. Unger, 30 Cal. 676; Masson v. Anderson, 59 Tenn. 290; Landis v. Perkins, 14 Mo. 238. See Sample v. Robb, 16 Pa. St. 305; Atchinson v. McCulloch, 5 Watts (Pa.), 13.

Where the owner of a tannery sold it, but forgot to remove some hides which had been placed in the vats for tanning, and some years afterwards they were found, *held*, they were not abandoned. *Livermore v. White*, 74 Me. 452; s. c., 43 Am. Rep. 600.

Plaintiff raked into heaps, intending to remove it, manure that had accumulated in a street the fee of which was in the borough. Before he could do so, and within twenty-four hours, defendant carted it away. *Held*, that plaintiff could maintain trover; that the manure originally belonged to the travellers whose animals had dropped it, but was abandoned by them. *Haslem v. Lockwood*, 37 Conn. 500; s. c., 9 Am. Rep. 500.

An abandonment of realty will be presumed where the party leaves no property or improvement to indicate his intention to return and resume the occupancy of the land; as, for instance, buildings, though not occupied, kept in good repair; and fields, though not under immediate cultivation, kept properly fenced, so as to exclude marauding cattle. *Burke v. Hammond*, 76 Pa. St. 172.

Where a vessel was sunk in November, and was found by the defendants in the following August, a verdict that the property was abandoned at the time when converted by the defendants was sustained. *Wyman v. Hurlburt*, 12 Ohio, 82.

Property sunk in a steamboat and un-

claimed for twenty years *held* to be abandoned. *Creery v. Breedlove*, 12 La. Ann. 745. See *Eads v. Brazelton*, 22 Ark. 429.

The payment of taxes by the defendant is no evidence of abandonment by the plaintiff. *Davis v. Perley*, 30 Cal. 630. See *Keene v. Cannovan*, 21 Cal. 291; *Mayor v. Riddle*, 25 Pa. St. 259.

A gift is not an abandonment. *Richardson v. McNulty*, 24 Cal. 339.

Abandonment of property divests the owner of his title therein, and the finder who reduces the same to possession after such abandonment is not guilty of conversion. *Wyman v. Hurlburt*, 12 Ohio, 81; s. c., 40 Am. Dec. 461.

Wherever abandonment can take effect, it simply destroys the title and does not vest it in another. A bargain to give up an equitable claim may work an abandonment, but the bargainee acquires no title by the bargain. A legal title, properly vested, can only be divested by abandonment, when the circumstances of the case are sufficient to raise an estoppel, or where the possession is acquired by one in consequence of the abandonment, and held by him under claim of title for the period of limitation. The title, although not lost by abandonment, would be barred by estoppel or by the Statute of Limitations. The voluntary abandonment would not prevent the possession of another from becoming adverse to the real owner, though the abandonment was expressly made for his benefit and to him. But where the abandonment is not accompanied by the circumstances of estoppel or limitation, no matter how formal the abandonment was, if it fell short of a legal deed of conveyance, it has no effect whatsoever upon the legal title. The owner may afterward re-enter and eject any one who may have entered into possession in reliance upon the abandonment. *Tiedeman Real Prop.* § 739.

1. *Eads v. Brazelton*, 22 Ark. 499.

**2. In Divorce.**—It is the act of wilfully leaving a wife, with intent to cause a palpable separation from her, and implies an actual desertion of the wife by the husband.<sup>1</sup> (See DIVORCE.)

**3. Office.**—An office created by statute can only be abandoned in the manner prescribed by statute.<sup>2</sup>

**4. Insurance.**—In marine insurance abandonment is effected by giving express and unconditional notice to the underwriter within a reasonable time after the assured has received intelligence of the loss, and its effect is to transfer the whole property and interest in the thing insured to the underwriter.<sup>3</sup> (See INSURANCE, MARINE.)

**5. Of Rights.**—Is where a person ceases to exercise a right. The term is principally used with reference to easements, profits à prendre, and similar rights, which may be extinguished by non-user for a certain number of years; but the non-user must be of such a nature as to show an intention to abandon the right, as where it amounts to an acquiescence in an unlawful interruption.<sup>4</sup>

**6. For Torts.**—Is the transfer of an animal or slave which has injured a person, in discharge of the owner's liability.<sup>5</sup>

**7. Of Child.**—If one exposes or abandons a child, incapable of taking care of itself, to cold or wet, whereby it receives an injury, he is indictable for misdemeanor; or if the child dies, for a felonious homicide.<sup>6</sup>

1. *Stanbrough v. Stanbrough*, 60 Ind. 275.

2. For a judge to say he abandons his office, or to neglect its duties, or to engage in the practice of law contrary to a statute, will not constitute an abandonment of his office. *State v. Seay*, 64 Mo. 89.

The acceptance of the office of justice of the peace for the township of T. while holding that office for the precinct of L. vacates and is an abandonment of the latter. *Eddy v. Peoria County*, 15 Ill. 375.

3. *Sweet's Law Dict.* The principle is applicable in fire insurance, where there are remnants, and sometimes also under stipulations in life policies in favor of creditors. *Bouvier's Law Dict.*; 2 *Phillips on Ins.* §§ 1490, 1514, 1515. (See INSURANCE, FIRE.)

4. *Sweet's Law Dict.*; 2 *Washb. Real Pr.* 83-85. See *Dyer v. Sanford*, 9 Metc. (Mass.) 395; *Emerson v. Wiley*, 10 Pick. (Mass.) 310; *William v. Nelson*, 23 Pick. (Mass.) 141; *Canney v. Andrews*, 123 Mass. 155; *Parkins v. Dunham*, 3 Strob. (S. Car.) 224; *Carlisle v. Cooper*, 4 C. E. Green (N. J.) 261; *Crain v. Fox*, 16 Barb. (N. Y.) 184; *Corning v. Gould*, 16

Wend. (N. Y.) 531; *Davis v. Gale*, 32 Cal. 27; *Dyer v. Depui*, 5 Whart. (Pa.) 584; *Mowry v. Sheldon*, 2 R. I. 369.

5. *Brown's Law Dict.*; *Bouvier's Law Dict.*; *Hynson v. Meullon*, 2 La. Ann. 798; *Arnoult v. Deschappelles*, 4 Id. 41.

6. 1 *Bishop's Cr. L.* (7th ed.) §§ 557, 883. B, A's wife, living apart from A, leaves C, their child, nine months old, lying in the road outside A's door. A, knowing its position, lets it lie there from 7 P.M. till 1 A.M. A's mother, D, knowing the child is there, and being in her house, acts in the same way as A. A has abandoned and exposed C; but D has not, as she was under no legal obligation to take charge of C. A sends B, her child, five weeks of age, packed up in a hamper as a parcel, by railway to C, B's putative father, giving directions to the clerk to be very careful of the hamper and send it by the next train. The child reaches C safely. A has abandoned and exposed B. *Stephen's Dig. Cr. L.* (Am. ed.) 202; *R. v. Falkingham*, L. R. 1 C. C. 222.

It does not mean a mere temporary absence from home, or temporary neglect of parental duty. *State v. Davis*, 70 Mo. 467.

8. What may be.—Possession of land<sup>1</sup> (see ADVERSE POSSESSION). Proceedings to condemn land<sup>2</sup> (see EMINENT DOMAIN).

1. To constitute an abandonment of land there must be a concurrence of the act of leaving the premises vacant, so that they may be appropriated by the next-comer, and the intention of not returning. If the intention was not manifested by leaving the possession vacant, without the intention of returning, there was no abandonment. *Judson v. Malloy*, 40 Cal. 309.

2. Abandonment of Condemnation Proceedings.—Condemnation proceedings may be abandoned by the corporation conducting them with even greater freedom than a plaintiff in an ordinary suit can take a nonsuit and discontinue. There are several reasons for this. It is often entirely in the discretion of the corporation, especially if it be a municipality, whether it will open the road sought to be condemned, and even after opening it the corporation may vacate the road and close it. Again, before payment of compensation no title passes, and the corporation has no right to the land, and until it has such right the landowner has no right to compensation and cannot compel payment of it. It may be laid down as a general rule that condemnation proceedings may be discontinued at any time before confirmation of the award of compensation or final judgment. *In re Mayor*, etc., 4 Rob. (La.) 35; *In re Canal St.*, 11 Wend. (N. Y.) 154; *People v. President*, etc., 1 Wend. (N. Y.) 318; *In re Anthony St.*, 20 Wend. (N. Y.) 619; *In re Dover St.*, 18 Johns. (N. Y.) 506; *Hudson*, etc., R. Co. v. Outwater, 3 Sandf. (N. Y.) 689; *In re Syracuse*, etc., Co., 11 N. Y. Supreme Ct. 311; *Blackshire v. Atchison*, etc., R. Co., 13 Kan. 514; *North Missouri R. Co. v. Lackland*, 25 Mo. 516. Or before trial. *Burlington*, etc., R. Co. v. Sater, 1 Iowa, 421; *Lancaster v. Kennebec L. D. Co.*, 62 Me. 273; *State v. Keokuk*, 9 Iowa, 439; *Dayton*, etc., R. Co. v. Marshall, 11 Ohio St. 497.

Indeed, it has been held that if after verdict the company gives notice of its intention to abandon the proceedings, the court cannot give judgment in favor of the landowner, even though it has confirmed the verdict. *State v. Cincinnati*, etc., R. Co., 17 Ohio St. 103; *Chicago v. Barbican*, 80 Ill. 482. And even after judgment the company may abandon. *Bloomington v. Miller*, 84 Ill. 621; *St. Louis*, etc., R. Co. v. Teters, 68 Ill. 144; *New Bedford v. Commissioners*, 9 Gray, (Mass.) 346. It is said that the

judgment assessing the amount of damages passes no title to the company and does not bind it to accept the lands and pay the amount assessed. *Gear v. Dubuque*, etc., R. Co., 20 Iowa, 524. And abandonment has been sanctioned even after appeal. *Curtis v. Portland*, 60 Me. 55.

Even purchasers from the condemning company cannot compel it to take the property condemned, especially if so to do would be injurious to the public interests. *State v. Graves*, 19 Md. 353.

Owners of land have no vested right in the verdict of the jury. *St. Joseph v. Hamilton*, 43 Mo. 283.

Abandonment of road will not justify recovery by the company of money paid to the landowner. *Stiles v. Middlesex*, 8 Vt. 440.

A party in whose favor the commissioner's report of damages is made can have no action against the other party for abandoning the proceedings by neglecting to file the report, even though he had sustained special damage. *Martin v. Mayor*, etc., 1 Hill (N. Y.) 545. See also *Stacey v. Vt. Cent. R. Co.*, 27 Vt. 39.

Abandonment must, however, be in good faith. If made because price is unsatisfactory, the company will be answerable to the landowner for all damages sustained by him. *Leisse v. St. Louis*, etc., R. Co., 2 Mo. App. 105; *McLoughlin v. Municipality No. 2*, 5 La. Ann. 504.

No Abandonment after Confirmation of Award.—After the owner has a right to surrender his property for compensation the city cannot discontinue, and the mayor of the city may be compelled by *mandamus* to perform such a ministerial act as the filing of the description of the property with the registry of deeds, so as to complete the remedy of the owner. *Farnsworth v. Boston*, 121 Mass. 173.

Some cases, therefore, hold that after confirmation of the award of damages the corporation cannot abandon the proceedings. Examples are amongst others the following: Upon report of commissioners of damages assessed, owner is entitled to amount, whether road is ever opened or not. *Wilkerson v. Buchanan Co.*, 12 Mo. 328.

Judgment on report of commissioner fixes rights. *Farmer v. Hooksett*, 28 N. H. 244.

No abandonment after order establishing highway. *Hupert v. Anderson*, 35 Iowa, 578. Or after confirmation. *In re*

**Condemnation Proceedings—Continued.**

Rhinebeck, 67 N. Y. 242; s. c., 15 N. Y. Sup. Ct. 34; *People v. Syracuse*, 20 How. Pr. (N. Y.) 491; *Stafford v. Mayor*, 7 Johns. (N. Y.) 541; *Jones v. Oxford*, 45 Me. 419; *In re Water Com.*, 31 N. J. L. 72.

Assessment of damages confirmed by the court is judgment in favor of owner of land, and he is entitled to execution, even though company desire to change route. *Neal v. Pittsburgh, etc., R. Co.*, 31 Pa. St. 19.

After reference to a committee who have reported the amount of damages there can be no abandonment. *Pollard v. Moore*, 51 N. H. 188.

Where a railroad company upon an award of commissioners have recorded the order and deposited the money as required by the eighteenth section of the general railroad act of 1850, the title to the premises taken becomes wholly vested in the company. Therefore where, in such a case, on a second appraisal the compensation to the owner of the land is increased by the award of the commissioners, the company cannot, by changing the route of their road, avoid the payment of such increased compensation, on the ground that the premises are not necessary for them. *Crowner v. Watertown, etc., R. Co.*, 9 How. Pr. (N. Y.) 457.

**Experimental Assessments.**—As to experimental assessments, Mr. Mills says (*Mills, Em. Dom.* § 315): "A corporation authorized to condemn land may make experimental surveys, but cannot institute experimental suits at law to determine amounts of damages by various routes. When a location is made, either party may institute proceedings to assess damages, and the company cannot withdraw. *Neal v. Pittsburgh R. Co.*, 2 Grant Cas. 137; the State may go so far as to assess damages and order the road to be opened without paying damages, but before the road is actually opened the damages should be paid. *Parham v. Justices*, 9 Ga. 341. In the case of *Rogers v. St. Charles*, 3 Mo. App. 41, the court severely condemns the practice of municipalities in having recourse tentatively to a number of juries, and in rejecting such findings as are not thought reasonable, and fastening upon and holding the citizen to the first one which places an estimate on the value of the property sufficiently low. The court further say:

We cannot perceive what possible advantage can arise from the constitutional declaration that private property shall not be taken for public use without just compensation, if the State or any of

its deputies, exercising the right of eminent domain, may cause as many inquests as it pleases of the value of the property to be condemned, and set aside as many of them as it sees fit, until one is found sufficiently small to suit its notions of a just compensation and to declare it to be so. Of course this permits one of the parties to a controversy to determine a judicial question in his own favor, and compels the other party to submit to the decision.' Proceedings may be abandoned, but 'in such cases, however, the party exercising, by delegation, the tremendous power known as the right of eminent domain must act in good faith. The exercise of this right can only be justified on the ground of the necessity of the particular property for the public use. To allow the State, or any deputy of the State, to pronounce a particular piece of property necessary or unnecessary, according to the terms on which it may be possible to acquire it; to enable the State, or any corporation, to be sole judge of the due correspondence between the property and its variously estimated value; to cause a thousand estimates to be made, and to have the unrestricted right of rejecting, *toties quoties*, every estimate which did not suit its views, would be thought an extravagant idea of arbitrary power if it were imagined in a satire. But if the purpose, instead of being abandoned in good faith, is merely modified so as to make the party exercising the right of eminent domain to take the chances of another jury, the first proceedings are a flat bar to such a course, and this for the sufficient reason that any other rule would work monstrous oppression and spoliation. We do not mean to say that there may not be, on the part of the municipal or other corporations, an abandonment of a particular project in a given year, let us say in the year 1870, and in the year 1874 a revival of the same measure. What we do mean to say is, that such a corporation shall not, under the color of this power, set at naught the constitutional provision that just compensation shall be made for all private property taken for public use."

**Partial Abandonment.**—"Although a certain portion of land is described in a petition as necessary for the construction of the improvement, a certain portion may be left out if not needed. The condemning party is not estopped by the allegation in the petition as to the quantity of land to be taken, when its engineer is of opinion that a less quantity would be sufficient. *Mills on Em. Dom.* § 314.



A mine<sup>1</sup> (see MINES). An easement<sup>2</sup> (see EASEMENTS). A mill-site<sup>3</sup> (see MILLS). An invention<sup>4</sup> (see PATENTS). A right under a land-warrant<sup>5</sup> (see LAND-WARRANTS). An application for land.<sup>6</sup> A fixture<sup>7</sup> (see FIXTURES). A homestead<sup>8</sup> (see HOMESTEAD). A domicile<sup>9</sup> (see DOMICILE). A contract<sup>10</sup> (see CONTRACTS). Wild animals.<sup>11</sup> As to lost articles (see PERSONAL PROPERTY).

**ABATEMENT.** See EQUITY; LEGACY; NUISANCE; PLEADING; PRACTICE; TAX.

I. *Of a Nuisance.*

II. *In Pleading.*

III. *Of Legacies.*

IV. *In Practice.*

V. *Of Freehold.*

VI. *In Revenue Law.*

I. *Of a Nuisance.*—1. **Definition.**—The abatement of a nuisance is the taking away or removing of the same by the party aggrieved thereby.<sup>12</sup> (See NUISANCE.)

2. **Who may abate.**—The distinction met with in the old text-books between the cases of a public and private nuisance, viz., that any one may abate the former, but only one who sustains special damage the latter, appears to have been entirely disregarded in the

1. *Richardson v. McNulty*, 24 Cal. 339.

2. Abandonment is a simple non-user of an easement; and in order to make out an effectual answer to the claim upon that ground, all the acts of enjoyment must have totally ceased for the same length of time that was necessary to create the original presumption. *Corn- ing v. Gould*, 16 Wend. (N. Y.) 531.

Mere non-user, even though for twenty years, will not of itself extinguish the easement. It must be accompanied with the express or implied intention of abandonment, and the owner of the servient estate, acting upon the intention of abandonment and the actual non-user, must have incurred expenses upon his own estate. *Tiedeman Real Prop.* § 606.

3. An express declaration by the owner of a mill-site which has been occupied by him that it is no longer his intention to keep up the mill, accompanied by corresponding acts, such as removing the dam and mill, and giving notice of such intention to those whose lands he has flowed, and to whom he has paid damages, will be deemed an abandonment and extinguishment of the privilege; or if he cease to use the mill-site for an unreasonable length of time, the entire and continued disuse for twenty years is strong *prima facie* evidence of a non-user for an unreasonable length of time;

and unless rebutted by clear and satisfactory proof, it is conclusive. Where a mill-owner suffers his mill and dam to go to decay and ceases to flow the land until a highway is made across the land, it is an abandonment. *Angell on Water-courses* (7th ed.) §§ 497-499.

4. *Walker on Patents*, §§ 87-92; *Curtis on Patents*, § 381 *et seq.*

5. *Emery v. Spencer*, 23 Pa. St. 271.

6. *Stewart v. Butler*, 2 S. & R. (Pa.) 379; *Philips v. Shaffer*, 5 S. & R. (Pa.) 215.

7. *Ewell on Fixtures*.

8. *Thompson on Homesteads*.

9. *Dacey on Domicil*, 90-92.

10. *Guerdon v. Corbett*, 87 Ill. 272; *Lincoln v. Swartz*, 70 Ill. 134; *Kim- merle v. Hass*, 53 Mich. 341.

11. Though property in an animal *feræ nature* may be acquired by occupancy, or by so wounding it as to bring it within the power and control of the pursuer; yet if, after wounding the animal, the party continues the pursuits until evening and then abandons it, though his dogs continue the chase, he acquires no property in it. *Buster v. Newkirk*, 20 Johns. (N. Y.) 75.

Wild geese which have been tamed, and have strayed away without regaining their natural liberty, are not abandoned. *Amory v. Flynn*, 10 Johns. (N. Y.) 102.

12. 3 Black. Com. 5.

modern decisions. The rule now is that any one who sustains a special injury or damage from a public nuisance to an extent that will support an action at law may abate the same of his own motion, doing no more damage than is necessary to protect his rights and prevent a recurrence of damage from the nuisance abated.<sup>1</sup> Therefore, where a nuisance is of a purely public character, *i.e.*, affects public rights merely and does not damage one individual more than another, there is no one who can abate, and the remedy is by indictment in the courts.<sup>2</sup> These principles have been applied to the cases of abatement of obstructions in public highways,<sup>3</sup> navigable streams,<sup>4</sup> of dwelling-houses,<sup>5</sup> of a noxious manufactory,<sup>6</sup> etc.

**3. What Nuisances may be abated.**—In general, any nuisance not purely public in its character may be abated. But a thing cannot be abated before it actually becomes a nuisance.

1. *Brown v. Perkins*, 12 Gray (Mass.), 83; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Lansing v. Smith*, 8 Cow. (N. Y.) 146; *Pierce v. Dart*, 7 Cow. (N. Y.) 609.

2. *Earp v. Lee*, 71 Ill. 193; *Brightman v. Bristol*, 65 Me. 426. This is true of moral nuisances; *e.g.*, a liquor store where liquor is sold contrary to law. *Blodgett v. Syracuse*, 36 Barb. (N. Y.) 529; *Brown v. Perkins*, 12 Gray (Mass.), 83; *Moody v. Supervisors*, 46 Barb. (N. Y. S. C.) 659; *Gray v. Ayres*, 7 Dana (Ky.), 375. A disorderly house. *Ely v. Supervisors*, 36 N. Y. 297; *Welch v. Stowell*, 2 Doug. (Mich.) 125; *Barclay v. Commonwealth*, 25 Pa. St. 503.

3. *Id. Dimes v. Petley*, 15 Q. B. 276. Lord Campbell says: "It is fully settled by the recent cases that if there be a nuisance in a public highway, a private individual cannot of his own authority abate it unless it does him a special injury, and then only to the extent necessary to enable him to exercise his right of passing over the highway." See *Harrower v. Ritson*, 37 Barb. (N. Y. S. C.) 301; *Griffith v. McCullum*, 46 Barb. (N. Y.) 561; *Bridge v. Grand Junc. R. R. Co.*, 3 M. & W. 244; *Roberts v. Rose*, 1 Exch. 82; *Bateman v. Bluck*, 18 Q. B. 870; *Hubbard v. Deming*, 21 Conn. 356; *Moffett v. Brewer*, 1 Iowa, 348; *Wales v. Stetson*, 2 Mass. 143; *Hopkins v. Crombie*, 4 N. H. 520; *Gates v. Blincoe*, 2 Dana (Ky.), 158; *Rung v. Shonenberger*, 2 Watts (Pa.), 23; *Arundel v. McCulloch*, 10 Mass. 70; *Rogers v. Rogers*, 14 Wend. (N. Y.) 250; *Broom's Com. on Com. Law* (4th ed.), 222; *Clark v. Ice Co.*, 24 Mich. 508; *Owens v. State*, 52 Ala. 400. Compare *Burnham v. Hotchkiss*, 14 Conn. 310; *Lancaster Turnpike Co. v.*

*Rogers*, 2 Barr (Pa.), 114; *Turner v. Holtzman*, 54 Md. 148.

4. In *Mayor of Colchester v. Brooke*, 6 Q. B. 339, the defendant's vessel, being improperly anchored, shifted on and damaged an oyster-bed, which was an obstruction in the stream. Lord Denman, Ch. J., said: "However wrongful the act of the plaintiff may have been, yet as the defendant sustained no special inconvenience therefrom, he certainly could not be justified in wilfully infringing upon the beds and destroying the oysters even for the purpose of abating a public nuisance." The defendant, who was the owner of a boat navigating a stream, ran into a net set in a private fishery. *Held*, that if he could by reasonable care have avoided the net he was bound to do so, though the rights of navigation were superior to those of fishery. *Cobb v. Bennett*, 75 Pa. St. 326. See *Renwick v. Morris*, 7 Hill (N. Y.), 575; *Arundel v. McCulloch*, 10 Mass. 70; *Selman v. Wolfe*, 27 Tex. 68.

5. The defendant with others, at a time when Asiatic cholera was prevailing in the country, and when the sanitary condition of all dwellings was important to prevent the spread of the disease, pulled down a tenement-house which was in a filthy condition. *Held*, that "as a citizen of the Fifth Ward he was interested in preserving the public health, and especially as an alderman he was fully justified in all he did." *Meeker v. Van Rensselaer*, 14 Wend. (N. Y.) 397. See *Rex v. Pappineau*, 1 Strange, 688; *Dewey v. White*, 1 Moody & M. 55; *Jones v. Williams*, 11 M. & W. 176.

6. *Manhattan Co. v. Van Keuren*, 23 N. J. 255; *Coe v. Schultz*, 47 Barb. (N. Y.) 64.

sance,<sup>1</sup> and it must at the time it is abated be injuring the abator.<sup>2</sup> In addition to the nuisances referred to above and in the notes as abatable, the following may be mentioned: if a dam be erected on a stream that pens back the water of an upper owner, he may lawfully enter on the premises and abate as much of it as produces the injury;<sup>3</sup> if a house be erected so that its eaves overhang the lands of another, he may cut off the overhanging part;<sup>4</sup> if a noxious trade is set up near another's dwelling, he may enter and destroy as much of the machinery as is necessary to prevent the nuisance;<sup>5</sup> if a bridge is erected across a navigable stream without proper draws, one trying to pass may remove as much as impedes his passage;<sup>6</sup> an unoccupied house in such a filthy condition as to endanger health, or that has become a resort for tramps, or dangerous in any way to adjoining buildings, may be torn down by one who is injured;<sup>7</sup> dangerous and diseased animals, when suffered to go at large by the owner, may under certain circumstances be killed.<sup>8</sup>

**4. Manner of abating.**—A nuisance may be abated only to the extent to which it does injury; any excess will render the abator a trespasser.<sup>9</sup>

1. In *Norrice v. Baker*, 1 Rolle, 394. Coke, C. J., says: "If a person have an intent to build a wall and lay the foundation, you cannot pull this down." And Croke, J., says: "So although boughs which hang over another man's land may be cut, yet they cannot be cut lest they hereafter grow over." See also Rolle's Abr. "NUISANCE."

2. *Gates v. Blincoe*, 2 Dana (Ky.), 158. The rule in the case of a vicious animal is thus laid down in *Morris v. Nugent*, 7 Car. & P. 572, by Denman, J.: "To justify the shooting of another's dog, it is not sufficient to show that he is of a ferocious disposition and at large (and thus a public nuisance). To justify the shooting he must be actually attacking the party at the time."

3. *Hastings v. Livermore*, 7 Gray, (Mass.) 194; *Treat v. Bates*, 27 Mich. 360; *Waffle v. Railroad Co.*, 58 Barb. (N. Y.) 413; *Adams v. Barney*, 25 Vt. 231; *Roberts v. Rose*, 1 L. R. (4) 82. So of changing the course of a sluiceway, thereby destroying cultivated fields. *Thompson v. Allen*, 7 Lans. (N. Y.) 459.

4. *Pendruddock's case*, 5 Coke, 101; *Baten's case*, 9 Coke, 55. So where rain or snow is shot from the roof of a house on the lands of another, the latter may enter and cut off the part producing the injury. *Rex v. Pappineau*, 2 Strange, 688; *Cooper v. Marshall*, 1 Burr. 259; *Rex v. Rosewell*, 2 Salk. 459. *Dyer v. Deputie*, 5 Whart. (Pa.) 584. So where branches extend over another's land, the

portions overhanging may be cut off. *Earl Lonsdale v. Nelson*, 2 Bar. & C. 311.

5. *Manhattan Co. v. Van Keuren*, 23 N. J. Eq. 141. When the nuisance arises from the improper use of a building, the building itself cannot be destroyed, but only the improper use stopped. *Brown v. Perkins*, 12 Gray (Mass.), 95.

6. *State v. Parrott*, 71 N. Car. 311.

7. *Harvey v. Dewoody*, 18 Ark. 252. But not where it is occupied, as that cannot be done without endangering public peace. *Perry v. Fishowe*, 8 Ad. & El. (N. S.) 757; *Davies v. Williams*, 16 Ad. & El. (N. S.) 546. Except where there is a violation of some one's rights and reasonable notice to remove has been given. *Burling v. Reid*, 11 Q. B. 904; *Davies v. Williams*, 16 Q. B., 546. Or in a great public emergency. *Meeker v. Van Rensselaer*, 14 Wend. (N. Y.) 397.

8. The dangerous animals only when they are making an attack, and the diseased ones only when they are running among other animals. *Williams v. Dixon*, 65 N. Car. 416; *Morris v. Nugent*, 7 Car. & P. 572. Compare *Franz v. Hiltebrand*, 45 Mo. 121. But not where they are simply trespassing. *Bost v. Minigues*, 64 N. Car. 44; *Ladue v. Branch*, 42 Vt. 574.

9. *Gates v. Blincoe*, 2 Dana (Ky.), 158; *Hutchinson v. Grainger*, 13 Vt. 394; *Dyer v. Deputie*, 5 Whart. (Pa.) 584; *Jewell v. Gardner*, 12 Mass. 311; *Heath v. Williams*, 25 Me. 209, *Wright v.*

As Lord Raymond says in *Rex v. Pappineau*, 1 Strange, 688: "If my neighbor builds his house too high, by which my ancient lights are stopped, I shall not take down the whole house, but only so much as makes it too high." So an abatement must be made without riot or danger to the public peace.<sup>1</sup> In fact, the remedy by abatement is a dangerous one. The party judges at his peril, and is liable in damages for any error he may make. The safer course is therefore to seek redress in the courts, wherever a slight delay will not seriously prejudice the interests of the injured party.<sup>2</sup>

**II. In Pleading.—Definition.**—A plea in abatement is one which shows some ground for abating or quashing the writ in a civil action, the indictment in a criminal one, and makes prayer to that effect.<sup>3</sup> It differs from a plea in bar by offering a formal objection to the writ without denying the right of action, and by showing the plaintiff how it may be corrected: in technical language, giving the plaintiff a better writ.

**Kinds of Pleas in abatement.—1. In a civil action.**—Pleas in abatement are to the disability of the plaintiff, to the disability of the defendant, and to the writ.

Pleas to the disability of the plaintiff show that he is incapable of commencing or continuing his action, as that he or one of the plaintiffs is a fictitious person,<sup>4</sup> or that he was dead before suit brought,<sup>5</sup> or is an alien enemy,<sup>6</sup> or that he is an infant and has declared by attorney,<sup>7</sup> or insane and under guardianship,<sup>8</sup> or that she is a *feme covert* and her husband has not joined,<sup>9</sup> or that plaintiffs suing as executors, trustees, etc., are not such.<sup>10</sup>

Moore, 38 Ala. 599; *Maffit v. Bruner*, 1 Greene (Iowa), 348; *Perry v. Fitzhowe*, 8 Ad. & El. (Q. B.) 757; *Cooper v. Marshall*, 1 Burr. 260; *Babcock v. City of Buffalo*, 56 N. Y. 268; *Calef v. Thomas*, 81 Ill. 478; *Bowden v. Lewis*, 13 R. I. 189; *Shepard v. People*, 40 Mich. 487; *Finley v. Hershey*, 41 Iowa, 389. But see *Indianapolis v. Miller*, 27 Ind. 894, and *Northrop v. Burrows*, 10 Abb. Pr. (N. Y.) 365, where it is held that the abator is liable only for wanton and unnecessary injury.

1. *Rex v. Rosewell*, 2 Salk. 459; *Day v. Day*, 4 Md. 262.

2. *Hicks v. Dorn*, 42 N. Y. 47; *Vason v. S. C. R. Co.*, 42 Ga. 631; *Brown v. Perkins*, 12 Gray (Mass.), 89; s. c., 5 Am. Rep. 242.

See in general Wood on the Law of Nuisances; Rolle's Abr. "Nuisance."

3. Steph. on Pleading, 47; 1 Chit. Crim. Law, 423.

4. *Doe v. Penfield*, 19 Johns. 308; *Boston Type Foundry v. Spooner*, 5 Vt. 93; *Campbell v. Galbreath*, 5 Watts (Pa.), 423.

5. *Sandbeck v. Quigley*, 8 Watts (Pa.), 460; *Patterson v. Brindle*, 9 Watts

(Pa.), 98. The death of the lessor in ejectment does not abate the suit. *Frier v. Jackson*, 8 Johns. (N. Y.) 495.

6. *Bell v. Chapman*, 10 Johns. (N. Y.) 133; *Hutchinson v. Brock*, 11 Mass. 119; *Russell v. Skipwith*, 6 Binn. (Pa.) 241; *Baywell v. Babe*, 1 Rand. (Va.) 272; *Coxe v. Gulick*, 5 Halst. (N. J.) 328; *Brinley v. Avery*, Kirby (Conn.) 25. If such plea be put in *pais darrein continuance*, the subsequent restoration of peace may be replied. *Russell v. Skipwith*, 1 S. & R. (Pa.) 310.

7. *Schemerhorn v. Jenkins*, 7 Johns. (N. Y.) 373; *Young v. Young*, 3 N. H. 346; *Blood v. Harrington*, 8 Pick. (Mass.) 552; *Smith v. Van Houten*, 4 Halst. (N. J.) 381; *Trask v. Stone*, 7 Mass. 241.

8. *Collard v. Crane*, Brayt. (Vt.) 18.

9. *Rangler v. Hummel*, 37 Pa. 130; *Perry v. Boileau*, 10 S. & R. (Pa.) 208; *Lyman v. Albee*, 7 Vt. 508. If she is sole administratrix, and marries pending an action brought by her, the suit abates. *Swan v. Wilkinson*, 14 Mass. 295. But not if she is one of several, and they all bring action. *Newell v. Marcy*, 17 Mass. 341.

10. *Conkey v. Kingman*, 24 Pick. (Mass.)

Pleas to the disability of the defendant are coverture,<sup>1</sup> infancy,<sup>2</sup> and privilege.<sup>3</sup>

Pleas in abatement to the writ are either to the form or to the action. Among those to the form are variances between the writ and declaration,<sup>4</sup> that the parties suing or being sued, as husband and wife, are not married;<sup>5</sup> that a joint contractor or another executor or administrator has not been joined, where it must be averred that the party who should have been joined is still living.<sup>6</sup> A misnomer of either party may be also pleaded in abatement to the writ,<sup>7</sup> and so may a defect in the process<sup>8</sup> or return.<sup>9</sup>

A very common plea to the action of the writ is that of *lis pendens*, or that there is another action depending for the same cause.<sup>10</sup>

115; *Childress v. Emory*, 8 Wheat. (U.S.) 642; *Kane v. Paul*, 14 Pet. (U. S.) 33; *Thomas v. Cameron*, 16 Wend. (N. Y.) 579; *Varick v. Bodine*, 3 Hill (N. Y.), 444. Or that their alleged testator is living. *Hummel v. Brown*, 24 Pa. St. 310.

1. *Surtell v. Brailsford*, 2 Bay (S. Car.), 333. But not if she marry after the commencement of the suit. *Crocket v. Ross*, 5 Greenl. (Me.) 445; *Commonwealth v. Phillipsburg*, 10 Mass. 58; *Henderson v. McClure*, 2 McCord (S. Car.) 469.

2. This defence may be interposed to an action of tort whenever the tort is founded on a contract and an action *ex contractu* would have lain. *Doran v. Smith*, 26 Am. L. Reg. 42; *Penrose v. Curren*, 3 Rawle (Pa.), 351.

3. *Hubbard v. Sanborn*, 2 N. H. 468; *Van Alstyne v. Dearborn*, 2 Wend. (N. Y.) 586; *Halsey v. Steward*, 1 South (S. Car.) 366; *Greening v. Sheffield Minor*, 476. The privilege of a member of legislature is pleadable in abatement. *King v. Coit*, 4 Day (Conn.) 129.

4. *Weld v. Hubbard*, 11 Ill. 573; *Pierce v. Lacy*, 23 Miss. 193.

5. *Coombes v. Williams*, 15 Mass. 243.

6. 1 Saund. 291, note 2; *Wadsworth v. Woodford*, 1 Day (Conn.), 28. In actions on contracts the non-joinder of a co plaintiff is ground for a nonsuit, and need not be pleaded in abatement, except where suit is brought *jure representationis* as by executors. In this latter case, and also in the case of the non-joinder of a defendant, the omission must be pleaded in abatement. *Stovey v. McNeill*, *Harper* (S. Car.), 173; *Horton v. Cook*, 2 Watts (Pa.), 40; *Moore v. Russell*, 2 Bibb. (Ky.) 443; *Winslow v. Merrill*, 2 Fairf. 127; *Brown v. Warram*, 3 Har. & John. (Md.) 572;

*Powers v. Spear*, 3 N. H. 35; *Gay v. Cary*, 9 Cowen (N. Y.), 44; *Coffee v. Eastland*, *Cooke* (Tenn.), 159; *Mackall v. Roberts*, 3 Munro (Ky.), 130; *McArthur v. Ladd*, 5 Ohio, 517. *Conley v. Good*, 1 Breeze (S. Car.), 96; *Allen v. Sewall*, 2 Wend. (N. Y.) 327. But in an action for a tort no advantage can be taken of the non-joinder of a defendant. *Rose v. Oliver*, 2 Johns. (N. Y.) 365; 1 Chitty on Pl. 87.

7. *Smith v. Bowker*, 1 Mass. 76; *Pate v. Bacon*, 6 Munf. (Va.) 219; *Whittier v. Gould*, 8 Watts (Pa.), 485.

8. *Renner v. Reed*, 3 Ark. 339; *Colby v. Dow*, 18 N. H. 557; *Hooper v. Jellison*, 22 Pick. (Mass.) 250. But see *Jones v. Nelson*, 51 Ala. 471.

9. *Embry v. Devinney*, 8 Dana (Ky.), 202; *Sebree v. Clay*, 3 Marsh (Ky.), 552.

10. *Humphries v. Dawson*, 38 Ala. 199; *Prosser v. Chapman*, 29 Conn. 515; *Buffum v. Tilton*, 17 Pick. (Mass.) 510; *Grider v. Apperson*, 32 Ark. 332. But an action pending in a foreign court, or in the court of another State, or in a United States court cannot be pleaded in abatement. *Lyman v. Brown*, 2 Curt. (U. S.) 559; *Eaton v. Hunt*, 20 Ind. 457; *Humphries v. Dawson*, 38 Ala. 199; *Bowne v. Joy*, 9 Johns. (N. Y.) 221; *Newell v. Newton*, 10 Pick. (Mass.) 470; *Walsh v. Durkin*, 12 Johns. (N. Y.) 99. See, however, as to a foreign attachment, *Embree v. Hanna*, 5 Johns. (N. Y.) 101; *Engle v. Nelson*, 1 Penn. 442. Compare *Winthrop v. Carlton*, 8 Mass. 456; *Morton v. Webb*, 7 Vt. 124. A suit subsequently commenced can never be pleaded in abatement. *Renner v. Marshall*, 1 Wheat. (U. S.) 215; *Buffum v. Tilton*, 17 Pick. (Mass.) 510; *Webster v. Randall*, 19 Pick. (Mass.) 13; *Nicholl v. Mason*, 21 Wend. (N. Y.) 339; *Wood v. Lake*, 13 Wis. 84.

Want of jurisdiction may also be pleaded, though this is not strictly a plea in abatement.<sup>1</sup>

**2. In a Criminal Action.**—In a criminal action the defendant may plead in abatement want of jurisdiction;<sup>2</sup> misnomer,<sup>3</sup> a former acquittal or conviction,<sup>4</sup> a pardon, objections to the selection or competency of the grand jury,<sup>5</sup> etc.

**Duplicity.**—A defendant cannot plead at the same time in abatement and bar to the same matter;<sup>6</sup> but as a writ is divisible, he may plead in abatement to part and demur or plead in bar to the residue.<sup>7</sup>

**Requisites.**—Great accuracy and precision are required in framing pleas in abatement. They should be certain to every intent and without repugnancy, and must always give the plaintiff a better writ.<sup>8</sup> 4 & 5 Ann., c. 16, s. 11 (4), enacts that "no dilatory plea shall be received . . . unless the party offering such plea do by affidavit prove the truth thereof or show some probable matter to the court, to induce them to believe that the fact of such dilatory plea is true;" and this or similar enactments are in force in this country.<sup>9</sup>

**Judgment.**—If the plaintiff reply and the issue is found in his favor, the judgment is *quod recuperet* and final. But judgment in his favor on a demurrer is only interlocutory and is *quod respondeat ouster*.<sup>10</sup> The judgment for the defendant on a plea in abatement, whether on an issue of fact or of law, is "that the writ be quashed;" or if a temporary disability or privilege be pleaded, "that the plaint remain without day until," etc.<sup>11</sup>

1. Osgood v. Thurston, 23 Pick. (Mass.) 110; Bishop v. Vose, 27 Conn. 1. Though advantage of this may be taken under the general issue. *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325; *Rea v. Hayden*, 3 Mass. 24.

2. 1 Chit. Crim. Law, 423; *Cole v. Cliver*, 43 N. J. L. 182.

3. *Commonwealth v. Perkins*, 1 Pick. (Mass.) 388; *Bright v. State*, 76 Ala. 96; *Amann v. People*, 76 Ill. 188; *Commonwealth v. Dedham*, 16 Mass. 146.

4. But not the pendency of a previous indictment in the same court for the same cause. *Dutton v. State*, 5 Ind. 533; *Hardin v. State*, 22 Ind. 347; *Com. v. Drew*, 3 Cush. (Mass.) 279; *Smith v. Com.*, 104 Pa. St. 339; *State v. Lambert*, 9 Nev. 321.

5. *State v. Williams*, 5 Port. (Ala.) 130; *Brown v. State*, 13 Ark. 96; *Baker v. State*, 23 Miss. 243; *Shropshire v. State*, 12 Ark. 190; *Hardin v. State*, 22 Ind. 347; *State v. Rockafellow*, 6 N. J. L. 332; *Pointer v. State*, 89 Ind. 255; *State v. Watson*, 86 N. C. 624; *Clare v. State*, 30 Md. 163. See *State v. Bleekley*, 18 Mo. 428; *State v. Mahan*, 12 Tex. 283; *People v. Jewett*, 6 Wend. (N. Y.) 386; *United*

*States v. Hammond*, 2 Woods (U. S.), 197; *Mershorn v. State*, 51 Ind. 14; *State v. Ward*, 64 Me. 545; *State v. Brown*, 64 Mo. 367; *U. S. v. Williams*, 1 Dill. (U. S.) 485.

6. As *non est factum* and coverture of the plaintiff since making the bond. See *Palmer v. Dixon*, 5 Dowl. & Ry. 623. But in an action against two defendants each may plead distinct matter in abatement, or one in bar and the other in abatement. 1 Chit. on Pl. 458.

7. 1 Chit. on Pl. 458.

8. 1 Chit. on Pl. 457. See *Wadsworth v. Woodford*, 1 Day. (Conn.) 28; *Clark v. Warner*, 6 Conn. 355; *Haywood v. Chestney*, 13 Wend. (N. Y.) 495; *Townsend v. Jeffries*, 24 Ala. 329; *Parsons v. Ely*, 2 Conn. 377; *Pearson v. French*, 9 Vt. 349; *Ellis v. Ellis*, 4 R. I. 110; *East v. Cain*, 49 Mich. 473.

9. *Trenton Bank v. Wallace*, 4 Halst. (N. J.) 83; 3 Bin. (Pa.) 625; 2 Rev. St. (N. Y.) 352, sec. 7; *Davis v. Campbell*, 35 Tex. 779.

10. *Fitch v. Lothrop*, 1 Root (Conn.), 192; *Baker v. Fales*, 16 Mass. 147, 157; *Trow v. Messer*, 32 N. H. 361.

11. 1 Chit. on Pleading, 466; *McCut-*

III. *Of Legacies.—Definition.*—Where the funds of a testator, which are liable before the legacies, are exhausted and there remain unsatisfied claims, the legacies will abate, *i.e.*, be diminished by a contribution *pro rata* towards the payment of debts or other legacies.<sup>1</sup>

*When they abate.*—Legacies do not abate until the following funds in their order have been exhausted: 1. The general personal estate, not expressly or by implication exempted. 2. Lands expressly devised to pay debts. 3. Lands descended to the heir. 4. Realty or personalty devised or bequeathed subject to the payment of debts.<sup>2</sup>

*Order of abatement.*—Specific and demonstrative legacies do not abate until the general pecuniary legacies have been exhausted.<sup>3</sup> But where there is no other personal estate than the specific legacies, they must be intended to be subject to the pecuniary legacies, and must abate *pro rata*.<sup>4</sup>

*Contribution, when enforceable.*—Specific legatees may enforce contribution from devisees of real estate.<sup>5</sup> But where a legacy has been paid in full, the legatee is not compelled to contribute to the payment of other legacies lost by the executor's default, where he had originally enough personal property in his hands to pay all.<sup>6</sup> The right of contribution may be enforced by way of set-off.<sup>7</sup>

chen v. McCutchen, 8 Port. (Ala.) 151; McKinstrey v. Pennoyer, 2 Ill. 319; Blackburn v. Watson, 85 Pa. St. 241. See in general 1 Chitty on Pleading, ch. ii.; Stephen on Pleading; 1 Chit. on Criminal Law, 423 *et seq.*

1. 1 Titus v. Titus, 26 N. Y. Eq. 111. But where personal property has been given away in the lifetime of the testator, it will not abate, though the gift be confirmed in the will. Biddle v. Carraway, 6 Jones Eq. 95.

2. 3 Jarm. on Wills (5th Am. ed.), 458.

3. 1 Bevan v. Cooper, 14 N. J. Sup. Ct. 117. A legacy will not abate when given in lieu of another claim as of dower, where the widow is considered a purchaser. Lord v. Lord, 23 Conn. 327; Hubbard v. Hubbard, 6 Metc. (Mass.) 50; Williamson v. Williamson, 6 Paige (N. Y.), 305; McGlaughlin v. McGlaughlin, 24 Pa. St. 22; Stuart v. Carron, 1 Desaus (S. Car.), 500; White v. Green, 1 Ired. Eq. (N. Car.) 45; Potter v. Brown, 11 R. I. 232. Compare Orton v. Orton, 3 Abb. App. Dec. (N. Y.) 411; Tickel v. Quinn, 1 Demarest (N. Y.), 425; Sanford v. Sanford, 4 Hun (N. Y.), 753.

4. White v. Green, 1 Ired. Eq. (N. Car.) 45; White v. Beattie, 1 Dev. Eq. (N. Car.) 87; Biddle v. Carraway, 6 Jones Eq.

(N. Car.) 95; 1 Roper on Leg. 418. They abate proportionally with demonstrative legacies and devises. Armstrong's App., 63 Pa. St. 312.

5. But the personal fund alone being responsible for payment of simple contract debts, specific legatees cannot force devisees to contribute to such payment. Dugan v. Hollins, 11 Md. 41. Otherwise as to specialty debts. Chase v. Lockerman, 11 Gill. & J. (Md.) 185, 204. But real estate is not liable to contribute to payment of legacies, unless specially charged therewith. Hayes v. Seaver, 7 Greenl. (Me.) 237; Elliott v. Carter, 9 Gratt. (Va.) 541, 550; Brands v. Hartung, 38 N. J. 42.

6. Sims v. Sims, 2 Stockt. (N. J.) 161; Lupton v. Lupton, 2 Johns. Ch. (N. Y.) 614. Otherwise as to debts, where the executor has wasted the assets. Stuart v. Kissam, 2 Barb. (N. Y.) 493; Lupton v. Lupton, 2 Johns. Ch. (N. Y.) 614. Where the executor has paid a debt, having departed from the provisions of the will, he cannot call on the real estate for contribution, the personalty having been originally sufficient. Feemster v. Good, 12 S. C. (2 Shand), 573.

7. Harris v. White, 2 South, (N. J.), 422. See, in general, Jarman on Wills, chap. 46.

IV. *In Practice*.—1. *At Law*.—At common law the death of a sole plaintiff or defendant before final judgment would have abated the suit.<sup>1</sup> But by statute of 17 Car. II. c. 8, "the death of either party between the verdict and the judgment shall not be alleged for error;"<sup>2</sup> and by 8 & 9 W. III., c. 11, § 6, it is provided that where either party dies and the action might have been prosecuted by or against his executors or administrators, the plaintiff or his representatives shall have a writ of *scire facias* against the defendant or his representatives, to show cause why damage should not be assessed and recovered by him or them. So also where there were two or more plaintiffs or defendants in a personal action, the death of one of them pending the suit would have abated it, until, by 8 & 9 W. III. c. 11, § 7, it was enacted that "where the cause of action survived, the writ or action should not be abated, but the death being suggested on record, the action should proceed;" and this applies also to writs of error.<sup>3</sup> Writs of error abate if the plaintiff in error die before errors assigned, but not after errors assigned; nor at all in case of the death of defendant in error.<sup>4</sup>

2. *In Equity*.—An abatement of a suit in equity takes place where, by reason of some event subsequent to the institution of the suit, there is no person before the court by or against whom it can either in whole or in part be prosecuted.<sup>5</sup> These events are the death of a party whose interest or liability neither determines by death<sup>6</sup> nor survives to another litigant,<sup>7</sup> and the marriage of a female plaintiff.<sup>8</sup>

1. Tidd Pr. 1168. Where part of the action is determined by act in law, and action for the residue is given, that writ shall not abate. Coke on Lit. 285 a. See, as to abatement by death, *Alexander v. Davidson*, 2 McMull (S. C.), 49; *Clindein v. Allen*, 4 N. H. 385; *Brown v. Andrews*, 1 Barb. (N. Y.) 227; *Green v. Watkins*, 6 Wheat. (U. S.) 260; *Baltimore R. Co. v. Ritchie*, 31 Md. 191; *Wade v. Kalbfleisch*, 16 Abb. Pr., N. S. (N. Y.) 104. A real action brought by husband and wife in her right abates by her death. *Ryder v. Robinson*, 2 Me. 127. Otherwise of trespass. *Syme v. Sanders*, 2 Stroth. (S. C.) 332.

2. See *Hatch v. Eustis*, 1 Gall. (U. S.) 160.

3. *Clark v. Rippon*, 1 B. & Ald. 586.

4. 2 Cromp. 401-2; *Barnes*, 206; 7 East. 296.

5. *Adams's Equity*, 403. An abatement in chancery, though it suspends proceedings in a cause, does not put an end to them as an abatement at law does; so that a defendant in custody under a process of contempt is not discharged thereby, nor is an injunction absolutely dissolved. *Chowick v. Dimes*,

3 Beav. 292; *Leggett v. Dubois*, 2 Paige (N. Y.), 211.

6. Upon the death of a husband suing in the wife's right, she may proceed without revivor; but if she does not, the bill is considered as abated. *McDowl v. Charles*, 6 John. Ch. (N. Y.) 132; *Vaughan v. Wilson*, 4 Hen. & M. (Va.) 453; Lord Red. 47; Mitf. 59; *Story's Eq. Pl.* § 357. And if they are made defendants, his death does not abate the suit. *Shelberry v. Briggs*, 2 Vern. 248; 1 Eq. Cas. Ab. 1, pl. 4, S. C. But otherwise if the wife dies, unless her interest survives to the husband. *Jackson v. Rawlins*, 2 Vern. 195. A suit by members of a corporation in their corporate capacity will not abate by the death of some of them. Otherwise of a sole corporation, or if the suit had been in their individual characters. *Blackburn v. Jepson*, 3 Swan. 138; 1 Daniell's Ch. Pr. & Pl. (3d Am. Ed.) 24.

7. *Glenn v. Clapp*, 11 Gill & J. (Md.) 1; *Howard v. Bank*, R. M. Charl. (Ga.) 216. In a court of admiralty death of a party does not abate the suit. *Penhallow v. Doane's Adm.*, 3 Dall. 54.

8. *Douglass v. Sherman*, 2 Paige (N. Y.), 357; *Campbell v. Bowne*, 5 Paige



**Bills of Revivor.**—The effect of the abatement is that all proceedings are stayed to the extent of the abated interest, and to set them in motion again a bill of revivor must be brought. Where the transmission of the interest is by act of law, as to the heir or personal representative, a simple bill of revivor may be brought;<sup>1</sup> where by act of the party, as to a devisee, an original bill in the nature of a bill of revivor must be filed.<sup>2</sup> To the latter an answer is required, and a formal decree is made thereon; while in the case of the former no answer is requisite, but the revivor is ordered as of course, unless cause is shown by demurrer or plea. The bill of revivor states the proceedings in the suit, the abatement, and the transmission of interest, and prays that the suit may be revived.<sup>3</sup> See Daniell's Chanc. Pl. & Prac. chap. 32; Adams's Eq. chap. 9.

**V. Of Freehold.**—Abatement of freehold is the entering upon and taking possession of a freehold of inheritance by a stranger after the death of the ancestor, and before the heir or devisee enters. It was a species of *ouster by intervention* wherein the entry *ab initio* was unlawful, thus differing from *discontinuance* and *de-forcement* where only the retaining possession was unlawful.<sup>4</sup>

**VI. In Revenue Law.**—The act of Congress of March 2, 1799, c. 22, s. 52, provides that in the appraisal of damaged goods the appraisers shall "ascertain and certify to what rate or percentage the merchandise is damaged, and the rate of percentage of damage so ascertained and certified shall be deducted from the original amount." To have this abatement made, however, it is necessary that "proof to ascertain such damage shall be lodged in the custom-house of the port where such merchandise has been landed, within ten days after the landing of such merchandise."<sup>5</sup> Similar provisions are made as to abating or refunding the amount of import duties paid or accruing on goods damaged or destroyed in any public or private warehouse under bond, or in the appraisers' stores undergoing appraisal, or while in transportation under bond from the port of entry to any other port in the United

(N. Y.), 34. But on the marriage of a female defendant the suit does not abate, but the husband must be named in the subsequent proceedings. Adams's Equity, 404.

1. Boynton v. Boynton, 1 Foster (N. H.), 246; Story's Eq. Pl. § 364; Feemster v. Markham, 2 J. J. Marsh, 303; Putnam v. Putnam, 4 Pick. (Mass.) 139.

2. Slack v. Walcott, 3 Mason (U. S.), 308; Russell v. Craig, 3 Bibb. (Ky.) 377. Where a defendant becomes a bankrupt or insolvent, the suit must be continued by a supplemental bill. Storm v. Davenport, 1 Sandf. Ch. (N. Y.) 135; Story's Eq. Pl. § 342.

3. Where after abatement the rights of the parties are affected by any event other than that causing the abatement,

they must incorporate in their bill a supplemental statement. This bill is termed a bill of revivor and supplement. Mitf. 70, 71; Bampton v. Birchall, 5 Beav. 330; 1 Ph. 568. Although the liability to abatement and the right of revivor are not limited to any stage of the suit, yet there can be no revivor for costs alone, except under special circumstances. Andrews v. Lockwood, 15 Sim. 153; Peer v. Cookerow, 2 Beas. 136; 1 McCart. Eq. (N. J.) 361; Travis v. Waters, 1 Johns. Ch. (N. Y.) 85.

4. Coke on Littleton, 277 a; 3 Black. Com. 168.

5. See Shelton v. The Collector, 5 Wall. (U. S.) 113; Shelton v. Austin, 1 Cliff. (U. S.) 388; Andrews on Rev. Laws, §§ 162-4.

States, or while in the custody of officers of the customs, or within the limits of the port of entry before landing.<sup>1</sup>

**ABBREVIATIONS.** (See AMBIGUITY; NAMES.)—A shortened form of words obtained by the omission of one or more syllables from the middle or end of the words.<sup>2</sup> As almost every word in the language may be abbreviated, the number may be made very large. The broadest rule which has been applied to their usage in legal forms and proceedings limits them to such as are in common use; and while their meaning in written instruments of almost every kind has been allowed to be explained by the introduction of parol testimony, yet the ambiguity and uncertainty which they occasion render the saving of trouble or expense of doubtful advantage. The difficulty is of course lessened to those that follow, which have had legal constructions placed upon them.

An attorney may use, in rendering his bill, such abbreviations as are commonly used in the English language, under the statutes of 2 George II. c. 23, and 12 George II. c. 13, s. 5. A bill containing the following abbreviations, "Drawg Declar. ffs. 15, Instrons. for case, attg. you in long confce, Preparing afft.," was held such as anybody would understand and therefore good.<sup>3</sup>

1. **Affidavits, etc.**—The characters N. P. and J. P. indicate respectively the offices of Notary Public and Justice of the Peace, and their use does not vitiate a jurat.<sup>4</sup>

"Ex. A" means "exhibit A"; and "C. P. C. C.," annexed to the name of a person before whom an affidavit was sworn to, may be construed in the Circuit Court of Porter County, where said affidavit was filed, to mean "Clerk of Porter Circuit Court," courts taking judicial notice of the signatures of their officers.<sup>5</sup>

A bond for costs, entitled in the cause, giving the names of the parties and of the court in which the cause was pending, only abbreviating the christian names of the plaintiffs and defendants, was held to be a good bond.<sup>6</sup>

The abbreviation "Octb.," in a writ of *scire facias*, held not to be mistaken for October.<sup>7</sup>

2. **Ballots.**—A ballot for J. A. Dyer cannot be counted for James A. Dyer, nor is evidence admissible to show that it was intended for James A. Dyer; but where the designation of an individual on a ballot is an abbreviation sanctioned by common usage, the ballot may be counted for the person for whom it was evidently intended. So a vote for Jas. A. Dyer will be counted for James A. Dyer.<sup>8</sup> (See ELECTIONS.)

1. See Rev. Stat. (2d Ed.) § 2894; Andrews on Rev. Laws, § 113; Weskett on Insurance—"Abatement."

2. Bouvier's Law Dict.

3. Frowd v. Stillard, 4 C. & P. 51.

4. Rowley v. Berrian, 12 Ill. 200; Shattuck v. People, 4 Scam. (Ill.) 477; Scudder v. Coryell, 5 Hal. (N. J.) 340.

5. Dugan v. Trisler, 69 Ind. 553; Buell v. State, 73 Ind. 523.

6. King et al. v. Thompson et al., 3 Scam. (Ill.) 334.

7. Kearns v. State, 3 Blackf. (Ind.) 334.

8. People v. Higgins, 3 Mich. 233; People v. Tisdale, 1 Doug. (Mich.) 60; People v. Ferguson, 8 Cow. 102; People v. Cook, 14 Barb. (N. Y.) 259; s. c., 8

3. **Deeds, Assessments for Taxes, etc.**—Well-known abbreviations may be used in conveyances and are sufficient; but such as do not permit that degree of certainty which admits of no reasonable doubt as to their meaning upon which persons of ordinary intelligence or courts can differ are not allowable.<sup>1</sup>

A deed is not invalid because of the descriptions of the lands being in figures and well-understood abbreviations.<sup>2</sup>

Words and figures, or abbreviations thereof, may be used to designate lands against which a judgment is asked for taxes, provided a definite locality can be given.<sup>3</sup>

The usual signs or symbols used in mathematics, chemistry and other sciences, characters used for denoting certain weights and measures, the marks of punctuation, and the ordinary abbreviations used in written composition may be used in proper cases without invalidating the instruments in which they are used.<sup>4</sup>

It is the duty of courts to give effect to instruments of writing so as to carry out the intentions of parties when it can be done consistently with the rules of law. Such abbreviations as the following have been held not to be misleading and not objectionable in the description of premises in various tax-title proceedings: c., cts., \$, m. (mills), Lt. (lot), Bk. (block), Tx. (tax), Vl. (valuation), T. (township), R. (range), Sec. (section), Qr. Sec. (quarter section), Pt. (part), Frm (from), Ft. (foot or feet).<sup>5</sup>

Federal money may be indicated by the use of the dollar-mark (\$) and the decimal-point with Arabic figures.<sup>6</sup>

A description of land in a suit to enforce a lien for benefits by a ditching association read as follows: "Matthias Wagoner. S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  Sec. 18, T. 21, N. R. 7 E., 40 acres." Held, that as the description would be good in a deed or mortgage, the abbreviations being as well understood in the State (Indiana) as the words for which they stood, it was good in the present case.<sup>7</sup>

The description of lands assessed or sold for taxes by the use of initial letters, abbreviations, and figures is sufficient.<sup>8</sup>

Where lands are described in an assessment and tax roll as,  
Young Men's Society—Gov. & J. P.

Jeff. av. N. 45 feet W. pt. lot 11 sec. 1 } B. 2.  
& E. pt. lot 10 sec. 1 }

the description is insufficient.<sup>9</sup>

N. Y. 67; *People v. Cicotte*, 16 Mich. 283; Opinions of Justices, 64 Me. 596; *Reg. v. Bradley*, 7 Jur. N. S. 757; 9 W. R. 372; 3 L. T. N. S. 853; 3 El. & El. 634.  
1. *Bowers v. Chambers*, 53 Miss. 267; *Tidd v. Rines*, 26 Minn. 201; *Keith v. Hayden*, 26 Minn. 212.

2. *Harrington v. Fish*, 10 Mich. 4. 5.

3. *Olcott v. State*, 5 Gilm. (Ill.) 481.

4. *Hunt v. Smith*, 9 Kans. 153.

5. *Blackwell on Tax Titles*, 202; *Atkins v. Hinman*, 2 Gilm. (Ill.) 444; *Jackson v. Cummings*, 15 Ill. 449; *Blakeley v. Bestor*, 13 Ill. 714.

6. *Long v. Long*, 2 Blackf. (Ind.) 293; *Fulenwider v. Fulenwider*, 53 Mo. 439; *Hunt v. Smith*, 9 Kans. Comp.; *Clark v. Stoughton*, 18 Vt. 50; *Avery v. Babcock*, 35 Ill. 175; *Bailey v. Doolittle*, 24 Ill. 577; *Dukes v. Rowley*, 24 Ill. 210.

7. *Jordan Ditching & Draining Ass'n v. Wagoner*, 33 Ind. 50. See also *Bowers v. Chambers*, 50 Mis. 267; *Frazer v. State*, 106 Ind. 471.

8. *Sibley v. Smith*, 2 Mich. 486; *Comp. Laws*, § 804.

9. *Detroit Young Men's Society v. Mayor of Detroit*, 3 Mich. 172.

Where a mechanic's lien is claimed for material furnished, and there is a sufficient general designation or description of each article, the addition by way of more particular description of letters or abbreviations not commonly understood by persons not in the business of furnishing such material does not vitiate the account :

July 3, 1883, 5 Wds. 32x38—2 Lt. 1 $\frac{1}{4}$  Gld. D. S.

2 " 18x38—2 " " " S. S.

Sept. 4, 350 ft. Mldg. No. 673, 2.00.

Disc. 40 per cent.<sup>1</sup>

**4. Evidence.**—Parol evidence may be heard to show the meaning of an abbreviation or the particular word for which it stands in a written instrument; but not to show the intention with which it was used.<sup>2</sup>

In an action upon a stock contract, the evidence of stock-brokers may be properly received to explain abbreviations.

County officers have been allowed to explain abbreviations in a tax deed.<sup>3</sup>

Where the memorandum of a notary public of a protest of a note and of notice is so abbreviated and elliptical as to be unintelligible, an expert may be called to prove the meaning of the words.<sup>4</sup>

Parol evidence of the meaning of the terms "EXFF. Madder, 121-4, 6ms," in a contract, allowed;<sup>5</sup> also of "100+ dolls. per ton," in a bill of lading.<sup>6</sup>

The letters I.O.U. are a valid acknowledgment of indebtedness.<sup>7</sup>

The production of an I.O.U. is *prima facie* evidence of an account stated.<sup>8</sup>

It is necessary, in order to introduce parol proof as to what sense letters which have not acquired a legal signification are used in a particular trade, to aver in the declaration that they are so used. The letters C.O.D. placed in a written contract are the initials of the words "collect on delivery," and this undertaking by these letters is assumed and a strict performance thereof may be exacted.<sup>9</sup>

The letters C.O.D. followed by an amount in dollars have come to be very well understood by the community and the public, but

1. *Smith v. Headley*, 33 Minn. 384.

2. *Hill v. State*, 9 Verg. (Tenn.) 357; *Jaqua v. The Witham & Anderson Co.*, 106 Ind. 545.

3. *Story v. Salmon, and Griffin v. Same*, 6 Daly, 531, and 71 N. Y. 420; *Barton v. Anderson et al.*, 104 Ind. 573.

4. *Sheldon v. Benham*, 4 Hill (N. Y.), 129.

5. *Dana v. Fiedler*, 1 E. D. Smith (N. Y.), 463.

6. *Taylor v. Beavers*, 4 E. D. Smith (N. Y.), 215.

7. *Kinney v. Flynn*, 2 R. I. 319.

8. *Fesenmeyer v. Adcock*, 16 M. T. W. 449, 450; *Curtis v. Richards*, 1 Scott N. R. 155; *Gould v. Coombs*, 1 C. B. 543; *vide also Childers v. Boulnois*, R. & R. N. P. C. 8; *Melanotte v. Teasdale*, 13 M. & W. 216; 13 L. J. Exch. 358; s. p., *Taylor v. Steele*, 16 M. & W. 665; 11 Jur. 806; 16 L. J. Exch. 177; *Smith v. Smith*, 1 F. & F. 539; *Waithman v. Elsee*, 1 C. & R. 35.

9. *The American Express Co. v. Lessem et al.*, 39 Ill. 333.

perhaps could not without the aid of extrinsic evidence be read and interpreted by the courts. It is certainly competent to explain their use in connection with a contract, not inconsistent with the terms thereof.<sup>1</sup>

After the letters f. o. b. in a contract have been explained to mean "free on board," there is nothing ambiguous, and consequently no room for parol evidence.<sup>2</sup>

**5. Judgment.**—A judgment is void for uncertainty in which the amount is expressed only in numerals and with nothing to indicate what they represent, and in which the land is described as "S.<sup>1</sup>N.E.<sup>1</sup>" of a designated section, town, and range.<sup>3</sup>

A judgment obtained before a magistrate against a defendant by a name in which an initial letter is used instead of his Christian name is irregular but not void.<sup>4</sup>

**6. Name.**—Initials preceding a surname are always understood to be the initials of a name and not the abbreviation of a title, unless proved the latter.<sup>5</sup>

Where one name is an abbreviation of another, but both are taken promiscuously and according to common usage to be the same, though differing in sound, the use of the one for the other is not a material misnomer.<sup>6</sup> "Jr." is no part of a person's name.<sup>7</sup> "Th." means the same as Thomas.<sup>8</sup> (See NAMES.)

**7. Notes, etc.**—A court sitting as a jury has a right to infer from the face of a note payable "at the Br. at Fort Wayne of the Bk. of the State of Indiana" that the branch at Fort Wayne of the Bank of the State of Indiana was intended.<sup>9</sup>

The words "Citz. Bank" in a note were held to be plainly an abbreviation of Citizens' Bank.<sup>10</sup>

A note made payable at a certain place, "Ind.," having been sued on, *held*, the courts and juries of Indiana may well know from their general information that the abbreviation "Ind." as applied to a place means Indiana.<sup>11</sup>

"Com." and "Co." are well-understood abbreviations of "company," when used as part of the name of a commercial firm, and an indorsement "Sturges & Co." on a note payable to "Sturges & Com." is no variance.<sup>12</sup>

1. *Collender v. Dinsmore*, 55 N. Y. 200.

2. *Silberman v. Clark*, 96 N. Y. 522.

3. *Tidd v. Rines*, 26 Minn. 201; *Keith v. Hayden*, 26 Minn. 212.

4. *Bridges v. Layman*, 31 Ind. 384.

5. *Burford v. McCue*, 53 Penna. St. 427; *Dana v. Fielder*, 12 N. Y. 40.

6. *Gordon v. Holiday*, 1 Wash. 285; *Wilkerson v. State*, 13 Mo. 91.

7. *Headley v. Shaw*, 39 Ill. 354; *State v. Grant*, 21 Me. 171; *Jameson v. Isaacs*, 12 Vt. 611; *Johnson v. Ellison*, 4 T. B. Mon. (Ky.) 526; *State v. Wear*, 38 N. H. 314; *Padgett v. Lawrence*, 12 Paige (N. Y.), 170; *People v. Cook*, 14 Barb.

(N. Y.) 259; *Blake v. Tucker*, 12 Vt. 39; *Prentiss v. Blake*, 34 Vt. 460; *Cobb v. Lucas*, 15 Pick. (Mass.) 7, 9; *Kincaid v. Howe*, 10 Mass. 203, 205; *Commonwealth v. Perkins*, 1 Pick (Mass.) 388; *People v. Collins*, 7 Johns. (N. Y.) 549; *Brainard v. Stephin*, 6 Vt. 9.

8. *Ogden v. Gibbons*, 2 South. (N. J.) 518, 531.

9. *Miller et al. v. Powers et al.*, 16 Ind. 410.

10. *Locke et al. v. Merchants' National Bank*, 66 Ind. 353.

11. *Burroughs et al. v. Wilson*, 59 Ind. 536.

12. *Keith v. Sturges*, 51 Ill. 142.

*Held*, not to be error to admit a note sued on in evidence, because the amount is written "four hund and two and  $\frac{52}{100}$  dollars."<sup>1</sup>

The word "cash" affixed to the name of a payee indicates that the note is payable to the bank, and the bank may sue thereon as payee, the agent being a party to the action.<sup>2</sup>

The words "ten pe. cen." in a promissory note have been held to have a meaning understood by everybody, and make the note bear interest at ten per cent.<sup>3</sup>

No force can be conceded in an objection to the word "Feb'y" in a note.<sup>4</sup>

The terms "Ill. cy.," on a certificate of deposit given by Chicago bankers, construed to mean, as applied to the payment of the certificate, that the same might be paid in bills of banks which at the time of payment were received and passed as ordinary currency in Illinois, but not in the same bills which were received.

8. **Pleading.**—Except when it is otherwise specially prescribed by law, a writ or other process must be in the name of the people of the State; and each writ, process, record, pleading, or other proceeding in a court or before an officer must be in the English language, and, unless it is oral, made out on paper or parchment, in a fair legible character, in words at length and not abbreviated. But the proper known names of process and technical words may be expressed in appropriate language as now is and heretofore has been customary; such abbreviations as are now commonly employed in the English language may be used, and numbers may be expressed by Arabic figures or Roman numerals in the customary manner.<sup>5</sup>

If a variance is an abbreviation, it is immaterial, if the jury find it to mean the same thing.<sup>6</sup>

The revised statutes of New York provide that no indictment shall be deemed invalid or the trial affected by any misstatement of the defendant's title, occupation, estate, or degree, when the defendant shall not be misled or prejudiced by such misstatement, or by reason of any other defect or imperfection in matters of form which shall not tend to the prejudice of the defendant.<sup>7</sup>

Averments may be made in a declaration explaining abbreviations used in the written instrument declared on.<sup>8</sup>

The use of "Geo." instead of George, as written in an indictment, *held* not to be a material variance<sup>9</sup> or proof of allegation of "U. States" by United States.<sup>10</sup>

The abbreviation, in a declaration, "Damages One thous. Dollars," is not error, though not a commendable practice.<sup>11</sup>

1. Glenn v. Porter, 72 Ind. 525.

2. Nave et al. v. Hadley et al., 74 Ind. 155.

3. Cutting v. Conklin, 28 Ill. 506.

4. Hulbert v. Carver, 37 Barb. (N. Y.) 62.

5. Bliss N. Y. Ann. Code, 1877, p. 25.

6. Lewis v. Few, 5 Johns. (N. Y.) 1.

7. 2 R. S. 728, § 52.

8. Jaqua v. The Witham & Anderson Co., 106 Ind. 545.

9. Patterson v. People, 12 Hun (N. Y.), 139.

10. Lewis v. Few, 5 Johns. (N. Y.) 1.

11. Rice v. Buchanan, 1 W. L. J. (Mich.) 395.

The use of "L. S." for place of seal, "*vs.*" for *versus* or *against*, and "&c." does not vitiate a plea. Such terms are English. The letters L. S. may be taken also to indicate a seal. *Ads. for adsectam*, with the names of parties properly placed, indicates the same as *vs.*<sup>1</sup>

A bill filed by Orrin P. Ramsdell to foreclose a mortgage given to O. P. Ramsdell being taken as confessed against defendants, who were the mortgagors, it must be assumed that defendants admit the execution, the identity of the parties being open to proof, if questioned.<sup>2</sup>

In a complaint for a criminal charge before a magistrate, the year may be stated in words following the letters "A. D.," and the sign "&" express the word "and."<sup>3</sup>

In an action for assault, battery, and imprisonment, a plea answering the "assault, &c., and imprisonment" is broad enough, the &c. including the battery.<sup>4</sup>

A plea of misnomer to a declaration against Geo. Turner, that his Christian name was George, not Geo., was held good on demurrer.<sup>5</sup>

In England, however, the describing in a writ and declaration a party to a suit by the initials of his Christian name must be treated as a misnomer.<sup>6</sup>

**9. Residence.**—Residence is sufficiently stated by double commas under a place already stated, where articles of association require subscribers' residences to be stated with their subscriptions.<sup>7</sup>

**10. Return.**—The return of service of summons is sufficient, though the Christian name of defendant is abbreviated therein.<sup>8</sup>

If an abbreviation taken in connection with the remainder of the writing and subject-matter can be clearly understood and not be ambiguous, it must have the same effect as if the words were written in full. Where a return of a sheriff ran, "by delivering a true copy of within writ to Dr. Peter Brugman, president of the O. F. B. A.," and on examination of the writ it appeared that the letters could refer to the Odd Fellows' Building Association, *held*, that there was no ambiguity.<sup>9</sup>

**11. Wills.**—If a testator introduce in his will certain terms or characters which are not understood by the court, recourse may be had to persons conversant with the subject for the purpose of deciphering the characters.<sup>10</sup>

1. *Smith v. Butler*, 25 N. H. 521; *Berry v. Osborn*, 28 N. H. 279; *Holbrook v. Nichol*, 36 Ill. 161; *Bowen v. Wilcox & Gibbs Sewing Machine Co.*, 86 Ill. 11.

2. *Ramsdell v. Eaton*, 12 Mich. 117.

3. *Commonwealth v. Clark*, 4 Cush. (Mass.) 596; *Brown v. State*, 16 Texas App. 245.

4. *Bryan v. Bates*, 15 Ill. 87.

5. *Wilson & Turner v. Shannon et al.*, 6 Ark. 196.

6. *Rust v. Kennedy*, 4 M. & W. 586; 7 D. P. C. 199; 3 Jur. 198.

7. *Steinmetz v. V. & O. T. Co.*, 57 Ind. 457; *Miller v. W. C. G. R. Co.*, 52 Ind. 51.

8. *Elliot & Redman v. The Bank of the State*, 4 Ark. 437.

9. *Odd Fellows' Building Ass'n v. Hogan*, 28 Ark. 265.

10. *Masters v. Masters*, 1 P. Wms. 421; *Norman v. Morell*, 4 Ves. 769; *Kell v. Charmer*, 23 Beav. 195; *Clayton v. Lord Nugent*, 13 M. & W. 206.

The word "mod." occurred in the codicil of the will of a sculptor; opinions of experts differed as to whether "models" was meant, and Lord Brougham decided that a formal bequest of the models in the will could not be revoked by such an abbreviation in the codicil.<sup>1</sup>

A testator devised his real estate under the description:

"Sixty acres, Se. 25, toon. 7 } Jasper county.

Forty acres, Se. 24, toon. 6 } State of Iowa."

*Held*, that he meant "section," and that it was competent to prove by parol in what township and range testator owned above land and no other.<sup>2</sup>

**ABDICATE.**—Lord Somers, in his speech delivered in 1688, when James II. vacated the throne, said: "The word abdicate doth properly and naturally signify entirely to renounce, throw off, disown, relinquish any thing or person, so as to have no further to do with it; and that whether it be done by express words or in writing, or by doing such acts as are inconsistent with the holding and retaining of the thing." But, nevertheless, whatever may be the manner by which the incumbent of an office indicates his intention of resigning or abdicating it, whether by acts inconsistent with the retention of the office, or by a formal renunciation of it, it is never consummated—he is never legally out of office—until his resignation is accepted, either expressly or by the appointment of another in his place.<sup>3</sup>

**ABDUCT—ABDUCTION.** See ENTICING AWAY; KIDNAPPING.

1. **What is.**—In private or civil law, abduction is the act of taking away a man's wife by violence or persuasion. For this injury an action lies, formerly known as an action of trespass *de uxore raptâ et abductâ*.<sup>4</sup>

In criminal law, abduction is the act of taking away or detaining a woman either against her own will or, in the case of minors, against the will of her parents or any other person having the lawful charge of her.<sup>5</sup>

1. *Goblet v. Beechey*, 3 Sim. 24; 2 R. & My. 624.

2. *Chambers v. Watson*, 60 Iowa, 339.

3. Where a policeman, appointed under the act of 1853 by the legislature of New York, was by virtue of the act of 1857 continued on the police force, but while obeying the commissioners under the act of 1853 refused to act under the new board of police on the ground that the act of 1857 was unconstitutional, *held*, that such conduct did not amount to a resignation. *People v. Board of Police*, 26 Barb. (N. Y.) 487.

4. Steph. Com. iii. 437.

5. Sweet's Law Dict.

Abduction means in law the taking and carrying away of a child, a ward, a wife, etc., either by fraud, persuasion, or

open violence. *State v. George*, 93 N. Car. 567. A mere attempt to abduct is not enough. *People v. Parshall*, 6 Park Cr. (N. Y.) 129.

The term is applied to the unlawful seizure or detention of a female for the purpose of marriage, concubinage, or prostitution. Brown's Law Dict., sec. 2; N. Y. Rev. Stat. 553, §§ 24-26; 1 Russell on Crimes (9 Am. Ed.), 940; 3 Black. Com. 139-141. The statute against taking away maidens and marrying them without consent of their legal guardians is in force in South Carolina. *State v. O'Bannon*, 1 Bail. (S. Car.) 144; *State v. Tidwell*, 5 Strobb. (S. Car.) 1. Also in New York where the female is under sixteen years of age. N. Y. Penal Code, § 282.



2. **Of Girls under Sixteen.**—Every one commits the crime who unlawfully takes, or causes to be taken, any unmarried girl, being under age of sixteen years,<sup>1</sup> out of the possession and against the will of her father or mother, or of any other person having the lawful care of her.<sup>2</sup>

The taking must be a taking under the power, charge, or protection of the taker, but it is immaterial whether the girl is taken with her own consent, or at her own suggestion, or against her will.<sup>3</sup>

It seems very doubtful how far abduction was, in any case, an offence at common law. Of course, if the woman did not consent, there would be an assault upon *her*; if she consented, but those having lawful charge of her resisted, and force were used, there would be an assault upon *them*. A conspiracy also to seduce would be an offence at common law, or to induce an unchaste woman to become a prostitute. *R. v. Howell*, 4 F. & F. 160. All the authorities usually quoted to show that this is an offence at common law may be explained on one or other of these grounds. See *R. v. Lord Grey*, 3 S. Tr. 519; *R. v. Mears*, 2 Den. C. C. 79; 1 East, P. C. 460; 1 Russ. by Gr. 401; Hawk. P. C. b. 1, c. 41, s. 8. See *State v. Sullivan*, 85 N. Car. 506.

The gist of the offence is the taking or enticing away, be it to a place distant or near, or be it for a long or short space of time. *Slocum v. People*, 90 Ill. 274.

A statute punishing the enticing away of a female applies where the defendant accomplishes his purpose while he artfully avoids making her a direct proposition to go away with him. *People v. Carrier*, 46 Mich. 442. See *State v. Ruhl*, 8 Iowa, 447; *Beyer v. People*, 86 N. Y. 369.

The N. Y. Penal Code, § 282, sub. 1, provides that whoever inveigles or entices an unmarried female under the age of twenty-five years, of previous chaste character, into a house of ill-fame or of assignation, or elsewhere for the purpose of prostitution or sexual intercourse, is guilty of abduction. See *People v. Seeley*, 37 Hun (N. Y.), 190; *Beyer v. People*, 86 N. Y. 369; *Schnicker v. People*, 88 N. Y. 192.

1. As the legal age for abduction varies in the different States, the age of sixteen is used in the following illustrations for convenience, and is the age generally adopted.

2. If the girl has no parents or legal guardians, those in whose care she is will be deemed to have the legal charge

of her. *State v. Ruhl*, 8 Iowa, 447. The indictment need not state the means by which the abduction was accomplished, nor that it was done without the consent and against the will of the father, nor that the defendant was not a nearer relation to the child than the person from whose custody it was abducted. *State v. George*, 93 N. Car. 567.

3. **What is not.**—A and B, two girls under sixteen, run away from home together. Neither abducts the other. *Steph. Dig. Cr. L. (Am. Ed.)* 198; *R. v. Meadows*, 1 C. & K. 399; *R. v. Kipps*, 4 Cox Cr. Cas. 168; *R. v. Mankletwo*, Dears. C. C. 162. Nor does one who receives them, in ignorance of who they are, even though he uses them for the purpose of prostitution. Upon the trial of an indictment for abduction, it appeared that the defendant kept a dance-hall or concert-saloon in the city of New York. The testimony of K., the female alleged to have been abducted, was to the effect that she was about fifteen years of age, of somewhat dissolute character, living with her parents in Newark; that in company with a young companion, a former inmate of a house of prostitution, she went to New York without the consent of her parents, and in strolling about came to and entered defendant's saloon; after sitting in the bar-room for a while she asked defendant "how much it was to see the entertainment." He answered, "Nothing, my little dear! come in," and asked if they had come to stay, to which K. replied that she had. He then invited them upstairs, took indecent liberties with their persons, and offered K. a dress, which she refused. She remained in the place voluntarily for about a month, leading the life of a prostitute. No evidence was given that defendant knew K.'s true name, her place of residence, or that he had any previous acquaintance with her or her family, their circumstances or condition. Other witnesses testified that they visited the saloon while K. was there; that there were a number of men and women danc-

The expression "taking out of the possession" means taking the girl to some place where the person in whose charge she is

ing and drinking, and among them K.; that they asked defendant if he had a young girl from Newark, by the name of K., but he denied any knowledge of such a girl, and offered to allow them to search the premises. While they were talking K. disappeared. They inspected the upper rooms, the appearances, as described, indicating they were used for purposes of prostitution. A physical examination of K.'s person showed that attempts at sexual intercourse had been made, but that it had not been accomplished. *Held*, that the evidence failed to sustain a conviction. *People v. Plath*, 100 N. Y. 590. See *R. v. Olifier*, 10 Cox Cr. Cas. 402.

A, a lady, persuades B, a girl under sixteen, to leave her father's house and come to A's house for a short time, for the purpose of going to the play with her. A has not abducted B. *Steph. Dig. Cr. L. (Am. Ed.)* 199.

A, a girl under sixteen, who was in service, was, as she was returning from an errand, asked by B if she would go to London, as B's mother wanted a servant, and he would give her £5 wages. A and B went away together to Bilston, where both were found, and B apprehended. *Held*, that this was not such a taking, or causing to be taken, of A as was sufficient to constitute the offence of abduction. *R. v. Meadows*, 1 C. & K. 399.

A mere seduction does not amount to an abduction under the N. Y. Rev. Statutes. *People v. Parshall*, 6 Park. Cr. (N. Y.) 129.

An indictment for abduction of a female of the age of fifteen years, with intent to defile her, cannot be supported at common law or under the North Carolina act of 1789, c. 81, which relates to abduction of children under the age of fourteen years. *State v. Sullivan*, 85 N. Car. 506.

**What is.**—A, a girl under sixteen, asks B, by whom she has been seduced, to elope with her, which he does. B. commits abduction. *Steph. Dig. Cr. L. (Am. Ed.)* 199; *R. v. Biswell*, 2 Cox Cr. Cas. 259. See *R. v. Robins*, 1 C. & K. 456. The defendant may be convicted, though the abduction may be with the consent of the female. *Tucker v. State*, 8 Lea (Tenn.), 633.

The "taking" need not be by force; solicitations or inducements are sufficient. *People v. Marshall*, 59 Cal. 386; *People*

*v. Carrier*, 46 Mich. 442; *People v. Seeley*, 37 Hun (N. Y.), 190; *Slocum v. People*, 90 Ill. 274.

In *People v. Carrier*, 46 Mich. 442, Cooley, J., said: "The defendant induced a brother of the girl to persuade her to meet him, and after the interview which there took place the girl went off at once to Canada. How far, if at all, this was induced by the persuasions of the defendant was left to the jury on the facts. As throwing light upon the intent, the prosecution was allowed to show that the girl had previously lived with defendant in illicit relations in Canada. The defendant claimed that the evidence showed the girl herself proposed the action which she took, and that the defendant in seeking for the interview had no other motive than to explain to her his conduct and motives in another transaction in respect to which it was expected her evidence was to be used against him. The circuit court charged the jury that before they could convict they must be satisfied the defendant enticed the girl away. "It may have been done by open solicitation to go for one purpose or for another purpose. It may have been done by designedly portraying to her her situation, and the result of going back to Mr. B., or the place from which she came, in such a light as to lead her to go to escape a return. If this were done with the design of getting her to go, it is an enticing, although the defendant may not have asked her to go, and apparently only consented to go with her; but if he had no design to get her to go away, and did nothing to bring about such an end, it would not be an enticing, and the defendant could not be convicted."

"This instruction was correct. A man cannot be suffered to evade the statute by artfully avoiding a direct proposition that she go off with him, when his conduct is equivalent to such a proposition, and not only suggests it to the girl, but is calculated and designed to induce her to go. The judge also instructed the jury that the previous relations of the parties might be considered as bearing upon the intent of the defendant in enticing the girl away. This also was correct. The previous relations of the parties were not conclusive, but they were very significant. (*People v. Jenness*, 5 Mich. 305.) It may be added, however, that the evidence of subsequent conduct

cannot exercise control over her, for some purpose inconsistent with the objects of such control. A taking for a time may amount to abduction.<sup>1</sup>

If the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such person.<sup>2</sup>

The fact that the offender supposes, in good faith and on reasonable grounds, that the girl is more than sixteen years of age is immaterial;<sup>3</sup> but [it seems] it is not necessary that he should either know or have reason to believe that she was under the lawful care or charge of her father, mother, or some other person.<sup>4</sup>

A, by improper solicitations or inducements, persuades B, a girl

was so conclusive of the unlawful intent that the proof of previous misconduct might well have been dispensed with." See *People v. Seeley*, 37 Hun (N. Y.), 190.

A girl under eighteen was placed by her father in the employ of C. She left the service in about a week without the knowledge or consent of her father. She then led an immoral life until she met the defendant. An improper intimacy at once commenced between the defendant and herself, and, at its beginning, he proposed that she should go into a house of prostitution and support him out of the money made by her as an inmate of such house. *Held*, that the defendant was guilty, as the girl, when taken, was in contemplation of the law in charge of her father. *People v. Cook*, 61 Cal. 478.

A brought B, a girl under fifteen years of age, into the State of New Jersey. He cohabited with her and interposed his will or persuasion between her and her guardian's control, so as to overcome her intention to return to her home. *Held*, that he abducted her. *State v. Gordon*, 46 N. J. L. 432.

1. A persuades B, a girl under sixteen, to leave her father's house and sleep with him for three nights, and then sends her back. A has abducted B. *Steph. Dig. Cr. L. (Am. Ed.)* 199; *R. v. Timmins*, Bell, 276.

It is not necessary that the illicit intercourse should continue for an indefinite or considerable length of time. A single act is sufficient. *State v. Feasel*, 74 Mo. 524.

A statute providing for the punishment of any person who for purposes of prostitution shall entice away a female of less than sixteen from her father, mother, guardian, or other person having the legal charge of her person, covers cases of girls who are living in a family with the knowledge of a parent who does

not object, or who has delegated the charge of the girl to the head of the family. It also applies to girls who are not under strict legal guardianship, but are orphans or abandoned by their parents and are given a home by charitable persons. *People v. Carrier*, 46 Mich. 442. See *State v. Ruhl*, 8 Iowa, 447.

It is sufficient to constitute the crime that a girl living with her parents is induced by persuasion or enticements to go to some convenient place from her father's house, in the immediate neighborhood, for the purpose of illicit intercourse, where she is gone only for an hour or two at a time. *Slocum v. People*, 90 Ill. 274.

2. A induces B to permit his daughter, C, to go away by falsely pretending that he (A) will find a place for C. A abducts C. *Steph. Dig. Cr. L. (Am. Ed.)* 199; *R. v. Hopkins* Car. & M. 254.

The prisoner represented to the girl's mother that he had secured a situation for the daughter. He took the girl away, but kept her with him from Monday to Friday, and slept with her every night, and then took her home. *Held*, that he was guilty of abduction. *R. v. Hopkins* C. & M. 254.

The defendant falsely represented to a woman that he had procured her a situation as a servant. He took her to a house of prostitution and effected her defilement. *Held*, that the unlawful intent could fairly be inferred from the end attained. *Beyer v. People*, 86 N. Y. 369.

3. A takes B, a girl under sixteen, out of her father's possession, believing her upon good grounds to be eighteen. A has abducted B. *Steph. Dig. Cr. L. (Am. Ed.)* 199; *R. v. Prince*, L. R. 2 C. C. R. 154; *R. v. Robins*, 1 C. & K. 456.

4. *People v. Cook*, 61 Cal. 478. The English cases hold the contrary view.

under sixteen, to leave her father's house; or induces B, a woman over sixteen years of age, to go with him, the purpose of A being to use B for prostitution. A is guilty of abduction.<sup>1</sup>

1. *People v. Marshall*, 59 Cal. 386; *People v. Cook*, 61 Cal. 478; *Slocum v. People*, 90 Ill. 274. See *Beyer v. People*, 86 N. Y. 369; *Schnicker v. People*, 88 N. Y. 192; *People v. Parshall*, 6 Park Cr. (N. Y.) 132; *R. v. Miller*, 13 Cox Cr. Cas. 179.

Prostitution means common indiscriminate intercourse with men and not with one man. *Osborn v. State*, 52 Ind. 526.

Purpose of prostitution as well as taking must be shown. *People v. Plath*, 100 N. Y. 590.

The prosecutrix, a German girl about sixteen years of age, who had been in this country about three weeks, went to a house of prostitution kept by the prisoner, not knowing the character of the house, for the purpose of obtaining employment as a domestic; the prisoner detained her there by exciting her fears that if she left she would be arrested, and by keeping the outer door locked; the prisoner plied her daily with solicitations to consent to the defilement of her person, but she refused; finally the prisoner told her to go upstairs with a man, and upon her refusal, opened the door of the room where she was and shoved her into the hall, whereupon she went upstairs to her room, and in a half-hour after a man called the "boss" came to her room with another man and left him there, and this man by force defiled her. *Held*, that the evidence was sufficient to sustain a conviction. *Schnicker v. People*, 88 N. Y. 192.

The purpose of the defendant must be prostitution or concubinage, and not merely illicit sexual intercourse. *Osborn v. State*, 52 Ind. 526; *Slocum v. People*, 90 Ill. 274; *Corn v. Cook*, 12 Metc. (Mass.) 93; *Carpenter v. People*, 8 Barb. (N. Y.) 603; *State v. Ruhl*, 8 Iowa. 447; *State v. Stoyell*, 54 Me. 24.

Seduction does not amount to abduction. *People v. Parshall*, 6 Park Cr. (N. Y.) 474.

Under the N. Y. Penal Code, § 282, the purpose of the abduction is accomplished if merely illicit intercourse is the purpose. It is sufficient if the woman is induced by solicitation to go to a place to meet the accused and there has sexual intercourse with him. *People v. Seeley*, 37 Hun (N. Y.), 190.

Where, upon the trial of an indictment, it appeared that the prosecutrix unsuspecting of any unlawful intent, and re-

lying upon his statements, was induced by false representations on the part of the prisoner, to the effect that he had procured her a situation as a servant in a respectable family, to go with him to a disreputable house, where she was, in spite of opposition and resistance and efforts to escape on her part, by force, menace, or duress, defiled, *held*, that the unlawful intent of the prisoner could fairly be inferred from the end attained; and that the evidence authorized a conviction. *Beyer v. People*, 86 N. Y. 369.

**Chaste Character.**—The law will presume the woman's previous life to be chaste, and the burden of proof is on the defendant to show otherwise; and her previous virtue cannot be impeached by her lewd life and conversation after she had been enticed away and had her mind and morals corrupted by the defendant. *Slocum v. People*, 90 Ill. 274. *Compare Kauffman v. People*, 11 Hun (N. Y.), 82; *People v. Parshall*, 6 Park Cr. (N. Y.) 129; *Carpenter v. People*, 8 Barb. (N. Y.) 603. "Previous chaste character" means not merely a reputation for chastity, but actual personal virtue. A single act of illicit intercourse on the part of the woman is a defence. *Lyons v. State*, 52 Ind. 426; *People v. Roderigas*, 49 Cal. 9. If the proof shows that the female was unchaste and lewd, the defendant cannot be convicted. *Jenkins v. State*, 15 Lea (Tenn.), 674.

In a prosecution for enticing a female away for purposes of prostitution, evidence of previous illicit relations and of the subsequent conduct of the parties is admissible as bearing upon defendant's intent in enticing her away. Evidence of former illicit relations is significant though not conclusive in its bearing upon the intent of one who is charged with enticing away a female for prostitution; but it may properly be dispensed with where proof of their subsequent conduct is conclusive as to the unlawful intent. *People v. Carrier*, 46 Mich. 442.

At the trial for enticing a woman of chaste life and conversation to a house of ill-fame for the purposes of prostitution, the burden is on the prosecution to prove the chastity of the woman. *Com. v. Whittaker*, 131 Mass. 224. See *Kauffman v. People*, 11 Hun (N. Y.), 82. *Compare Slocum v. People*, 90 Ill. 274; *Lyons v. State*, 52 Ind. 426.

**ABETTING.** See ACCESSORY.

**ABEYANCE.** (See CORPORATIONS; OFFICERS; REAL PROPERTY).—This word as applied to real property, whether estates or dignities, denotes that the same are in expectation, remembrance, or intendment of the law. Abeyance is said to be of two sorts, being either (1) Abeyance of the fee simple or (2) Abeyance of the freehold. The first is where there is an actual estate of freehold *in esse*, but the right to the fee simple is suspended, and is to revive upon the happening of some event; *e.g.*, in the case of a lease to A for life, remainder to the right heirs of B, who is alive, the fee simple is in abeyance until B dies.<sup>1</sup> Similarly, during the incumbency of each successive incumbent of a church, he having only a freehold interest therein, the fee simple is in abeyance.<sup>2</sup> The second species of abeyance, *i.e.*, an abeyance of the freehold itself, occurs on the death of an incumbent, and until the appointment of his successor.<sup>3</sup> But saving this one case, the freehold is never in abeyance, and cannot possibly be so.

It was customary in speaking of a thing in abeyance to say that it was "*in nubibus*" (which was rather a profane expression), or "*in gremio legis*,"<sup>4</sup> the latter phrase denoting that the fee simple or freehold which was in abeyance was meanwhile under the care or protection of the law.

There is no abeyance either of the fee simple or of the freehold in the case of conveyances operating under the Statute of Uses, for in these what is not given away remains in the grantor until it is so given.<sup>5</sup>

The unchasteness must be specifically proved. *Crozier v. People*, 1 Park Cr. (N. Y.) 453; *People v. Kenyon*, 5 Park Cr. (N. Y.) 254; *People v. Kane*, 15 Abb. Pr. (N. Y.) 15; *Conkey v. People* 1 Abb. App. Dec. (N. Y.) 418.

**Evidence.**—A woman who, having been taken away, has been married to the offender is, notwithstanding that marriage, competent to be a witness against him. *R. v. Perry*, 1 R. C. & M. 949; *R. v. Wakefield*, 2 Lewin C. C. 279; *State v. Gordon*, 46 N. J. L. 432.

To support a conviction under the N. Y. Penal Code for abduction, it must be proved both that there was a "taking" within the meaning of the act, and that such taking was for the purposes of prostitution. The word "taking" implies some persuasive inducement on the part of the accused, not a mere permission or allowance to follow a life of prostitution. A conviction cannot be sustained upon the unsupported evidence of the female alleged to have been abducted as to either element constituting the crime, *i.e.*, the taking or the intent. Proof must be given, aside from her testimony, tending to establish the com-

mission of the crime, and that it was perpetrated by the accused. *People v. Plath*, 100 N. Y. 590.

**Authorities for Abduction.**—1 Russell on Crimes (9 Am. Ed.), 940 *et seq.*; Bishop's Cr. Law; Wharton's Cr. Law; Dwyer's Cr. Law; Roscoe's Cr. Ev.

1. Co. Litt. 342 b.

2. Litt. § 644-6.

3. Litt. § 647.

4. *Carter v. Barnardiston*, 1 P. Wms. 516.

5. Brown's Law Dict. (Sprague's Ed.).

"If a conveyance be made to A for life, the remainder to the heirs of B then living, and livery be made to A, Mr. Fearnie contends that the inheritance continues in the grantor, because there is no passage open for its transmission at the time of the livery. The transmission may rest in abeyance or expectation, until the contingency or future event occurs to give it operation; but the inheritance in the mean time continues in the grantor, for the very plain and unanswerable reason that there is no person *in rerum natura* to receive it; and he or his heirs must be entitled, on the determination of the particular estate, before the contingent

If a freehold could commence to pass *in futuro*, there would be an abeyance and want of a tenant against whom to bring a *precipe*, and the law will not suffer the land to be in abeyance a single day, if possible to prevent this.<sup>1</sup>

**ABIDE.**—When used as to an order of court, it means to perform, to execute, to conform to such order.<sup>2</sup>

remainder can take place, to enter and resume the estate. He treated with ridicule the notion that the fee was in abeyance, or *in nubibus*, or in mere expectation or remembrance, without any definite or tangible existence; and he considered it an absurd and unintelligible fiction. *Fearne on Remainders*, 452-458. Of the existence of such a technical rule of the common law there can be no doubt. The principle was perhaps coeval with the common law, that during the pendency of a contingent remainder in fee, upon a life estate, as in the case already stated, the inheritance was deemed to be in abeyance. But a state of abeyance was always odious, and never admitted but from necessity, because, in that interval, there could not be any seisin of the land, nor any tenant to the *precipe*, nor any one of the ability to protect the inheritance from wrong, or to answer for its burdens and services. This was the principal reason why a particular estate for years was not allowed to support a contingent remainder in fee. *Hob.* 153. The title if attacked could not be completely defended, because there was no one in being whom the tenant could pray in and to support his right; and upon a writ of right patent, the lessee for life could not join the *mise* upon the mere right. The particular tenant could not be punishable for waste, for the writ of waste could only be brought by him who was entitled to the inheritance. So many operations of law were suspended by this sad theory of an estate in abeyance, that great impediments were thrown in the way of it, and no acts of the parties were allowed to put the immediate freehold in abeyance by limiting it to commence *in futuro*. . . . Though the good sense of the thing and the weight of liberal doctrine are strongly opposed to the ancient notion of an abeyance, the technical rule is that livery of seisin takes the reversion or inheritance from the grantor, and leaves him no tangible or disposable interest. Instead of a reversion he has only a potential ownership subsisting in contemplation of law, or a possibility of reverter; and *Mr. Preston* (on Estates, 1, 225; on Abstracts, 2, 103-106) insists that an estate

of freehold depending on another estate of freehold, and limited in contingency, must be in abeyance and not in the grantor." 4 *Kent. Com.* 258-260. See 1 *Washburne's Real Prop.* (4th Ed.) 71, 72; *Terrett v. Taylor*, 9 *Cranch* (U. S.) 43; *Dartmouth College Case*, 4 *Wheat.* (U. S.) 518, 691.

1. The necessity under the feudal system that there should be always some one ready to perform the lord's services was not the only reason which introduced the maxim of the common law that a freehold can never be placed in abeyance. It had a better foundation which continues still to exist, and to exist in Pennsylvania, that there should be always some person to answer the real actions brought for the recovery of the property. *Lyle v. Richards*, 9 S. & R. (Pa.) 322.

2. *Hodge v. Hodgdon*, 8 *Cush.* (Mass.) 294, citing *Taylor v. Hughes*, 3 *Greenl.* (Me.) 433.

"Abide the Judgment of the Court."—A condition of a recognizance on an appeal, which is conditioned for the defendant's appearance "to await the action of the court," is not sufficient when the statute prescribes the words "to abide the judgment of the court." *Wilson v. State*, 7 *Tex. App.* 38.

"Abide by" an Award.—The meaning of the term "abide by" is not the same as "to acquiesce in" or "not dispute." To abide by an award is the same as to abide an award, to stand to the determination of the arbitrators, and to take the consequences of the award. It means simply to await the award without revoking the submission. It can never be construed to mean that the defendant should not be at liberty to dispute the validity of any award that might be made. *Shaw v. Hatch*, 6 N. H. 162; see *Marshall v. Read*, 48 N. H. 36.

"Abide the Decision."—The plaintiff in a bill in equity, praying for a discovery, for an account of the rents and profits of real estate, to which he claimed title as tenant in common with the defendant, who denied his title, and for general relief, petitioned at law for partition of the premises, and by agreement, with consent of the court, a docket entry was made in the action at law that it was "to abide de-

**ABILITY.**—In a California statute setting forth the grounds for divorce, ability was held to mean the possession by the husband of means in property to provide such necessities, not his capacity for acquiring such means by labor.<sup>1</sup>

**ABLE.**—A Maine statute declares that expenses incurred for providing nurses; etc., to an infected person shall be at the charge of the person sick, "if able." *Held*, that the possession of \$600, in available personal securities, rendered a person "able" in the meaning of the statute, where the charges were \$176.<sup>2</sup>

**ABLE-BODIED.**—That the term "able-bodied" does not imply an absolute freedom from all physical ailment we think evident. We think it imports an absence of those palpable and visible defects which evidently incapacitate the person for performing the ordinary duties of a soldier.<sup>3</sup>

**ABODE.** See DOMICILE.

**ABORTION.** (See ACCESSORY.)—1. Any person who does any act calculated to prevent a child being born alive is guilty of abortion.<sup>4</sup>

2. **At Common Law.**—If the act be done with the mother's consent, and the child has not quickened, it is not a crime by the common law; nor is procuring an abortion a felony, if the child has quickened.<sup>5</sup> When, in consequence of the means used to

"*cision*" in the suit in equity. A verdict was afterwards returned by a jury on an issue framed in the suit in equity to try the title in the premises, and at the argument of exceptions taken at the trial an amendment of this verdict was agreed to, and the case was sent to a master to state an account. *Held*, that the docket entry did not require the petitioner at law to await the final decree in equity, but partition should be ordered in conformity with the title so determined. *Hodges v. Pingree*, 108 Mass. 585.

1. *Washburn v. Washburn*, 9 Cal. 475. An English statute, 9 Geo. 4, c. 14, s. 6, provides that no action could be brought to charge a person by reason of a representation given concerning the ability of another person unless reduced to writing and signed. It was held that the representation should relate to the ability of the other person effectually to perform and satisfy the engagement of a pecuniary nature into which he has proposed to enter. *Lyde v. Barnard*, 1 M. & W. 101.

2. *Hampden v. Newburgh*, 67 Me. 370.

3. A physical disability or bodily infirmity, not apparent, does not exempt a person from enrolment in the militia. The enrolling officer is the judge, and any error of judgment cannot be inquired into collaterally, such as a suit for tres-

pass for taking and selling a mare, property of plaintiff, as an amercement for non-appearance at training. *Darling v. Bowen*, 10 Vt. 148. There being no exception made by the charter of a city or the ordinance imposing a tax in favor of persons not able-bodied, and no constitutional restriction upon legislation in this respect, the fact that a citizen upon whom the tax is imposed is not able-bodied constitutes no defence to the imposition of the tax. *City of Malcomb v. Twaddle*, 4 Bradw. (Ill.) 254.

4. See *Abrams v. Foshee*, 3 Iowa, 278; *Cotton v. Cotton*, 5 Martin (La.), 95.

5. **At Common Law.**—"After a patient investigation we are forced to the conclusion that it never was a punishable offence at common law to produce, with the consent of the mother, an abortion prior to the time when the mother became quick with child. It was not even murder at common law to take the life of the child at any period of gestation, even in the very act of delivery." *Hines, J. Mitchell v. Com.*, 78 Ky. 204; s. c., 39 Am. Rep. 227. See *Com. v. Bangs*, 9 Mass. 387; *Com. v. Parker*, 9 Metc. (Mass.) 263; s. c., 43 Am. Dec. 396; *Smith v. State*, 33 Me. 48; *State v. Cooper*, 22 N. J. L. 52; s. c., 51 Am. Dec. 248; *State v. Siagle*, 82 N. Car. 653;

secure an abortion, the death of the woman ensues, then it is murder at common law; but by statute in some States it is made manslaughter.<sup>1</sup>

**3. Intention.**—By the giving of any drug, noxious thing or other matter or substance, or the use of any instrument calculated to produce miscarriage,<sup>2</sup> whether the object be attained or not; if

*People v. Sessions*, 26 N. W. Repr. (Mich.) 291; *Ann v. State*, 11 Humph. (Tenn.) 159; *Abrams v. State*, 3 Iowa, 274; s. c., 66 Am. Dec. 77; *Hatfield v. Gano*, 15 Iowa, 178. The *contra* view appears to have been followed by the Pennsylvania Supreme Court. *Mills v. Com.*, 13 Pa. St. 633; *Com. v. Demain*, 6 Pa. Law Jour. 29; s. c., Brightly, 441.

**1. When Murder.**—4 Black Com. 201; 1 Bishop Cr. L. 328; *State v. Moore*, 25 Iowa, 128; *State v. Dickinson*, 41 Wis. 299.

**2. Intention.**—*State v. Owens*, 22 Minn. 238; *Wilson v. State*, 2 Ohio St. 319; *State v. Geddicke*, 43 N. J. L. 86; *State v. Fitzgerald*, 49 Iowa, 260; s. c., 31 Am. Rep. 148; *State v. Murphy*, 3 Dutch. (N. J.) 112; *R. v. Hillman*, 9 Cox Cr. Cas. 386. If the drug is taken in the absence of the giver, he "causes it to be taken." *R. v. Wilson, Dearsly & B.* 127; *People v. Josselyn*, 39 Cal. 396; *Stephen's Dig. Cr. L.* (Am. Ed.) 176, *note*. Even if the intention exists only in his own mind. *R. v. Hillman, Leigh & C.*, 343; *State v. Stewart*, 52 Iowa, 284. To constitute an administering there need not be an actual delivery by the hand of the prisoner. *R. v. Harley*, 4 C. & P. 370. It was proved that the woman requested the prisoner to get her something to procure miscarriage, and that a drug was both given by the prisoner and taken by the woman with that intent, but that the taking was not in the presence of the prisoner. It was held, nevertheless, that the prisoner had caused the drug to be taken within the meaning of the statute. *R. v. Wilson, Dearsly & B.* C. C. 127; *R. v. Farrow*, Id. 164, *acc.* See *R. v. Fretwell*, 31 L. J., M. C. 145. Mere belief of the existence of pregnancy is sufficient to justify the inference of intent. *Powe v. State*, 48 N. J. L. 34. A husband assaulted and beat his wife, then about three months pregnant. Shortly after such beating she miscarried. It was not proved that the husband desired or intended such result. *Held*, that a conviction for abortion could not be sustained. *Slattery v. People*, 76 Ill. 217.

Where drugs were administered, and an instrument thrust into the body of

the deceased, with specific intent to produce an abortion, these acts imply malice aforethought. *State v. Thurman*, 66 Iowa, 693; *State v. Owens*, 22 Minn. 238; *State v. Geddicke*, 43 N. J. L. 86, where defendant prescribed "Dr. Clarke's Female Periodical Pills;" *R. v. Hollis*, 12 Cox Cr. Cas. 463; *R. v. Hennah*, 13 Cox C. C. 548.

**Noxious Thing.**—A small quantity of *savin*, which was sufficient only to produce a little disturbance of the stomach, *held* not a noxious thing. *R. v. Perry*, 2 Cox Cr. Cas. 223. This case doubted and criticised, *Storer & H. Abor.* 196. If the drug is liable to cause injury to a pregnant woman, it is noxious. *Dougherty v. People*, 1 Colo. 517. Upon an indictment for administering *savin*, the charge was that the prisoner administered "six ounces of the decoction of a certain shrub called *savin* then and there, being a noxious and destructive thing." It appeared that the prisoner had prepared the medicine by pouring boiling water on the leaves of the shrub, and the medical men examined stated that such preparation is called an *infusion* and not a decoction. It was objected that the medicine was misdescribed. The objection was overruled. The court said *infusion* and decoction are *ejusdem generis*, and the variance is immaterial. The question is whether the prisoner administered *any matter or thing* to the woman with intent to procure abortion. *R. v. Phillips*, 3 Campb. 78. The authority of this decision appears to have been recognized in the following case. The prisoner was indicted for administering saffron to the prosecutrix with intent to procure abortion. The counsel for the prisoner cross-examining as to the innocuous nature of the article administered, *Vaughan, B.* said, "Does that signify? It is with the intention that the jury have to do; and if the prisoner administered a bit of bread merely with the intent to procure abortion, it is sufficient to constitute the offence contemplated by the act of Parliament." *R. v. Coe*, 6 C. & P. 403. The words in the clause of the statute under which the prisoner appears to have been indicted in this case were "any medicine or other thing." Where the prisoner was indicted



miscarriage be the intention, the crime is complete. The drug administered may even be harmless.<sup>1</sup>

4. The administration of a drug, or the actual use of an instrument, is not necessary to the incrimination; if any person sells or supplies any drug or thing to be taken, or any instrument to be used, knowing that miscarriage is the intention, he is an accessory.<sup>2</sup>

5. **Pregnant—Quick with Child.**—It is immaterial whether or not the woman was pregnant,<sup>3</sup> though a miscarriage can be effected at any time after actual conception.<sup>4</sup> A woman is "quick with

for supplying "a certain noxious thing," and the evidence was that the thing supplied was of a perfectly harmless character in itself, though if taken with the belief that it would procure a miscarriage it might, by acting on the imagination, produce that effect, it was *held*, that the conviction must be quashed, as there was no evidence that the thing supplied was noxious. *R. v. Isaacs*, 1 L. & C. 220; 32 L. J., M. C. 52. But where there was no evidence of the ingredients of the thing administered, or of its character being harmless or otherwise, except that in fact it made the witness ill and produced miscarriage, it was *held*, that there was evidence of its being a noxious thing. *R. v. Hollis*, 12 Cox C. C. R. 463. If the drug be innocuous if taken in small quantities, but harmful if taken in large, it would appear to be a noxious thing. *R. v. Cramp*, 5 Q. B. D. 307; *R. v. Hennah*, 13 Cox, 547.

1. **Accessories.**—*Com. v. W—*, 3 Pittsb. (Pa.) 463, where defendant advised excessive exercise. Evidence is admissible to show that the accused received the woman upon whom the abortion was committed to board, knowing her condition, for the purpose of having an abortion performed upon her, and that he had procured a physician to operate upon her. *Com. v. Adams*, 127 Mass. 15. In *People v. Vedder*, 98 N. Y. 630; s. c., 34 Hun (N. Y.), 280, it was *held*, that a woman permitting an abortion is not an accomplice under the Penal Code, § 294. To same effect *Com. v. Boynton*, 116 Mass. 343; *Dunn v. People*, 29 N. Y. 523; *Com. v. Brown*, 121 Mass. 69; *Com. v. Wood*, 11 Gray (Mass.), 85; *State v. Owens*, 22 Minn. 238; *State v. Hyer*, 39 N. J. L. 598. Although the woman is not an accomplice, her moral implication may properly be considered in weighing her testimony. *Watson v. State*, 9 Tex. App. 237. It is not a crime for her to take the potion. *State v. Hyer*, 39 N. J. L. 598. Compare *Solander v. People*, 2 Colo. 48. A father

is accessory who consents to the attempt. *Watson v. State*, 9 Tex. App. 237. The woman's evidence is competent against those mutually engaged with her in the act. *Solander v. People*, 2 Colo. 48; *People v. Vedder*, 98 N. Y. 630.

2. **Consequence not Material.**—*R. v. Coc*, 6 C. & P. 403; *U. S. v. Bott*, 11 Blatchf. (U. S.) 346; *Dougherty v. People*, 1 Colo. 514; *State v. Gedicke*, 43 N. J. L. 86; *Com. v. Morrison*, 16 Gray (Mass.), 224. The indictment need not allege what the drug was. *Watson v. State*, 9 Tex. App. 237; *Com. v. Morrison*, 16 Gray (Mass.) 224. Nor that it was noxious. *Com. v. Morrison*, 16 Gray (Mass.), 224. The drug may be harmless. *State v. Fitzgerald*, 49 Iowa, 260; s. c., 31 Am. Rep. 148. See *State v. Gedicke*, 43 N. J. L. 86.

3. **Pregnant—Quick with Child.**—*R. v. Goodchild*, 1 Den. C. C. 187; s. c., 2 Car. & K. 293; *Com. v. Taylor*, 132 Mass. 261; *R. v. Titley*, 14 Cox Cr. C. 502. In Iowa it has been held that the pregnancy, as well as the administering of drugs or use of instruments, must be proved beyond a reasonable doubt. *State v. Stewart*, 52 Iowa, 284. In New Jersey mere belief of the existence of pregnancy is sufficient, with other circumstances, to justify the inference of intent. *Powe v. State*, 48 N. J. L. 34. In Vermont and Massachusetts it is held that it is immaterial whether the foetus be alive or not. *State v. Howard*, 22 Vt. 380; *Com. v. Wood*, 11 Gray (Mass.) 85; *Com. v. Taylor*, 132 Mass. 261; *Smith v. State*, 33 Me. 48; s. c., 54 Am. Dec. 607. In Michigan the foetus must have quickened. *People v. McDowell*, 30 N. W. Repr. 70. In Pennsylvania it is held that the moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated. *Mills v. Com.*, 13 Pa. St. 631.

4. *Evans v. People*, 49 N. Y. 86; *Watson v. State*, 2 Ohio St. 319; *State v. Fitzgerald*, 49 Iowa, 260; s. c., 31 Am. Rep. 148.

child" from the period of conception and the commencement of gestation, but is only "pregnant with a quick child" when the child has become quickened in the womb.<sup>1</sup>

**6. Death of Child.**—If a person intending to procure an abortion does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who, by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it less a felony.<sup>2</sup>

**7. Evidence.**—The evidence of the woman upon whom the abortion was produced is admissible; <sup>3</sup> but not her dying declarations, unless homicide is charged.<sup>4</sup> The testimony of a physician who attended the woman subsequent to the procuring of the abortion is not admissible;<sup>5</sup> but the evidence of a physician who made a *post-mortem* examination of the woman is competent testimony.<sup>6</sup> Evidence that instruments calculated to produce abortion were found in possession of the person charged is admissible.<sup>7</sup> The instruments may be exhibited to the jury.<sup>8</sup> It is competent to show that the accused had previously used the same treatment on the same woman,<sup>9</sup> and that he had operated on others;<sup>10</sup> but it is

1. *Evans v. People*, 49 N. Y. 86; *R. v. Wycherly*, 8 C. & P. 262. This distinction is denied in *State v. Cooper*, 2 Zab. (N. J.) 52. In an indictment the phrase "woman with child" is equivalent to "pregnant woman." *Eckhardt v. People*, 83 N. Y. 462; s. c., 38 Am. Rep. 462.

2. **Death of Child.**—*R. v. West*, 2 Cox Cr. Cas. 500; *Wharton's Crim. L.* § 942; *Storer & H. on Abor.* 154 *et seq.*; *Com. v. Brown*, 14 Gray (Mass.), 419.

3. **Evidence.**—*People v. Vedder*, 98 N. Y. 630; *Maine v. People*, 16 N. Y. Sup. Ct. 113; *Com. v. Wood*, 11 Gray (Mass.), 85; *Com. v. Boynton*, 116 Mass. 343; *Watson v. State*, 9 Tex. App. 237; *Dunn v. People*, 29 N. Y. 523; *State v. Gedicke*, 43 N. J. L. 86. The woman's testimony must be corroborated. *People v. Josselyn*, 39 Cal. 393.

4. *Railing v. Com.*, 2 East Repr. (Pa.) 892; s. c., 1 Atl. Repr. 314; *People v. Davis*, 56 N. Y. 95; *Maine v. People*, 9 Hun (N. Y.), 113; *State v. Harper*, 35 Ohio St. 78; s. c., 35 Am. Rep. 596; *R. v. Hind*, 8 Cox Cr. Cas. 300; *Wooten v. State*, 39 Ga. 223; *Storer & H. Abor.* 208.

In *Indiana* and *Wisconsin* it has been held that dying declarations are admissible. *Montgomery v. State*, 80 Ind. 338; s. c., 41 Am. Rep. 815; *State v. Dickinson*, 41 Wis. 299.

5. *People v. Murphy*, 101 N. Y. 126, where a physician was sent by the public prosecutor to make an examination of the woman.

6. *People v. Sessions*, 26 N. W. Repr. (Mich.) 291.

7. *People v. Vedder*, 34 Hun (N. Y.), 280; s. c., 98 N. Y. 630. Evidence that the accused had an instrument in possession five months before the time of the alleged operation is admissible. *Com. v. Blair*, 126 Mass. 40.

8. *Com. v. Brown*, 14 Gray (Mass.), 419.

9. At the trial of an indictment for unlawfully using a certain instrument, with intent to cause the miscarriage of a woman, evidence that, in addition to using the instrument, the defendant also administered other unlawful treatment for the same purpose, and evidence that he used the same treatment on the same woman upon two other occasions than that named in the indictment, and but a few days previously thereto, is competent to show his intent and his knowledge of the pregnant condition of the woman. *Com. v. Corkin*, 136 Mass. 429.

10. *Com. v. Brown*, 14 Gray (Mass.), 419. See *Com. v. Holmes*, 103 Mass. 440.

not competent to prove a similar offence.<sup>1</sup> Where a woman conspired with others to produce an abortion upon her, her acts and declarations in furtherance of the common purpose are evidence against the accessories.<sup>2</sup> It may be shown that the drug administered was, in popular opinion, supposed to cause abortion.<sup>3</sup>

Evidence is admissible to show that the house of the accused where the abortion was performed was one of ill-fame;<sup>4</sup> also advertisements tending to show that the accused was engaged in the business of procuring abortions.<sup>5</sup> The health and spirits of the woman, also stains and marks upon her bedding, may be shown.<sup>6</sup> The parts of the body of the dead woman, preserved in spirits, may be exhibited to the jury in connection with the testimony of the physician who made the *post-mortem* examination.<sup>7</sup> The sexual intercourse between the woman and the accused, or between her and a third person, may be proved.<sup>8</sup> The *corpus delicti* must be established.<sup>9</sup> The fact of the pregnancy, as well as the administering of the drugs or the using of instruments, must be proved beyond a reasonable doubt.<sup>10</sup> A physician testifying as an expert that he has discovered no traces of an abortion in a certain case may properly be asked whether such traces would exist under certain circumstances, even though no proof of such circumstances has been made.<sup>11</sup>

**ABOUT.** (See MORE OR LESS.)—The word means nearness of time, quality or degree, or making preparations to do a thing, or being actually engaged in doing something.<sup>12</sup>

A contract to convey "about sixty-five acres" cannot be performed by conveying thirty-six acres.<sup>13</sup>

1. Upon the trial of a party for abortion, evidence to prove a similar offence founded upon another and separate transaction is not admissible, but in such case the prosecution will be put to its election. *Baker v. People*, 105 Ill. 453.

Evidence that the accused had, before the commission of the alleged abortion, told other persons that she had instruments wherewith to produce abortion, and offered her services for that purpose at a certain price, is admissible to show knowledge and intent, and the possession of necessary means to accomplish the act in the chosen way of the accused. *People v. Sessions*, 26 N. W. Repr. (Mich.) 291.

2. *Solander v. People*, 2 Colo. 48. See *People v. Vedder*, 98 N. Y. 630; s. c., 34 Hun (N. Y.), 280.

3. *Carter v. State*, 2 Ind. 617.

4. *Hays v. State*, 40 Md. 633.

5. *Weed v. People*, 1 Thomp. & C. (N. Y.) 50.

6. *Com. v. Wood*, 11 Gray (Mass.), 85.

7. *Com. v. Brown*, 14 Gray (Mass.), 419.

8. *Com. v. Wood*, 11 Gray (Mass.), 85; *Dunn v. People*, 29 N. Y. 523; *People v. McDowell*, 30 N. W. Repr. (Mich.) 68.

9. In a prosecution for procuring an abortion resulting in the death of the pregnant woman, it is the procurement of the miscarriage that constitutes the *corpus delicti*. *Traylor v. State*, 101 Ind. 65.

10. *State v. Stewart*, 52 Iowa, 284.

11. *Bathrick v. Detroit, etc., Co.*, 50 Mich. 629.

**Authorities for Abortion.**—*Storer and Heard on Abortion*; *Bishop's Crim. Law*, vol. i. §§ 328, 741, 769, vol. ii. § 691; *Wharton's Crim. Law*, §§ 182, 316, 323, 390, 430, 592-599, 1364, 1831.

12. *Hockspringer v. Ballenburgh*, 16 Ohio, 304.

13. *Baltimore, etc., Society v. Smith*, 54 Md. 187. The court said: "The force of the qualifying word, we think, is simply that while the parties do not bind themselves to the precise quantity of sixty-five acres, it imports that the actual quantity is a near approximation to that mentioned; that is to say, within a

A contract which called for the delivery of "about five hundred tons nitrate of soda" was construed to be a contract for the sale of five hundred tons, with such exception by the word "about" as the variance usually found to exist in such cases, arising from some little difference in the mode of weighing, and that it was not performed by delivering four hundred tons.<sup>1</sup>

Where an entry calls for land on a certain creek "about seven miles" from its mouth, the word "about" must be rejected and the distance taken in a straight line.<sup>2</sup>

fraction of an acre, or perhaps it might cover a discrepancy of one or two acres."

In *Stevens v. McKnight*, 40 Ohio St. 341, the court said: "If in a contract in writing to sell land the tract is described as containing 'about one hundred and forty acres,' the import of the qualifying word 'about' is simply that the actual quantity is a near approximation to that mentioned. When there is found to be a material and valuable variation, a court of equity upon a petition for specific performance will give the word its proper effect.

A description of a piece of land as containing "about seven acres" and bounded by a canal was held to include the centre of the canal. Without that there would only have been about six acres. *Good-year v. Shanahan*, 43 Conn. 204.

The description of the quantity of land, though corresponding in the number of acres with that stated in a former conveyance, and especially when accompanied with the qualifying words "more or less" or "about" so many acres, furnishes very strong evidence of the purpose of the grantor to restrict the limits of the premises to those which were conveyed in such former deed. *Wheeler v. Randali*, 6 Metc. (Mass.) 529.

As to length of a line in deed see *Cutts v. King*, 5 Me. 482; *Purinton v. Sedgley*, 4 Me. 286.

1. In *Bourne v. Seymour*, 16 C. B. 336.

**Quantity of Goods.**—The plaintiffs having been informed by S., a commission agent, that the defendants had a quantity of old iron in their yard for sale, "about 150 tons," wrote to the defendants, "We are buyers of good wrought scrap-iron free of light and burnt iron, for our American house, and understand from S. that you have for sale about 150 tons. We can offer you 80s. per ton." There were three intermediate letters relating to the place of delivery and expense of carting, and then the defendants wrote, "We accept your offers for old iron, viz., 80s. per ton, we delivering alongside vessel in one of the London docks. Please let us know when you can send a man

here to see it weighed, and also inform us where to send it." Before S. saw the plaintiffs he had seen in the yard of the defendants, who were builders, a heap of iron, and said, "You seem to have about 150 tons there." The reply was, "Yes, or more." The defendants only delivered 44 tons, that being the quantity of the heap in the yard. The plaintiffs recovered 50*l.* damages in an action for short delivery. *Held*, that the words "about 150 tons" were merely words of estimate and expectation, and there was no warranty as to quantity, and therefore the defendants were not bound to deliver 150 tons; that the subject-matter of the contract was not 150 tons of iron, but the iron which S. had seen in the defendants' yard. *McLay v. Perry*, 44 L. T., N. S. 152.

The plaintiffs agreed to purchase of the defendants "about 300 quarters, more or less," of rye. The ship brought 350 quarters, and the defendants refused to deliver any part unless they would accept the whole. *Held*, that by the words "about" and "more or less" the parties could not be taken to have contemplated so large an excess as 50 over 300 quarters. *Cross v. Eglin*, 2 B. & Ad. 106. See *Brawley v. U. S.*, 6 Otto (U. S.), 168.

Where a grantee of land contracts to pay as part consideration therefor a claim of another against the grantor "for about one hundred and fifty dollars," he must pay the amount due, though it be fifty dollars more. *Turner v. Whidden*, 22 Me. 121.

Where there was a refusal of an order for "about 52 tons" of hemp, on the ground that it was so expressed, *held*, that parol evidence was admissible to show that it was the custom for warehousemen in describing the quantity to insert in the delivery order as above the word "about," and, when coupled with evidence that the weight was as expressed, there was a sufficient performance of a contract to deliver. *Moore v. Campbell*, 10 Ex. 323.

2. *Sanders v. Morrison*, 2 T. B. Mon. (Ky.) 109; s. c., 15 Am. Dec. 140. See

The words "about to sail from Benizaf with cargo for Philadelphia," contained in a charter-party, mean, about ready to sail; therefore a vessel not more than three elevenths loaded, and the time of finishing subject to all the contingencies of wind, weather, labor, and boats, incident to an open roadstead on the northern coast of Africa, was not "about to sail" within the meaning of the charter-party.<sup>1</sup>

**ABROAD.** See BEYOND THE SEAS.

**ABSCOND.** (See ABSCONDING DEBTOR.)—If a person depart from his usual residence, or remain absent therefrom, or conceal himself in his house, so that he cannot be served with process, with intent unlawfully to delay or defraud his creditors, he is an absconding debtor. But if he depart from the State or from his usual abode with the intention of again returning, and without any fraudulent design, he has not absconded, nor absented himself within the intendment of the law.<sup>2</sup>

Johnson v. Pannel, 2 Wheat. (U. S.) 206; Shipp v. Miller, 2 Wheat. (U. S.) 316. Compare Bodley v. Taylor, 5 Cranch (U. S.), 191.

1. Von Lingen v. Davidson, 4 Fed. Repr. 346.

In Shipping Contract.—The plaintiffs by written contract sold to defendants a quantity of linseed oil "to arrive per ship Marcia from London, sailed on or about the 15th of March ult." Held, that the statement in the contract as to the time of sailing was a mere representation and not a warranty, and, being made without fraud, that the defendants were bound to accept and pay for the oil, although the vessel did not sail until the 26th of March. Hawes v. Lawrence, 4 N. Y. 345.

A charter-party provided that a ship should load a full and complete cargo of iron ore, not exceeding what she could reasonably stow, "say about 1100 tons." The charterer provided 1080 tons, the actual capacity of the ship being 1210 tons. The ship-owner sued the charterer for not loading a full cargo. The court had power to draw inferences of facts. Held, that the words "say about 1100 tons" were words of contract and not of mere expectation; that the ship-owner agreed to accept a cargo of about 1150 tons; and that three per cent was a fair percentage of difference to allow; so that the charterer should have furnished three per cent above 1100 tons, or 1133 tons, and that consequently the charterer was 58 tons short, for which the ship-owner was entitled to net freight. Morris v. Levison, L. R. 1 C. P. 155.

In an agreement to sell "a cargo of old railroad iron, to be shipped per bark Charles William, at thirty dollars per ton, delivered on the wharf at the port of discharge, dangers of the seas excepted—about 300 or 350 tons," the figures "about 300 or 350 tons" are undoubtedly to be taken as part of the contract; but taken with the context, they manifestly express an estimate only, and do not control the descriptive clause designating and limiting the subject of the contract. Held, that the delivery at port of discharge of as much as a vessel seaworthy and in good order could carry, though only 227 tons, was a compliance. Pembroke Iron Co. v. Parsons, 5 Gray (Mass.), 589.

2. Where a debtor departs from one town and goes to another in the same State, where he works openly for over three months, he does not abscond, though his whereabouts was unknown to his friends in the first-mentioned town. The question of withdrawal with a view to elude process is one for the jury. Fitch v. Waite, 5 Conn. 117.

Where the statute provides for a debtor "absconding," an attachment stating that he is about to abscond does not allege sufficient cause for the issuance of the writ. To abscond in a legal sense means to hide, conceal, or absent one's self clandestinely, with the intent to avoid legal process. Bennett v. Avant, 2 Sneed (Tenn.), 152.

An affidavit stating a debtor "about to abscond himself and his property out of the State privately, so that process cannot be served," is equivalent to the assertion that he is about to remove himself and

**ABSCONDING DEBTOR.** See ATTACHMENT; BILLS AND NOTES.

**ABSENCE—ABSENT—PRESUMPTION OF LIFE, DEATH, AND SURVIVORSHIP.** See BEYOND THE SEAS; DOMICILE; LIMITATIONS.

1. *Definition.*
2. *Statute of Limitations.*
3. *Presumption of Death.*
4. *Presumption of Continuance of Life.*
5. *Hearing of Inquiries.*
6. *Survivorship.*

1. **Definition.**—By absence is sometimes meant that a person is not at the place of his domicile; yet his place of residence being known, or news or information having been received from him, his existence is not uncertain. But in a more confined and more technical sense absence signifies that the residence of the person who is not at the place of his domicile is unknown, and that for this reason his existence is doubtful.<sup>1</sup>

property out of the State privately, and therefore complies substantially with a statutory oath that defendant is about to remove himself from the State, so that the ordinary process of law cannot be served upon him. *Ware v. Todd*, 1 Ala. 199.

The Kansas Statute of Limitations provides: "If, when a cause of action accrues against a person, he be out of the State or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the State, or while he is so absconded or concealed." *Held*, that absconding and concealing so used refer to the acts of the party in the State. Secretly leaving another State is not absconding or concealing from the reach of process here. *Hoggett v. Emerson*, 8 Kans. 262.

A certificate of a magistrate that a debtor is not about to abscond or has money, etc., does not meet an affidavit of a creditor alleging that he had money secreted and was about to remove out of the State. *In re Proctor*, 27 Vt. 118.

A debtor shut up from his creditors in his own house is an absconding debtor. *Ives v. Curtis*, 2 Root (Conn.), 133.

A publicly going or moving out of the State is not an absconding. *Boardman v. Bickford*, 2 Aik. (Vt.) 345.

A party may abscond and subject himself to the operation of the attachment laws against absconding debtors, and still not depart from the limits of the State. A party may not be a citizen for political purposes, and yet be a citizen for commercial or business purposes, and

liable to attachment. *Field v. Adreon*, 7 Md. 209.

"The fact of converting a large amount of goods into money by auction sales, and at a large sacrifice, and in a clandestine manner furnished a reasonable presumption that [the debtor] intended to abscond or absent himself, so as to avoid the service upon him of the ordinary process of the law," and evidence of such acts should be admitted. *Ross v. Clark*, 32 Mo. 296.

1. *Bouvier's Inst.* § 234.

"Absence" is equivalent to non-appearance. *Strine v. Kaufman*, 12 Neb. 423.

One who is dead is not "absent." *Rockland v. Merrill*, 71 Me. 452. See *Redfern v. Rumney*, 1 Cranch. C. C. 300.

An absent debtor is one absent from his dwelling, residence, and place of abode, out of the country, so that the ordinary process of the court cannot be served upon him. *Den v. Wharton*, 1 Yerg. (Tenn.) 124.

A man may be a citizen of Kentucky and yet a non-resident, and he may be a resident and yet an absent defendant. *Curd v. Letcher*, 3 J. J. Marsh. (Ky.) 443.

An officer of the army ordered home to await orders is not absent from duty with leave so as to fall within the act placing officers absent from duty with leave on half-pay. *United States v. Williamson*, 23 Wallace, 411.

Absence means non-appearance in a suit, not absence without knowledge or notice; and a petition for reversal of a decree of judicial separation under 20 and 21 Vict. c. 85, sec. 23, on the ground

**2. Statute of Limitations.**—In most of the States the statute contains a provision that if at the time a cause of action accrues against a person he shall be absent from the State, the action may be commenced within the time limited after he comes into the State; and that if after a right of action has accrued against a person he shall be absent from and reside out of the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action. Under this provision it is an important question whether a mere temporary absence of the defendant when the right of action accrued, as for a day or a week, constitutes such an absence as prevents the statute from attaching in his favor; and it may be said that even in such a case the statute does not begin to run until his return to the State, unless the circumstances existing during the period of such temporary absence were such that the service of legal process against him could have been made so that the plaintiff could obtain a judgment against him personally. The evident purpose and intention of this clause of the statute is to insure to a plaintiff the full statutory period within which to commence his action against a defendant; and if he is temporarily absent from the State when the right of action accrues, so that process cannot at

that it was obtained in petitioner's "absence" is good on demurrer, though alleging personal service of the citation in the separation suit. *Phillips v. Phillips*, L. R. 1 P. & D. 169.

A provision in a Mississippi statute provides that in a suit against an absent defendant publication may be made on satisfactory proof that such defendant is out of the State, or that upon inquiry at his usual place of abode he could not be found. *Held*, that "absent" refers only to defendants temporarily out of the State. *Wast v. Heard*, 27 Miss. 400.

When the presence of the defendant is not secured either in fact by his appearance or constructively by the service upon him of the summons to appear, a judgment obtained upon his involuntary default is in legal intendment, rendered in his absence. *James v. Townsend*, 104 Mass. 367.

The general statutes of Massachusetts provide for the granting of a review upon petition, "provided that if the judgment complained of was rendered in the absence of petitioner and without his knowledge," the petition should be filed within one year of notice, etc. *Held*, that "absence" did not mean out of the State only, but was intended to apply to all cases of default, without service of process, in the several cases mentioned in the statute. *James v. Townsend*, 104 Mass. 367.

Intentional absence without leave from

military service does not constitute a desertion; there must accompany it an intent not to return. *Hanson v. South Scituate*, 115 Mass. 336.

One who by reason of being an officer or private in the United States army is absent from the State is within a statute of limitations providing for absence on public business. *Gregg v. Matlock*, 31 Ind. 373.

**Absence of Judge.**—Where a statute provided that in case of the absence of the county judge the county clerk should fill his place, it was held that the judge, though absent from the county seat, had sufficient power to execute and issue bonds advancing county interests and do certain ministerial acts and buy a seal, being authorized by the code to procure one. *Lynde v. The County*, 16 Wall. (U. S.) 6.

**Absence of Governor.**—The constitution of Louisiana provides that in case of "absence from the State" of the governor, the powers and duties of his office shall devolve upon the lieutenant-governor. *Held*, not to refer to mere temporary absence; and the fact that the governor was at a place out of the State, but within a few hours' ride of the capital, for a period of twenty-one days, did not authorize the lieutenant-governor to exercise the functions of governor. *State v. Graham*, 26 La. Ann. 568; s. c., 21 Am. Rep. 551. See *People v. Parker*, 3 Neb. 409; s. c., 19 Am. Rep. 634.

that time be served upon him, so that the plaintiff cannot obtain a personal judgment against him, the saving clearly applies in favor of the plaintiff.<sup>1</sup>

**3. Presumption of Death.**—The absence of a person for a long time, no word being received of him, is presumptive of his death. The usual limit of time by statute is seven years; but where a person is known to have been alive, it is presumed that he is still alive until his death is proved, or his death is presumed, by rule of law, to have occurred.<sup>2</sup>

1. Wood on Lim. §§ 244, 245.

2. The rule of law is that upon a person's leaving his usual home and place of residence, for temporary purposes, and not being heard of, or known to be living, for the term of seven years, the presumption is that he is not alive. It must appear that he has not been heard of by those persons who would naturally have heard from him during the time had he been alive. The rule, however, does not confine the intelligence to any particular class of persons. It may be to persons in or out of the family. The mere failure to hear from an absent person for seven years who was known to have had a fixed place of residence abroad would not be sufficient to raise the presumption of his death, unless due inquiry had been made at such place without getting tidings of him. *Wentworth v. Wentworth*, 71 Me. 72; *White v. Mann*, 26 Me. 361; *Stevens v. McNamara*, 36 Me. 178; s. c., 58 Am. Dec. 740; *Kidder v. Blaisdell*, 45 Me. 467; *Stinchfield v. Emerson*, 52 Me. 465; *Smith v. Knowlton*, 11 N. H. 196; *Brown v. Jewett*, 18 N. H. 230; *Winship v. Connor*, 42 N. H. 341; *Forsaithe v. Clarke*, 21 N. H. 424; *Newman v. Jenkins*, 10 Pick. (Mass.) 515; *Loring v. Steineman*, 1 Metc. (Mass.) 210; *Flynn v. Coffee*, 12 Allen (Mass.), 133; *Bowditch v. Jordan*, 131 Mass. 321; *Eagle v. Emmet*, 4 Bradf. Sur. (N. Y.) 117; *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455; *Clarke v. Cummins*, 5 Barb. (N. Y.) 339; *Sheldon v. Ferris*, 45 Barb. (N. Y.) 124; *King v. Paddock*, 18 Johns. (N. Y.) 141; *Hoyt v. Newbold*, 45 N. J. L. 219; s. c., 46 Am. Rep. 757; *Wambrough v. Schenck*, 2 N. J. L. 229; *Smith v. Smith*, 5 N. J. Eq. 484; *Holmes v. Johnson*, 42 Pa. St. 159; *Innis v. Campbell*, 1 Rawle (Pa.), 375; *Bradley v. Bradley*, 4 Whart. (Pa.) 173; *Burr v. Sim*, 4 Whart. (Pa.) 450; s. c., 33 Am. Dec. 50; *Miller v. Beates*, 3 S. & R. (Pa.) 490; s. c., 8 Am. Dec. 658; *Tilly v. Tilly*, 2 Bland. Ch. (Md.) 444; *Foulks v. Rhea*, 7 Bush (Ky.), 568; *Ashbury v. Saunders*, 8 Cal. 62; *Crawford v. Elliott*,

1 *Houst. (Del.)* 465; *Prim v. Stewart*, 7 Tex. 178; *Jamison v. Smith*, 35 La Ann. 609; *Adams v. Jones*, 39 Ga. 508; *Cofer v. Thurmond*, 1 Ga. 538; *Doe v. Flanagan*, 1 Ga. 538; *Spears v. Burton*, 31 Miss. 547; *Craig v. Craig*, 1 Bailey Eq. (S. Car.) 102; *Proctor v. McCall*, 2 Bailey (S. Car.) 298; s. c., 23 Am. Dec. 135; *Godfrey v. Schmidt*, 1 Cheve (S. Car.), 57; *Woods v. Woods*, 2 Bay. (S. Car.) 476; *North Carolina University v. Harrison*, 90 N. Car. 385; *McNair v. Ragland*, 1 Dev. Eq. (N. Car.) 533; *Anonymous*, 2 Hayw. (N. Car.) 134; *Bowden v. Evans*, 2 Hayw. (N. Car.) 222; *Puckett v. State*, 1 Sneed (Tenn.), 356; *Shown v. Mackin*, 9 Lea (Tenn.), 601; s. c., 42 Am. Rep. 680; *Dickens v. Miller*, 12 Mo. App. 408; *Hancock v. American Life Ins. Co.*, 62 Mo. 26; *Thomas v. Thomas*, 16 Neb. 553; *Ryan v. Tudor*, 31 Kan. 366; *Rosenthal v. Maybough*, 33 Ohio St. 155; *Rice v. Lumley*, 10 Ohio St. 596; *Youngs v. Heffner*, 36 Ohio St. 232; *Davie v. Briggs*, 7 Otto (U. S.), 628; *Moffett v. Varden*, 5 Cranch C. C. 658; *1st v. Hall*, 1 Wall, Jr. (U. S.) 85; *Doe v. Jesson*, 6 East. 80; *Doe v. Deakin*, 4 Barn. & Ald. 433; *Doe v. Andrews*, 15 Ad. & Ell. (N. S.) 760; *Rust v. Baker*, 8 Sim. 443; *Ommaney v. Stillwell*, 23 Beav. 328.

Absence of a person alone does not raise a presumption of his death; but such absence, in connection with surrounding circumstances, such as the failure by his family and friends to learn of his whereabouts, his character, and business relations, together with the fact that he was last known to be seen near the place where a murder is supposed to have been committed, and the reputation in his family and with his friends that he is dead, creates a very strong presumption of death, the law being satisfied with less than certainty, yet requiring a preponderance of proof. On the other hand, evidence to overcome the presumption of death, that the party supposed to be dead was in a financial condition which might have induced him to abscond, or that he was a speculator, or



The rule now is general that a person shown not to have been heard of for seven years by those (if any) who, if he had been

visionary, in his business or trades, is all proper evidence to be considered by the jury in establishing the fact. *Sensen-defer v. Pacific, etc., Ins. Co.*, 19 Fed. Repr. 68.

There being no statute providing that, after an absence of a given time without being heard from, administration may be granted of the estate of an absent person, the courts should be cautious in acting upon the presumption of death from lapse of time, and should, as a general rule, require diligent inquiry at the place where the party was last heard from. *Shown v. Mackin*, 9 Lea (Tenn.), 601.

In *Montgomery v. Bevans*, 1 Sawy. (U. S.) 666, Field, J., after examining the English cases, said: "But the law as declared in England is different from the law which obtains in this country, so far as it relates to the presumption of the continuance of life. Here, as in England, the law presumes that a person who has not been heard of for seven years is dead; but here the law, differing in this respect from the law of England, presumes that a party once shown to be alive continues alive until his death is proved, or the rule of law applies by which death is presumed to have occurred—that is, at the end of seven years. And the presumption of life is received in the absence of any countervailing testimony as conclusive of the fact, establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails." The principle last mentioned was approved in *People v. Feilen*, 58 Cal. 218; s. c., 41 Am. Rep. 258, and is sustained by the English case of *R. v. Twynning*, 2 B. & Ald. 385. See *R. v. Lumley*, L. R. 1 C. C. 196. See *Com. v. Jackson*, 11 Bush. (Ky.) 679; *Cooper v. Cooper*, 86 Ind. 75; *Squire v. State*, 46 Ind. 458; *Williams's Est.*, 13 Phila. (Pa.) 325; *Yates v. Houston*, 3 Tex. 433; *Lockwood v. White*, 18 Tex. 102; *Hull v. State*, 7 Tex. App. 593; *Harris v. Harris*, 8 Ill. App. 57; *Johnson v. Johnson*, 114 Ill. 611; *Spears v. Burton*, 31 Miss. 547; *Blanchard v. Lambert*, 43 Iowa, 228; s. c., 22 Am. Rep. 245.

**Marriage—Presumption of Innocence.**—Although the presumption in favor of the validity of a marriage in fact, and of the innocence of the contracting parties,

may conflict with that of the continued life of a former husband or wife not heard from for a period less than seven years prior to the second marriage, yet if neither presumption is aided by proof of facts or circumstances co-operating with it, the presumption of the validity of the second marriage must prevail over the other. *Johnson v. Johnson*, 114 Ill. 611.

In a trial for bigamy, the only evidence to show the life of the first wife was testimony showing that she was alive about three years prior to the second marriage. *Held*, to be insufficient to sustain a verdict of guilty. *People v. Feilen*, 58 Cal. 218; s. c., 41 Am. Rep. 258, and cases cited *supra*. *Compare Com. v. Thompson*, 11 Allen (Mass.), 25; *Hyde Park v. Canton*, 130 Mass. 505.

It appeared that in 1844 W married A. In 1868 he was convicted of bigamy for marrying B, A being then alive. In 1879 he married C, and in 1880, C being then alive, he married D. On a charge of bigamy against this much-married man for marrying D, C being then alive, whereupon he set up the defence that A was alive when he married C, it was held that the question should have been left to the jury whether A was not alive when he married C; as, if so, the marriage with C would be invalid. The prisoner had set up a life in 1868, which, said the learned judge, "must be presumed to be continuing in 1879, no evidence of any kind being given, but it being shown simply that the woman was alive in 1868. . . . The prisoner was not bound to do more than to set up the life in 1868, which would be presumed to continue, and it was then for the prosecution to show by evidence that that presumption was rebutted." *R. v. Willshire*, L. R. 10 Q. B. 366.

The wife of a soldier who went abroad married again in a little over a year, and the question was as to the legitimacy of the children of this second marriage. The court said: "The law presumes the continuance of life for seven years, but it also presumes against the commission of crime. It is contended that the death of the husband ought to have been proved, but the answer is that the presumption of law is that he was not alive, when the consequence of his being so is that another person has committed a crime." *R. v. Twynning*, 2 B. & Al. 386.

In *Yates v. Houston*, 3 Tex. 449, four

alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.<sup>1</sup>

years only had elapsed after the disappearance of the wife before the husband and another woman appeared as husband and wife, under circumstances raising the presumption of marriage; and in considering the subject of the conflicting presumptions the court held that "the rational presumption, after this lapse of time is that the former wife is dead. The ordinary presumption of the continuance of human life should not, under the facts in this case, outweigh the presumption in favor of the innocence of their cohabitation, and that there was no legal impediment to their contracting the matrimonial relation."

In *Dixon v. The People*, 18 Mich. 84, the prosecution, desiring to use a witness who claimed to be the wife of the defendant, produced evidence of her marriage to one Phillips in 1859. Thereupon she was put on the stand, and admitted her marriage with Phillips, and stated that she last heard from him in April, 1860, and, supposing he was dead, married the defendant in 1865. The court below permitted her to testify, against the objection of the defendant. The Supreme Court of that State, in reviewing the case, said: "The presumption of innocence—that she would not commit the crime of bigamy by marrying the defendant while Phillips was alive—rendered it obligatory on the court, in the absence of testimony to the contrary, conclusively to presume the death of Phillips and the validity of her marriage with defendant."

In *Senser v. Bower*, 1 Pa. 450, the court, in determining the validity of the second marriage, say: "But there is said to be the same evidence of a precedent marriage of the mother with another man, who was alive at her second marriage, and hence a supposed dilemma; but the proof being equal, the presumption is in favor of innocence. And so far is this carried in the case of conflicting presumptions, that the one in favor of innocence shall prevail."

In *Hull v. Rawls*, 27 Miss. 471, the widow of Rawls petitioned for dower, which was resisted upon the ground that her marriage with Rawls was void, for the reason that he had a wife living at the date of his marriage with the petitioner. The proof showed that petitioner and Rawls were married December 6, 1848, and that in 1844 Rawls was living with another woman whom he recognized as

his wife. The court said: "The fact that the deceased (Rawls) was living in 1844 with a woman believed to be his wife is no evidence that she was living on the 6th of December, 1848. The marriage having been solemnized according to the forms of law, every presumption must be indulged in favor of its validity."

The case of *Chapman v. Cooper*, 5 Rich. (S. Car.) 452, was where five or six years only had intervened between the time the former husband was last heard from and the second marriage of the wife, and the court held that under the facts of that case (the case having been brought many years afterwards) the presumption of innocence ought to prevail.

In *R. v. Harborne*, 2 Ad. & El. 540, the circumstances being that the wife had been seen within twenty-five days of the second marriage of the husband, it was held that the presumption of the continuance of life should prevail; while in *Greenborough v. Underhill*, 12 Vt. 604, (afterwards questioned in *Northfield v. Plymouth*, 20 Id. 582), it was held that after an absence of two years not heard from the presumption of innocence would prevail over the presumption of life.

1. *Clark v. Canfield*, 15 N. J. L. 119; *Wambaugh v. Schenck*, 2 N. J. L. 229; *Smith v. Smith*, 5 N. J. Eq. 484; *Osborn v. Allen*, 26 N. J. L. 388; *Wentworth v. Wentworth*, 71 Me. 72; *Bowditch v. Jordan*, 131 Mass. 321; *Johnson v. Johnson*, 114 Ill. 611; *Jamison v. Smith*, 35 La. Ann. 609; *Learned v. Corley*, 43 Miss. 687; *Adams v. Jones*, 39 Ga. 479; *Foulks v. Rhea*, 7 Bush (Ky.), 568; *Ross v. Clore*, 3 Dana (Ky.), 189; *Lewis v. Mobley*, 4 Dev. & B. (N. C.) 323; s. c., 34 Am. Dec. 379; *Davie v. Briggs*, 7 Otto (U. S.), 628; and cases cited in next note.

It must be shown that he left his usual place of abode (*Thomas v. Thomas*, 16 Neb. 553) or the State (*Dickens v. Miller*, 12 Mo. App. 408); but the burden of proof is on the party denying the death, and the identity of person must be shown. *Hoyt v. Newbold*, 45 N. J. L. 219; s. c., 46 Am. Rep. 757.

There is no presumption as to his having been either dead or alive at any particular period of time during the seven years, but he is presumed to have died at the end of the seven years. *Davie v. Briggs*, 7 Otto (U. S.), 628; *Montgomery v. Bevans*, 1 Sawy. (U. S.) 653; *Moffit v. Varden*, 5 Cranch C. C. 658; *Stevens v.*

**4. Presumption of Continuance of Life.**—The presumption after proof of existence is that the person continued to live.<sup>1</sup>

McNamara, 36 Me. 176; s. c., 58 Am. Dec. 740; White v. Mann, 26 Me. 361; Rockland v. Morrill, 71 Me. 455. Forsaith v. Clark, 21 N. H. 424; Smith v. Knowlton, 11 N. H. 191; Flynn v. Coffee, 12 Allen (Mass.), 133; Loring v. Steineman, 1 Metc. (Mass.) 204; McDowell v. Simpson, 1 Houst. (Del.) 467; Johnson v. Johnson, 114 Ill. 611; Whiting v. Nicoll, 46 Ill. 230; Spurr v. Trimble, 1 A. K. Marsh (Ky.), 278; Foulks v. Rhea, 7 Bush (Ky.), 568; Doe v. Flanagan, 1 Ga. 538; Smith v. Smith, 49 Ala. 156; Primm v. Stewart, 7 Tex. 178; Hancock v. Ins. Co., 62 Mo. 26; Lancaster v. Ins. Co., 62 Mo. 121; Ashbury v. Saunders, 8 Cal. 62; Youngs v. Heffner, 36 Ohio St. 232; Rosenthal v. Mayhugh, 33 Ohio St. 155; Rice v. Lumley, 10 Ohio St. 596; Gibbes v. Vincent, 11 Rich. (S. Car.) 323; King v. Paddock, 18 Johns. (N. Y.) 141; Stouvenal v. Stephens, 2 Daly (N. Y.), 319; McCartee v. Camel, 1 Barb. Ch. (N. Y.) 456; Spencer v. Roper, 13 Ired. (N. Car.) 333; State v. Moore, 11 Ired. (N. Car.) 160; s. c., 53 Am. Dec. 401; Clarke v. Canfield, 15 N. J. Eq. 119; Hershey v. Shenk, 58 Pa. St. 385; Homer v. Johnson, 42 Pa. St. 159; Whiteside's App., 23 Pa. St. 114; Burr v. Sim, 4 Whart. (Pa.) 150; s. c., 33 Am. Dec. 50; Spears v. Burton, 31 Miss. 554; Shown v. McMackin, 9 Lea (Tenn.), 601; s. c., 42 Am. Rep. 680; Tilly v. Tilly, 2 Bland Ch. (Md.) 444; Nepean v. Doe, 2 M. & W. 916; Watson v. King, 1 Stark. 121; *Re Phene's Trusts*, L. R. 5 Ch. App. 139; *Re Lewes' Trusts*, L. R. 6 Ch. 356, 11 Eq. 236; *Re Green's Settlement*, L. R. 1 Eq. 282; *R. v. Lumley*, L. R. 1 C. C. 196. See Gill v. Manly, 16 Ir. L. T. Rep. 57.

Yet, on the other hand, sometimes a person's death may be presumed (or, rather, inferred) to have happened within a period of time even shorter than seven years, if the inference is deduced from well-authenticated facts of such a nature as almost to preclude the possibility of a mistake. Cox v. Ellsworth, 26 N. W. Repr. (Neb.) 460; Johnson v. Johnson, 114 Ill. 611; Lancaster v. Washington Ins. Co., 62 Mo. 121; Stouvenal v. Stephens, 2 Daly (N. Y.), 319; Merritt v. Thompson, 1 Hilt. (N. Y.) 550; Oppenheim v. Wolf, 3 Sand. Ch. (N. Y.) 571; Sheldon v. Ferris, 45 Barb. (N. Y.) 124; Gerry v. Post, 13 How. Pr. (N. Y.) 118; State v. Moore, 11 Ired. L. (N. Car.) 160; s. c., 53 Am. Dec. 401; Spencer v. Roper, 13 Ired. L. (N. Car.) 333; Tisdale v.

Conn., etc., Ins. Co., 26 Iowa, 170; s. c., 28 Iowa, 12; Boyd v. N. Eng., etc., Ins. Co., 34 La. Ann. 848. So, in Davie v. Briggs, 7 Otto (U. S.), 628, it was laid down that "if it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years."

In Tisdale v. Conn., etc., Ins. Co., 26 Iowa, 170; s. c., 28 Iowa, 12, it was held that "Evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard-from may be inferred, without regard to the duration of such absence." See Cox v. Ellsworth, 26 N. W. Repr. (Neb.) 460; Ryan v. Tudor, 31 Kans. 366.

1. A grant of land was made to A in 1846. He disappeared the same year. *Held*, that it was to be presumed that he was alive in 1871. *Montgomery v. Bevans*, 1 Sawy. (U. S.) 660. See *Watson v. Tindall*, 24 Ga. 494; *Whiteside's App.*, 23 Pa. St. 114; *Bradley v. Bradley*, 4 Whart. (Pa.) 173; *Eagle v. Emmet*, 4 Brad. Sur. (N. Y.) 117.

It is shown in 1843 that H, whose deposition in a case was taken in 1822, was then fifty-nine years old and in bad health. He lived then in New York City. He is not shown to have ever left there, but his address is not now (1843) known at the post-office, nor is it in the city directory. There is no presumption that H is now (1843) dead. *Matter of Hall*, 1 Wall., Jr. (U. S.) 85.

Where a *cestui que trust*, who takes a vested interest under a settlement, has not been heard of since a period prior to the date of the settlement, the presumption is that he was alive at that date. *In re Corbishley's Trusts*, L. R. 14 Ch. 846. In *Gill v. Manly*, 16 Ir. L. T. Rep. 57, in reference to the alleged death of a *cestui que vie* who, if alive, would be only about sixty years of age, it was considered quite within the probabilities of human existence that the person in question might still be alive and well, and that there should be stronger evidence of his

**5. Hearing of—Inquiries.**—The rule that it must appear that the person whose death is in question has not been heard of by those persons who would naturally have heard from him during the time, had he been alive, does not confine the intelligence to any particular class of persons—it may be to persons in or out of the family; and the mere failure to hear from an absent person for seven years who was known to have had a fixed place of residence abroad would not be sufficient to raise the presumption of his death, unless due inquiry had been made at such place without getting tidings of him.<sup>1</sup>

death than the mere fact of his absence from the country without being heard of.

In *Ommaney v. Stillwell*, 23 Beav. 328, it was held to have been shown that a person who sailed with Sir John Franklin in 1845 was alive in 1850.

In the *Matter of Ackerman*, 2 Redf. Sur. (N. Y.), it was held that an incurable sickness in connection with old age may destroy the presumption of continuance of life.

See, generally, *Stinchfield v. Emerson*, 52 Me. 465; *Brown v. Jewett*, 18 N. H. 230; *Com. v. Thompson*, 11 Allen (Mass.), 25; *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 463; *Keller v. Stuck*, 4 Redf. Sur. (N. Y.) 226; *McKee v. Copelin*, 2 Cent. L. J. (Mo.) 813; *Grey v. McDowell*, 6 Bush (Ky.), 482; *Burney v. Ball*, 24 Ga. 505; *Proctor v. McCall*, 2 Bailey (S. Car.), 298; s. c., 23 Am. Dec. 135; *Martinez v. Vives*, 32 La. Ann. 305. Compare *Holmes v. Johnson*, 42 Pa. St. 159.

By the civil law, death is never presumed from absence, for an absentee is presumed to live till the contrary is proved, or until he attains the age of a hundred years. *Hayes v. Berwick*, 2 Martin (La.), 138; s. c., 5 Am. Dec. 727.

1. *Wentworth v. Wentworth*, 71 Me. 72; *Bailey v. Bailey*, 36 Mich. 185.

In *Norris v. Edwards*, 90 N. Car. 382; s. c., 47 Am. Rep. 526, it was held that declarations of a deceased wife that she had received a letter from her husband long after his departure were competent to rebut presumption of death.

Where one had gone to sea in 1823 and had been heard of in 1832, it will be presumed in 1861 that he is dead. *Holmes v. Johnson*, 42 Pa. St. 159.

In *Re Rhodes*, *Frazer v. Renton*, 28 L. T. (N. S.) 392, it was held that death will not be presumed if it appears that further evidence can be obtained. So, if sufficient inquiries have not been made. *In re Creed*, 1 Drew. 235; *Goods of How*, 1 S. & T. 53; *Goods of Smyth*, 28 L. J. Pro. 1; *Re Tindall's Trust*, 30 Beav. 151.

And in *Gill v. Manly*, 16 Ir. L. T. R. 57, the same principles, in effect, were most properly applied. Accordingly, in equity or probate proceedings, advertisements are directed, though the seven years have expired. *Re Allin*, 15 W. R. 1164; *Re Atkinson*, Ste. R. 5 Eq. 219. In *Re Webb's Estate*, 1 R. 5 Eq. 235, it appeared that a person emigrated to Australia, under circumstances showing that he was likely to communicate constantly with his family in Ireland, and having so communicated with them for some time, then ceased to do so, and was not heard of for more than seven years. From his last letter it was probable that, had he lived, he would have continued to write home. Inquiries were made by his family concerning him, and advertisements published, but with no result. And it was held that there was sufficient *prima facie* evidence to establish a title, depending on his death without issue during the lifetime of a person who died after the expiration of the seven years. Compare *Gill v. Manly*, 16 Ir. L. T. R. 57. But the presumption does not arise where it is improbable there would have been any communication with home. *Bowden v. Henderson*, 2 Sm. & G. 360; *Watson v. England*, 14 Sim. 28; and see *Re Smith*, 31 L. J. P. & M. 182; *M'Mahon v. M'Elroy*, 1 R. 5 Eq. 1; *Re Mileham*, 15 Beav. 507. There is no presumption as to the age at which a person died who is shown to have been alive at a given time. See *Stephen on Evidence*, c. 14, a. 99. And as to death without issue, see *Re Webb*, 1 R. 5 Eq. 235; *Mullaly v. Walsh*, 1 R. 6 C. L. 314; *Doe d. Banning v. Griffin*, 15 East, 293; *Re Hanby* v. 25 W. R. 427. Or leaving no widow. *Re Westbrooke*, W. N. 1873, 167. But the age and state of health at the time of disappearance are to be regarded. *In re Ackerman*, 2 Redf. Sur. (N. Y.) 521; *In re Hall*, 1 Wall., Jr. (U. S.) 85; *Gill v. Manly*, 16 Ir. L. T. R. 57; *Danby v. Danby*, 5 Jur. (N. S.) 54; *R. v. Harborne*,

6. **Survivorship.**—At one time it was said that where several persons have perished in the same catastrophe, the presumption was in favor of the survival of the stronger person. And again, many cases are to be found seeming to support the position that simultaneous death is to be presumed. But it must now be taken as the law that there is no artificial presumption in cases of this nature, either that any one in particular survived or that all died at the same time; and it will merely be considered, in the absence of evidence to the contrary, that one of them survived, leaving it to be discovered from the evidence who was the individual sur-

2 A. & E. 544; *Re Beasney*, L. R. 7 Eq. 498. In *Gill v. Manly*, 16 Ir. L. T. R. 57, the departed (not declared deceased) would, at the time of controversy, be only about sixty years old.

The circumstances appearing in the case last mentioned were as follows: In April, 1842, a lease was made for twenty-one years, and during the life of Bryan Gill, then aged twenty-one or twenty-four. In 1856 Bryan Gill went to Steeven's Hospital, Dublin, suffering from an affection in his eyes; and a short time afterwards some members of his family called, but could hear nothing of him. It was deposed that he had left this country in that year; and it was stated that, when leaving home, before going to the hospital, he had got £5 from his relatives. It did not appear that he had at any time subsequently asked for any assistance from them; and William Gill, his brother, had not heard from him since, and stated his belief that his other brothers and sisters had not heard from him. But the other brothers and sisters made no affidavit; nor did it appear what inquiries were instituted to discover his whereabouts; and it was sworn by or on behalf of the lessor that a bailiff had been informed that Bryan Gill was a mate on board an American vessel in March, 1875. During Bryan Gill's absence rent had been paid by William Gill, and received by the lessor, but not, so far as appeared, with knowledge that, as alleged, Bryan Gill was dead. William Gill (whose elder brother would have been entitled to the land if Bryan Gill was still alive) claimed to be a "present tenant," under a tenancy from year to year, and served an originating notice to fix a judicial rent, under the Land Law Act, 1881, at a time when Bryan Gill, if still alive, would be about sixty years of age. On an application to the lessor to set aside the originating notice, it was contended that it lay on William Gill to show by evidence that there was sufficient ground for deeming that Bryan Gill was dead; and that

it was, also, material for him to establish the time of the death, whether before or after the passing of the act, in order to sustain his position as a "present tenant" from year to year within its provisions. If the evidence of the bailiff were to be received, it would appear that Bryan Gill was alive about six years and eleven months previously; it was objected that this was only the hearsay of a person who had not even made an affidavit; but some degree of reliance seems to have been placed upon it by the court. See *O'Kelly v. Felker*, 71 Ga. 775. The case of *Prudential Assurance Co. v. Edmunds*, L. R. 2 App. Cas., may be referred to, however, where the question, in 1874, was as to the death of Nutt, who had disappeared in 1867, and his sister and brother-in-law deposed that they had not heard of him for seven years, but on cross-examination admitted that a niece of Nutt's had said that in 1872 she saw a man at Melbourne whom she believed to be her uncle (in which the jury thought she might be mistaken), but he was lost in the crowd before she could speak to him. Kelly, C. B., declined to tell the jury that Nutt should be presumed dead, as having been absent for seven years without being heard of, but, on the contrary, charged strongly for the defendants on the ground that all the members of the Nutt family had "heard" what the niece had stated. The Court of Appeal, however, held this to be a misdirection, and, as the House of Lords could not agree on the subject, their decision stood affirmed. If, then, the bailiff be eliminated from *Gill v. Manly*, it stands as a case where a man had disappeared for no less than twenty-six years, unheard of. But, on the other hand, there was the circumstance (which rightly seems to have weighed mainly with the court) that, while it was stated that there were brothers and sisters of Bryan Gill living, they had made no affidavit, nor did it appear what inquiries had been instituted to discover his whereabouts. It was con-

vivor. The question is one of fact, depending wholly on evidence; the real or supposed superior strength (as from age or sex) of any of the persons perishing by a common calamity being left merely to carry its natural weight—*i.e.*, as a circumstance proper to be taken into consideration by a judicial tribunal, but which standing alone is insufficient to shift the burden of proof. The *onus probandi* is on the person who claims derivatively through a survivorship of one out of several, to prove the fact affirmatively; and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined.<sup>1</sup>

tended that, although there was no presumption of his death at a particular date, yet, if the presumption were that he was dead at the end of the first seven years, it should be presumed that he was dead before the commencement of the second seven years. But Mr. Commissioner Litton held that sufficient evidence had not been brought forward to establish the death at all, so as to warrant any presumption. *In re Keary's Trusts, ex parte Walsh*, Ch. Div., March 15, 1882, it appeared that Michael Walsh had gone to New Zealand some twenty years ago, and had not since been heard of; and, after advertisements had been published here (which had been copied by an Australian paper) by order of the Probate Division without result, letters of administration as of a supposed deceased were granted to Robert Walsh, which are not evidence of the death. See *Thompson v. Donaldson*, 3 Esp. 63; *Mut. Ben. Life Ins. Co. v. Tisdale*, 1 Otto (U. S.), 238; *Carroll v. Carroll*, 60 N. Y. 121. And Sir Edward Sullivan, M. R., refused to order a transfer of the trust funds to the administrator without better proof that the man was dead. The better proof required was, however, afterwards procured by referring back to the evidence adduced in the probate proceedings. But the fact of a tenant for life not having been seen or heard of for fourteen years, by a person residing near the estate, although not a member of his family, was held *prima facie* evidence of the death of the tenant for life, in *Lloyd v. Hunt*, 4 B. & A. 433; compare *Wentworth v. Wentworth*, 71 Me. 72. The production of the will of an alleged deceased, and proof by a legatee of having received a bequest under it, coupled with the copy of an entry in the register of burials, has been held sufficient evidence of the death. *Doe v. Penfold*, 8 C. & P. 536. Where a second marriage was contracted on the 11th of April, 1831, and it was proved by the father of the former wife that he had received a letter in her handwriting,

dated Van Diemen's Land, 17th March, 1831, it was held, upon the question of the validity of the second marriage, that the letter was admissible, and that the justices or jury would be justified in coming to a conclusion that she was alive at the date of the second marriage. *R. v. Harborne*, 4 N. & M. 341; 2 Ad. & E. 541.

1. *Newell v. Nichols*, 75 N. Y. 78. *In re Ridgway*, 4 Redf. Sur. (N. Y.) 226; *Stinde v. Goodrich*, 3 Redf. Sur. (N. Y.) 87; *Russell v. Hallett*, 23 Kan. 276; *Pell v. Ball*, 1 Cheyes Ch. (S. Car.) 99; *Coye v. Leach*, 8 Metc. (Mass.) 371; s.c., 41 Am. Dec. 518; *Smith v. Croom*, 7 Fla. 144; *Robinson v. Gallier*, 2 Wood (C. C.) 178; 2 So. L. R. 594; *Broughton v. Randall*, Cro. Eliz. 503; *R. v. Hay*, 1 W. Bl. 640; 4 Burr. 2295 (see 2 Phillim. 261, n); *Hitchcock v. Beardsley*, West. R. t. Hardw. 445; *Taylor v. Diplock*, 2 Phillim. 261; *Wright v. Netherwood*, 2 Phillim. 266; *Mason v. Mason*, 1 Meriv. 308; *Colvin v. H. M. Procurator-Gen.*, 1 Hagg. N. S. 92; *Goods of Selwyn*, 3 Hagg. N. S. 748; *Goods of Murray*, 1 Curt. 596; *Satterthwaite v. Powell*, 1 Curt. 705; *Sillick v. Booth*, 1 Y. & Col. 117; *Durrant v. Friend*, 5 De G. & S. 343; *Goods of Wainwright*, 1 Sw. & Tr. 257; *Goods of Ewart*, 1 Sw. & Tr. 258; *Goods of Nichols*, L. R. 2 P. & D. 361; *Goods of Wheeler*, 37 L. J. P. & M. 40; *Dowley v. Winfield*, 14 Sim. 277; *In re Phene's Trusts*, L. R. 6 Ch. 145; *Scrutton v. Pattillo*, L. R. 19 Eq. 369; *Underwood v. Wing*, 4 De G., M. & G. 633; *Wing v. Angrave*, 8 H. L. C. 183; *Wollaston v. Berkeley*, L. R., 2 Ch. Div. 213; *Wright v. Samada*, 2 Salk. 593; *R. v. Heuss*, 2 Salk. 533; 5 B. & Ad. 91. See *Best on Ev.*, 6th ed. 527; 1 *Tay. on Ev.*, 7th ed. 209; 1 *Tay. Med. Jur.*, 2d ed. 168; *Wharton and Stille's Med. Jur.*; *Guy's Med. Jur.*; 1 *Beck. Med. Jur.*; 1 *Greenl. Ev.* 38 n; 2 *Kent's Com.* 435. Compare *Moehring v. Mitchell*, 1 Barb. Ch. (N. Y.) 269; *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455.

The testatrix and her two grandchild-

## ABSENTED—ABSENTEE—ABSOLUTE.

**ABSENTED.**—Where the absence is such that a summons issued upon the day the attachment is sued out will be served upon the defendant in sufficient time before the return day to give the plaintiff all the right which he can have at the return term, the defendant has not so absented himself as that the ordinary process of law cannot be served upon him.<sup>1</sup>

**ABSENTEE.**—An absentee is a person who has resided in the State and has departed without leaving any one to represent him. It means, also, the person who never was domiciliated in the State and resides abroad.<sup>2</sup>

**ABSOLUTE.**—It means complete, unconditional, not relative, not limited, independent of anything extraneous. It is used in law to distinguish an estate in fee from an estate in remainder, the rights of man in a state of nature from those pertaining to him in his social relations; as in algebra to designate "any pure number standing without the conjunction of literal characters."<sup>3</sup>

dren, together with the father of the children, were lost in a shipwreck. They were all in the pavilion on deck after the vessel struck. The testatrix was washed out of the pavilion, but it was not shown whether she was carried overboard or to some other part of the deck. The children, with their father, were seen alive in the pavilion some ten or fifteen minutes afterwards. *Held*, that the evidence of the survivorship of the grandchildren was insufficient. *In re Ridgway*, 4 Redf. Sur. (N. Y.) 226.

**California Rule.**—When two persons perish in the same calamity, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to certain rules, one of which is: If both be over 15 and under 60, and the sexes be different, the male is presumed to have survived. Code Civil Proc. § 1963, sub. 4, par. 40; *Sanders v. Simcich*, 65 Cal. 50; s. c., 2 Pac. Repr. 741.

**Authorities for Absence.**—Greenleaf on Evidence; Wharton on Evidence; Best on Evidence; Lawson on Presumptive Evidence; Wood on Limitations.

1. *Kingsland v. Worsham*, 15 Mo. 657; *Chariton Co. v. Moberly*, 59 Mo. 239.

The 103d article of war (Rev. St. § 1342) bars a trial for an offence committed more than two years before the issuing of the order for trial, "unless by reason of the offender absenting himself, or of some other manifest impediment, he shall not have been amenable to justice within that period." *Held*, that the

language of this statute must be construed as that of other statutes of limitations, and the absence means absence from jurisdiction of military courts; that is, from the United States. *In re Davison*, 4 Fed. Rep. 507.

2. *Morris v. Bienvenue*, 30 La. Ann. Pt. 2, 878.

3. *Johnson's Adm'r's v. Johnson*, 32 Ala. 637. That is, an absolute interest in property which is so completely vested in the individual that he can by no contingency be deprived of it without his own consent. A policy of insurance contained the clause, "If the interest in the property to be insured is not absolute, it must be so represented to the company, and expressed in the policy in writing," etc. The applicant described the property as "his house." It was shown that at the time the legal title was in another; that insured had a contract for the purchase, had paid part of the purchase-money, and was in possession. The court charged that he was to be regarded as the owner of the property if he had the equitable title and his interest was such that the loss would fall on him if the property was destroyed. *Held*, to be correct. *Hough v. Ins. Co.*, 29 Conn. 10.

By the words, "The rest and residue of all my property, personal, real, or mixed (after paying all just and lawful demands against my estate). I give and bequeath to my beloved wife," an "absolute" inheritable title or an estate in fee is passed in Massachusetts. *Lincoln v. Lincoln*, 107 Mass. 590.

A condition annexed to a devise, that no condition should be made until ten

**ABSOLUTE INTEREST—ABSOLUTELY—ABSTRACT.**

**ABSOLUTE INTEREST.**—A policy of insurance provided that "if the interest in property to be insured be a leasehold interest or other interest not *absolute*, it must be so represented and expressed in the policy." *Held*, that a mortgagor's estate was an absolute interest, and that an omission to disclose the mortgage was not a breach of the condition.<sup>1</sup>

**ABSOLUTE TOTAL LOSS.** See ACTUAL TOTAL LOSS.

**ABSOLUTELY.**—The word *absolutely* is an appropriate expression for the exclusion of the idea that an estate is either partial or conditional.<sup>2</sup>

**ABSTRACT**, as applied to records, ordinarily means a mere brief, and not a copy of that from which it is taken.<sup>3</sup>

years after the death of testator's widow, was void as to personal estate, as suspending the absolute ownership beyond the period prescribed by the statute. *Converse v. Kellogg*, 7 Barb. (N. Y.) 590.

By the absolute rights of individuals we mean those which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy out of society or in it. 1 Black. Com. 123; *People v. Berberich*, 20 Barb. (N. Y.) 224.

An absolute total loss takes place when the subject insured wholly perishes, or its recovery is rendered irretrievably hopeless, and is one which entitles the insured to claim the whole amount of his subscription, without giving notice of abandonment. *Burt v. Insurance Co.*, 9 Hun (N. Y.), 383.

A sale of a minor's property without the prescribed formalities is absolutely null, but may be ratified by the minor after majority expressly or by implication. *Means v. Robinson*, 7 Texas, 502; *Clay v. Clay's Heirs*, 35 Texas, 509.

The words "absolute purchase of any pew in the church," in statute, held not to mean that the purchaser is to hold free from all claim or control of the incumbent or churchwardens, or free from all interest of these persons in the general property of the church; but they are used in opposition to the rights of leaseholders of pews and of those who have only sittings; and, subject to the necessary incidents of such a species of property, a person may not be improperly said to be an absolute purchaser of, and to have a freehold of inheritance in, the pew which he has bought. Ejectment, however, is not maintainable. *Ridout v. Harris*, 17 U. C. C. P. 88.

1. *Washington Ins. Co. v. Kelley*, 32 Md. 421; see *Hough v. City Ins. Co.*, 29 Conn. 10.

2. A clause in a will bequeathing property to testator's daughters and directing the shares to "vest absolutely in them and their respective heirs of their bodies forever" does not create a separate estate in daughter married at the date of the will. *Johnson's Adm'rs v. Johnson*, 32 Ala. 637.

Trustees of a settlement or will with power of sale are persons "absolutely entitled" to purchase money of land paid into court under an act providing for taking land for public improvements and the means for ascertaining the compensation therefor. *In re Hobson's Trusts*, L. R. 7 Ch. Div. 708.

Where the first section of a statute vested the estate of an assignor in his assignee on the presentation of a petition, etc., the provision in a subsequent section that it should become "absolutely vested" has no new operation. *Sayer v. Dufaur*, 11 Q. B. 324.

The phrase "due absolutely and not on a contingency" is applicable to the past earnings of a party payable in the future on the estimate and certificate of a third person. *Ware v. Gowen*, 65 Me. 534.

In instructions presented to court that "In order to justify the inference of legal guilt from circumstantial evidence the existence of inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation on any other reasonable hypothesis than that of his guilt," it was *held*, that the words "absolutely incompatible" imply that defendant's guilt must be established beyond the possibility of a doubt, and for that reason it was not error to refuse to give the instruction. *State v. Rover*, 13 Nev. 17.

3. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

A certificate reading "United States Land Office, Springfield, Mo., August 10,



**ABSTRACT OF TITLE.** See REAL ESTATE; DEEDS; CONVEYANCING.

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|--|---|
| 1. <i>Definition.</i>                    | 8. <i>Judicial Sales.</i>                   |
| 2. <i>England and the United States.</i> | 9. <i>Execution Sales.</i>                  |
| 3. <i>Arrangement of Abstract.</i>       | 10. <i>Tax Sales.</i>                       |
| 4. <i>Patents.</i>                       | 11. <i>Dedication to Public Use.</i>        |
| 5. <i>Deeds.</i>                         | 12. <i>Title by Descent.</i>                |
| 6. <i>Powers.</i>                        | 13. <i>Liens and Incumbrances.</i>          |
| 7. <i>Wills.</i>                         | 14. <i>Liability of Examiners of Title.</i> |

1. **Definition.**—An abstract of title, or a brief of title, as it is sometimes called, is a short methodical summary of the documents and facts which affect the title to a piece of land.<sup>1</sup>

Whenever a contract for the sale of real estate is made, it is implied that the seller will before the completion of the contract show a good, marketable title, and until he does so the purchaser is not bound to accept a deed or pay the purchase-money.<sup>2</sup> The object of the abstract is to enable the purchaser, or his counsel, to pass more readily on the sufficiency of the title.

An abstract should contain whatever concerns the sources of the title and its condition. Not only should the descent and line of the title be clearly traced out, but all incumbrances, all chances of eviction, and adverse claims should be shown. The material parts of all patents, deeds, wills, judicial proceedings, and other records or documents which touch the title, and also liens and incumbrances of every nature, should be set forth. There should also be included those facts usually called matters *in pais*, such as births, majorities, marriages, descents, and successions, which connect the different parts of the title.<sup>3</sup>

2. **England and the United States.**—In England the vendor of land must furnish the purchaser with an abstract; and a purchaser not in possession is bound to pay interest on the purchase-money, and may take the rents and profits only from the time when a good title is first shown.<sup>4</sup> But in the United States the vendor is not strictly bound to furnish an abstract; his obligation extends only to his ability to give a marketable title.<sup>5</sup>

3. **Arrangement of Abstract.**—An abstract should have a caption showing the contents and method of arrangement, and, if lengthy

1868. I certify that the within plat is a correct abstract of the records of this office. John S. Waddill, Register." *Held*, that the word "abstract" was used in the sense of "copy" as required by statute. *Wilhite v. Barr*, 67 Mo. 284.

1. Warvelle defines it as follows: "A condensed history of the title to land, consisting of a synopsis or summary of the material or operative portion of all the conveyances, of whatever kind or nature, which in any manner affect said land, or any estate or interest therein, together with a statement of all liens, charges, or liabilities to which the same

may be subject, and of which it is in any way material for purchasers to be apprised." Warvelle, *Abstracts of Title*, sec. 2. *Banker v. Caldwell*, 3 Minn. 94.

2. *Shreck v. Pierce*, 3 Clark (Iowa), 350; *Espy v. Anderson*, 14 Pa. St. 308.

3. See *Chase et al. v. Heaney*, 70 Ill. 268.

4. *Williams Real Prop.* 448; 1 *Prest. Abst.* 34; 1 *Chitty Gen. Prac.* 298.

5. *Shreck v. Pierce*, 3 Clark (Iowa), 350; *Espy v. Anderson*, 14 Pa. St. 308. But see *Faisans v. Moore*, 11 La. Ann. 741.

and complicated, an index. Plats and sketches of the premises should be inserted whenever they will assist to a more complete understanding of the situation of the property.

The following are some of the important points to be observed in abstracting the various documents which are apt to appear in a chain of title:

**4. Patents.**—1. The date; 2. Name of person to whom issued; 3. Words of heirship; 4. Recital of payment of purchase-money; 5. Person to whom payment made; 6. Recital of any assignment by certificate-holder; 7. Description of the land; 8. Signing, sealing, and other formalities; 9. Volume and page of record.

**5. Deeds.**—1. General character of the instrument; 2. Names and descriptions of the parties (note whether wife or husband joined in the deed); 3. Recitals which affect the title; 4. The consideration; 5. Receipt of payment; 6. The granting clause; 7. Description of the property; 8. The habendum; 9. The reddendum; 10. Conditions, limitations, etc.; 11. Covenants for title; 12. Signing, sealing, and witnesses; 13. Acknowledgment; 14. Registration.

**6. Powers.**—Powers which have been exercised or which are to be exercised should be set out *verbatim*. But such as have been released or extinguished in any way need not be set out in full.

**7. Wills.**—It has been said that a will should never be abstracted, but set out at large. There are, however, some things which certainly may be omitted, such as the testator's gratitude to God, his directions about interment, and small legacies of personal property, etc. But great care should be taken, for it has been held that the power to sell land may sometimes be implied from the imposition on the executor of duties which cannot be performed except by sale.<sup>1</sup> The abstract must of course show the date of the will, the method of its execution and attestation, the death of the testator, and the probate and registration.

**8. Judicial Sales.**—These are sales made by order of a court as distinguished from sales made by execution on a writ. The foreclosure of mortgages, judgments in partition, and decrees in probate proceedings are examples of judicial sales. The points to be particularly observed in abstracting are: 1. Jurisdiction of the court, in general, of the subject-matter and of the person (careful attention should be given to this point in probate proceedings); 2. The bill, complaint, or petition (whether it state a cause of action which would be good on general demurrer); 3. The judgment, order, or decree; 4. The sale (whether all formalities were complied with); 5. The report of the sale; 6. Confirmation of the sale; 7. The deed.

**9. Execution Sales.**—1. The judgment (attachment, if any); 2. The execution; 3. Claims of exemption; 4. Inquisition or appraisal (if required by the act); 5. Notice of sale; 6. Sale; 7. Redemption; 8. Confirmation; 9. The deed.

1. *Skinner v. Wood*, 76 N. Car. 109.

**10. Tax Sales.**—Tax titles are always looked upon with suspicion, and should be carefully investigated. The slightest flaw in the proceedings will invalidate them.<sup>1</sup> The points to be chiefly observed are: 1. The validity of the assessment; 2. The levy; 3. Special assessments (sidewalks, paving, etc.); 4. The collector's warrant; 5. Return of delinquent list; 6. Judgment and proceedings; 7. Notice of sale; 8. The sale; 9. The transfer or deed (as the statute may require). The records must be searched for some time after the transfer, to see if the conveyance has been impeached.

**11. Dedication to Public Use.**—Dedications may be by deed, but are very often implied from acts, such as selling lots bounded on the highway, long usage, etc.

**12. Title by Descent.**—The transmission of title on the death intestate of the owner of land is an important point in a chain of title. No rules can be laid down for its investigation, as the proof of death and of the person who answers to the description of heir varies in each case. Careful search should always be made both for record evidence, and also for matter *in pais*; and particular attention should be paid to the state of the law of descent at the time of intestate's death.

**13. Liens and Incumbrances.**—These are largely controlled by local laws. In general, the points to be guarded against are: 1. Liens in favor of the United States; 2. Debts due the State; 3. Official bonds; 4. Taxes; 5. Special assessments; 6. Judgments and executions; 7. Recognizances; 8. Attachments; 9. *Lis pendens*; 10. Mechanic's liens; 11. Vendor's liens; 12. Decedent's debts; 13. Legacies and annuities; 14. Trustee's expenses; 15. Mortgages and deeds of trust; 16. Leases; 17. Dower and curtesy; 18. Easements; 19. Miscellaneous liens.

**14. Liability of Examiners of Title.**—Persons who examine titles are liable in damages for want of skill and care. The implied contract out of which the action arises is not one of indemnity, but merely an agreement to use care, diligence, and skill.<sup>2</sup> But the examiner is so liable only to the person who employed him. He is not liable to a third party, unless he has made representations to him, or there is fraud or collusion between himself and his em-

1. See *Braley v. Leaman*, 30 Cal. 610; *People v. Savings Union*, 31 Cal. 132; *Cahoon v. Coe*, 52 N. H. 518, 524; *Tierny v. Union Lumbering Co.*, 47 Wis. 248; *State ex rel.*, etc., *v. Cook*, 82 Mo. 185; *Willey v. Scoville's Lessees*, 9 Ohio, 44; *Shimmin v. Inman*, 26 Me. 228; *Smith v. Davis*, 30 Cal. 536; *Huntington v. Central Pac. R. Co.*, 2 Sawy. (U. S.) 503. See, generally, *Cooley on Tax.*; *McInnery v. Reed*, 23 Iowa, 470; *Sibley v. Smith*, 2 Mich. 486; *Brown v. Veazie*, 25 Me. 359.

2. *Story, Bailm.* § 431; *Wharton Neg.* 749; *Dodd v. Williams*, 3 Mo. App. 278; *Rankin v. Shaeffer*, 4 Mo. App. 108; *Page v. Trutch*, 8 Chicago Legal News, 385; *Dundee, etc., Co. v. Hughes*, 20 Fed. Repr. 39. See *Clark v. Marshall*, 34 Mo. 429; *Chase v. Heaney*, 70 Ill. 268; *Chapman v. Chapman*, 9 L. R. Eq. 276; *Ireson v. Pearman*, 5 Dowl. & R. 687; *Waine v. Kempster*, 1 F. & F. 695.

ployer.<sup>1</sup> An action cannot be maintained unless actual damage be shown.<sup>2</sup>

**ABUSE AND MISUSE.**—Abuse, in strictness, signifies to injure, diminish in value, or wear away by using improperly.

Abuse or misuse of corporate privileges is any positive act in violation of the charter, and in derogation of public right, wilfully done or caused to be done by those appointed to manage the general concerns of the corporation.<sup>3</sup>

A malicious abuse of legal process is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect.<sup>4</sup>

The word abuse applied to a woman is never used except with reference to sexual intercourse. The expression "abusing" in an indictment implies assaulting and something more.<sup>5</sup>

The word as used in a statute punishing carnal knowledge or "abuse" of children applies only to injuries to the genital organs, and does not include ill-usage.<sup>6</sup>

**ABUT—ABUTTING.** (See ADJOINING.)—Premises abut upon a street, road, or other premises where no other street, road, or land intervenes.<sup>7</sup>

1. *Houseman v. Girard, etc.*, 81 Pa. St. 256; *Hood v. Fahnestock*, 8 Watts (Pa.), 489; *Bracken v. Miller*, 4 W. & S. (Pa.) 110; *Savings Bank v. Ward*, 100 U. S. 195; *Dundee, etc., v. Hughes*, 20 Fed. Repr. 39; *Siewers v. Commonwealth*, 6 W. N. C. (Phila.) 17. See *Donaldson v. Haldane*, 7 C. & F. 762; *Page v. Trutch*, 8 Chicago Legal News, 385.

2. *Kimball v. Connolly*, 42 N. Y. 57. **Authorities.**—Preston's Abstracts of Title; Martindale's Abstracts of Title; Warvelle's Abstracts of Title; Moore's Abstracts of Title.

3. *Baltimore v. Pittsburg, etc.*, R. Co., 3 Pittsb. Rep. (Pa.) 20; *Erie, etc., R. Co. v. Casey*, 26 Pa. St. 318.

4. *Mayer v. Walter*, 64 Pa. St. 283.

**Abuse of Discretion**, and especially gross and palpable abuse of discretion, which are the terms ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. *The People v. The N. Y. C. R. Co.*, 29 N. Y. 431.

5. A rule for a *habeas corpus* directed to two justices before whom the prisoner had been tried for unlawfully assaulting and abusing a woman was discharged, two judges holding that the justices had jurisdiction, no charge of rape having

been made, and the other two holding that, as there was evidence of rape, the word "abuse" in the information sufficiently covered the case to take it out of the jurisdiction. *In re Thompson*, 6 Hurl. & N. 192.

6. *Dawkins v. State*, 58 Ala. 376; s. c., 29 Am. Rep. 754.

7. An estate opposite a park, separated from it by a county road, is not an abutting estate. *Holt v. City Council*, 127 Mass. 408. A lot cannot be said to front on a public road when a railroad the bed of which is owned by the company runs between the lot and the road. *Philadelphia v. Eastwick*, 35 Penna. 75. Declaration in trespass as to an acre of land with the abutments. Verdict, Guilty as to one half. *Held*, that the plaintiff had not failed in his abutments. *Winckworth v. Mayo*, Cro. Jac. 184.

Where a small stream intervened between a lane and a lot of land, it was held that the premises adjoined but did not abut the lane by one judge, and by another that they were abutting. *Wakefield Bd. v. Lee*, 1 L. R. Ex. Div. 336.

Under a statute providing for assessment of owners of premises for the purpose of paving footways, etc., upon which said premises were fronting, adjoining, or abutting, said owners are only responsible for the footways on which their respective premises abutted; the north side, for instance, not being responsible for the footways on the south. *Wakefield Bd. v. Mander*, L. R. 5 C. P. Div. 248.

**ABUTMENT—ACCEPT—ACCESS—ACCESSION.**

**ABUTMENT.**—The abutment, in the sense in which the term is ordinarily used, is part of the bridge.<sup>1</sup>

**ACCEPT—ACCEPTED.**—The acceptance must be proved by some clear and unequivocal act of the party to be charged.<sup>2</sup>

**ACCEPTANCE.**<sup>3</sup> See **BILLS AND NOTES.**

**ACCESS.** (See **BASTARDY; HUSBAND AND WIFE.**)—At common law neither the husband nor wife could prove access or non-access. A statute allowing the parties to testify in their own behalf does not change the rule,<sup>3</sup> unless expressly indicated.<sup>4</sup>

**ACCESSION—CONFUSION OF GOODS.** See **ACCRETION; BAILMENT; CONVERSION; FIXTURES.**

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|----------------------------------|------------------------|
| 1. <i>Definition.</i>            | 6. <i>Mortgage.</i>    |
| 2. <i>Wrongful Possession.</i>   | 7. <i>Accounts.</i>    |
| 3. <i>Innocent Possession.</i>   | 8. <i>Trustees.</i>    |
| 4. <i>Admixture of Property.</i> | 9. <i>Real Estate.</i> |
| 5. <i>Confusion of Property.</i> |                        |

1. **Definition.**—Strictly speaking, accession is where a thing which

1. *Bardwell & Huntingdon v. Town of Jamaica*, 15 Vt. 438. In speaking of a bridge in connection with the use for which bridges are erected, we can no more exclude the abutment than the flooring or framework of the bridge. Where a declaration alleged an injury to have been caused by the defects in a bridge, and it was shown that the defects were in the abutment, there was not such a variance as to be ground for reversing the judgment.

2. The delivery of goods to the place where the purchaser's agent directed, and the shipping by the agent to a port where defendant had given general directions to have such goods sent, constitute a sufficient acceptance. *Snow v. Warner*, 10 Metc. (Mass.) 132.

Where there was a parol contract for the sale of a horse, payment on delivery, and the purchaser called and exercised the horse and gave some directions, but before payment or delivery the horse died, *held*, that the buyer was not liable for the price. "The word 'accepted' imports not merely that there should be a delivery by the seller, but that each party should do something by which the bargain should be bound." *Tempest v. Fitzgerald*, 3 B. & Ald. 680.

There is no acceptance where a verbal purchase of winter tares was made, to be paid for on delivery and to be delivered when called for. *Howe v. Palmer*, 3 B. & Ald. 321.

Upon a verbal contract of sale of goods of more than \$50 value, a delivery of them, in accordance with such contract, to a general carrier, not designated or

selected by the buyer, does not constitute such a delivery and acceptance under the statute of frauds as to pass the title to the goods. *Rodgers v. Phillips*, 40 N. Y. 519.

Where a merchant sold goods to another upon an arrangement that a third party was to collect the account and pay over the same, less a commission, and such third party was furnished with duplicate bills of account, made out in the name of the purchaser, and wrote across those retained by the merchant the word "accepted," signing his name, such third party did not thereby make himself liable as a guarantor. *Hatch v. Antrim*, 51 Ill. 106.

An affidavit that a person has "accepted" an office does not sufficiently show a user to comply with the statute. 4 and 5 W. H. c. 76, s. 50, and a *quo warranto* cannot be granted against him on such affidavit. *Queen v. Slatter*, 11 Ad. & El. 505.

**Accept and Receive.**—The N. Y. Statute of Frauds provides that in certain cases the contract shall be void unless "the buyer shall accept and receive part of such goods." *Held*, that a delivery of goods to a general carrier, in pursuance of the order of a purchaser, to be transported to him, is not such an "acceptance and receipt" of the goods as takes the case out of the statute. *Rodgers v. Phillips*, 40 N. Y. 519.

3. *Boykin v. Boykin*, 70 N. Car. 262; s. c., 16 Am. Rep. 776. See **BASTARDY** and cases cited.

4. *Tioga Co. v. South Creek*, 75 Pa. St. 436.

belongs to one person becomes the property of some one else by reason of its becoming added to or incorporated with a thing belonging to the latter. This takes place in the case of the addition of buildings, plants, etc., to the soil, the erection of fixtures, and where two things are so united as to form one, as by the embroidering of cloth, the painting of a picture on canvas, etc.<sup>1</sup>

Blackstone includes under accession what is more correctly called *specificatio*, which takes place where a person makes a new thing (*species*) out of materials belonging to another, and thereby acquires the ownership of them, subject to making compensation to the former owner for their original value; he also includes under accession the acquisition of young animals born in confinement.<sup>2</sup> See also ANIMALS.)

1. Sweet's Law Dict.; 2 Kent's Com. 360.

2. Black. Com. ii. 404; Betts v. Lee, 5 Johns. (N. Y.) 348; s. c., 4 Am. Dec. 368.

**Trees and Plants.**—Fruit-trees growing upon land become part of the freehold. *Adams v. Smith*, 1 Ill. 221; see *Griffin v. Bixby*, 12 N. H. 454.

A and B were partners in the business of fruit-growing, A furnishing the land and money, and B the labor. By the terms of a submission to arbitration between them to wind up the partnership, A was to be charged with the value of all permanent improvements made by the firm. *Held*, that he was not chargeable with the increase, by reason of growth during the continuance of the partnership, in the value of vines which were growing on the land when the partnership was formed. *Squires v. Anderson*, 54 Mo. 193.

**Crops.**—Where a person entered upon the land of another without license, and cut grass therefrom and made the same into hay, *held*, that he acquired no property in such hay, and could not maintain an action for its destruction, caused by the negligence of another, while it was stacked upon such land. *Murphy v. Sioux City, etc., R. Co.*, 55 Iowa, 473; *Lindsay v. Winona, etc., R. Co.*, 29 Minn. 411; s. c., 43 Am. Rep. 228.

**Animals.**—The increase of animals belongs to the owner of the female. *Stewart v. Ball*, 30 Mo. 154; *Hanson v. Millett*, 55 Me. 184; *Hazelbacker v. Goodfellow*, 64 Ill. 238. See *Tynson v. Simpson*, 2 Hayw. (N. Car.) 147.

Where a female animal has increase, while held under a bailment or executory contract, the title remaining in the bailor or vendor until the agreed price is paid, the increase is the property of the bailor or vendor. *Elmore v. Fitzpatrick*, 56

Ala. 400; *Allen v. Delano*, 55 Me. 113. Putting a mare to pasture, in consideration of her services, does not entitle the bailee to the increase. *Allen v. Allen*, 2 Pa. 166.

Where the female is hired for a time limited and has increase during the term, the hirer will be entitled to it and not the general owner. *Putnam v. Wyley*, 8 Johns. (N. Y.) 432; *Concklin v. Havens*, 12 Johns. (N. Y.) 314; *Hanson v. Millett*, 55 Me. 184; *Stewart v. Ball*, 30 Mo. 154; *Kellogg v. Lovely*, 46 Mich. 131; s. c., 41 Am. Rep. 151. A foal obtained under an agreement by which the owner of the mare arranged with another person that if he would put her to horse and pay the expense he should have the foal, became the property of such person. *Linendoll v. Terhune*, 14 Johns. (N. Y.) 222.

Where the animal is loaned, its increase belongs to the owner. *Orser v. Storms*, 9 Cow. (N. Y.) 687. See *infra*, p. 59; ACCRETION.

The offspring of slaves belong to the owner of the mother. *Fowler v. Merrill*, 11 How. (U. S.) 375. See *Concklin v. Havens*, 12 Johns. (N. Y.) 314.

**Ice** which is formed belongs to the owner of the water. *Higgins v. Kusterer*, 41 Mich. 318.

**Dividends.**—A dividend earned but not declared belongs to the owner of the stock at the time when the dividend is actually declared. *Brundage v. Brundage*, 65 Barb. (N. Y.) 397; 60 N. Y. 544.

**Sale.**—B and others delivered milk to a cheese factory; each was credited with the amount of his milk, and all was manufactured together; the company sold all the cheese; each farmer was charged with the expense, and received his share of the proceeds in proportion to the milk furnished. *Held*, that B and the others were not partners, nor tenants in common in the cheese, nor was there a bail-

2. **Wrongful Possession.**—A trespasser who takes the property of another wilfully and without the owner's consent cannot acquire the right to it by accession or specification, though he has changed the species.<sup>1</sup>

3. **Innocent Possession.**—Where the property of one comes to the possession of another innocently, he may acquire the right to it if by accession the species be changed.<sup>2</sup>

4. **Admixture.**—If the materials of one person are united to the materials belonging to another by the labor of the latter, who furnishes the principal materials, the property in the joint product is in the latter by right of accession;<sup>3</sup> but the person who furnishes

ment or agency as to the particular milk delivered. It was a sale of milk to be paid for in a certain time and manner. *Butterfield v. Lathrop*, 71 Pa. St. 225.

1. 2 Kent's Com. 364. See the able brief of Nicholas Hill, Jr., 3 N. Y. 380; *Betts v. Lee*, 5 Johns. (N. Y.) 348; s. c., 4 Am. Dec. 368; *Curtis v. Groat*, 6 Johns. (N. Y.) 168; s. c., 5 Am. Dec. 204; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *Baker v. Wheeler*, 8 Wend. (N. Y.) 508; *Silisbury v. McCoon*, 3 N. Y. 379; *Roth v. Wells*, 29 N. Y. 471; s. c., 53 Am. Dec. 307; *Barron v. Cobleigh*, 11 N. H. 557; *Snyder v. Vaux*, 2 Rawle (Pa.), 423; s. c. 21 Am. Dec. 466; *Willard v. Rice*, 11 Metc. (Mass.) 493; s. c., 45 Am. Dec. 226; *Hesseltine v. Stockwell*, 30 Me. 237; *Riddle v. Driver*, 12 Ala. 590; *Heard v. James*, 49 Miss. 236; *Lampton v. Preston*, 1 J. J. Marsh (Ky.), 454; s. c., 19 Am. Dec. 104; *Davis v. Easley*, 13 Ill. 192; *Single v. Schneider*, 30 Wis. 570; *Jenkins v. Steanka*, 19 Wis. 128. See *CONFUSION OF GOODS*, *infra*, p. 54.

A trespasser who cuts grass growing on land is not, as to the owner of the land, the owner of the hay made from the grass, and cannot recover for its destruction by the negligence of such owner. *Lindsay v. Winona*, etc., R. Co., 29 Minn. 411; s. c., 43 Am. Rep. 228; *Murphy v. Sioux City*, etc., R. Co., 55 Iowa, 473.

The owner of timber trees cut from his land by a trespasser cannot be divested of his title thereto, although the trespasser has converted them into railroad ties and sold them to a *bona-fide* purchaser. *Strubbee v. Trustees*, 78 Ky. 481; s. c., 39 Am. Rep. 251.

Crops sowed on land by a stranger to the title, and without authority or consent of the owner, belong to the owner of the soil. *Freeman v. McLennan*, 26 Kan. 151; *Simpkins v. Rogers*, 15 Ill. 397; *Crotty v. Collins*, 13 Ill. 567; *Thomes v. Moody*, 11 Me. 139. Compare *Lindsay v. Winona*, etc., R. Co., 29 Minn. 411;

s. c., 43 Am. Rep. 228; *Brothers v. Hurdle*, 10 Ired. (N. Car.) 490; *De Mott v. Hagerman*, 8 Cow. (N. Y.) 220.

2. *Silisbury v. McCoon*, 3 N. Y. 378; s. c., 53 Am. Dec. 307; *Hyde v. Cookson*, 21 Barb. (N. Y.) 92; *Baker v. Wheeler*, 8 Wend. (N. Y.) 508; *Swift v. Barnum*, 23 Conn. 523; *Snyder v. Vaux*, 2 Rawle (Pa.), 423; s. c., 21 Am. Dec. 466; *Worth v. Northam*, 4 Ired. (N. Car.) 102; *Riddle v. Driver*, 12 Ala. 590.

**Crop growing on Land held adversely.**—An action cannot be maintained to recover grain sown and harvested by defendant upon lands to which he claimed title, and of which he had the actual adverse and exclusive possession. *Martin v. Thompson*, 62 Cal. 618; s. c., 45 Am. Rep. 663. See *Reilly v. Ringland*, 39 Iowa, 106. Compare *Lampton v. Preston*, 1 J. J. Marsh (Ky.), 454.

3. 2 Kent's Com. 204; 2 Blackstone's Com. 404; *Pulcifer v. Page*, 32 Me. 404; s. c., 54 Am. Dec. 582; *Merritt v. Johnson*, 7 Johns. (N. Y.) 473; s. c., 5 Am. Dec. 289; *Gregory v. Stryker*, 2 Denio (N. Y.), 628; *Hyde v. Cookson*, 21 Barb. (N. Y.) 92; *McConike v. N. Y.*, etc., R. Co., 20 N. Y. 495; *Stephens v. Santee*, 49 N. Y. 35; *Beers v. St. John*, 16 Conn. 322; *Ryder v. Hathaway*, 21 Pick. (Mass.) 305; *Stevens v. Briggs*, 5 Pick. (Mass.) 177; *Wetherbee v. Green*, 22 Mich. 311; *Dunn v. O'Neal*, 1 Sneed (Tenn.), 106; s. c., 60 Am. Dec. 140; *Lampton v. Preston*, 1 J. J. Marsh. (Ky.) 454; s. c., 19 Am. Dec. 104. Compare *Silisbury v. McCoon*, 3 N. Y. 379; s. c., 53 Am. Dec. 307; *Riddle v. Driver*, 12 Ala. 590; *Snyder v. Vaux*, 2 Rawle (Pa.), 423; s. c., 21 Am. Dec. 466.

Where A contracted with B to build a vessel, and A was to furnish the timber requisite to complete the frame of the vessel, and B was to advance money to A, and also to furnish the materials for the joiner's work; and the vessel, while standing on land hired by A, and in an unfinished state, was seized under a *fi fa*

all the goods upon which the labor is expended retains the ownership of them and of the article made from them.<sup>1</sup> (See *MECHANIC'S LIEN*.)

Where one by mistake in good faith has expended labor upon the property of another, not destroying its identity, nor converting it into something substantially different, nor essentially enhancing its value, he cannot recover compensation therefor from the owner, although the owner has availed himself of the benefit;<sup>2</sup> but if he has by his labor greatly increased the value of the property, he will become the owner.<sup>3</sup>

A wilful trespasser, however, acquires no property in the goods of another by any change wrought in them by his labor or skill,

issued against A, and sold by the sheriff to C, who afterward completed the vessel and sold her to D,—in an action of trover brought by B against D it was *held*, that the property in the vessel was in D, and that B could not have any property in the vessel, under the contract, until she was completed and delivered to him. *Merritt v. Johnson*, 7 Johns. (N. Y.) 473; s. c., 5 Am. Dec. 28. See *Andrews v. Durant*, 11 N. Y. 35; *People v. Commissioners*, 58 N. Y. 242; *Abbott v. Blossom*, 66 Barb. (N. Y.) 353.

A railroad company made a contract with a rolling-mill company for the making at the mill of new rails out of old rails supplied by the railroad, with the addition of new iron, to be supplied by the mill, which was required for the top of the rails. *Held*, that if the railroad furnished the chief or principal part of the material of the new rails, the property in the material and in the new rails as finished remained in the railroad. *Arnott v. Kansas Pac. R. Co.*, 19 Kans.

1. *Babcock v. Gill*, 10 Johns. (N. Y.) 287; *Gregory v. Stryker*, 2 Denio (N. Y.), 628; *Hyde v. Cookson*, 21 Barb. (N. Y.) 92; *Eaton v. Munroe*, 52 Me. 63; *Eaton v. Lynde*, 15 Mass. 242; *Stevens v. Briggs*, 5 Pick. (Mass.) 177; *Foster v. Warner*, 49 Mich. 641; *Dunn v. O'Neal*, 1 Sneed (Tenn.), 106; s. c., 60 Am. Dec. 140.

A let B have some canvas for a sail, under an agreement that it should be and remain the property of A until paid for. B made the sail, furnishing further materials for it, and then sold it without having paid for it. *Held*, that A could maintain replevin against the vendee to recover the sail. *Eaton v. Munroe*, 52 Me. 63.

An owner of pine lands, in contracting the pine to a shingle manufacturer, retained the title thereto until it should be fully paid for, and also reserved the right to seize the shingles manufactured from it if the manufacturer failed to perform

the conditions of his contract. The manufacturer mixed these shingles with others, and, with the knowledge of his vendor's agent, treated them all as his own property and sold them to *bona-fide* purchasers. There was evidence tending to show that in buying the latter relied on this apparently exclusive ownership. *Held*, that they could maintain trover against the owner of the pine if he seized any shingles sold to them which had not been manufactured from his own timber. *Foster v. Warner*, 49 Mich. 641.

2. *Isle Royal M. Co. v. Hertin*, 37 Mich. 332; s. c., 26 Am. Rep. 520. This case was distinguished from *Witherbee v. Green*, *post*, in that the identity of the converted property was not destroyed, nor its value greatly increased. See *Newton v. Porter*, 5 Lans. (N. Y.) 416; affirmed, 69 N. Y. 133; s. c., 25 Am. Rep. 152; *Spicer v. Waters*, 65 Barb. (N. Y.) 227. Compare *Single v. Schneider*, 30 Wis. 570.

Where one person supplies the material, and another the labor under an agreement that he is to be paid for the labor by a certain share of the manufactured article, they become tenants in common. *White v. Brooks*, 43 N. H. 402.

A by mistake and in good faith cut cord-wood on the land of B, and hauled it to a landing and piled it, and the owner seized and sold it. *Held*, that the owner was not liable for the value of such labor. *Isle Royal M. Co. v. Hertin*, 37 Mich. 332; s. c., 26 Am. Rep. 520.

3. In *Wetherbee v. Green*, 22 Mich. 311; s. c., 7 Am. Rep. 653, Cooley, J., said: "Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses. But this is obviously a very unsatisfactory test, and in many cases would wholly defeat the purpose which the law has in view in recognizing a change of title in any of these cases."



however great the change may be, provided it can be proved that the improved article was made from the original material.<sup>1</sup>

**5. Confusion of Goods.**—If a person without fraud, intentional wrong, or reckless disregard of the right of others mingle his goods with those of another person, in such manner that they

That purpose is not to establish any arbitrary distinctions, based upon mere physical reasons, but to adjust the redress afforded to the one party and the penalty inflicted upon the other, as near as circumstances will permit, to the rules of substantial justice. It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might, perhaps, be traced without trouble into a church organ, or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the question how much the property or labor of each has contributed to make it what it is must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it, not because the timber cannot be identified, but because in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor in the case of the musical instrument is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant. No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstances of relative values. When we bear in mind the fact that what the law aims at is the ac-

complishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundredfold is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it nor adds materially to the value. There may be complete changes with so little improvement in value that there could be no hardship in giving the owner of the original materials the improved article."

One of two tenants in common of certain timber land conveyed his undivided half of the land by warranty deed to certain parties to whom he was indebted, such parties agreeing orally to reconvey upon the discharge of the indebtedness. Subsequent to the sale of his interest in the land, and under authority previously given by his co-tenant, the vendor sold a quantity of the timber growing upon the land to a third party, who cut and manufactured the same into hoops. An action for replevin was brought by the owner of the land to recover the hoops. It was shown upon trial that the value of the timber was \$25, and that the value of the hoops was \$700. *Held*, that evidence showing that the defendant purchased the timber and manufactured it in good faith was admissible; and that upon such showing he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was by an action of trespass. *Wetherbee v. Green*, 22 Mich. 311; s. c., 7 Am. Rep. 653. See *Haskin v. Record*, 32 Vt. 575; *Brown v. Sax*, 7 Cow. (N. Y.) 95; *Elwell v. Burnside*, 44 Barb. (N. Y.) 447; *Baker v. Wheeler*, Lock. Rev. Cas. (N. Y.) 470. *Alford v. Bradeen*, 1 Nev. 228; *Harmon v. Gartman*, Harp. (S. Car.) 430.

1. *Murphy v. Sioux City*, etc., R. Co., 55 Iowa, 473, and cases *post*, p. 55. See *Salisbury v. McCoon*, 3 N. Y. 379; s. c., 53 Am. Dec. 307. In this case it was held, where a quantity of corn was taken from the owner by a wilful trespasser and converted by him into whiskey, that the property was not changed, and that the whiskey belonged to the owner of the original materials. In *Chandler v. Edson*, 9 John. (N. Y.) 362, it was held that where a party entered

cannot be distinguished, such other person will be protected in his ownership, so far as the circumstances will permit.<sup>1</sup>

If the goods of one person without his fault or by his consent become so commingled with those of another, by the act of the latter, as to be undistinguishable therefrom, the former has the right to take and use from the common mass or lot his proportionate share, without restriction in choice to any particular portion of the common lot, provided there is no advantage in selection as to quality, value, or otherwise.<sup>2</sup> The same rule applies where the com-

upon the land of another and cut down trees, of which he made shingles, he acquired no property in the timber or shingles. In *Brock v. Smith*, 14 Ark. 431, it was held that where one entered upon land as a trespasser, felled timber, and split it up into cord-wood, the bestowal of his labor in splitting the timber into cord-wood neither wrought a change in its specific character nor gave him any title by accession. To the same effect are also the following cases: *Betts v. Lee*, 5 John. (N. Y.) 348; s. c., 4 Am. Dec. 368; *Nesbit v. St. Paul Lumber Co.*, 21 Minn. 491; *Brown v. Sax*, 7 Cowen (N. Y.), 95; *Freeman v. Underwood*, 66 Me. 229. In this last case the defendant purchased a quantity of blueberries from persons who picked them from plaintiff's land as trespassers, and it was held that although he acted in good faith he became liable in trover to the true owner.

Where the property has been so changed in its character as to have lost its identity, it ceases to have the same legal existence, and the owner cannot pursue it against third persons. *Cross v. Marston*, 17 Vt. 533; s. c., 44 Am. Dec. 353; *Peirce v. Goddard*, 22 Pick. (Mass.) 559; s. c., 33 Am. Dec. 764.

Where certain trunks belonging to A disappeared and were found, as claimed, amongst other trunks in the store of B, held, that, no tortious taking being proved, it was error to instruct the jury that if B wilfully took and carried away the trunks and afterwards mixed them with his own so that it was impossible to identify them, then A was entitled to recover any of B's goods to the amount taken; although such instruction would have been correct if B had been shown to be a wilful trespasser. *Gray v. Parker*, 38 Mo. 160.

1. *Wetherbee v. Green*, 22 Mich. 311; s. c., 7 Am. Rep. 653; *Ryder v. Hathaway*, 21 Pick. (Mass.) 298; *Smith v. Sanborn*, 6 Gray (Mass.), 134; *Pratt v. Bryant*, 20 Vt. 333; *Ringgold v. Ringgold*, 1 H. & G. (Md.) 11.

If the property of each can be distinguished, it may be reclaimed. *Frost v. Willard*, 9 Barb. (N. Y.) 440.

H bought a wagon of B, on condition that it should remain the property of B until paid for. C repaired it for H by putting in new wheels and axles. H took it from C's possession without his knowledge or consent, and afterward agreed with C that the "running part" supplied by C should remain his property until paid for. H never paid either B or C, and neither had notice of the other's claim. B took the wagon back and sold it to D, who did not know of C's claim. Held, that D was liable in trover for the wheels and axles. *Clark v. Wells*, 45 Vt. 4. Compare *Gregory v. Stryker*, 2 Denio (N. Y.), 628.

If the property is not severable in its nature, the partition must necessarily be by agreement or proceedings in equity. *Tripp v. Riley*, 15 Barb. (N. Y.) 333. See *Channon v. Lusk*, 2 Lans. (N. Y.) 211; *Fiquet v. Allison*, 12 Mich. 328; *Horr v. Barker*, 6 Cal. 489; *Young v. Miles*, 20 Wis. 615.

2. *Chandler v. De Graff*, 25 Minn. 88; *Jewitt v. Partridge*, 12 Me. 243; *Smith v. Morrill*, 56 Me. 566; *Pratt v. Bryant*, 20 Vt. 333; *Perry v. Pettingill*, 33 N. H. 433; *Robinson v. Holt*, 39 N. H. 557; *Cochran v. Flint*, 57 N. H. 514; *Adams v. Wildes*, 107 Mass. 123; *Ryder v. Hathaway*, 21 Pick. (Mass.) 298; *Cushing v. Breed*, 14 Allen (Mass.), 376; *Moore v. Erie R. Co.*, 7 Lans. (N. Y.) 39; *Clark v. Griffith*, 24 N. Y. 595; *Seymour v. Wyckoff*, 10 N. Y. 213; *Nowlen v. Colt*, 6 Hill (N. Y.), 461; s. c., 41 Am. Dec. 756; *Wilson v. Nason*, 4 Bosw. (N. Y.) 155; *Sims v. Glazener*, 14 Ala. 695; *Alley v. Adams*, 44 Ala. 609; *Wood v. Fales*, 24 Pa. St. 246; *Hamilton v. Rogers*, 8 Md. 301; *Randolph v. Gwynne*, 3 Halst. Ch. (N. J.) 88; *Stephenson v. Little*, 10 Mich. 433; *Fowler v. Hoffman*, 31 Mich. 215; *Dole v. Olmstead*, 36 Ill. 150; *Warner v. Cushman*, 31 Ill. 283; *Young v. Miles*, 20 Wis. 615; *Adams v. Meyers*, 1 Sawy. (U. S.) 306; *South*

mingling was caused by accident or *vis major*,<sup>1</sup> or by the mistake

Australian Ins. Co. v. Randell, L. R. 3 P. C. 101. Compare Brakely v. Tuttle, 3 W. Va. 86; Redington v. Chase, 44 N. H. 36.

Where a person taking his wheat to a mill to be ground, by the assent of the miller mingles it with the wheat of the miller, he does not thereby lose his property in the wheat, but retains a property in so many bushels of the common stock as he has put in; although, by a contract between the parties, the person delivering it is to receive a certain quantity of flour for a certain number of bushels of wheat. Inglebright v. Hammond, 19 Ohio, 337. See Adams v. Meyers, 1 Sawy. (U. S.) 306.

In filling certain contracts for railroad ties, plaintiff delivered about 20,000 in excess of the contracts, which defendants refused to accept. Such surplus having by the act of the plaintiff, and without fault of the defendants, become so intermingled with the accepted ties belonging to the latter as to be undistinguishable therefrom, *held*, that the defendants were entitled of right to take and use from the common lot a number equal to their proportionate share of the whole. Chandler v. De Graff, 25 Minn. 88.

Where various parties deliver grain for storage to the keeper of an elevator, who, without any agreement to that effect, and without the knowledge of the owners, but according to the custom in such cases, mixes in a common mass all the grain of the same kind and quality, the several owners become tenants in common of the entire amount in store of like quality; and where in such case the elevator and its contents are burned through the negligence of a railway company, each owner may recover of the company the value of his grain so destroyed. In such case the warehouseman would not be liable to the owners of the grain, as his act of mixing it was not a conversion; and the fact that one of the owners of the grain brought an action against the warehouseman to recover the value of his grain, on the ground that the act of mingling was a conversion of it, in which action he failed to recover, would not defeat him in his action against the railway company. Arthur v. Chicago, etc., R. Co., 61 Iowa, 648; Stone v. Quaal, 29 N. W. Repr. (Iowa) 326. See Dole v. Olmstead, 36 Ill. 150.

Where distilled spirits forfeited to the U. S. are mixed with other distilled spirits belonging to the same person (ignorant of the forfeiture), they are not lost to the government by such mixture,

even though subsequently run through leaches for the purpose of rectification. The government will be entitled to its proportion of the result. The Distilled Spirits Cases, 11 Wall. (U. S.) 356.

Where A places his logs in a pile belonging to B, and marks them with the same mark as the logs of B are marked with, A can afterward claim only such logs as can be identified as his property. Dillingham v. Smith, 30 Me. 370.

This rule applies where one has made additions to machinery belonging to another. Alley v. Adams, 44 Ala. 609.

If a portion of the mass was destroyed, one owner cannot take out an amount equal to that put in by him, and throw the whole loss on the other party. Spence v. Union M. Ins. Co., L. R. 3 C. P. 427; Dole v. Olmstead, 36 Ill. 150, 41 Ill. 344.

Pelts piled by A upon those belonging to B will not render B's pelts liable to an execution against A. Gilman v. Hill, 36 N. H. 311. Or pork or lard so commingled. Huff v. Earl, 3 Ind. 306. Or oil in tanks. Wilkinson v. Stewart, 85 Pa. St. 255. Or hay. Robinson v. Holt, 39 N. H. 557. Or grain. Starr v. Winegar, 3 Hun (N. Y.), 491. See Low v. Martin, 18 Ill. 286; Nowlen v. Colt, 6 Hill (N. Y.), 461; s. c., 41 Am. Dec. 756; Seymour v. Wyckoff, 10 N. Y. 213; Samson v. Rose, 65 N. Y. 411; Kauffmann v. Schilling, 58 Mo. 218; Sims v. Glazener, 14 Ala. 695; Inglebright v. Hammond, 19 Ohio, 337.

1. Cotton belonging to different owners was shipped, in bales specifically marked, at Mobile for Liverpool; 43 bales belonged to the plaintiffs, and were insured by the defendants against the usual perils. In the course of her voyage the ship was wrecked near Key West; all the cotton was more or less damaged; some of it was lost, and some was so damaged that it had to be sold at Key West. The rest of the cotton was conveyed in another vessel to Liverpool. The marks on a very large number of the bales were so obliterated by seawater that none of the cotton lost or sold at Key West, and a portion only of that carried to Liverpool, could be identified as belonging to any particular consignee. Two only of the plaintiffs' 43 bales were identified, and these were delivered to the plaintiffs. *Held*, that in respect of the cotton lost and that sold at Key West there was a total loss of a part of each owner's cotton, and that all the owners became tenants in common of

of one owner,<sup>1</sup> or by the wrongful act of a stranger,<sup>2</sup> or by any natural cause.<sup>3</sup> But if the commingling was made wilfully and without mutual consent, the property becomes that of the person whose property was originally invaded, if its distinct character is destroyed.<sup>4</sup>

the cotton which arrived at Liverpool and could not be identified; the share of each owner's loss in the cotton totally lost or sold at Key West, and his share in the remainder which arrived at Liverpool, being in the proportion that the quantity shipped by him bore to the whole quantity shipped, according to the rule in cases of general average where it is not known whose goods are sacrificed; and, consequently, that there was no total loss, either actual or constructive, of the plaintiffs' 41 bales. *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427. See *Moore v. Erie R. Co.*, 7 Lans. (N. Y.) 39; *Sheldon v. Sherman*, 42 Barb. (N. Y.) 368; *Washburn v. Gilman*, 64 Me. 163; *Gentry v. Madden*, 3 Ark. 127; *Rogers v. Judel*, 5 Vt. 236; *Foster v. Juniata B. Co.*, 16 Pa. St. 393.

1. *Pratt v. Bryant*, 20 Vt. 333; *Ryder v. Hathaway*, 21 Pick. (Mass.) 298; *Moore v. Bowman*, 47 N. H. 494; *Thorne v. Colton*, 27 Iowa, 425.

2. *Bryant v. Ware*, 30 Me. 295.

3. *State v. Burt*, 64 N. Car. 619. The rule of law as to confusion of goods does not apply to logs floating in a stream so distinctly marked that their identity is not lost. *Goff v. Brainerd*, 5 Atl. Repr. (Vt.) 393.

4. 2 Kent's Com. 364; *Silsbury v. McCoon*, 3 N. Y. 379; s. c., 53 Am. Dec. 307; *Roth v. Wells*, 29 N. Y. 471; *Joslin v. Cowee*, 60 Barb. (N. Y.) 48; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *Babcock v. Gill*, 10 Johns. (N. Y.) 287; *Betts v. Lee*, 5 Johns. (N. Y.) 348; s. c., 4 Am. Dec. 368; *Curtis v. Groat*, 6 Johns. (N. Y.) 168; s. c., 5 Am. Dec. 204; *Brown v. Sax*, 7 Cow. (N. Y.) 95; *Baker v. Wheeler*, 8 Wend. (N. Y.) 505; *Gorden v. Jenny*, 16 Mass. 465; *Willard v. Rice*, 11 Metc. (Mass.) 493; s. c., 45 Am. Dec. 226; *Smith v. Sanborn*, 6 Gray (Mass.), 130; *Treat v. Barber*, 7 Conn. 280; *Barron v. Cobleigh*, 11 N. H. 557; *Seavy v. Dearborn*, 19 N. H. 351; *Robinson v. Holt*, 39 N. H. 557; *Smith v. Morrill*, 56 Me. 566; *Hesseltine v. Stockwell*, 30 Me. 237; s. c., 50 Am. Dec. 627; *Dillingham v. Smith*, 30 Me. 370; *Loomis v. Green*, 7 Me. 386; *Snyder v. Vaux*, 2 Rawle (Pa.), 423; s. c., 21 Am. Dec. 466; *Brakely v. Tuttle*, 3 W. Va. 86; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377; s. c., 20 Am. Dec. 123; *Beach*

*v. Schmultz*, 20 Ill. 185; *Diversey v. Johnson*, 93 Ill. 547; *Jenkins v. Steanka*, 19 Wis. 128; *Root v. Bonnema*, 22 Wis. 539; *Stephenson v. Little*, 10 Mich. 433; *Riddle v. Driver*, 12 Ala. 590; *Alley v. Adams*, 44 Ala. 609; *Weil v. Silverstone*, 6 Bush (Ky.), 698; *The Idaho*, 3 Otto (U. S.), 575.

The question of intent is for the jury. *Taylor v. Jones*, 42 N. H. 25.

To work a forfeiture of the whole mass where one has confused his own goods with those of other persons, two things are requisite; namely, that the confusion be made fraudulently, and that after such confusion the articles be incapable of identification or apportionment. *Jewett v. Dringer*, 30 N. J. Eq. 291. See *Hesseltine v. Stockwell*, 30 Me. 237; s. c., 50 Am. Dec. 627; *Stephenson v. Little*, 10 Mich. 433; *Wetherbee v. Green*, 22 Mich. 311; s. c., 7 Am. Rep. 653; *Starr v. Winegar*, 3 Hun (N. Y.), 491; *Alley v. Adams*, 44 Ala. 609.

A junk-dealer by fraudulent collusion with the employees of a railroad company obtained large quantities of old iron at much less than the actual weight or value. On delivery it was thrown indiscriminately on other heaps of old iron belonging to him, so as to be undistinguishable. Held, that he must forfeit the whole mass to the company. *Jewett v. Dringer*, 30 N. J. Eq. 291. See *McDowell v. Rissell*, 37 Pa. St. 164; *Redington v. Chase*, 44 N. H. 36; *Seavy v. Dearborn*, 19 N. H. 351; *Willard v. Rice*, 11 Metc. (Mass.) 493; s. c., 45 Am. Dec. 226; *Beach v. Schmultz*, 20 Ill. 185; *Jenkins v. Steanka*, 19 Wis. 128; *Smith v. Welch*, 10 Wis. 91.

Where materials are removed from a house by a mortgagor, and sold and used by his purchaser in building a house on other lands, the mortgagee cannot follow them. *Peirce v. Goddard*, 22 Pick. (Mass.) 559. See *Madigan v. McCarthy*, 108 Mass. 376; *Beers v. St. John*, 16 Conn. 322; *Salter v. Sample*, 71 Ill. 430. Bricks laid in wall become part of the realty. *Moore v. Cunningham*, 23 Ill. 328. See *Wadleigh v. Janvrin*, 41 N. H. 503; *Beard v. Duralde*, 23 La. Ann. 284.

Where the materials can be distinguished there will be no forfeiture and each party may claim his property. *Hesseltine v. Stockwell*, 30 Me. 237.

**6. Mortgage.**—Where goods are mortgaged and are afterwards intermixed with other goods, the whole mass is covered by the

Where plaintiff cut logs on defendant's land and marked the same as his own, and commingled them,—in action for trover for logs taken by the defendant in excess of the number taken from him, *held*, that he was not liable for conversion until the plaintiff pointed out his property and demanded it. *Smith v. Morrill*, 56 Me. 566. See *Bryant v. Ware*, 30 Me. 295; *Barron v. Cobleigh*, 11 N. H. 559; *May v. Bliss*, 22 Vt. 477; *Root v. Bonnewa*, 22 Wis. 539; *Goode-nov v. Snyder*, 3 Greene (Iowa), 599; *Stearns v. Raymond*, 26 Wis. 74.

Where plaintiffs sent a large number of cloths to be printed, and the sheriff seized all the goods in the factory, and the plaintiffs then claimed 250 pieces, but not being able to identify their goods claimed that number of similar goods, *held*, that if the printers had actually confused them the claim must be allowed. *Wood v. Fales*, 24 Pa. St. 246.

A licensee mixed the coals gotten under the license with those gotten from his own colliery, and sold them together. He alleged that the coals gotten under the license were inferior in value to the other coals. *Held*, that as they had been mixed by the licensee's own act, he was not entitled to any inquiry as to how much the selling price of the coals was diminished by the mixture of the coals gotten under the license. *Lord Rokeby v. Elliot*, L. R. 9 Ch. D. 685; 13 Ch. D. 277. See *Seymour v. Wyckoff*, 10 N. Y. 213.

**Execution.**—If a person adds to goods acquired under a fraudulent sale, in which he participated, other goods subsequently purchased, he is not entitled, in an action against an officer who attaches all the goods as the property of the fraudulent vendor of the first-named goods, to recover the value of the goods subsequently purchased, if the mingling them with the other goods was purposely done or through want of proper care. *Stearns v. Herrick*, 132 Mass. 114.

If the purchaser of goods from an insolvent debtor, intentionally intermingles them with his own goods, and refuses to furnish to the sheriff seeking to levy an execution on them, as the property of the seller, the information necessary to distinguish and separate them, he cannot claim any advantage from the confusion of goods; and having interposed a statutory claim to the goods levied on, the duty is cast on him to furnish the evidence necessary to separate his own

goods from the others. *Lehman v. Kelly*, 68 Ala. 192. See *Weil v. Silverstone*, 6 Bush (Ky.), 698; *Chappell v. Cox*, 18 Md. 513; *Shumway v. Rutter*, 8 Pick. (Mass.) 443; *Sawyer v. Merrill*, 6 Pick. (Mass.) 478; *Taylor v. Jones*, 42 N. H. 25; *Albee v. Webster*, 16 N. H. 362; *Robinson v. Holt*, 39 N. H. 557; *Roth v. Wells*, 29 N. Y. 471; *McDowell v. Rissell*, 37 Pa. St. 164; *Smith v. Welch*, 10 Wis. 91; *Weil v. Silverstone*, 6 Bush (Ky.), 698; *Wellington v. Sedgwick*, 12 Cal. 469. Compare *Thorne v. Colton*, 27 Iowa, 425; *Treat v. Barber*, 7 Conn. 274; *Kingsbury v. Pond*, 3 N. H. 511; *Wilson v. Lane*, 33 N. H. 466.

Where logs were seized under execution against the mortgagor, and the mortgagee sued the sheriff for damages, and it was contended that the logs were not so described in the mortgage as to be capable of identification, *held*, that as the difficulty of identification was caused by the wrongful confusion by the mortgagor of the logs with other logs, the mortgagee, being innocent, could not suffer thereby. *Merchants' Nat. B. v. McLaughlin*, 2 Fed. Rep. 128. See *Beach v. Schmultz*, 20 Ill. 185.

**Replevin.**—The owner of property wrongfully taken may pursue it so long as it can be identified, whatever alteration in form it may assume, unless it is annexed to or made a part of some other thing which is the principal, as timber converted into a house. *Davis v. Easley*, 13 Ill. 192. See *Silsbury v. McCoon*, 3 N. Y. 379; s. c., 53 Am. Dec. 307, where corn was made into whiskey; *Curtis v. Groat*, 6 Johns. (N. Y.) 168; *Riddle v. Driver*, 12 Ala. 590, where trees were made into charcoal; *Foster v. Warner*, 49 Mich. 641; *Betts v. Lee*, 5 Johns. (N. Y.) 349; s. c., 4 Am. Dec. 368; *Chandler v. Edson*, 9 Johns. (N. Y.) 362, where lumber was made into shingles; *Brock v. Smith*, 14 Ark. 431, where trees were cut into cord-wood; *Heard v. James*, 49 Miss. 236, where lumber was made into staves; *Snyder v. Vaux*, 2 Rawle (Pa.), 423; s. c., 21 Am. Dec. 466; *Millar v. Humphries*, 2 A. K. Marsh. (Ky.) 446, where trees were made into posts and rails; *Hyde v. Cookson*, 21 Barb. (N. Y.) 92, where hides were made into leather; *Pierrepont v. Barnard*, 5 Barb. (N. Y.) 364; *Fival v. Backus*, 18 Mich. 218, where trees were made into timber; *Lake Shore, etc., R. Co. v. Hutchins*, 32 Ohio St. 571; s. c., 37 Id. 282; *Smith v. Gonder*, 22 Ga. 353, where

mortgage. So, also, if the goods are manufactured into a finished article, or there is any natural increase.<sup>1</sup>

trees were made into railroad ties; *Hal-leck v. Mixer*, 16 Cal. 574; *Moody v. Whitney*, 34 Me. 563; *Brewer v. Fleming*, 51 Pa. St. 102, where trees were made into fire-wood; *Brown v. Sax*, 7 Cow. (N. Y.) 95; *Baker v. Wheeler*, 8 Wend. (N. Y.) 505; *Davis v. Easley*, 13 Ill. 192, where trees, or logs, were made into boards; *Eastman v. Harris*, 4 La. Ann. 193, where a raft of logs was made into fire-wood; *Jackson v. Walton*, 28 Vt. 43, where stone was taken from a quarry, dressed, and laid in a pavement.

As to what goods replevin may be brought, see *Wingate v. Smith*, 20 Me. 287; *Hesseltine v. Stockwell*, 30 Me. 237; *Loomis v. Green*, 7 Me. 386; *Ames v. Miss. B. Co.*, 8 Minn. 467; *Wood v. Fales*, 24 Pa. St. 246.

**Damages.**—Timber was cut from lands of B by trespassers, who by their labor converted it into cord-wood and railroad ties, thus increasing its value threefold. It was sold to an innocent purchaser, who was sued by B for the value of the wood and ties. *Held*, that B could not recover the value of the timber as enhanced by the labor of the wrong-doers after it was severed from the realty. *Lake Shore, etc., R. Co. v. Hutchins*, 32 Ohio St. 571, 37 Id. 282. See *Salmon v. Horwitz*, 23 L. J. Q. B. 77; *Weymouth v. Chicago, etc., R. Co.*, 17 Wis. 556; *Single v. Schneider*, 30 Wis. 570; *Ellis v. Wire*, 33 Ind. 127; s. c., Am. Rep. 189; *Moody v. Whitney*, 38 Me. 174; *Buckmaster v. Mower*, 21 Vt. 204; *Forsyth v. Wells*, 41 Pa. St. 291; *Herdic v. Young*, 55 Pa. St. 176; *Grant v. Smith*, 26 Mich. 201; *Farwell v. Price*, 30 Mo. 587; *Heard v. James*, 49 Miss. 236. Compare *Nesbit v. St. Paul L. Co.*, 21 Minn. 491; *Pearson v. Inlow*, 20 Mo. 322; *Stuart v. Phelps*, 39 Iowa, 14; *Hungerford v. Redford*, 29 Wis. 345; *Smith v. Gonder*, 22 Ga. 353; *Bailey v. Shaw*, 28 N. H. 297; *Coxe v. England*, 65 Pa. St. 212; *Hill v. Canfield*, 56 Pa. St. 454; *Benjamin v. Benjamin*, 15 Conn. 347.

1. Story on Bailments, § 292; *Putnam v. Cushing*, 10 Gray (Mass.), 334; *Hardin v. Coburn*, 12 Metc. (Mass.) 333; *Comins v. Newton*, 10 Allen (Mass.), 518; *Sumner v. Hamlet*, 12 Pick. (Mass.) 76. See *Bryant v. Pennell*, 61 Me. 108; *Pulcifer v. Page*, 32 Me. 404; s. c., 54 Am. Dec. 582; *Cudworth v. Scott*, 41 N. H. 456; *Perry v. Pettengill*, 33 N. H. 433; *Putnam v. Cushing*, 10 Gray (Mass.),

334; *Simmons v. Jenkins*, 76 Ill. 479; *Merchants' Nat. B. v. McLaughlin*, 2 Fed. Repr. 128; *Jenckes v. Goffe*, 1 R. I. 511; *Fowler v. Merrill*, 11 How. (U. S.) 375; *Evans v. Merriken*, 8 G. & J. (Md.) 39; *Frost v. Willard*, 9 Barb. (N. Y.) 440; *Forman v. Proctor*, 9 B. Mon. (Ky.) 124; *Evans v. Merriken*, 8 G. & J. (Md.) 39; *Thorpe v. Cowles*, 55 Iowa, 408; *Kellogg v. Lovely*, 46 Mich. 131; s. c., 41 Am. Rep. 151.

**Mortgage.**—Where a mortgagor of goods intrusted with possession mingles them with his own goods, so that they cannot be distinguished, he loses his property as against the mortgagee, and the latter may claim the whole against the mortgagor and his consignees. *Willard v. Rice*, 11 Metc. (Mass.) 493; s. c., 45 Am. Dec. 226. See *Adams v. Wildes*, 107 Mass. 123.

Where new materials are purchased, after giving a chattel mortgage, to supply the place of materials which are worn out, and the new materials, such as type, are so commingled with the old materials as not to be easily distinguished, *held*, that new materials (if not kept separate) become part of the old by accession, and are covered by the mortgage. *Fowler v. Hoffman*, 31 Mich. 215.

The mortgage of a vessel attaches to a new set of sails provided by the mortgagor, after its execution, to replace old sails. *Southworth v. Isham*, 3 Sandf. (N. Y.) 448.

Where leather, which has been cut and prepared to make into shoes is covered by a chattel mortgage, the shoes which are subsequently made will be also covered by the mortgage. *Putnam v. Cushing*, 10 Gray (Mass.), 334.

**Animals.**—Where one buys a mare on credit and gives a chattel mortgage on her for the entire purchase-price, and she is afterwards found to be with foal which is not weaned before the credit expires, he is not entitled to keep the colt if he makes default in payment and the mare is taken on the mortgage. *Kellogg v. Lovely*, 46 Mich. 131; s. c., 41 Am. Rep. 151. See *Forman v. Proctor*, 9 B. Mon. (Ky.) 124; *Thorpe v. Cowles*, 55 Iowa, 408; *Gundy v. Biteler*, 6 Ill. App. 510; *Evans v. Merriken*, 8 G. & J. (Md.) 39; *Fowler v. Merrill*, 11 How. (U. S.) 375.

To entitle a chattel-mortgagee to the offspring of stock included in his mortgage, he must show that such offspring

7. **Accounts.**—The rules as to confusion of goods apply to accounts.<sup>1</sup>

8. **Trustees.**—Where an executor converts an estate into money, and mixes it with the general mass of his own money, and there is no identifying the particular money of the trust, the distributees or legatees have no preference over his other creditors, but

were conceived prior to the date of his mortgage, or that since their birth they have been in the open possession of himself or his agent; and where the evidence in his behalf, as to the age of offspring and fact of their conception prior to his mortgage, was mere opinion of the witness, and not positive knowledge, *held*, insufficient. *Thorpe v. Cowles*, 55 Iowa, 408.

It has been held that unless the increase is included and the mortgagor remains in possession, the mortgage does not cover the increase. In an action of replevin, the property replevied was described as "one sorrel last spring's colt; twenty-six head of black and white spotted shoats, about ten months old," etc. Plaintiff claimed this property by virtue of a chattel mortgage, in which the property was described as "one bay mare eleven years old, named Tony; one gray horse about nine years old, named Pet; one sorrel mare four years old, named Bet; fifty head of hogs from six weeks to two years old." Evidence was introduced that one of said mares was in foal at the date of the mortgage, and dropped the colt replevied some time afterwards; also that some of the shoats replevied were pigged. *Held*, that as to the colt and shoats the verdict was not sustained by the evidence. See *Winter v. Landphere*, 42 Iowa, 471.

A chattel mortgage conveying a stock of goods and "all books of account and rights of credit arising out of said business" did not cover accounts subsequently accruing upon the sale of the goods by the mortgagor, with the consent of the mortgagee, in the regular course of trade. *Lormer v. Allyn*, 64 Iowa, 725.

Additions made to unfinished machinery which is covered by a mortgage are also included in the mortgage. *Ex parte Ames*, 1 Law Dec. (U. S.) 561. *Jenckes v. Goffe*, 1 R. I. 511.

Repairs and improvements made upon rolling stock by a company which had acquired the right to control the road, subsequently to the mortgage, are in the nature of accessions to a mortgaged chattel, and subject first to the mortgage that had priority of date. *Hamlin v.*

*Jerrard*, 72 Me. 62; s. c., 4 Am. & Eng. R. R. Cas. 488.

**Crops, Plants, etc.**—Plants and shrubs, the growth of cuttings from plants and shrubs mortgaged, pass to the mortgagee by accession. *Bryant v. Pennell*, 61 Me. 108; s. c., 14 Am. Rep. 550.

Pending foreclosure proceedings under a mortgage of certain land, together with the rents, issues, and profits thereof, the court is authorized to appoint a receiver to take possession of the mortgaged premises and harvest and market the crop growing thereon which had been planted by defendant; the crops in such case would be part of the mortgaged property. *Montgomery v. Merrill*, 65 Cal. 432.

Where a mortgagor brought trover for the conversion of a crop of growing corn, *held*, that he was entitled to recover the value of the corn in the crib in which it had been put by the defendant after husking, and that if the defendant had commingled it with his own corn the duty of separating it lay on him; also that the cost of husking and gathering could not be deducted. *Stuart v. Phelps*, 39 Iowa, 14. See *Lewis v. Whittenmore*, 5 N. H. 364; *Benjamin v. Benjamin*, 15 Conn. 347; *Backenstoss v. Stahler*, 33 Pa. St. 251; *Cook v. Steel*, 42 Tex. 53. Compare *Lake Shore, etc., R. Co. v. Hutchins*, 32 Ohio St. 571; 37 Id. 282.

Where one mixes his own goods with those of another, which are mortgaged, and refuses to separate the goods, if the mortgagee takes the goods confounded with his own, he will not be a trespasser. *Fuller v. Paige*, 26 Ill. 358. See *Rider v. Hathaway*, 21 Pick. (Mass.) 298; *Simpson v. Carleton*, 1 Allen (Mass.), 109.

1. Where a surviving partner, after the death of his partner, still bought goods in the firm-name of another firm, of which he was a partner, and had or allowed the same to be charged to the old firm, the same as before the death of his partner, thereby so confounding that which was a liability of the firm with his as surviving partner as to render it impossible to separate the two, *held*, that the consequences of the confusion must fall upon him, unless he could

they must prove their claims.<sup>1</sup> (See EXECUTORS AND ADMINISTRATORS.) A trustee must not mingle the trust fund with his own. If he does, the *cestui que trust* may follow the trust property, and claim every part of the blended property which the trustee cannot identify as his own.<sup>2</sup> (See TRUSTS.)

**9. Real Property.**—Where permanent buildings or improvements are made upon real property in the way of buildings, etc., they become the property of the owner of the land.<sup>3</sup> (See FIXTURES.)

**ACCESSORY—ACCOMPLICE—AIDER—ABETTOR.** See particular titles, as ABDUCTION, ABORTION, etc.; also CONFESSION; CONSPIRACY; HOMICIDE; STRIKES.

1. Definition.
2. Aiders and Abettors.
3. Intent.
4. Indictment.
5. Persons seeking to discover Crime.
6. Innocent Agent.
7. Common Purpose.
8. Before the Fact.
9. Knowledge.
10. Where the Crime suggested is committed in a Different Way.
11. Where the Crime committed is Probable Consequence of the Crime suggested.
12. Where Instigation is countermanded.
13. Instigation to commit a Crime different from the one committed.
14. Constructive Presence.
15. As Principals.
16. After the Fact.
17. As Principals.
18. Evidence.

**1. Definition.**—An accessory is a person guilty of a felonious offence, not by being the actor or actual perpetrator of the crime, nor by being present at its performance, but by being in some way concerned therein either before or after its commission. If he has been concerned in it before its commission he is termed an accessory before the fact; if after, an accessory after the fact. An accessory before the fact is one who, being absent at the time the crime is committed, yet procures, counsels, or commands another to commit it; and, in this case, absence is necessary to constitute him an accessory, for if he is present he is guilty of the crime as principal. Thus if A advises B to kill another, and B does it in the absence of A, in this case B is principal, and A accessory to the murder. An accessory after the fact is one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon; and, generally, any assistance whatever given to a

show the parts chargeable to each. *Diversey v. Johnson*, 93 Ill. 547.

Where a factor sold goods of his principal, together with his own, and took one note for whole amount, which was paid, *held*, that the principal could recover his proportion of the amount of

the note. *Beach v. Forsyth*, 14 Barb. (N. Y.) 499.

1. Perry on Trusts, § 128.
2. Perry on Trusts, § 447.
3. 2 Kent's Com. 362; *Ewell on Fixtures*, 57.

Authorities for Accession.—2. *Shouler*



felon, to hinder his being apprehended, tried, or suffering punishment, makes such assister an accessory,—as, furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or using open force and violence to protect him.<sup>1</sup>

2. To abet is to incite a person to commit a crime: an abettor is a person who, being present or in the neighborhood, incites another to commit a crime, and thus becomes a principal.<sup>2</sup>

on Per. Prop. § 47 *et seq.*; Story's Bailments, § 40.

1. Brown's Law Dict. (Sprague's ed.); 2 Hawk. P. C. 316-318; Russell on Crimes (9th amd. ed.) 49; 4 Black. Com. c. 3; Wharton's Cr. L. § 213.

An accomplice is a person involved either directly or indirectly in the commission of the crime. To render him such, he must in some manner aid, or assist, or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party by reason of the criminal transaction. *People v. Smith*, 28 Hun (N. Y.), 626; *Cross v. People*, 47 Ill. 152.

The definition of an accomplice as "one who being present aids by acts or encourages by words the principal offender in commission of the offence" held erroneous, as such a person would be principal. *Smith v. State*, 13 Tex. App. 507.

Persons who play together at an unlawful game are several and joint offenders, and therefore not accomplices of each other. *Stone v. State*, 3 Tex. App. 675. Compare *Smith v. State*, 37 Ala. 472; *Bass v. State*, 37 Ala. 469; *English v. State*, 35 Ala. 428; *Davidson v. State*, 33 Ala. 350.

A person who joins in a game of tennis at the request of others, who are betting upon it, but without betting himself, is not an accomplice. *Bass v. State*, 37 Ala. 469; see *Smith v. State*, 37 Ala. 472.

The purchaser of liquor sold in violation of law is not an accomplice of the seller. *People v. Smith*, 28 Hun (N. Y.), 626; *State v. Teahan*, 50 Conn. 92.

A boy twelve years old who is coerced is not an accomplice. *Beal v. State*, 72 Ga. 200; *People v. Miller*, 6 Pac. Repr. (Cal.) 99.

To hold an accessory as principal, he must do some act to connect him with the crime while it is being committed. *Bean v. State*, 17 Tex. App. 60.

Merely approval of the act or sympathy with the perpetrator is not sufficient to constitute one an accessory. *State v.*

*Cox*, 65 Mo. 29; *Connaughty v. State*, 1 Wis. 169. Nor concealing the felonious purpose. *White v. People*, 81 Ill. 333.

A conspiracy may be inferred where it is shown that any two of the parties charged aimed by their acts to accomplish the same unlawful purpose or object, one performing one part and another another part of the same so as to complete it, although they never met together to confer the means or to give effect to the design. *U. S. v. Sacia*, 2 Fed. Repr. 754.

It is sufficient if it is proved that the defendants pursued by their acts the same object often by the same means, one performing one part and another another part of the same, so as to complete it with a view to the attainment of the same object. *Mussel Slough Case*, 5 Fed. Repr. 680.

A conspiracy to plunder a wrecked vessel within the admiralty and maritime jurisdiction of the United States is an offence under R. S. § 5440. *U. S. v. Sanche*, 7 Fed. Repr. 715.

Where two are engaged in committing a larceny from the person, all who are present, aiding or abetting, are principals; but one receiving stolen property is guilty of larceny alone. *People v. Sligh*, 48 Mich. 54.

3. Sweet's Law Dict.; 4 Bl. Com. 34.

Persons who are either actually or constructively present at the commission of an offence, aiding and abetting or counselling, and procuring the same to be done, are principals in the second degree. The aider and abettor of high treason is a principal in the first degree; the aider and abettor of a misdemeanor is also a principal in the first degree, but for a very different reason, namely, the maxim *de minimis non curat lex* (the law does not concern itself about trifles). Consequently aiders and abettors that are principals in the second degree are only found in the case of felonies, whether at common law or under any statute. The aider and abettor must participate in the felony, in the sense of acting in concert with those committing it; for although

Presence and participation are necessary to constitute a person an abettor.<sup>1</sup> But the mere fact of presence or failure to interfere to prevent the commission of a crime does not alone constitute the person a joint criminal with the active party, or cast on him the burden of proving his innocence.<sup>2</sup> He must do or say some-

he is present, yet if he does not participate, but remains passive, he is not an abettor. Moreover, the participation must be with a felonious intent, and not in ignorance of the nature of the act. *Brown's Law Dict.* (Sprague's ed.); *Sharp v. State*, 6 Tex. App. 650; *State v. Kirk*, 10 Oregon 505; *State v. Ellis*, 12 La. Ann. 390; *State v. McGregor*, 41 N. H. 407; *White v. People*, 81 Ill. 333; *Brennan v. People*, 15 Ill. 511; *Stevens v. People*, 67 Ill. 587; *Connaught v. State*, 1 Wis. 169; *U. S. v. Wheat*, (U. S.) 460; *State v. Comstock*, 46 Iowa, 265; *Williams v. State*, 20 Miss. 58; *Raiford v. State*, 59 Ala. 106; *King v. State*, 21 Ga. 220; *Hately v. State*, 15 Ga. 346; *Clem v. State*, 33 Ind. 418; *Doan v. State*, 26 Ind. 495; *People v. Erwin*, 4 Denio (N. Y.), 129; *Lowenstein v. People*, 54 Barb. (N. Y.) 299.

In misdemeanors, aiders and abettors are principals, and may be so charged in the indictment. *U. S. v. Gooding*, 12 Wheat. (U. S.) 460; *Com. v. Macomber*, 3 Mass. 254; *Com. v. Barlow*, 4 Mass. 439; *Brown v. Perkins*, 1 Allen (Mass.), 89; *Stevens v. People*, 67 Ill. 587; *People v. Erwin*, 4 Denio (N. Y.), 129; *Lowenstein v. People*, 54 Barb. (N. Y.) 299; *Dunman v. State*, 1 Tex. App. 593.

Where an attachment is wrongfully levied by a constable upon property which is exempt from attachment, and the property is sold by virtue of the attachment proceedings at the instance and by the direction of D, who is not a party to the suit, *held*, that D is responsible to the owner of the property for the value thereof; that any person who aids, abets, or assists in the commission of a wrongful act is equally liable with the principal; and any person who causes a wrong to be done is himself responsible for the wrong, even though the wrong may be accomplished or effected through the action of an innocent person. *Fish v. Street*, 27 Kan. 270.

A statute which provides that "every person who shall assist, abet, counsel, cause, hire, or command another to commit any offence may be prosecuted and punished as if he were the principal offender" does not apply to the case of the purchaser of liquor sold contrary to law. *State v. Teahan*, 50 Conn. 92. See *Harrington v. State*, 36 Ala. 236; *Peo-*

*ple v. Smith*, 28 Hun (N. Y.), 626, affirmed 92 N. Y. 665.

If there is a connection between the instigation and the committal of the offence, it is immaterial how long a period of time elapses. *Com. v. Glover*, 111 Mass. 395.

**Trespass.**—Any person who is present at the commission of a trespass, encouraging or inciting the same by words, gestures, looks, or signs, or who in any way, or by any means, countenances or approves the same, is, in law, deemed to be an aider and abettor, and liable as a principal. *Cooper v. Johnson*, 81 Mo. 483; *Com. v. Hurley*, 99 Mass. 433; *People v. Hodges*, 27 Cal. 340.

1. He must be present, and aiding and abetting; but if he assented to the crime and was in a situation where he might render some aid, he would be present and aiding in the commission of the crime. *Com. v. Knapp*, 9 Pick. (Mass.) 496; s. c., 20 Am. Dec. 491; *Connaught v. State*, 1 Wis. 169.

If one sees another hiding stolen property, and refuses to give information to officers searching for it, he is an aider and abettor. *State v. St. Clair*, 17 Iowa, 149. See *State v. Turner*, 19 Iowa 144; *Kelly v. Commonwealth*, 1 Grant (Pa.), 484; *Brown v. State*, 28 Ga. 199; *Strawhorn v. State*, 37 Miss. 422.

2. *People v. Ah-Ping*, 27 Cal. 489; *People v. Woodward*, 45 Cal. 293; s. c., 13 Am. Rep. 176; *Connaught v. State*, 1 Wis. 169; *Kemp v. Commonwealth*, 80 Va. 443; *Lowery v. State*, 72 Ga. 649; *Butler v. Commonwealth*, 2 Duvall (Ky.), 435; *Plummer v. Commonwealth*, 1 Bush (Ky.), 76; *Smith v. State*, 37 Ark. 274; *State v. Maloy*, 44 Iowa, 104; *Brown v. Perkins*, 1 Allen (Mass.), 89; *Fost. 350*.

In *State v. Hildreth*, 9 Ired. (N. Car.) 440; s. c., 51 Am. Dec. 369, the court said: "For one who is present and sees that a felony is about being committed and does in no manner interfere does not thereby participate in the felony committed." *United States v. Jones*, 3 Wash. (U. S.) 209.

Where a reasonable doubt exists as to a person's intention in interfering in a struggle between two other persons, he cannot be held to aid and abet. *Guilford v. State*, 24 Ga. 315.

Mere presence without endeavoring to

thing showing consent to the felonious purpose, and must contribute to its execution.<sup>1</sup> The advice or encouragement may be by words, acts, signs, or motions;<sup>2</sup> and may be given by one incompetent to commit the offence as principal, by reason of not being of the particular sex, age, condition, or class.<sup>3</sup> Actual presence is not essential; it may be constructive.<sup>4</sup>

**3. Intent.**—When the existence of a particular intent forms part of the definition of an offence, a person charged with aiding and abetting the commission of the offence must be shown to have known of the existence of the intent on the part of the person so aided.<sup>5</sup>

prevent the commission of a trespass will not render a person liable as a participator, but any encouragement or aid given, or any concert of action or aid thereto, will render such one liable as principal. *Hilmes v. Stroebel*, 59 Wis. 74.

A witness who testifies on trial for burning a jail that accused invited him to go down and see him "upset the jail," and he did go down and see him wrench off the lock from the door of the jail and enter it, and that the accused afterwards confessed to him that he had burned the jail, is not generally by such testimony deemed to be an accomplice. *State v. Reader*, 60 Iowa, 527.

1. *State v. Hildreth*, 9 Ired. (N. Car.) 440; s. c., 51 Am. Dec. 369; *White v. People*, 81 Ill. 333. Where two persons are present at the time of a homicide, and but one commits the crime, and the other does not aid, abet, or assist, but afterwards they both, with guilty knowledge, conceal the fact of the crime, the one not participating in the crime is only guilty as an accessory after the fact, and is not guilty of murder.

2. *Brown v. Perkins*, 1 Allen (Mass.), 89; *McMannus v. Lee*, 43 Mo. 206; *Brennan v. People*, 15 Ill. 511; *Kennedy v. People*, 40 Ill. 488; *R. v. Bingley*, Russ. & R. C. C. 446; *R. v. Kelly*, Ib. 421.

3. An unmarried man who is present and aids a friend in committing bigamy is guilty as principal in the second degree. *Boggus v. State*, 34 Ga. 275.

A woman aiding and abetting an attempt to commit a rape is guilty as principal. *State v. Jones*, 83 N. Car. 605; s. c., 35 Am. Rep. 586; *State v. Comstock*, 46 Iowa, 265.

Aiders and abettors in statutory offences are punishable as principals, under the statute, although not expressly referred to in the statute, as in the case of one who aided a postmaster to make a false return to the auditor for the purpose of fraudulently increasing his compensation.

*U. S. v. Snyder*, 14 Fed. Repr. 554. Compare *Stamper v. Commonwealth*, 7 Bush (Ky.), 612; *Bland v. Commonwealth*, 10 Bush (Ky.), 622.

Although a wife was the real owner of a store, yet if her husband controlled and managed it, and spirituous liquors were sold therein without a license, he would be guilty of that offence; nor would it be material that the liquor was sold by a clerk in the store, if the husband were present at the time, controlling and managing it. *Faircloth v. State*, 73 Ga. 426.

4. Illustration: A, B, C, and D go out with a common design to rob. A commits the robbery; B stands by ready to help; C is stationed some way off, to give the alarm if any one comes. A is principal in the first degree; B, C, and D are principals in the second degree. *Stephens Dig. Cr. L.*, Am. ed. 126.

*State v. Hamilton*, 13 Nev. 386, where by arrangement L built a fire on the top of a mountain in Eureka Co. as a signal to his confederates in Nye Co. of the approach of a stage with treasure which it was proposed to rob.

Presence may be constructive. *McCarney v. People*, 83 N. Y. 409. *State v. Heyward*, 2 N. & McC. (S. Car.) 312; s. c., 10 Am. Dec., 604; *Ruloff v. People*, 45 N. Y. 213; *Selvidge v. State*, 30 Tex. 60; *Breese v. State*, 12 Ohio St. 146; *State v. Nash*, 7 Iowa, 347; *Com. v. Lucas*, 2 Allen (Mass.), 170; *Doan v. State*, 26 Ind. 495; *R. v. Kelly* Russ. & R. C. C. 421. This case Mr. Stephens says (*Dig. Cr. Law*, Am. ed. 26, n.) "perhaps marks the line between a principal in the second degree and an accessory. B stole horses and brought them to A, who was waiting half a mile off; A and B then rode away on them. It was held that A was an accessory before the fact. The distinction is now of no importance." *State v. Fley*, 2 Brev. (S. Car.) 338; s. c., 4 Am. Dec. 583.

5. B is indicted for inflicting on C an

**4. Indictment.**—If those who aid and abet the commission of a crime are required by statute to be indicted as principals, the indictment must be the same as though they were principals.<sup>1</sup> An indictment need not allege, when the prisoner is charged as accessory, the conviction of the principal.<sup>2</sup> Acquittal as principal in a murder is no bar to an indictment as accessory.<sup>3</sup> Aiders and abettors may be indicted or tried as principals in cases of murder.<sup>4</sup>

**5. Persons seeking to discover Crime.**—A person who enters into communication with criminals and assists them, without any criminal intent, but solely for the purpose of discovery and making known their crimes, is not an accomplice.<sup>5</sup>

**6. Innocent Agent.**—Whoever commits a crime by an innocent agent is a principal, but the agent is excused.<sup>6</sup>

injury dangerous to life, with intent to murder. A is indicted for aiding and abetting B. A must be shown to have known that it was B's intent to murder C; and it is not enough to show that A helped B in what he did. *Stephens Dig. Cr. L., Am. ed. 26.* If B and C have had a quarrel with A, and A approaches B and C, and B commands him to halt or he will shoot him, and C then shoots A, the circumstances do not necessarily import a common criminal intent between B and C to kill A, so as to make B guilty. *People v. Leith, 52 Cal. 251; Savage v. State, 18 Fla. 909.*

1. *State v. Hessian, 58 Iowa, 68; State v. Fley, 2 Brev. (S. Car.) 338; s. c., 4 Am. Dec. 583.* The court held it is not material which of several is charged as principal in the first degree, for the mortal injury done by any one of the persons is the act of each and every one of them. *State v. Kirk, 10 Oregon, 505.* Held, one present, aiding and abetting in the commission of a felony, may be convicted on an indictment charging him directly with committing the crime.

2. *State v. Crank, 2 Bailey (S. Car.) 66; s. c., 23 Am. Dec. 117.* An abettor in a crime may be guilty of murder, though his principal may be guilty of manslaughter or even legally innocent. See *People v. Bearss, 10 Cal. 68; People v. Newberry, 20 Cal. 439; Hatchett v. Commonwealth, 75 Va. 925.*

3. *State v. Buzzell, 58 N. H. 257; s. c., 42 Am. Rep. 586.*

4. *State v. Ross, 29 Mo. 32; Commonwealth v. Chapman, 11 Cush. (Mass.) 422; Freil v. State, 21 Ark. 212; State v. Putnam, 18 S. Car. 175; s. c., 44 Am. Rep. 569.*

5. Where a person buys liquor sold in violation of the excise law. *Com. v. Downing, 4 Gray (Mass.), 29; Com. v.*

*Willard, 22 Pick. (Mass.) 476; People v. Smith, 28 Hun (N. Y.), 626; affirmed, 94 N. Y. 649; Harrington v. State, 36 Ala. 236.*

Where a person united with others to steal horses, in order to detect the thieves. *State v. McKean, 36 Iowa, 343; s. c., 14 Am. Rep. 530.*

Where a detective joined criminal organization for the purpose of discovering and punishing the crime of murder. *Campbell v. Commonwealth, 84 Pa. St. 187.*

6. If A tells B, a child under seven, to bring him money belonging to C, and B does so, A is a principal. *R. v. Manley, 1 Cox C. C. 104.* Or gives a counterfeit bill to a boy, ignorant of its nature, to have it changed. *Com. v. Hill, 11 Cush. (Mass.) 136.* Or makes an innocent party the custodian of stolen goods. *People v. McMurray, 4 Park. Cr. (N. Y.) 234.* Or induces a boy to commit arson. *People v. Katz, 23 How. Pr. (N. Y.) 93.* If a person incites an insane person or a child or other innocent agent to commit a crime, he is liable as principal. *Com. v. McLoon, 101 Mass. 1; Com. v. White, 123 Mass. 116; s. c., see 25 Am. Rep. 116; People v. Adams, 3 Den. (N. Y.) 190; s. c., 45 Am. Dec. 470; U. S. v. Ross, 1 Gall. (U. S.) 624; State v. Lucas, 55 Iowa, 321; State v. Simmons, 6 Jones L. (N. Car.) 21; Peden v. State, 61 Miss. 267; State v. Allen, 47 Conn. 121; People v. Knapp, 26 Mich. 112; Mitchell v. Commonwealth, 33 Gratt. (Va.) 845; Berry v. State, 4 Tex. App. 492; Taylor v. State, 9 Tex. App. 100; State v. Putnam, 18 S. Car. 175; s. c., 44 Am. Rep. 569; People v. Woodward, 45 Cal. 293; s. c., 13 Am. Rep. 176; People v. Brown, 59 Cal. 345; Hamilton v. People, 113 Ill. 34; Lamb v. People, 96 Ill. 73; Brennan v. People, 15 Ill. 516; Williams v. State,*

**7. Common Purpose.**—When several persons take part in the execution of a common criminal purpose, each is a principal, in respect of every crime committed by any one of them in the execution of that common purpose; but if any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals nor accessories unless they actually instigate or assist in its commission.<sup>1</sup>

47 Ind. 568; *Com. v. Knapp*, 9 Pick. (Mass.) 496; *Norton v. People*, 8 Cow. (N. Y.) 37; *Ruloff v. People*, 45 N. Y. 213; 1 Bishop Cr. L. § 636; 1 Russ. on Crimes; 2 Wharton's Cr. Law, § 998.

1. A constable and his assistants go to arrest A at a house in which are many persons. B, C, and D, and others come from the house, drive the constable and his assistants off, and one of the assistants is killed, either by B, C, D, or one of their party. Each of the party is equally responsible for the blow, whether he actually struck it or not. *Stephen's Dig. Cr. L. (Am. Ed.)* 27.

Three soldiers go to rob an orchard. Two get into a fruit-tree; the third stands at the door with a drawn sword, and stabs the owner, who tries to arrest him. The men in the tree are neither principals nor accessories, unless all three came with a common resolution to overcome all opposition. *Stephen's Dig. Cr. L. (Am. Ed.)* 27.

Two parties of persons fight in the street about the removal of goods to avoid a distress. One of the persons engaged kills a looker-on totally unconcerned in the affray. The other persons present are not responsible for his crime. *Stephen's Dig. Cr. L. (Am. Ed.)* 27.

Two persons go out to commit theft. One, unknown to the other, puts a pistol in his pocket, and shoots a man with it. The other person is not responsible for the shot. *Stephen's Dig. Cr. L. (Am. Ed.)* 27.

Two private watchmen, seeing the prisoner and another person with two carts laden with apples, went up to them, intending as soon as they could get assistance to secure them; one of the watchmen walked beside the prisoner, and the other watchman beside the other person, at some distance from the prisoner. The other person wounded the watchman who was near him. *Held*, that the prisoner could not be convicted of his wounding, unless the jury should be satisfied that the prisoner and the other person had not only gone out with a common purpose of stealing apples, but also had the common purpose of resisting with extreme violence any person

who might attempt to apprehend them. *R. v. Collison*, 4 C. & P. 565. Compare *Frank v. State*, 27 Ala. 37; *Thompson v. State*, 25 Ala. 41; *Com. v. Campbell*, 7 Allen (Mass.), 541; *People v. Knapp*, 26 Mich. 112; *Watts v. State*, 5 W. Va. 532.

If several conspire to beat A, but not to kill him, and, after tying him for the purpose of beating him, one of the conspirators abandons the enterprise and goes away, and the others kill A, the one who so went away cannot be convicted of murder. *Harris v. State*, 15 Tex. App. 629; see *State v. Allen*, 47 Conn. 121.

If several persons agree together to rob another, and for that purpose arm themselves with deadly weapons, and meet at the house of the person to be robbed, and to carry out their unlawful design one is left outside, ready to aid and assist, while the others enter and commit the crime agreed on, all are guilty of the robbery as principals. So, if those inside the house, while attempting to consummate the robbery, and in furtherance of such conspiracy, purposely kill the person they are attempting to rob, while he is resisting such attempt, and such killing is the natural and probable consequence of the common purpose, the person outside who is aiding and assisting is equally guilty as the one striking the fatal blow, though he did not, previous to such attempt, agree to or assent to such killing. *Stephens v. State*, 42 Ohio St. 150.

In April, 1882, W became the purchaser, upon conditions, of the right to operate a certain gas-well. He moved upon the premises and commenced operations preparatory to conducting the gas to practical use. In June, 1883, other parties made a contract with the persons from whom W had obtained the property, for the purchase of the same interest that had been conveyed to W. They thereupon entered upon the property whereon the well was situated and expelled W. In the struggle between the rival claimants H was killed by B, who was in the employ of W. W was indicted, found guilty of manslaughter, and sentenced to be im-

**8. Before the Fact.**—An accessory before the fact is one who directly or indirectly counsels, procures, or commands any person to commit any crime which is committed in consequence of such counselling, procuring, or commandment.<sup>1</sup> Such accessory before the fact may be by statute indicted and tried as a principal.<sup>2</sup>

prisoned. *Held*, that the conviction was sustained by the evidence; that one who is present, with others, aiding or abetting in a common purpose, is responsible for the act of one of the party which results in the killing of a person, providing the killing was in pursuance of or an incidental probable consequence of such purpose. The intent to hold possession of property by a show of arms, for intimidation only, is unlawful and draws to itself the consequences of acts done in carrying it into execution. *Weston v. Com.*, 111 Pa. St. 251.

If several are associated together to commit a robbery, and one of them, while all are engaged in the common design, intentionally kills the person they are attempting to rob, in furtherance of the common purpose, all are equally guilty, though the others had not previously consented to the killing, where such killing was done in the execution of the common purpose, and was a natural and probable result of the attempt to rob. *People v. Vasquez*, 49 Cal. 560; *People v. Pool*, 27 Cal. 572; *State v. Shelledy*, 8 Iowa, 477; *U. S. v. Ross*, 1 Gall. (U. S.) 624; *State v. Nash*, 7 Iowa, 347; *Stipp v. State*, 11 Ind. 62; *Stephens v. State*, 42 Ohio St. 150; *Breese v. State*, 12 Ohio St. 146; *Miller v. State*, 25 Wis. 384; *Carr v. State*, 43 Ark. 99; *Williams v. State*, 9 Mo. 270; *State v. Davis*, 29 Mo. 391.

1. 4 Bl. Com. c. 3.

An accessory before the fact is defined by Lord Hale to be one who, being absent at the time of the offence committed, does yet procure, counsel, command, or abet another to commit a felony. 1 Hale P. C. 615. The bare concealment of a felony to be committed will not make the party concealing it an accessory before the fact. 2 Hawk. c. 29, s. 23. So words amounting to a bare permission will not render a man an accessory; as, if A says he will kill J. S., and B says, "you may do your pleasure for me," Hawk. P. C. b. 2, c. 29, s. 16. The procurement must be continuing; for if before the commission of the offence by the principal, the accessory countermands him, and yet the principal proceeds to the commission of the offence, he who commanded him will not be guilty as accessory. 1 Hale P. C. 618.

If B procures C to commit a robbery, and C kills A to conceal the robbery, B is guilty as accessory before the fact to the murder. *State v. Davis*, 87 N. Car. 514. See *Washington v. State*, 68 Ga. 570; *Stratton v. State*, 45 Ind. 468; *Clem v. State*, 33 Ind. 418; *Goff v. Prime*, 26 Ind. 196; *Baker v. State*, 12 Ohio St. 214; *Jones v. State*, 13 Tex. 168; *State v. Mann*, 1 Hayw. (N. Car.) 4; *People v. Shepardson*, 48 Cal. 189; *People v. Hodges*, 27 Cal. 340; *Norton v. People*, 8 Cow. (N. Y.) 137; *People v. McMurray*, 4 Park Cr. (N. Y.) 234; *People v. Knapp*, 26 Mich. 112; *Keith v. State*, 10 Smedes & M. (Miss.) 191.

A person may render himself an accessory by the intervention of a third person, without any direct communication between himself and the principal. Thus if A bids his servant to hire somebody to murder B, and furnishes him with money for that purpose, and the servant hires C, a person whom A never saw or heard of, who commits the murder, A is an accessory before the fact. *Fost.* 121; *R. v. Macdaniel*, 1 Lea, 44; *Hawk. P. C.* b. 2, c. 29, ss. 1, 11; 1 Russ. Cri. (5th ed.) 166; *R. v. Cooper*, 5 C. & P. 535.

2. *Noland v. State*, 18 Ohio, 131; *Brown v. State*, 18 Ohio St. 496; *Levy v. People*, 80 N. Y. 327; *State v. Cassidy*, 12 Kan. 550; *Ulmer v. State*, 14 Ind. 52; *Stipp v. State*, 11 Ind. 62; *Com. v. Hughes*, 11 Phila. (Pa.) 430; *Mitchell v. Commonwealth*, 33 Gratt. (Va.) 845; *People v. Davidson*, 5 Cal. 133; *People v. Bearss*, 10 Cal. 68.

At common law the instigator was regarded as an accessory before the fact in felonies, and must be indicted and tried as such. In cases of misdemeanor, however, all were principals. *People v. Lyon*, 99 N. Y. 210; *McCarney v. People*, 83 N. Y. 409; *Irvine v. Wood*, 51 N. Y. 224; *Wixson v. People*, 5 Park Cr. (N. Y.) 121; *Able v. Commonwealth*, 5 Bush (Ky.), 698; *Tully v. Commonwealth*, 11 Bush (Ky.), 154; *English v. State*, 35 Ala. 428; *Bieber v. State*, 45 Ga. 570; *Parsons v. State*, 43 Ga. 197; *U. S. v. White*, 5 Cranch C. C. 38.

All distinction between principal and accessory before the fact has been abolished in Missouri. *State v. Fredericks*, 85 Mo. 145.

9. **Knowledge** that a person intends to commit a crime, and conduct connected with, and influenced by, such knowledge, is not enough to make the person who possesses such knowledge, or so conducts himself, an accessory before the fact to any such crime, unless he does something to encourage its commission actively.<sup>1</sup>

One who advises or encourages the commission of a felony, but is not actually or constructively present when it is committed, cannot be convicted under an indictment charging him as principal in the crime. *Smith v. State*, 37 Ark. 274.

Upon the trial of an indictment for larceny it did not appear that the prisoner was present at the warehouse from which the property was taken, or in its close vicinity, but there was proof upon the trial tending to show that he had part in planning the theft and in learning the situation of the premises and the ways of the keeper thereof; that the one who was in fact engaged in taking the property sent the porter of the warehouse to the house of the keeper with a letter, and promised a reward, upon his calling, after the delivery of it, at a specified street and number; and that on reaching the street, while searching for the number, he met the prisoner and conversed with him about the keeper and his whereabouts. *Held*, that the testimony was sufficient to authorize the submission of the question of the prisoner's participation as principal in the theft to the jury. *McCarney v. People*, 83 N.Y. 408.

**Degree of Incitement.**—Upon the subject of the degree of incitement and the force of persuasion used no rule is laid down. That it was sufficient to effectuate the evil purpose is proved by the result. On principle it seems that any degree of direct incitement with the actual intent to procure the consummation of the illegal object is sufficient to constitute the guilt of the accessory; and therefore that it is unnecessary to show that the crime was effected in consequence of such incitement, and that it would be no defence to show that the offence would have been committed although the incitement had never taken place. 2 Stark. Ev. 9, 3d ed. Where a man furnished a woman with corrosive sublimate at her request, which she took with intent to procure abortion, but he did not instigate her to take it, and his conduct was consistent with his having hoped that she would change her mind, it was held that he was not an accessory before the fact. *R. v. Fretwell*, 1 L. & C. 161; 31 L. J. M. C. 145. So a mere holder of stakes for a prize-fight who is not present, but who afterwards paid over the stakes to the winner, was

held not an accessory after the fact to the manslaughter of the man who was killed in the fight. *R. v. Taylor*, L. R. 2 C. C. 148; 44 L. J. M. C. 67.

1. A supplies B with corrosive sublimate, knowing B means to use it to procure her own abortion, but being unwilling that she should take the poison, and giving it to her because she threatened to kill herself if he did not. B does so use it, and dies. Even if B is guilty of murdering herself, A is not an accessory before the fact to such murder. *R. v. Fretwell*, Leigh & C. 161. Contrast with this *R. v. Russell*, 1 Moody, 356.

B and C agree to fight a prize-fight for a sum of money. A, knowing their intention, acts as stakeholder. B and C fight, and C is killed. A is not present at the fight, and has no concern with it except as stakeholder. Even if in such a case there can be an accessory before the fact, A is not accessory before the fact to the manslaughter of C. *R. v. Taylor*, L. R. 2 C. C. R. 147.

L swore that M, himself, and several others were members of a secret organization, called "Ku-Klux"; that this band was bound by oath to keep secret the doings and works of their order; that they had officers, of whom M was the captain; that H rendered himself obnoxious to the order by talking about them, and that at one of their regular monthly meetings it was determined that he must be whipped; that accordingly a party of masked men, among whom were M and L, went to H's house at night, took him out and flogged him. L was present and saw the whipping administered, but did not actively participate in it. About a week after this, the society held a called meeting to take some further steps concerning H, as he continued to talk about them. M, L, and others were present. After discussion it was resolved that H should be put to death. L said he opposed this resolution and never did assent to it. M and one R volunteered to do the act. In the course of the following week M and R came to witness's house and after night picked up their guns and left, telling the wife of witness to set the clock back, as they were going to kill H, but returned after a while and stated that the night was too dark to accomplish their purpose. Some

**10. Where the Crime suggested is committed in a Different Way.**—When a person instigates another to commit a crime, and the person so instigated commits the crime, but in a different way from that in which he was instigated to commit it, the instigator is an accessory before the fact to the crime.<sup>1</sup>

**11. Where Crime committed is Probable Consequence of Crime suggested.**—If a person instigates another to commit a crime, and the person so instigated commits a crime different from the one which he was instigated to commit, but likely to be caused by such instigation, the instigator is an accessory before the fact.<sup>2</sup>

**12. Where Instigation is countermanded.**—If an accessory before the fact countermands the execution of the crime before it is executed, he ceases to be an accessory before the fact, if the principal had notice of the countermand before the execution of the crime, but not otherwise.<sup>3</sup>

**13. Instigation to commit a Crime different from the one committed.**—When a person instigates another to commit a crime, and the person so instigated commits a different crime, the instigator is not accessory before the fact to the crime so committed, unless such crime was committed with his assent or is a probable consequence of the instigation.<sup>4</sup>

time after that H was killed, and M soon afterwards confessed to witness that he and R had done it, and described how they had done the act. L had kept the secret until about one year before the trial, when he divulged it. His reason was that he was afraid of personal violence at the hands of the band. He had been examined as a witness before the coroner's jury that held the inquest over H's dead body, and also before a grand jury, and had denied any knowledge of the authors of the crime. *Held*, that L was not an accomplice. *Melton v. State*, 43 Ark. 367.

If one knows that a crime is contemplated and absents himself in order to facilitate its commission, he is guilty as principal. *State v. Poynier*, 36 La. Ann. 572.

1. A advises B to murder C by shooting; B murders C by stabbing; A is accessory before the fact to the murder of C. *Stephen's Dig. Cr. L. (Am. Ed.)* 29. See *Watt v. State*, 5 W. Va. 532.

2. A describes C to B, and instigates B to murder C. B murders D, whom he believes to be C, because D corresponds with A's description of C. A is accessory before the fact to the murder of D. *Foster Cr. Cas.* 370.

A instigates B to rob C; B does so; C resists, and B kills C. A is accessory before the fact to the murder of C. *Ib.*

A advises B to murder C (B's wife) by poison. B gives C a poisoned apple,

which C gives to D (B's child). B permits D to eat the apple, which it does, and dies of it. A is not accessory to murder of D. *Saunders' Case*, Plowd. 475; *Hale Pleas. Cr.* 431. See note, *Stephen's Dig. Cr. L. (Am. Ed.)* 29.

3. A advises B to murder C, and afterwards by letter withdraws his advice. B does murder C. A is not an accessory before the fact if his letter reaches B before he murders C; but he is if it arrives afterwards. *1 Hale Pleas. Cr.* 618.

4. If the principal totally and substantially vary from the terms of the instigation—if, being solicited to commit a felony of one kind, he willingly and knowingly commit a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. Thus if A command B to burn C's house, and he in so doing commits a robbery; now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and inconsequential nature. And if A counsels B to steal goods of C on the road, and B breaks into C's house and steals there, A is not accessory to the breaking the house, because that is a felony of another kind. He is, however, accessory to the stealing. But if the principal complies in substance with the instigation of the accessory, varying only in circumstances of time or place, or in the manner of execution, the accessory will be involved in his guilt; as if A commands



**14. Constructive Presence.**—A crime is deemed to be committed and punishable in one State (New York) when a person, though situate in another State (Ohio) and there originating and concoct-

B to murder C by poison and B does it by a sword or other weapon, or by any other means, A is accessory to this murder; for the murder of C was the object principally in contemplation, and that is effected; and it seems that if A counsels B to steal goods in C's house, but not to break into it, and B does break into it, A is accessory to the breaking. And where the principal goes beyond the term of the solicitation, yet, if in the event the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to the felony. As, if A advised B to rob C, and in robbing him B kills him, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery; or if A solicit B to burn the house of C, and B does it accordingly, and the flames take hold of the house of D, that likewise is burnt. In these cases A is accessory to B, both in the murder of C and in the burning of the house of D. Russell on Crimes (9th Am. Ed.), 62.

Where the principal wilfully commits a different crime from that which he is commanded or advised to commit, the party counselling him will not be guilty as accessory. But whether, where the principal by mistake commits a different crime, the party commanding or advising him shall stand excused, has been the subject of much discussion. It is said by Lord Hale, that if A commands B to kill C, and B by mistake kills D, or else in striking at C kills D, but misses C, A is not accessory to the murder of D, because it differs in the person. 1 Hale P. C. 617, citing 3 Inst. 51; R. v. Saunders, Plow. Com. 475. The circumstances of Saunders's case, cited by Lord Hale, were these: Saunders, with the intention of destroying his wife, by the advice of one Archer mixed poison in a roasted apple, and gave it to her to eat, and the wife having eaten a small part of it, and given the remainder to their child, Saunders making only a faint attempt to save the child, whom he loved and would not have destroyed, stood by and saw it eat the poison, of which it soon afterwards died. It was held that though Saunders was clearly guilty of the murder of the child, yet Archer was not accessory to the murder.

Upon the law as laid down by Lord

Hale, and upon R. v. Saunders, Mr. Justice Foster has made the following observations, and has suggested this case: B is an utter stranger to the person of C, and A therefore takes upon himself to describe him by his stature, dress, etc., and acquaints B when and where he may probably be met with. B is punctually at the time and place, and D, a person in the opinion of B answering the description, unhappily coming by, is murdered under a strong belief on the part of B that he is the man marked out for destruction. Who is answerable? Undoubtedly A: the malice on his part *egreditur personam*. The pit which he, with a murderous intention, dug for C, D fell into and perished. Through his guilt, B, not knowing the person of C, had no other guide to lead him to his prey than the description of A, and in following his guide he fell into a mistake, which it is great odds any man in his circumstances might have fallen into. "I therefore," continues the learned writer, "as at present advised, conceive that A was answerable for the consequences of the flagitious orders he gave, since that consequence appears in the ordinary course of things to have been highly probable." Foster, 370. With regard to Archer's case, the same learned author observes that the judges did not think it advisable to deliver him in the ordinary course of justice by judgment of acquittal, but for example's sake kept him in prison by frequent reprieves from session to session, till he had procured a pardon from the crown. Ibid. 371. Mr. Justice Foster then proposes the following *criteria*, as explaining the grounds upon which the several cases falling under this head will be found to rest. Did the principal commit the felony he stands charged with, under the flagitious advice, and was the event, in the ordinary course of things, a probable consequence of that felony? Or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind or upon a different subject? Foster, 372. See also Hawk. P. C. b. 2, c. 29, s. 22. Roscoe's Cr. Ev. (10th ed.) 184.

A instigates B to murder C; B murders D. A is not accessory before the fact to the murder of D. Foster Cr. Cas. 369, s. 1; State v. Lucas, 55 Iowa, 321; Watts v. State, 5 W. Va. 532.

ing the crime, consummates it in the other State (New York) by innocent agents there employed and acting under his authority.<sup>1</sup>

**15. Accessories before the Fact as Principals.**—At common law an accessory before the fact could only be tried jointly with the principal, or after the conviction of the principal;<sup>2</sup> but by statute in

A and B joined in a rape. After A had left the place, B, in attempting to escape, killed the woman. A was not an accessory to the homicide. *People v. Knapp*, 26 Mich. 112.

If a person, a party to an agreement to commit a burglary and steal goods from a store and conceal the same for disposition, who was not present at the time others of the conspirators were unloading and depositing the stolen goods at a pawnbroker's shop, when, upon being accosted by a police officer, some one of the persons who were present at such unloading and depositing shot and killed the officer, the co-conspirator who was absent at the time of the killing, not having aided or abetted, advised or encouraged, the homicide, nor, before its commission, advised the persons in charge of the stolen goods to oppose and resist any and all persons who should attempt to seize the same, or interrupt them in secreting or disposing of the goods, will not be liable criminally for the homicide. *Lamb v. People*, 96 Ill. 73.

A husband, desiring to obtain a divorce from his wife, employed a man to seduce her while he could be a witness. The man, not being able to accomplish his purpose by persuasion, resorted to force, and raped the woman, who screamed and endeavored to protect herself, while the husband stood by in a concealed place, and not only refused to assist her, but subsequently filed a petition for divorce on the ground of his wife's adultery on this occasion. The husband, under these circumstances, was held to be guilty of rape. *People v. Chapman*, 28 N. W. Repr. (Mich.) 896.

Several soldiers employed by the messenger of the secretary of state to assist in the apprehension of a person unlawfully broke open the door of a house where the person was supposed to be. Having done so, some of the soldiers began to plunder, and stole some goods. The question was, whether this was felony at all. *Holt, C.J.*, observing upon this case, says that they were all engaged in an unlawful act is plain, for they could not justify the breaking a man's house without first making a demand. Yet all those who were not guilty of stealing were acquitted, notwithstanding their being engaged in an un-

lawful act of breaking the door; for this reason, because they knew not of any such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands. *Anon.* 1 Leach, 7 (n); 1 Russ. Cri. 162 (j), 5th ed. See also *R. v. White, R. & R.* 99; *R. v. Hawkins*, 3 C. & P. 392.

Three men went out into a field to shoot, and placed a target in a tree eight feet from the ground. They lay down on the ground, and each fired at it in turn. Their rifles were sighted to shoot 950 yards, and would probably be deadly at a mile. A boy in an apple-tree 393 yards off was killed by one of the shots; but it was uncertain which of the prisoners had shot him. They were all held to be guilty of manslaughter. *Reg. v. Salmon*, L. R. 6 Q. B. 79; 50 L. J., M. C. 25. It is, perhaps, open to doubt that if only one had fired his rifle all would have been equally guilty. *Lord Coleridge, C.J.*, said, "the death resulted from the action of the three," and *Stephen, J.*, said, "they unite to fire at the spot in question."

See *Com. v. Campbell*, 7 Allen (Mass.), 541; *State v. Stalcup*, 1 Ired. (N. Car.) 30; *Watts v. State*, 5 W. Va. 532; *Manier v. State*, 6 Baxt. (Tenn.) 595; *Lamb v. People*, 96 Ill. 73; *Brennan v. People*, 15 Ill. 511; *State v. Lucas*, 57 Iowa, 501; *People v. Knapp*, 26 Mich. 112; *Miller v. State*, 15 Tex. App. 125; *Harris v. State*, 15 Tex. App. 639.

1. *People v. Adams*, 3 Denio (N. Y.), 190; s. c., 45 Am. Dec. 468; *Com. v. White*, 123 Mass. 430; s. c., 25 Am. Rep. 116; *State v. Chapman*, 6 Nev. 320.

2. 4 Black. Com. 40. See *Stoops v. Commonwealth*, 7 Serg. & R. (Pa.) 491; *Holmes v. Commonwealth*, 25 Pa. St. 221; *Com. v. Knapp*, 10 Pick. (Mass.) 477; *People v. Lyon*, 99 N. Y. 210; *Able v. Commonwealth*, 5 Bush (Ky.), 698; *Tully v. Commonwealth*, 11 Bush (Ky.), 154; *State v. Wyckoff*, 2 Vroom (N. J.), 65; *Walrath v. State*, 8 Neb. 80; *Hughes v. State*, 12 Ala. 458; *Josephine v. State*, 39 Miss. 613; *Keech v. State*, 15 Fla. 591; *McCarty v. State*, 44 Ind. 214; s. c., 15 Am. Rep. 232; 1 Archbald's Cr. P. & P. (Pomeroy's ed.) 68; 1 Whart. Cr. L. § 208; *Bish. Cr. L.* § 666.

most of the States he may be indicted, tried, convicted, and punished as if he alone and independently had committed the crime.<sup>1</sup> In misdemeanors there are no accessories, but all who participate in the commission of the act, or aid therein, are principals.<sup>2</sup>

**16. Accessories after the Fact.**—Every one is an accessory after the fact to a crime who, knowing a crime to have been committed

At common law the accessory is released by the acquittal of the principal. *U. S. v. Crane*, 4 McL. (U. S.) 317.

Before the 7 Geo. 4, c. 64, accessories could not, except by their own consent, be punished until the guilt of the principal offender was established. It was necessary, therefore, either to try them after the principal had been convicted or upon the same indictment with him, and the latter was the usual course. 1 Russ. Cri. 174, 5th ed. This statute is now repealed, and by the 24 and 25 Vict. c. 94, s. 1, it is enacted that "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted, tried, convicted and punished in all respects as if he were a principal felon." By s. 2, "whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as an accessory before the fact to the same felony, if convicted as an accessory, may be punished."

Soliciting and inciting a person to commit a felony is not a substantive felony under this section, unless the felony is actually committed, but only a misdemeanor; and it is doubtful whether a soliciting and inciting is equivalent to a counselling and procuring. *R. v. Gregory*, L. R. 1 C. C. R. 77; 36 L. J., M.C. 60.

It was decided upon the 11 and 12 Vict. c. 46, s. 1 (which is in the same terms as the 24 and 25 Vict. c. 94, s. 1, and was passed to remedy a defect in the 7 Geo. 4, c. 64), that a person charged as an accessory before the fact may be convicted even though the principal be acquitted. *R. v. Hughes*, Bell C. C. 242. The two first counts charged A and B with steal-

ing, and the third count charged B with receiving. No evidence was offered against A, who was acquitted and called as a witness. The evidence went to show that B was an accessory before the fact, and the jury found a general verdict of guilty. It was held that the conviction was good. Erle, J., said: "We consider that being an accessory before the fact now stands as a substantive felony, and that now the conviction of an accessory would stand good, and no wrong be done him, though he should be tried before the principal."

By the 24 and 25 Vict. c. 94, s. 5, "if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory either before or after the fact in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal shall die or be pardoned, or otherwise delivered before attainder; and every such accessory shall, upon conviction, suffer the same punishment as he would have suffered if the principal had been attainted." By the 24 and 25 Vict. c. 94, s. 6 (replacing the 14 and 15 Vict. c. 100, s. 15), "any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall be in custody or amenable to justice." Roscoe's Cr. Ev. (10th ed.) 185.

**Evidence of Conviction of Principal Admissible.**—Upon the trial of an accessory before the fact, the record of the conviction of the principal is proof *prima facie* of that fact; but this is not conclusive, and other evidence of the commission of the crime by the principal is admissible. *State v. Mosley*, 31 Kan. 355; *Levy v. People*, 80 N. Y. 327.

1. *State v. Kirk*, 10 Oregon, 505; *State v. Mosley*, 31 Kan. 355; *State v. Cassady*, 12 Kan. 550; *Thomas v. State*, 43 Ark. 149; *Sutton v. State*, 16 Tex. App. 490; *State v. Mower*, 25 N. W. Repr. (Iowa) 929; *Minich v. People*, 9 Pac. Repr. (Colo.) 4; *Levy v. People*, 80 N. Y. 327.

2. *Faircloth v. State*, 73 Ga. 426.

by another, receives, comforts, or assists him in order to enable him to escape from punishment, or rescues him from an arrest for crime, or, having him in custody for the crime, intentionally and voluntarily suffers him to escape, or opposes his apprehension: <sup>1</sup> provided that a married woman who receives, comforts, or relieves her husband, knowing him to have committed a crime, does not thereby become an accessory after the fact.<sup>2</sup>

1. Russell on Cr. (9th Am. ed.) 63-66. See *Harrel v. State*, 39 Miss. 702; *Com. v. Filburn*, 119 Mass. 297; *People v. Gassaway*, 28 Cal. 404; *White v. People*, 81 Ill. 323; *Wren v. Commonwealth*, 26 Gratt. (Va.) 952; *Loyd v. State*, 45 Ga. 321; *State v. Payne*, 1 Swan (Tenn.), 383; *Com. v. Miller*, 2 Ashm. (Pa.) 61.

An accessory after the fact, says Lord Hale, is where a person knowing the felony to be committed by another receives, relieves, comforts, or assists the felon. 1 Hale P. C. 618. Whether he be a principal, or an accessory before the fact. 2 Hawk. c. 29. s. 1; 3 P. Wms. 475. But a *feme covert* does not become an accessory by receiving her husband. This, however, is the only relationship which will excuse such an act, the husband being liable for receiving the wife. 1 Hale P. C. 621. So if a master receives his servant, or a servant his master, or a brother his brother, they are accessories, in the same manner as a stranger would be. Hawk. P. C. b. 2, c. 29, s. 34. But in some States, by statute, near relatives may aid each other without becoming accessories after the fact. 2 Cooley's Blackstone, 298 n. If a husband and wife knowingly receive a felon, it shall be deemed to be the act of the husband only. 1 Hale P. C. 621. But if the wife alone, the husband being ignorant of it, receive any other person being a felon, the wife is accessory, and not the husband. Id.

The accused must know that the defendant is guilty. *Wren v. Commonwealth*, 26 Gratt. (Va.) 952; *Tully v. Commonwealth*, 11 Bush (Ky.), 154; *State v. Davis*, 14 R. I. 281.

It must be shown that the criminal who was assisted committed the crime. *Paston v. State*, 12 Tex. App. 408; *Wren v. Commonwealth*, 26 Gratt. (Va.) 952. And that the crime is fully completed. See *State v. Payne*, 1 Swan (Tenn.), 383; *Harrel v. State*, 39 Miss. 702.

If A assaults B and mortally injures him, and C assists A before the death of B, C is not an accessory after the fact to the murder. *Harrel v. State*, 39 Miss. 702; *Wren v. Commonwealth*, 26 Gratt. (Va.) 952; 4 Black Com. 38.

A man who employs another person to harbor the principal may be convicted as an accessory after the fact, although he himself did no act to relieve or assist the principal. *R. v. Jarvis*, 2 Moo. & R. 40. So it appears to be settled that whoever rescues a felon imprisoned for the felony, or voluntarily suffers him to escape, is guilty as accessory. Hawk. P. C. b. 2, c. 29, s. 27. In the same manner, conveying instruments to a felon, to enable him to break jail, or to bribe the jailer to let him escape, make the party an accessory. But to relieve a felon in jail with clothes or other necessities is no offence, for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law. 4 Black. Com. 38.

One who receives money from the thief, knowing it to have been stolen, is not an accessory after the fact. *People v. Shepardon*, 48 Cal. 189.

A was convicted of concealing B, an alleged horse-thief. The case against B was reversed on error. *Held*, the judgment against A should also be reversed, without examination of errors assigned. *Ray v. State*, 13 Neb. 55.

One who conceals or aids a felon, not in order that he may escape arrest, trial, conviction, or punishment, but for some other purpose, cannot be convicted as an accessory after the fact under the Missouri Statutes. *State v. Reed*, 85 Mo. 194.

Merely suffering the principal to escape will not make the party an accessory after the fact, for it amounts at most but to a mere omission. 9 H. 4, st. 1; 1 Hale, 619. So if a person speak or write, in order to obtain a felon's pardon or deliverance. 26 Ass. 47. Or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly. 3 Inst. 139; 1 Hale, 620. Or even if he himself agree for money not to give evidence against the felon. Moo. 8. Or know of the felony and do not discover it. 1 Hale, 371, 618. None of these acts will make a party an accessory after the fact.

2. *R. v. Good*, 1 C. & K. 185.

Where one assists in concealing stolen property and receives a part as his share he is guilty as accessory.<sup>1</sup>

**17. Accessories after the Fact are Principals.**—Every accessory after the fact to any crime is guilty of a substantive crime, for which he may be convicted, whether the principal has or has not been convicted, or is or is not amenable to justice, and for which he may be indicted either together with the principal or alone.<sup>2</sup>

**18. Evidence.**—In England and in most of the States it rests with the court whether the evidence of an accomplice may be received.<sup>3</sup> Upon the trial of an accessory before the fact, the

1. *House v. State*, 16 Tex. App. 25. Compare *People v. Shepardson*, 48 Cal. 189.

Goods were feloniously taken and removed in A's absence by his servant, and under A's direction; afterwards A was present and aided in secreting the goods. *Held*, that this was not larceny in A, who was a mere accessory. *Norton v. People*, 8 Cow. (N. Y.) 137.

2. *Loyd v. State*, 45 Ga. 57; *Wren v. Commonwealth*, 26 Gratt. (Va.) 952; *Sutton v. State*, 16 Tex. App. 490.

Made so in Ohio by statute. *Noland v. State*, 19 Ohio St. 131.

In California, a receiver of stolen goods, knowing them to be stolen, is not an accessory after the fact. *People v. Stakem*, 40 Cal. 599; *People v. Shepardson*, 48 Cal. 189.

In Illinois, by statute, an accessory after the fact is not punishable as a principal. *Reynolds v. People*, 83 Ill. 479; s. c., 25 Am. Rep. 410.

Unless regulated by statute, the principal must be tried and convicted first. *State v. Pybass*, 4 Humph. (Tenn.) 442; *Baron v. People*, 1 Park. Cr. (N. Y.) 246; *U. S. v. Crane*, 4 McL. (U. S.) 317; *Stoops v. Commonwealth*, 7 Serg. & R. (Pa.) 491; *Com. v. Phillips*, 16 Mass. 423; *State v. Groff*, 1 Murph. (N. Car.) 270.

3. Notwithstanding the common-law rule which formerly prevailed that witnesses who were interested in the inquiry were not admissible, an exception was always made in the case of an accomplice who was willing to give evidence; and this exception has been stated to be founded on necessity, since, if accomplices were not admitted, it would frequently be impossible to find evidence to convict the greatest offenders, *Hawk P. C. b. 2, c. 46, s. 94*. In the absence of statutory provision it is not a matter of course to admit an accomplice to give evidence on the trial, even though his testimony has been received by the committing magistrates; but an application

to the court for the purpose must be made. 1 Phill. Ev. 91, 10th ed.; *People v. Whipple*, 9 Cow. (N. Y.), 707; *Com. v. Brown*, 130 Mass. 279. Compare *Runnels v. State*, 28 Ark. 121. The court usually considers not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. If, therefore, there be sufficient evidence to convict without his testimony, the court will refuse to allow him to be admitted as a witness. So if there be no reasonable probability of a conviction even with his evidence, the court will refuse to admit him as a witness. Thus where several prisoners were committed as principals, and several as receivers, but no corroboration could be given as to the receivers against whom the evidence of the accomplice was required, *Gurney, B.*, refused to permit one of the principals to become a witness. *R. v. Mellor*, Staff. Sum. Ass. 1833. See *Ray v. State*, 1 Greene (Iowa), 316; *Wight v. Rindskopf*, 43 Wis. 344. So in *R. v. Saunders*, Worc. Spr. Ass. 1842, on a motion to admit an accomplice, *Patteson, J.*, said, "I doubt whether I shall allow him to be a witness; if you want him for the purpose of identification and there is no corroboration, that will not do." In *R. v. Salt*, Staff. Spr. Ass. 1843, where there was no corroboration of an accomplice, *Wightman, J.*, refused to allow him to become a witness. 3 Russ. Cri. 602, 5th ed (j). And again in *R. v. Sparks*, 1 F. & F. 388, where the counsel for the prosecution applied for leave to call an accomplice who had pleaded guilty, *Hill, J.*, refused to permit it until the other evidence had been given in order to see whether it was sufficient to corroborate that of the accomplice.

It is competent for the court to order the accomplice to be acquitted at the trial for the purpose of qualifying him as a witness for the State, or to accept a plea admitting guilt to such a degree as in the opinion of the court is requisite; or for

record of the conviction of the principal is proof *prima facie* of that fact; but this is not conclusive, and other evidence of the commission of the crime by the principal is admissible.<sup>1</sup> The uncorroborated evidence of an accomplice is sufficient at common law to convict;<sup>2</sup> but this rule has been changed in some States by

the court to assent to entering of a *nolle prosequi*. *State v. Graham*, 41 N. J. L. 15; s. c., 32 Am. Rep. 174. See *State v. Lyon*, 81 N. Car. 600; s. c., 31 Am. Rep. 518; *U. S. v. Ford*, 9 Otto (U. S.), 594.

At the trial of an indictment against two persons jointly, if one of them offers himself as a witness, his testimony is competent against the other defendant, and may, by permission of the court, be introduced after the government has rested its case. *Com. v. Brown*, 130 Mass. 279.

It is within the discretion of the public prosecutor to determine whether or not the defendant, who is an accomplice, shall be permitted to become "State's evidence," and also whether, if he does, he is afterward entitled to exemption from further prosecution by reason of what he has done. *State v. Runnels*, 28 Ark. 121.

A defendant in a criminal action is competent and compellable by statute to testify for or against a co-defendant, provided his testimony does not criminate himself. *State v. Smith*, 84 N. Car. 705.

A was tried alone upon an indictment in which he was jointly indicted with B; the latter had never been arraigned, nor had a *nolle prosequi* been entered as to him. Upon the trial B was called as a witness on behalf of the people, no formal motion that he be admitted as a witness on their behalf having been made. Counsel for A objected that he was not a competent witness, having been jointly indicted with A for the offence with which the latter was charged. *Held*, that the objection was properly overruled and his testimony admissible. *Taylor v. People*, 12 Hun (N. Y.), 212, 63 N. Y. 143.

It makes no difference whether the accomplice has been convicted or not, or whether he be joined in the same indictment with the prisoner to be tried or not; provided he be not put upon his trial at the same time. *Hawk P. C. b. 2, c. 46, s. 90*; *Taylor v. People*, 12 Hun (N. Y.), 212. Where A, B, C, and D were indicted together, after plea, and before they were given in charge to the jury, Williams, J., allowed D to be removed from the dock and examined as a witness against his associates. *R. v. Gerber*, Temp. & M. 647. See also *Winsor v. R.*, L. R. 1 Q. B. 390; 35 L. J., M. C. 161.

Where the accomplice has been joined in the indictment, and, before the case comes on, it appears that his evidence will be required, the usual practice is, before opening the case, to apply to have the accomplice acquitted. *R. v. Rowland, Ry. & Moo.* N. P. C. 401. See also a remark of Cockburn, C. J., in *Winsor v. Reg.*, L. R. 1 Q. B. 390, approving of this course, where the prosecution call the witness, although, as pointed out by Lord Coleridge, in *R. v. Bradlaugh*, 15 Cox C. C. 217, he did not lay it down as a proposition of law that the accomplice could not be called without being first acquitted. Where the case has proceeded against all the prisoners, but no evidence appears against one of them, the court will, in its discretion, upon the application of the prosecutor, order that one to be acquitted for the purpose of giving evidence against the rest. *R. v. Fraser*, 1 McNally, 56. Where defendants are jointly indicted and jointly tried, they cannot be called for or against each other. *R. v. Payne*, L. R. 1 C. C. R. 349; *Noyes v. State*, 40 N. J. L. 429.

**When Competent for Prisoner.**—It is quite clear that an accomplice is a competent witness for the prisoner in conjunction with whom he himself committed the crime. *R. v. Balmore*, 1 Hale P. C. 305. But if he is charged in the same indictment, and is put upon his trial, he cannot be called. If he is charged in the same indictment, but not given in charge to the jury, and his trial is postponed, he may be called (without being acquitted) either for the prosecution or the defence; but if called for the prosecution, the better course is to take an acquittal; and if called for the defence, no acquittal need be taken. *R. v. Bradlaugh*, 15 Cox C. C. 217; *R. v. Payne*, L. R. 1 C. C. R. 349.

1. *People v. Buckland*, 13 Wend. (N. Y.) 592; *Levy v. People*, 80 N. Y. 327; *State v. Mosley*, 31 Kans. 355; *Arnold v. State*, 9 Tex. App. 435; *Keithler v. State*, 10 Smedes & M. (Miss.) 192; *State v. Ricker*, 29 Me. 84; *State v. Rand*, 33 N. H. 216; *Com. v. Knapp*, 10 Pick. (Mass.) 477; *State v. Duncan*, 6 Ired. (N. Car.) 236; *U. S. v. Hartwell*, 3 Cliff. (U. S.) 221.

2. Wharton's Crim. Ev. §441; *Watson v. Commonwealth*, 95 Pa. St. 418;

statute,<sup>1</sup> and the general rule is that where a verdict is rendered exclusively on such testimony it should be set aside by the court, and it is the duty of the trial judge to advise the jury not to convict on the evidence of an accomplice who is uncorroborated as to the essential elements of the case.<sup>2</sup> It is not necessary that there

*State v. Russell*, 33 La. Ann. 135; *Earl v. People*, 73 Ill. 329; *Collins v. People*, 98 Ill. 584; s. c., 38 Am. Rep. 105; *State v. Potter*, 42 Vt. 495; *Stocking v. State*, 7 Ind. 326; *Johnson v. State*, 2 Ind. 652; *Dawley v. State*, 4 Ind. 128; *Johnson v. State*, 65 Ind. 269; *Ayers v. State*, 88 Ind. 275; *State v. Stebbins*, 29 Conn. 463; *State v. Watson*, 31 Mo. 361; *Sumpter v. State*, 11 Fla. 247; *Com. v. Holmes*, 127 Mass. 424; s. c., 34 Am. Rep. 391, note; *State v. Hyer*, 39 N. J. L. 598; *Hamilton v. People*, 29 Mich. 173; *People v. O'Brien*, 26 N. W. Repr. (Mich.) 795; *White v. State*, 52 Miss. 216; *People v. Costello*, 1 Denio (N. Y.), 83; *People v. Davis*, 21 Wend. (N. Y.) 313; *Lindsay v. People*, 63 N. Y. 143 (but the rule is now changed by the N. Y. Penal Code); *People v. Ryland*, 28 Hun (N. Y.), 568; *U. S. v. Neverson*, 1 Mackey (D. C.), 152; *U. S. v. Bicksler*, 1 Mackey (D. C.), 341; *State v. Holland*, 83 N. Car. 624; s. c., 35 Am. Rep. 587; *Olive v. State*, 11 Neb. 1; *Ingalls v. State*, 48 Wis. 647.

1. *Bowling v. Commonwealth*, 79 Ky. 604; *State v. Godell*, 8 Oregon, 30; *Lumpkin v. State*, 68 Ala. 56; *People v. Ryland*, 28 Hun (N. Y.), 568; *Myers v. State*, 7 Tex. App. 640; *Hannahan v. State*, 7 Tex. App. 664; *Heath v. State*, 7 Tex. App. 464; *Childers v. State*, 52 Ga. 106; *Middleton v. State*, 52 Ga. 527.

2. *Wharton's Crim. Ev.* § 441; *Zollicoffer v. State*, 16 Tex. App. 312; *Harrison v. State*, 17 Tex. App. 442; *Tisdale v. State*, 17 Tex. App. 444; *Marler v. State*, 67 Ala. 55, 68 Ala. 580; *Lumpkin v. State*, 68 Ala. 56; *Bowling v. Commonwealth*, 79 Ky. 604; *Craft v. Commonwealth*, 80 Ky. 349; *George v. State*, 39 Miss. 570; *White v. State*, 52 Miss. 216; *Fitzcox v. State*, 52 Miss. 923; *Hughes v. State*, 58 Miss. 355; *State v. Bayonne*, 23 La. Ann. 78; *Hamilton v. People*, 29 Mich. 173; *People v. Schweitzer*, 23 Mich. 30; *People v. Jenness*, 5 Mich. 305; *State v. Moran*, 34 Iowa, 453; *State v. Thornton*, 26 Iowa, 79; *State v. Schlagel*, 19 Iowa, 169; *State v. Jones*, 64 Mo. 391; *State v. Watson*, 31 Mo. 361; *State v. Kellerman*, 14 Kans. 135; *Craft v. State*, 3 Kans. 450; *State v. Litchfield*, 58 Me. 267; *State v. Cunningham*, 31 Me. 355; *Com. v. Scott*, 123 Mass. 222; *Com. v. Holmes*, 127 Mass. 424; s. c., 34 Am. Rep. 391; *Com. v. Snow*, 111 Mass.

411; *Com. v. Price*, 10 Gray (Mass.), 472; *Com. v. Bosworth*, 22 Pick. (Mass.) 397; *State v. Williamson*, 42 Conn. 261; *State v. Wolcott*, 21 Conn. 272; *State v. Stebbins*, 29 Conn. 463; *State v. Howard*, 32 Vt. 380; *Dunn v. People*, 29 N. Y. 523; *Lindsay v. People*, 63 N. Y. 143; *People v. Evans*, 40 N. Y. 1; *People v. Costello*, 1 Denio (N. Y.), 83; *Coates v. People*, 4 Park. Cr. (N. Y.) 662; *Carroll v. Commonwealth*, 84 Pa. St. 107; *State v. Hyer*, 39 N. J. L. 598; *Powers v. State*, 44 Ga. 209; *Brown v. Commonwealth*, 2 Leigh (Va.), 769; *Allen v. State*, 10 Ohio St. 287; *Ulmer v. State*, 14 Ind. 52; *Collins v. People*, 98 Ill. 584; s. c., 38 Am. Rep. 105; *Earl v. People*, 73 Ill. 329; *Cross v. People*, 47 Ill. 152; *State v. Holland*, 83 N. Car. 624; *State v. Brown*, 3 Strob. L. (S. Car.) 508; *Sumpter v. State*, 11 Fla. 247; *Flanagan v. State*, 25 Ark. 92.

The state of the law as to the corroboration of accomplices is somewhat peculiar. It has been repeatedly laid down that a conviction on the testimony of an accomplice uncorroborated is legal. The point was considered by the twelve judges, and so decided in *R. v. Attwood*, 1 Lea, 464, and again in *R. v. Durham*, Id. 478. And that the rule is so has also been acknowledged by Lord Hale, 1 Hale P. C. 304, 305; Lord Ellenborough, *R. v. Jones*, 2 Campb. 132; Lord Denman, *R. v. Hastings*, 7 C. & P. 152; Alderson, B., *R. v. Wilks*, Id. 273; Gurney, J., *R. v. Jarvis*, 2 Moo. & R. 40; and lastly, by the Court of Criminal Appeal, in *R. v. Stubbs*, 25 L. J., M. C. 16. See also *R. v. Boyes*, 1 B. & S. 311.

But while the law is thus fully established, the practice of judges is almost invariably to advise juries not to convict upon the evidence of an accomplice who is uncorroborated, and sometimes judges, where the testimony of the accomplice is the only evidence, take upon themselves to direct an acquittal of the prisoner. Of course it is always proper for a judge in the exercise of his discretion to advise a jury to acquit the prisoner in any case, but it is submitted that it is not usually his province to direct an acquittal unless there be no legal evidence against the prisoner, which in the face of the above decisions cannot be the case if an accomplice has given evidence against him.

should be other evidence which would of itself warrant a conviction.<sup>1</sup>

Accomplices admitted as witnesses for the prosecution are not of right entitled to pardon. The district attorney has no authority to exempt such accomplice from prosecution.<sup>2</sup>

The almost absolute terms, moreover, in which judges state it to be their practice to advise juries not to convict in such cases leave it impossible to conceive in what case the principle so frequently acknowledged in the cases above quoted is to receive any application. And lastly, the practice of not permitting the accomplice to be called until it appears that his evidence can be satisfactorily corroborated can only be justified on the assumption that on his evidence, uncorroborated, a legal conviction could not be founded. Thus the law remains in that anomalous state in which the bare existence of a principle is acknowledged, but which principle is constantly disapproved of and frequently violated. As the law now stands, it is universally agreed by all the authorities that, if the accomplice were uncorroborated, a judge would be wrong who did not advise the jury not to convict; whereas the Court of Criminal Appeal would be bound to pronounce an opinion that a judge who did not so advise them was right. *Roscoe's Crim. Ev.*, 10th ed. 132.

In *Collins v. People*, 98 Ill. 584; s. c., 38 Am. Rep. 105, Scholfield, J., after reviewing the English cases, said: "The tendency with us, at present, is to arbitrarily exclude as little as possible, but to listen and give credence to whatever tends to establish the truth. The innocent should not be convicted, nor should the guilty escape punishment, by reason of any merely arbitrary rule preventing the free and full exercise of the judgment as to the truthfulness or untruthfulness of testimony, and the reliance to be placed upon it in the trial of cases. In many, probably in most, cases, the evidence of an accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt; and then it is clearly insufficient to authorize a verdict of guilty. But there may frequently occur other cases, where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice of the guilt of the defendant as it is possible it could be satisfied from human testimony; and in such case it would be an outrage upon the administration of justice to acquit."

Although it is not usual to suffer a

conviction upon the wholly uncorroborated evidence of an accomplice, and juries are advised not to convict without a confirmation as to the material facts; still, if the jury are fully convinced of the truth of the statements of a witness thus situated, they may convict upon his testimony alone. *Lindsay v. People*, 63 N. Y. 143.

If the court does not advise the jury to acquit the defendant, when the only evidence is the uncorroborated testimony of an accomplice, it is not ground for a reversal on appeal. *State v. Potter*, 42 Vt. 495.

1. *Lumpkin v. State*, 68 Ala. 56; *Smith v. State*, 59 Ala. 104; *Lockett v. State*, 63 Ala. 5; *Marler v. State*, 67 Ala. 55; *Partee v. State*, 67 Ga. 570; *Com. v. Bosworth*, 22 Pick. (Mass.) 397; *Com. v. Hayes*, 140 Mass. 366; *State v. Litchfield*, 58 Me. 267; *State v. Potter*, 42 Vt. 495; *State v. Russell*, 33 La. Ann. 135; *Watson v. Commonwealth*, 95 Pa. St. 418; *State v. Watson*, 31 Mo. 361; *State v. Stebbins*, 29 Conn. 463; *People v. Costello*, 1 Denio (N. Y.), 418, 424. *Compare* *People v. Evans*, 40 N. Y. 1; *U. S. v. Harries*, 2 Bond. (U. S.) 311; *State v. Allen*, 57 Iowa, 431.

But it must be corroborated by evidence tending to connect the defendant with the commission of the offence. *Marler v. State*, 67 Ala. 55; *Com. v. Holmes*, 127 Mass. 424; s. c., 34 Am. Rep. 391; *McCalla v. State*, 66 Ga. 346; *Kilrow v. Commonwealth*, 89 Pa. St. 480; *State v. Hyer*, 39 N. J. L. 598; *People v. Courtney*, 28 Hun (N. Y.), 589; *Coleman v. State*, 44 Tex. 109; *State v. Thornton*, 26 Iowa, 80; *People v. Davis*, 21 Wend. (N. Y.) 309; *Watson v. Commonwealth*, 95 Pa. St. 418; *Cohea v. State*, 11 Tex. App. 622; *State v. Hennessy*, 55 Iowa, 299; *State v. Allen*, 57 Iowa, 431.

Voluntary confessions are sufficient to corroborate the testimony of an accomplice. *Partee v. State*, 67 Ga. 570.

2. *U. S. v. Ford* (Whiskey Cases), 99 U. S. 594. See *Com. v. Woodside*, 105 Mass. 597; *Com. v. Brown*, 103 Mass. 422; *State v. Graham*, 41 N. J. L. 15; *State v. Lyon*, 81 N. Car. 600; *U. S. v. Lee*, 4 McLean (U. S.), 103. *Compare* *Harden v. State*, 12 Tex. App. 186; *People v. Bruzzo*, 24 Cal. 41.

*Roscoe* (Cr. Ev. 10th ed. 132): Although



Where an accomplice testifies as a witness, a liberal and full cross-examination, for the purpose of testing the truth of his statements, should be permitted.<sup>1</sup>

Lord Hale thought that if a man had a promise of pardon if he gave evidence against one of his confederates, this disabled his testimony—2 Hale P. C. 280—yet it was fully settled, before the statutes were passed which removed the disabilities of witnesses on the ground of interest, that such a promise, however it might affect the credibility of the witness, would not destroy his competency. *R. v. Tonge, Kelynge* 18. See *State v. Cook*, 23 La. Ann. 45; *Casey v. State*, 37 Ark. 67.

Where an accomplice, after making a confession upon the understanding that he is not to be prosecuted, refuses to testify, his confession may be given in evidence against him on his trial. *Com. v. Knapp*, 10 Pick. (Mass.) 477; *Com. v. Price*, 10 Gray (Mass.), 472; *U.S. v. Ford*, 99 U. S. 594. See *Wight v. Rindskopf*, 43 Wis. 349; *People v. Whipple*, 9 Cow. (N. Y.) 707; *Runnels v. State*, 28 Ark. 121; *Alderman v. People*, 4 Mich. 414; *State v. Condry*, 5 Jones L. (N. Car.) 418.

If an accomplice be convicted after being made a witness by the State and received as such by the court, and after having made an ingenuous confession, such accomplice has an equitable claim to a judicial recommendation to the mercy of the pardoning power which cannot be withheld without a violation of an established rule of practice. *State v. Graham*, 41 N. J. L. 15; s. c., 32 Am. Rep. 174; *State v. Lyon*, 81 N. Car. 600; s. c., 31 Am. Rep. 518; *U. S. v. Ford* (Whiskey Cases), 9 Otto (U. S.), 594. Compare *Com. v. Dabney*, 1 Rob. (Va.) 696; s. c., 40 Am. Dec. 717.

**Situation of an Accomplice when called as a Witness.**—Where a receiver discovered the principals in a felony under a promise of favor, and also disclosed another felony of the same kind under an impression that by the course he had taken he had protected himself from the consequences, Coleridge, J., recommended the counsel for the prosecutor not to proceed with the indictment against the receiver for such other felony, adding, however, that if it was persisted in he was bound to try the case. The recommendation of the learned judge being yielded to, an acquittal was taken. *R. v. Garside*, 2 Lew. C. C. 38.

A prisoner who, after a false representation made to him by a constable in jail that his confederates had been taken into custody, made a confession, and was

admitted as a witness against his associates, but on the trial denied all knowledge of the subject, was afterwards tried and convicted upon his own confession; and the conviction was upheld by all the judges. *R. v. Burley*, 2 Stark. Ev. 13, 3d ed. So where in a case of burglary an accomplice, who had been allowed to go before the grand jury as a witness for the crown, upon the trial pretended to be ignorant of the facts on which he had before given evidence, Coleridge, J., ordered a bill to be preferred against him, to which he pleaded guilty, and judgment of death was recorded. *R. v. Moore*, 2 Lew. C. C. 37. So where an accomplice, after making a full disclosure before the committing magistrate, refused when before the grand jury to give any evidence at all, Wightman, J., ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. *R. v. Holtham, Staff. Spr. Ass.* 1843, 3 Russ. Cri. 601, 5th ed. (h). So where an accomplice who was called as a witness against several prisoners gave evidence which showed that all, except one, who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one being present, and the jury found all the prisoners guilty, Parke, B., thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried. *R. v. Stokes, Staff. Spr. Ass.* 1837, 3 Russ. Cri. 601, 5th ed. (h). The prisoner made a statement to a constable, and then repeated it to a magistrate upon oath. He then made a further statement on oath, adding, "I came here to save myself." Subsequently he refused to prosecute. It was held by five judges out of nine that both the statements made by him were receivable in evidence against him; and by seven out of nine that the first statement was admissible. *R. v. Gillis*, 11 Cox C. C. 69.

1. *Lee v. State*, 21 Ohio St. 151; see *Com. v. Price*, 10 Gray (Mass.), 472; *Hamilton v. People*, 29 Mich. 173.

When the evidence of an accomplice is corroborated, he occupies the same attitude of any other witness so far as the methods of contradicting or impeaching him is concerned. *Craft v. Commonwealth*, 81 Ky. 349.

The testimony of a witness who was present when a homicide was committed, but who did not in any way participate therein, but for a time thereafter concealed the fact, is sufficient without other evidence to authorize conviction.<sup>1</sup>

Evidence cannot be legally admitted as competent and sufficient corroboration which does not tend to confirm the testimony of the accomplice upon a point material to the issue, in the sense that it tends to prove the guilt of the defendant.<sup>2</sup>

The testimony of the accomplice should be corroborated as to the person of the prisoner against whom he speaks.<sup>3</sup>

While a conviction cannot be had upon the uncorroborated evidence of an accomplice in the crime, without something else deposed by other witnesses to connect the defendant with it, yet it is impracticable to lay down any rule as to the precise amount of evidence which is requisite to sustain the accomplice's account identifying the defendant as one of the criminals,<sup>4</sup> further than

1. *Lowery v. State*, 72 Ga. 649.

2. *Com. v. Holmes*, 127 Mass. 424; s. c., 34 Am. Rep. 391; *Com. v. Bosworth*, 22 Pick. (Mass.) 397; *State v. Kyer*, 39 N. J. L. 598; *Kilrow v. Commonwealth*, 80 Pa. St. 480; *Territory v. Minney*, 2 Pac. Repr. (N. Mex.) 357. See *State v. Howard*, 32 Vt. 380; *State v. Wolcott*, 21 Conn. 282; *Lindsay v. People*, 63 N. Y. 143; *State v. Kellerman*, 14 Kans. 135.

3. *Watson v. Commonwealth*, 95 Pa. St. 418; *Carroll v. Commonwealth*, 84 Pa. St. 107; *Com. v. Drake*, 124 Mass. 21; *State v. Wolcott*, 21 Conn. 271; *State v. Smalls*, 11 S. Car. 262; *Bell v. State*, 73 Ga. 572; *McCalla v. State*, 66 Ga. 346; *Middleton v. State*, 52 Ga. 527; *Childers v. State*, 52 Ga. 106; *Craft v. Commonwealth*, 80 Ky. 349; *Hoyle v. State*, 4 Tex. App. 239; *State v. Adams*, 20 Kan. 311; *State v. Hing*, 16 Nev. 307; *State v. Allen*, 57 Iowa, 431; *State v. Lawlor*, 28 Minn. 216; *State v. Odell*, 8 Oregon, 30. Compare *State v. Watson*, 31 Mo. 361.

4. *Bell v. State*, 73 Ga. 572.

Proof of combination must be given before acts and declarations are admissible. *People v. Parish*, 4 Denio (N. Y.), 153.

Giving or refusing an instruction that conviction may be had on unsupported testimony of accomplice is in discretion of the court below, and the appellate court will not reverse its action in that respect. *Ingalls v. State*, 48 Wis. 647.

It is discretionary with the court to direct an acquittal on corroborative testimony of an accomplice. That an accomplice was induced to testify by an offer of immunity only goes to his credibility. *Black v. State*, 59 Wis. 471; *Olive v. State*, 11 Neb. 1.

Whether a witness is an accomplice is for the jury. Under Gen. Stat. Minn. 1878, c. 73, sec. 104, corroborating evidence, without the aid of the testimony of the accomplice, must connect the defendant with the offence, but it need not be sufficient alone to establish his guilt. *State v. Lawlor*, 28 Minn. 216.

A thirteen-year-old boy, who, under threats and coercion of another, takes part in the commission of a felony is not an accomplice, and his testimony is sufficient to sustain a conviction without corroboration. *People v. Miller*, 6 Pac. Repr. (Cal.) 99.

A co-conspirator is a competent witness. *U. S. v. Sacia*, 2 Fed. Repr. 754.

Admissions of one of several charged as conspirators are not admissible unless made during the existence of the conspiracy and in aid of the common design. *Johnson v. Miller*, 63 Iowa, 529.

Declarations of a co-conspirator made before the purposes of the conspiracy have been accomplished are competent. *State v. Weaver*, 57 Iowa, 730.

Declarations of one of a combination for an illegal object are admissible against the others, when the combination and intent is clearly established. *Waterbury v. Sturtevant*, 18 Wend. (N. Y.) 353.

Where two unite in an undertaking to defraud, the admissions of one are competent against both, although there is no evidence of conspiracy. *Riehl v. Evansville Found. Assoc.*, 104 Ind. 70.

Two defendants charged with fraudulently obtaining property by prearrangement and fraud of one not denied, proof of subsequent participation in the fraud and its fruits by the other is sufficient proof of combination. *Lincoln v. Claffin*, 7 Wall. (U. S.) 132.

that there must be other evidence sufficient to satisfy the jury of the fact.

It is not necessary that the testimony of the accomplice should be corroborated as to every material fact. *State v. Hennesy*, 55 Iowa, 299; *State v. Allen*, 57 Iowa, 431.

The wife of a convict in a penitentiary not connected with the charge is a competent witness to corroborate an accomplice. *State v. McIntire*, 58 Iowa, 572. See *Woods v. State*, 76 Ala. 35; s. c., 52 Am. Rep. 314; *Dill v. State*, 1 Tex. App. 286; *Haskins v. People*, 16 N. Y. 344; *U. S. v. Horn*, 5 Blatchf. (U. S.) 102.

Where two were jointly indicted for a burglary, and the theory was that one had broken in and entered the building while the other was present abetting, held, that an admission of the one supposed to have broken in and entered has no force as evidence against his co-defendant. *People v. Stevens*, 47 Mich. 411.

Where two persons were jointly indicted for murder and there was no evidence of a conspiracy prior to the conflict resulting in the homicide, upon the separate trial of one testimony of threats made by the other some months before the homicide held incompetent. *State v. Weaver*, 54 Iowa, 730.

Declarations of an alleged conspiracy cannot be admitted until after proof of the conspiracy, and the declarations must have been made during the progress of the conspiracy and in furtherance of its objects. *U. S. v. Gunnell*, 3 Cent. Repr. (D. C.) 764.

**Nature of Corroboration.**—Mr. Roscoe says (Cr. Ev. 10th ed. 133): Another point which arises with respect to the corroboration of accomplices, and upon which the authorities are by no means so well agreed, is as to what is the nature of the corroboration which ought to be required. We say *required*, but it is rather difficult to say by what or how the requirement is to be exacted, for by law no corroboration is required at all. See *R. v. Gallagher*, 15 Cox C. C. 292. The practice, however, is for the present purpose much more important than the principle, and we shall, therefore, consider how far the evidence ought to be corroborated.

It must be recollected that an accomplice is in most cases present at the commission of the offence; and even if not so, he may be presumed to be on those terms of intimacy with the accused which would render his knowledge of all the circumstances attending the commission

of the crime extremely probable. There may be many witnesses, therefore, who give testimony which agrees with that of the accomplice, but which, if it does not serve to identify the accused parties, is no corroboration of the accomplice; the real danger being that the accomplice should relate the circumstances truly, and at the same time attribute a share in the transaction to an innocent person.

It may indeed be taken that it is almost the universal opinion that the testimony of the accomplice should be corroborated as to the person of the prisoner against whom he speaks. This was so held by Patteson, J., in *R. v. Addis*, 6 C. & P. 388, and again in *R. v. Kelsey*, 2 Lew. 45; by Williams, J., in *R. v. Webb*, 6 C. & P. 595; by Alderson, B., in *R. v. Wilks*, 7 C. & P. 272; and by Lord Abinger, C.B., in *R. v. Farlar*, 8 C. & P. 106.

And in the later case of *R. v. Stubbs*, 25 L. J., M. C. 16, Parke, B., said, "My practice always has been to tell the jury not to convict the prisoner, unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner;" and Cresswell, J., added, "You may take it for granted that the accomplice was at the commission of the offence, and may be corroborated as to the facts; but that has no tendency to show that the parties accused were there."

What appears to be required is that there should be some fact deposed to independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. Thus upon an indictment for receiving a sheep knowing it to have been stolen, an accomplice proved that a brother of the prisoner and himself had stolen two sheep, and that the brother gave one of them to the prisoner, who carried it into the house in which the prisoner and his father lived, and the accomplice stated where the skins were hid. On the houses of the prisoner's father and the accomplice being searched, a quantity of mutton was found in each, which had formed parts of two sheep corresponding in size with those stolen, and the skins were found in the place named by the accomplice. Patteson, J., held that this was sufficient; the finding of the mutton in the possession of the prisoner in itself raising an

Corroboration may be supplied by circumstantial evidence.<sup>1</sup> If any evidence is admitted as competent by way of corroborating an accomplice, so as to make it safe for the jury to convict, which is

implication of guilt on his part, which the testimony of the accomplice confirmed. *R. v. Birkett*, 8 C. & P. 732. It is not necessary that the accomplice should be corroborated in every particular; but there must be a sufficient amount of confirmation to satisfy the jury of the truth of his story. *R. v. Gallagher*, 15 Cox C. C. 292.

The point about which the opinions of judges appear to have fluctuated is as to whether where several are indicted, and the evidence of the accomplice is confirmed as to some only and not as to others, the jury ought to be advised to acquit those against whom there is no corroboration. On the one hand it is strongly urged in a note by Mr. Starkie to the case of *R. v. Dawber*, 3 Stark. N. P. C. 34 (n), that a witness, if believed at all, must be believed *in toto*, and he cannot be considered as speaking the truth as to some of the prisoners and not as to the others. The view of Mr. Starkie is supported by the case to which the note is appended; there, on the trial of several prisoners, an accomplice who gave evidence was confirmed in his testimony with regard to some of the prisoners, but not as to the rest; Bayley, J., informed the jury that if they were satisfied by the confirmatory evidence that the accomplice was a credible witness, they might act upon his testimony with respect to others of the defendants, though as far as his evidence affected them he had received no confirmation; and all the defendants were convicted. But to the argument used by Mr. Starkie it may be answered that the whole practice of requiring corroboration is founded on the supposition that there are degrees of credibility, and that an accomplice, though not absolutely incredible, is only credible when confirmed; and that he will only speak the truth in part is just as probable as that he will not speak the truth at all. And this is the view that has been taken in the majority of the cases; thus, in *R. v. Wells*, M. & M. 326, where an indictment was preferred against several as principals and accessories, the case was proved by the testimony of an accomplice, who was confirmed as to the accessories, but not as to the principal; Littledale, J., advised the jury that the case ought not to be considered as proved against the principal, and that all the prisoners ought,

therefore, to be acquitted. So in *R. v. Morris*, 7 C. & P. 270, on an indictment against A as principal and B as receiver, where the evidence of an accomplice was corroborated as against A, but not as against B, Alderson, B., thought that it was not sufficient; and in *R. v. Stubbs*, 25 L. J., M. C. 16, Jervis, C. J., said, "There is another point to be noticed: when an accomplice speaks as to the guilt of three prisoners, and his testimony is confirmed as to two of them only, it is proper, I think, for the judge to advise the jury that it is not safe to act on his testimony as to the third person in respect of whom he is not confirmed; for the accomplice may speak truly as to all the facts of the case, and at the same time in his evidence substitute the third person for himself in his narrative of the transaction."

**By whom to be corroborated.**—The practice of requiring the evidence of an accomplice to be confirmed appears to apply equally when two or more accomplices are produced against a prisoner. In a case where two accomplices spoke distinctly to the prisoner, Littledale, J., told the jury that if their statements were the only evidence, he could not advise them to convict the prisoner, adding that it was not usual to convict on the evidence of one accomplice without confirmation, and that in his opinion it made no difference whether there were more accomplices than one. *R. v. Noakes*, 5 C. & P. 326. *Sed qu.* In one case it was held by Mr. Justice Park that a confirmation by the wife of an accomplice was insufficient, as the wife and the accomplice must be considered as one for this purpose. *R. v. Neale*, 7 C. & P. 168. See also *R. v. Jellyman*, 6 C. & P. 604. See note 4. *ante*, p. 79.

1. When, in addition to the confession of a defendant, there is proof of circumstances which, although they may have an innocent construction, are nevertheless calculated to suggest the commission of the crime charged, and for the explanation of which the confession furnishes the key, the case cannot be taken from the jury for a non-compliance with the statute—§ 395, Code Crim. Pro.—which declares that a defendant's confession "is not sufficient to warrant a conviction without additional proof that the crime charged has been committed." *People v. Jaehne*, 7 East'n Repr. (N. Y.) 290.

not legally entitled to that effect, it is a subject for exception and ground for a new trial.<sup>1</sup>

A confession is to be treated as evidence of the *corpus delicti*; in other words, as competent proof of the body of the crime, though insufficient without corroboration to warrant a conviction.<sup>2</sup>

Evidence of good character is always admissible in defence.<sup>3</sup>

**ACCIDENT.** See ACT OF GOD; CONTRACTS; CARRIERS; EQUITY; HOMICIDE; MISTAKE; MUNICIPAL CORPORATIONS; NEGLIGENCE; RAILROADS; TRESPASS; SHIPPING.

1. *Accident at Law.*

2. *Accident in Equity.*

**1. At Law—Definition.**—An accident is an event from an unknown cause, or an unusual and unexpected event from a known cause; a chance, or casualty.<sup>4</sup> To constitute an accident, in the legal sense of the word, the casualty must be such as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency and in the circumstances in which he was placed.<sup>5</sup>

**Test of Liability.**—The test of liability for the result of an accident turns upon the fact whether the person causing the accident was guilty of negligence or not. If so, he is liable for the result of his negligence, unless the plaintiff was also guilty of contributory negligence; but if no negligence can be shown, and the accident occurred in the prosecution of a lawful act, no action, civil or criminal, can be supported for an injury arising therefrom.<sup>6</sup>

Any fact or circumstance which tends to corroborate any material part of the testimony of an accomplice is admissible for what it is worth, although it may not inculcate the accused on trial. *State v. Maney*, 2 N. Eng. Repr. (Conn.) 926.

In *Roberts v. State*, 55 Ga. 220, it is ruled that "light circumstances, such as constant and easy access to the place whence the goods are stolen, the defendant's presence thereabouts when the goods are missed, the fact that he drove a single dray there, and that such a dray was seen being unloaded, about the break of day, where the goods were found, may be weighed by the jury as corroborating proof."

1. *Com. v. Holmes*, 127 Mass. 424; s. c., 34 Am. Rep. 391; *Com. v. Bosworth*, 22 Pick. (Mass.) 397.

2. *People v. Jaehne*, 7 East'n Repr. (N. Y.) 290.

3. *U. S. v. Gunnell*, 3 Cent. Repr. (D. C.) 764.

**Authorities for Accessory.**—Bishop's *Crim. Law*; Wharton's *Crim. Law*; Desty's *Crim. Law*; Wharton's *Crim. Evidence*; Roscoe's *Crim. Evidence*.

4. Thus, if a railroad-bed, engine, and cars are in good order, and the engineer and other attendants are skillful and careful, and yet the rail breaks and the train

is crushed, and the employees and passengers are killed, that is an unusual and unexpected event from a known cause, and therefore an accident. But if the track is out of order and the engine worn and unmanageable, and on account thereof there is the like result as above stated on the good road, that is not an unusual and unexpected event, but a usual and expected event from such a cause: it is not an accident, but it is negligence. *Crutchfield v. Richmond*, etc., R. Co., 76 N. Car. 320. An accident may happen from an unknown cause; but it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected by the party. *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28; s. c., 1 Am. Rep. 157. It does not include the ordinary misfortunes in business. *Langdon v. Bowen*, 43 Vt. 512.

5. *Brown v. Kendall*, 6 Cush. (Mass.) 292. See *Chase v. Barrett*, 4 Paige (N. Y.), 148; *Jones v. Woodhull*, 1 Root (Conn.), 298; *Brown v. Elliott*, 17 N. J. Eq. 353; *Morris v. Platt*, 32 Com. 75; *Schneider v. Provident Ins. Co.*, 24 Wis. 28.

6. In *Brown v. Kendall*, 6 Cush. (Mass.) 292, Shaw, C. J., laid down the rule that "the plaintiff must come pre-

This rule applies to injuries to the person;<sup>1</sup> to property, as by the leakage of water from a neighboring dam or reservoir;<sup>2</sup> the

pared with evidence to show that the intention was unlawful or that the defendant was in fault." *Compare Morgan v. Cox*, 22 Mo. 373; s. c., 66 Am. Dec. 623; *Conway v. Reed*, 66 Mo. 355.

1. The defendant having interfered to part his dog and the plaintiff's, which were fighting, in raising his stick for that purpose accidentally struck the plaintiff in the eye, severely injuring him. *Held*, that he was not liable. *Brown v. Kendall*, 6 Cush. (Mass.) 292.

The defendant threw a stone at plaintiff's daughter and put out her eye. It appeared that the injury was accidental. *Held*, the plaintiff could not recover. *Harvey v. Dunlop*, Hill & D. Sup. (N. Y.) 193.

One hunting in a wilderness is not bound to anticipate the presence of another man, and he is not liable for an injury caused unintentionally by him to a person of whose presence he was not aware. *Bizzell v. Booker*, 16 Ark. 308.

The defendant injured a child on the highway by running over him. *Held*, that, under the circumstances, he was not liable. *Hartfield v. Roper*, 21 Wend. (N. Y.) 615. See HOMICIDE.

Several persons being together had a playful altercation, during which one of them, in sport, pointed an old pistol, thought to be unloaded, at another. It went off and killed the latter. *Held*, that the person causing the death was not guilty of involuntary manslaughter. *Robertson v. State*, 2 Lea (Tenn.) 239.

W., being on board a ship, and B. in a boat, alongside, had a dispute about payment for some goods, both being intoxicated. W., to get rid of B., pushed away the boat with his foot; B., reaching out to lay hold of a barge to prevent his boat from drifting away, overbalanced himself, fell into the water, and was drowned. *Held*, W. was not guilty of manslaughter. *R. v. Waters*, 6 C. & P. 328.

The defendant was an ignorant quack who undertook to cure a man and gave him emetics until he died. *Held*, that if the prisoner acted with an honest intention and expectation of curing the deceased by this treatment, although death, unexpected by him, was the consequence, he was not guilty of manslaughter. *Com. v. Thompson*, 6 Mass. 134.

Plaintiff, in defending himself from an assault, wounded a bystander. *Held*, not liable. *Morris v. Platt*, 32 Com. 75. *Compare Welch v. Durand*, 36 Conn. 182; s. c., 4 Am. Rep. 55.

A child came upon the defendant's premises and fell into an uncovered cistern. *Held*, not liable. *Hargreaves v. Decon*, 25 Mich. 1.

See, generally, *R. v. Murray*, 5 Cox C. 509; *R. v. Mastin*, 6 C. & P. 396; *R. v. Dalloway*, 2 Cox C. 273; *R. v. Williamson*, 3 C. & P. 635; *R. v. Spenser*, 10 Cox C. C. 525; *In re Finney*, 12 Cox C. C. 625; *R. v. Macleod*, 12 Cox C. C. 535; *R. v. Noakes*, 4 F. & F. 921; *R. v. Van Butchell*, 3 C. & P. 629; *Kohn v. Lovett*, 44 Ga. 251; *Roulston v. Clark*, 3 E. D. Smith (N. Y.), 366; *Zoebisich v. Tarbell*, 10 Allen (Mass.), 385; *Frost v. Grand Trunk R. Co.*, 10 Allen (Mass.), 387; *Victory v. Baker*, 67 N. Y. 366; *Murray v. McLean*, 57 Ill. 378; *Henkel v. Murr.*, 31 Hun (N. Y.), 28; *Carter v. Columbia, etc., R. Co.*, 19 Shand (S. Car.), 20; s. c., 45 Am. Rep. 754; *Cahill v. Layton*, 57 Wis. 600; s. c., Am. Rep. 46; *Ex parte Stell*, 4 Hughes (U. S.), 157; *Miles v. Atlantic, etc., R. Co.*, 4 Hughes (U. S.), 172; *Hounsell v. Smyth*, 7 C. B. N. S. 731; *Stone v. Jackson*, 16 C. B. 199; *Bolch v. Smith*, 7 Hurl. & N. 736; *Gautret v. Egerton*, L. R. 2 C. P. 371; *Beatty v. Gilmore*, 16 Pa. St. 463; *Bush v. Johnston*, 23 Pa. St. 209; *Beach v. Frankenburg*, 4 W. Va. 712; *Beardsley v. Swann*, 4 McLean (U. S.), 333; *Burton v. Davis*, 15 La. Ann. 448; *Hannon v. Agnew*, 96 N. Y. 439; *Converse v. Walker*, 30 Hun (N. Y.), 566; *Sikes v. Sheldon*, 58 Iowa, 744; *Wright v. Clark*, 50 Vt. 130; s. c., 28 Am. Rep. 496; *Gillespie v. McGowan*, 100 Pa. St. 144; s. c., 45 Am. Rep. 365; *Yarnall v. St. Louis, etc., R. Co.*, 10 Am. & Eng. R. R. Cas. 726; s. c., 75 Mo. 575; *Lary v. Cleveland, etc., R. Co.*, 78 Ind. 323; s. c., 41 Am. Rep. 572; *Union S. T. Co. v. Rourke*, 10 Ill. App. 474; *Hearne v. St. Charles St. R. Co.*, 34 La. Ann. 160.

2. Where water from a newly constructed reservoir broke through some old vertical shafts apparently filled with earth and flooded a mine, which ran to passages connected with the old shafts, *held*, that the constructor of the reservoir was liable for damage caused. *Fletcher v. Rylands*, L. R. 1 Exch. 265. *Blackburn, J.*, said: "We think the true rule of law is that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes is *prima facie* answerable for all the damage which is the natural consequence of its escape." This doctrine was repudiated in *Loose v.*

explosion of a steam-boiler;<sup>1</sup> sparks emitted from a steam-dredge, causing neighboring property to take fire;<sup>2</sup> or from a steamboat;<sup>3</sup> or a locomotive;<sup>4</sup> or from the use of a steam-whistle;<sup>5</sup> or the noises of a passing train;<sup>6</sup> or from the use of fire upon one's premises;<sup>7</sup> or lights;<sup>8</sup> or injuries resulting from the use of horses;<sup>9</sup> or by animals *fera natura*,<sup>10</sup> or domestic ani-

Buchanan, 51 N. Y. 476; s. c., 10 Am. Rep. 623, where it was held that one who erected upon his premises a steam boiler, having in it no defect known to him or discoverable by the application of known tests, and who operated it with care and skill, was not answerable to an adjacent proprietor for damages caused by its explosion. "Here, if one builds a dam, etc., and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part." To the same effect are *Garland v. Towne*, 55 N. H. 57, and *Marshall v. Wellwood*, 38 N. J. L. 339. *Compare Ball v. Nye*, 99 Mass. 582; *Wilson v. New Bedford*, 108 Mass. 261; *Gorham v. Gross*, 125 Mass. 232; *Cahill v. Eastman*, 18 Minn. 324.

1. *Losee v. Buchanan*, 51 N. Y. 476; s. c., 10 Am. Rep. 623; *Spencer v. Campbell*, 9 Watts & S. (Pa.) 32; U. S. v. Taylor, 5 McLean (U. S.), 22; *Marshall v. Wellwood*, 38 N. J. L. 339; *R. v. Gregory*, 4 F. & F. 153. *Compare Fay v. Davidson*, 13 Minn. 523.

2. *Hinds v. Barton*, 25 N. Y. 544; *Teall v. Barton*, 40 Barb. (N. Y.) 137.

3. *Cook v. Champlain Trans. Co.*, 1 Den. (N. Y.) 137. See *Read v. Morse*, 34 Wis. 315; *Crandall v. Goodrich Trans. Co.*, 16 Fed. Repr. 75.

4. The test in the case of a chartered railroad company is whether in using its engines it fails in the diligence good specialists in this department are accustomed to exercise, and the burden is on the plaintiff to show negligence. *Flynn v. San Francisco R.*, 40 Cal. 14; *Rood v. R.*, 18 Barb. (N. Y.) 80; *Read. R. v. Yeiser*, 8 Pa. St. 366; *Aldridge v. R.*, 3 M. & G. 515; *Morris & E. R. Co. v. State*, 36 N. J. 553; *Field v. N. Y. Cent. R. Co.*, 32 N. Y. 339; 4 West. Jur. 333; 5 Am. Law Rev. 208.

This rule is otherwise as to unchartered companies where damage caused by the emission of sparks is in itself evidence of negligence. *Jones v. Festiniog R. Co.*, 3 Q. B. 733.

5. *Hahn v. Southern Pac. R. Co.*, 51 Cal. 605.

6. *Coy v. Utica, etc., R. Co.*, 23 Barb. (N. Y.) 643; *Phila., etc., R. Co. v. Stinger*, 78 Pa. St. 219; *Hall v. Brown*,

54 N. H. 495; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Favor v. Boston, etc., R. Co.*, 114 Mass. 350; *Culp v. Atchison, etc., R. Co.*, 17 Kan. 475; *Baltimore, etc., R. Co. v. Thomas*, 60 Ind. 107.

7. In *Clark v. Foot*, 8 Johns. (N. Y.) 422, the rule is thus laid down: "If A sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of B. his neighbor, no action lies against A, unless there was some negligence or misconduct in him or his servant."

*Tourtellot v. Rosebrook*, 11 Metc. (Mass.) 460; *Barnard v. Poor*, 21 Pick. (Mass.) 378; *Batchelder v. Heagan*, 18 Me. 32; *Hewey v. Nourse*, 54 Me. 256; *Fraser v. Tupper*, 29 Vt. 409; *Miller v. Martin*, 16 Mo. 508; *Dewey v. Leonard*, 14 Minn. 153; *Bizzell v. Booker*, 16 Ark. 308; *Fahn v. Reichart*, 8 Wis. 255; *Lansing v. Stone*, 37 Barb. (N. Y.) 15; *Simons v. Morrier*, 29 Barb. (N. Y.) 419; *Hind v. Barton*, 25 N. Y. 544; *Case v. Hobart*, 25 Wis. 654; *Dean v. McCarty*, 2 Upp. Can. Q. B. 448; *Gillson v. North Gray R. Co.*, 33 Upp. Can. Q. B. 129; *Achenbach v. Johnston*, 84 N. Car. 264. *Compare Kripper v. Biebel*, 28 Minn. 139; *Reiper v. Nichols*, 31 Hun (N. Y.), 401; *Read v. P. R. Co.*, 44 N. J. L. 280; *Ayer v. Starkie*, 30 Conn. 304 (under statute).

8. *Wood v. Chicago, etc., R. Co.*, 51 Wis. 196.

9. A person whose horse, frightened by a locomotive, became uncontrollable, ran away with him upon the land of another and broke a post there is not liable for the damage. *Brown v. Collins*, 53 N. H. 442. See, generally, *Bigelow v. Reed*, 51 Me. 325; *Unger v. 42d St. R. Co.*, 51 N. Y. 497; *Strouse v. Whittlesey*, 41 Conn. 559; *Center v. Collins*, 17 Barb. (N. Y.) 94; *Goshorn v. Smith*, 92 Pa. St. 435; *Goodman v. Taylor*, 5 C. & P. 410; *Holmes v. Mather*, L. R. 10 Exch. 261. See *Vincent v. Stinehour*, 7 Vt. 62; s. c., 29 Am. Dec. 145.

10. As bees. *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630.

Rats are, it seems, a necessary evil in navigation, and their presence therefore in a ship in reasonable numbers does not render her unseaworthy. Their action is not an act of God, but it is an inevita-

mals;<sup>1</sup> or to domestic animals;<sup>2</sup> or from the handling of dangerous goods in ignorance of their character;<sup>3</sup> or from ice or snow upon the sidewalk in front of the defendant's premises;<sup>4</sup> or falling from the roof of an owner or occupier.<sup>5</sup>

**2. In Equity.**—The jurisdiction of equity extends to relief in many cases of accident. In its equitable sense the word has been defined as "an unforeseen and injurious occurrence not attributable to mistake, neglect, or misconduct."<sup>6</sup>

**Extent of Jurisdiction.**—This jurisdiction may be grouped under three heads: where bonds, promissory notes, etc., are lost or destroyed;<sup>7</sup> where the obligor in a bond is unable through some accident to pay the penalty named therein,—the remedy in this case having been extended to all cases of forfeiture and penalties, irrespective of accident;<sup>8</sup> and where a power created by way of use has

ble accident; and therefore if they gnaw a hole in the ship and let in the seawater, this is a "danger or accident of the seas" within the meaning of the ordinary exception in a charter-party, and the owners are not liable. *Pandorf v. Hamilton*, L. R. 16 Q. B. D. 629. *Compare Carstairs v. Taylor*, L. R. 6 Ex. 217.

1. The owner of a domestic animal is not in general liable for an injury committed by such animal, unless it be alleged and shown that the defendant had notice of its vicious propensities. *Van Leuven v. Lyke*, 1 N. Y. 515. But the owner of a mischievous dog will be liable even as regards a trespasser who is bitten in the daytime by the animal, it being at large on its master's premises. *Loomis v. Terry*, 17 Wend. (N. Y.) 496.

2. *Bush v. Brainard*, 1 Cow. (N. Y.) 78; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Knight v. Abert*, 6 Pa. St. 472; *Leseman v. S. Car. R. Co.*, 4 Rich. L. (S. Car.) 413; *Hess v. Lupton*, 7 Ohio, 216; *Aurora, etc., R. Co. v. Grimes*, 13 Ill. 587; *Illinois, etc., R. Co. v. Carraher*, 47 Ill. 333; *Durham v. Musselman*, 2 Blackf. (Ind.) 96; *Union Pacific R. Co. v. Rollins*, 5 Kans. 157; *Caulkins v. Matthews*, 5 Kans. 191; *Maltby v. Dihel*, 5 Kans. 430; *Hughes v. Hannibal, etc., R. Co.*, 66 Mo. 325; *Turner v. Thomas*, 71 Mo. 596. *Compare Young v. Harvey*, 16 Ind. 314; *Wright v. Clark*, 50 Vt. 130; s. c., 28 Am. Rep. 496.

3. *Parrot v. Wells, Fargo & Co.*, 15 Wall. (U. S.) 524; *Pierce v. Winsor*, 2 Cliff. (U. S.) 18. See *Thomas v. Winchester*, 6 N. Y. 397.

4. *Flynn v. Cantor Co.*, 40 Md. 312; s. c., 17 Am. Rep. 603; *Kirby v. Boylston Market Assoc.*, 14 Gray (Mass.), 249; *Van Dyke v. Cincinnati, I Disney (Ohio)*, 532; *Chambers v. Ohio L. & T. Co.*, 1 Disney (Ohio), 327; *Moore v. Gadsden*,

93 N. Y. 12; s. c., 41 Am. Rep. 352; *Wenzlick v. McCotter*, 87 N. Y. 122; s. c., 41 Am. Rep. 358; *Hartford v. Talcott*, 48 Conn. 525; s. c., 40 Am. Rep. 189.

5. *Kirby v. Boylston Market Assoc.*, 14 Gray (Mass.), 249. *Compare Shipley v. Fifty Associates*, 101 Mass. 251; *Garland v. Towne*, 55 N. H. 55.

6. *Smith's Eq.* 36. But equity will not interfere where the equity of the defendant is equal to or greater than that of the party invoking its aid, as where the former is a *bona fide* purchaser for value, or the latter a mere volunteer. *Story's Eq. Juris.* (13th Ed.) § 106 *et seq.*

7. A bond of indemnity against the future discovery of lost instruments may be always demanded from the complainant both in equity and under the common-law system of most of the States. *Bridgeford v. Masonville Mfg. Co.*, 34 Conn. 546; *Almy v. Reed*, 10 Cush. (Mass.) 421; *Bispham on Equity*, § 177. Re-execution of the instrument may be ordered or an alternative decree framed providing for the case of the future discovery of the lost instrument. *Story's Eq. Juris.* (13th Ed.) § 84. Where a note is not negotiable or is overdue at the time of its loss, the remedy is at law and not in equity. *Byles on Bills*, 300-1 and notes; *Wright v. Maidstone*, 1 R. & J. 701; *Savannah Nat. Bank v. Haskins*, 101 Mass. 370.

8. Equity, considering the penalty simply as a security for the principal debt, on payment of the latter with interest, discharges the obligor from further liability. Where the measure of the injury is not computable, equity will not relieve against payment of an amount agreed on as "stipulated damages," the question being, however, one purely of intention, and the mere use of the words "stipulated damages" not determining which



been defectively executed.<sup>1</sup> There are other cases where equity will relieve a party from the effect of an unforeseen occurrence, some of which are referred to in the note.<sup>2</sup>

rule to apply. *Nesbit v. Brown*, 1 Dev. Eq. (N. Car.) 30; *Rogan v. Walker*, 1 Wis. 527; 3 Lead. Cas. Eq. (3d Am. Ed.) 683; *Streeper v. Williams*, 12 Wright (Pa.) 454; *Chase v. Allen*, 13 Gray (Mass.) 45. Where there is an agreement to reduce a debt in case of prompt payment, a party who does not fulfil the condition will not be relieved against payment of the whole original amount. *Thompson v. Hudson*, L. R. 4 H. L. Cas. 1; *Sterne v. Beck*, 11 Week. Rep. 791; *Robinson v. Loomis*, 51 Pa. St. 78.

A court of equity will not lend its aid actively to enforce a forfeiture, but will leave the parties to their legal remedies. *Oil Creek R. Co. v. Atlantic, etc., R. Co.*, 54 Pa. St. 65; *Livingston v. Tompkins*, 4 John. Ch. (N. Y.) 415; 4 Kent's Com. 130.

1. Relief will be granted both where the instrument itself is informal and where there has been a defective execution of a formal instrument. *Tollet v. Tollet*, 1 Lead. Cas. Eq. 234; *Garth v. Townsend*, L. R. 7 Eq. 220; *Morse v. Martin*, 34 Beav. 200. In favor of purchasers for value, mortgagees, lessees, creditors, a wife, a legitimate child, or a charity, but not in favor of a husband, grandchild, or of the settler himself. *Thorpe v. McCullum*, 1 Gilm. (Ill.) 615; *In re Dyke's Estate*, L. R. 7 Eq. 337; *King v. Roney*, 5 Ir. Ch. 64; *Bixby v. Eley*, 2 Bro. C. C. 325; *Tollet v. Tollet*, 1 Lead. Cas. 229; *Pepper's Will*, 1 Pars. Eq. 436; *Porter v. Turner*, 3 S. & R. (Pa.) 114. See, however, as to "grandchildren," *Huss v. Morris*, 63 Pa. St. 367. This rule does not apply to powers in trust, the exercise of which is obligatory. *Brown v. Higgs*, 8 Ves. 570; *Brown v. Pocock*, 6 Sim. 257; *Penny v. Turner*, 2 Phil. 493; *White's Trusts*, Johns. 656; *Whiting v. Whiting*, 4 Gray (Mass.), 240.

2. **Insufficient Assets, etc.**—Where an executor pays debts or legacies, and it turns out that from some unexpected occurrence the assets are insufficient for all demands, the unpaid creditor or legatee will be permitted to recover from the

executor, and the latter from his distributee. So, where a former will is cancelled on an unfounded presumption that a later one is duly executed; where boundaries have been accidentally confused, etc. In all these cases suitable relief will be granted. See *Story's Eq. Juris.* (13th Ed.) § 90 *et seq.*

#### **Destruction of Demised Premises by Fire.**

—But equity will not afford relief so as entirely to release a person from doing a thing which he has expressly covenanted to do, but of which the performance, by reason of some accidental occurrence, has become unexpectedly burdensome; as where demised premises are destroyed by fire, if the tenant has expressly covenanted to pay rent, he will not be relieved from doing so, though he has lost the enjoyment of the premises. *Fowler v. Bott*, 6 Mass. 63; *Hallett v. Wylie*, 3 John. (N. Y.) 44; *Brewer v. Herbert*, 30 Md. 301. But if the hiring is of apartments in a building, the lease is terminated by destruction of the building by fire. *Stockwell v. Hunter*, 11 Metc. (Mass.) 448; *Graves v. Berdan*, 26 N. Y. 498; *Winton v. Cornish*, 5 Ohio. 477. *Compare Helburn v. Moffard*, 7 Bush (Ky.), 169.

**Test in Such Cases.**—The test is whether the continued existence of a specific thing is a condition on which the parties have contracted.—in which case, even in the absence of any warranty, the parties will be excused in case before the breach performance becomes impossible from the perishing of the thing without default of the contractor; and the distinction is as much observed at law as in equity. See, for cases of such implied condition, *Dexter v. Norton*, 47 N. Y. 62; *Wells v. Colman*, 107 Mass. 514; *Thomas v. Knowles*, 122 Mass. 22; *Lovering v. Buck Mt. Coal Co.*, 54 Pa. St. 291. For cases where such condition was held wanting, see *School District v. Dauchy*, 25 Conn. 530; *School Trustees v. Bennett*, 27 N. J. L. 513; *Adams v. Nichols*, 19 Pick. (Mass.) 275.

**Authorities for Accident.**—1 *Story's Eq. Juris.*, 13th ed. 84 *et seq.*; 14 Am. Law Rev. 1; *Thompson on Negligence*; *Wharton on Negligence*.

**ACCIDENT INSURANCE.** (See also ACCIDENT; CONTRACTS; CONTRIBUTION; INSURANCE; NEGLIGENCE; PROXIMATE AND REMOTE CAUSE.)

1. *Definition. Distinction between Accident and Other Insurance.*
2. *The Policy.*
3. *Definition of an Accident in its Application to Insurance.*
4. *Instances of what are Accidents.*
5. *Instances of what are not Accidents.*
6. *Proximate and Remote Cause in Accident Insurance.*
7. *Stipulations in the Policy Limiting the Liability of the Company.*
  - (a) *Due Diligence for Personal Safety.*
- (b) *Conformity to Common Carrier's Rules.*
- (c) *Death Caused by Taking Poison.*
- (d) *Travelling by Public or Private Conveyance.*
- (e) *Suicide while Insane.*
8. *Voiding the Policy by a Change of Occupation.*
9. *What is Total Disability.*
10. *Notice of Accident to the Company.*
11. *Measure of Damages.*
12. *Miscellaneous Matters.*

**1. Definition.—Distinction between Accident and Other Insurance.**—Accident insurance is an insurance against injury or loss of life, which, though applied to a particular class of risks, depends upon essentially the same principles as other insurance. It is said in effect and analogy to more nearly resemble fire than life insurance, and to be truly a provision for indemnity, except in cases of death, when it becomes a contract to pay a fixed sum of money upon the happening of death caused by accident.<sup>1</sup> The whole matter of accident insurance has been regulated in England by statute,<sup>2</sup> which limits the right to effect such insurance to those over twelve years of age.

**2. The Policy.**—In England, accident policies, like marine policies, are divided into time and voyage policies. The first-named are by the year or for life, and can only be distinguished from ordinary life policies in the nature of the risk. They are not limited as to place, and cover all forms of accident. The voyage policies may or may not be limited as to time, and are always limited as to space to a prescribed journey.<sup>3</sup>

In the United States the policy is usually a contract by which the company agrees to pay a stipulated sum per week during disability caused by accident, and a gross sum in case of death by accident.<sup>4</sup>

**3. Definition of an Accident.**—An accident, in its application to insurance policies, has been defined as an injury which happens by reason of some violence, casualty, or *vis major* to the assured, without his design or consent or voluntary co-operation.<sup>5</sup>

1. 7 American Law Rev. 585.

This is not a contract of indemnity, because a person cannot be indemnified for the loss of life as he can in case of a house or shop. Alderson, B., in *Theobald v. Railway Passengers' Assur. Co.*, 10 Ex. R. 45; 23 L. J. Ex. 249; 23 L. T. 222; 18 Jur. 583; 2 W. R. 528. But see *Bradburn v. The Great Western Railway Co.*, L. R. 10 Ex. 1; 44 L. J. Ex. 9; 31 L. T. (N. S.) 464; 23 W. R. 48.

The central idea of such a policy is partial indemnity against accident. *Hill v. Hartford Ins. Co.*, 22 Hun (N. Y.), 187.

2. 27, 28 Vict. c. 125; *Porter's Laws of Insurance* (1884), c. 24, p. 431.

3. *Porter's Laws of Insurance*, p. 434.

4. *Bliss on Life Insurance*, § 395.

5. 7 Am. Law Rev. 588.

It is an unusual and unexpected result attending the performance of a usual and necessary act. It is any unexpected event

**4. Instances of what are Accidents.**—The following have been held, under the circumstances of each case, to be accidents: an injury to the spine;<sup>1</sup> drowning by falling into water in a fit, or so falling because of an accidental wound (and the presumption in such cases will be in favor of death by drowning and not by fits), nor will suicide be presumed;<sup>2</sup> falling across a railroad track in a fit;<sup>3</sup> hernia resulting from external violence;<sup>4</sup> rupture of a blood-vessel from over-exercise with Indian clubs;<sup>5</sup> peritonitis caused

which happens as by chance, or which does not take place according to the usual course of things. *North American Ins. Co. v. Burroughs*, 69 Pa. St. 43.

It is something which takes place without any intelligent or apparent cause, without design and out of course. *Mallory v. Travellers' Ins. Co.*, 47 N. Y. 52.

Any event which takes place without the foresight or expectation of the person acted upon or affected by the event. *Ripley v. Railway Passengers' Assurance Co. (U. S. C. C., West. Dist. Mich. 1870)*, 2 Big. Cases, 738.

An event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected. *Schneider v. Provident Life Ins. Co.*, 24 Wis. 28.

**Railroad Accident.**—An accident occurring in the course of travelling by railway, and arising out of the fact of the journey. It does not necessarily depend upon any accident to the railway or machinery connected with it. *Alderson, B., in Theobald v. Railway Passengers' Assurance Co.*, 10 Exch. 45.

The term "accidental," as used in an accident policy, is used in its ordinary sense, and means "happening by chance, unexpectedly, or not as expected." *Barry v. U. S. Mut. Acc. Assoc.*, 23 Fed. Rep. 712.

**1. Injury to Spine.**—Assured sprained muscles of his back in lifting a heavy weight, and was held entitled to recover under a proviso that the injury must be due to a material or external cause operating upon the person of the insured. *Martin v. Travellers' Co.*, 1 F. & F. 505.

**2. Drowning.**—In *Trew v. Railway Passengers' Assurance Co.*, 6 H. & N. 839, it was held that death by drowning while bathing was an accident, and it should be left to the jury to say whether death resulted from the action of the water or from natural causes. Where a man while bathing in a pool only a foot deep suddenly became insensible and fell face downwards into the water and died, and the condition of the body showed that he breathed after the fall, the court held that death was caused by the action of water on the lungs, and that the falling was an

accident within the policy. *Reynolds v. Accidental Ins. Co.*, 18 W. R. 1114; s. c., 22 L. T. (N. S.) 820.

Where a man is found dead in the water, he may be presumed to have come to his death by drowning, and not by fits. Even if he fell into the water in a fit and was thus drowned, the insurer would be liable, as death would be caused by the action of the water, and not by the fit. *Winspear v. Accidental, etc., Ins. Co.*, 6 L. R. (Q. B. Div.) 42; 43 L. T. 459; 29 W. R. 116.

Where an accidental wound caused the insured to fall into the water and be drowned, this was still an accident. If a man might have come to his death by accidental drowning or suicide, the presumption will be in favor of accident rather than intention. *Mallory v. Travellers' Ins. Co.*, 47 N. Y. 52; s. c., 7 Am. Rep. 410.

**3. Accident Caused by Fits.**—Where a man was seized with a fit and fell on the railroad track from the platform in front of an approaching train and was killed, it was held that the cause of death was the being run over, and not the fit. *Lawrence v. Accident Co.*, L. R. 7 Q. B. D. 216; 50 L. J. (Q. B.) 522; 29 W. R. 802.

**4. Hernia from External Violence.**—In *Fitton v. Accidental Death Ins. Co.*, 17 C. B. (N. S.) 122, the deceased fell with violence on the floor of his room, and thereby produced an immediate rupture, which resulted in strangulated hernia and death after a surgical operation. It was held that the policy, though excluding hernia generally, must be construed to mean hernia arising within the system independently of external violence.

**5. Rupture of Blood-vessel by Over-exercise.**—In *McCarthy v. Travellers' Insurance Co.*, 8 Biss. C. C. 362, the death was alleged to have occurred by reason of the rupture of a blood-vessel, sustained while exercising with Indian clubs. *Held*, that if the deceased used the clubs for exercise in the ordinary way, and without the interference of any unusual circumstances, the injury was not accidental; but if there occurred any unforeseen accident or involuntary movement of the body which, in connection with the

by an accidental blow;<sup>1</sup> attack upon insured by highwaymen while pursuing his journey on foot;<sup>2</sup> stepping off a train of cars and falling through a concealed hole in a bridge;<sup>3</sup> falling from the cars while walking in sleep;<sup>4</sup> death from an overdose of medicine taken by mistake;<sup>5</sup> death of an insane person who commits suicide by hanging is an accidental death.<sup>6</sup>

**5. Instances of what are not Accidents.**—The following have been held, under the circumstances of each case, not to be accidents: Sunstroke;<sup>7</sup> rupture caused by jumping from railway train.<sup>8</sup>

With these decisions may be compared various others, construing the "voluntary exposure to obvious danger" clause in accident policies. Most of these cases exonerate the insurance company from liability, because of the failure of the insured to comply with

use of the clubs, brought about the injury, then such means were accidental and within the terms of the policy.

**1. Peritonitis caused by Accidental Blow.**—In *North American Ins. Co. v. Burroughs*, 69 Pa. St. 43, the insured while pitching hay was struck on the bowels by the handle of the fork, which slipped in his hands, and died from the peritoneal inflammation which ensued. The jury found the blow was an accident and the cause of the death, and the court sustained the verdict.

**2. Attack by Highwaymen.**—Where the insured, while pursuing his journey on foot, was attacked by highwaymen, the question was as to whether this was an accident. The court observes: "The injuries were effected by violence, but was there any accident? . . . Perhaps, in a strict sense, any event which is brought about by design of any person is not an accident, because that which has accomplished the intention and design, and is expected is a foreseen and foreknown result, and therefore not strictly accident. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning; for the event took place unexpectedly and without design on Ripley's part. It was to him a casualty, and, in the more popular and common acceptation of the word 'accident,' if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event." *Ripley v. Railway Pass. Ass. Co.*, 2 Bigelow L. & Acc. Cas. 738.

**3. Burkhard v. Travellers' Ins. Co.**, 102 Pa. St. 262.

**4. Scheiderer v. Travellers' Ins. Co.**, 58 Wis. 13; s. c., 46 Am. Rep. 618.

**5. Penfold v. Universal Life Co.**, 85 N. Y. 317; s. c., 39 Am. Rep. 660. Compare *Pollock v. United States Mut. Assoc.*, 102 Pa. St. 230; *Mutual Life Ins.*

*Co. v. Lawrence*, 8 Brad. (Ill. App.) 488.

**6. Accident Ins. Co. of North America v. Crandall** (U. S. Sup. Ct., Error to Circuit Court for District of Illinois, March 7, 1887, not yet reported.)

**7. Sunstroke.**—Where a policy contracted to pay to the representatives of the insured, "in the event of his sustaining any personal injury during the said intended voyage, from, or by reason, or in consequence of, any accident whatsoever." The insured died by sunstroke, to which he did not knowingly and without adequate motive expose himself, but it was held that the defendants were not liable, because his death could not be said to have arisen from accident, within the meaning of the policy. *Cockburn, C. J.*, remarked: "It is difficult to define the term 'accident,' as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from accident, and injury or death from natural causes, such as shall be of universal application. At the same time we think we may safely assume that, in the term 'accident,' as so used, some violence, casualty, or *vis major*, is necessarily involved. We cannot think disease produced by the action of a known cause can be considered as accidental." *Sinclair v. Maritime Passenger Assurance Co.*, 3 El. & El. 478; 4 L. T. (N. S.) 15; 30 L. J. (Q. B.) 77; 7 Jur. (N. S.) 367.

In American policies, sunstroke is usually excepted in express terms. 8 Alb. L. J. 85.

**8. Rupture by Jumping from Train.**—A rupture caused by jumping from a railway train before it had stopped is not a bodily injury effected through violent and accidental means; the rupture is the result, and not the means; the injured man meant to jump down and did so, and nothing unforeseen happened in jumping down. *Southard v. Railway Passengers' Assurance Co.*, 34 Conn. 574.

this stipulation in the contract. They are of value, however, in determining what the authorities consider to be death resulting from accident.<sup>1</sup>

**6. Proximate and Remote Cause in Accident Insurance.**—It is essential to a recovery under a policy of accident insurance that the accident shall be the proximate, and not the remote cause of injury or death. An injury which is clearly the result of accident, but which is simply the means of bringing into activity a dormant disease, will not authorize a recovery. While this is, in brief, the state of the law, the dividing line between proximate and remote cause is always a narrow one, and the decision in the cases will often depend upon extreme niceties of distinction as to facts.<sup>2</sup>

1. *Stone v. U. S. Casualty Co.*, 34 N. J. Law, 371; *Providence Life, etc., Co. v. Martin*, 32 Maryland, 310; *Schneider v. Providence, etc., Life Ins. Co.*, 24 Wis. 28; *Tooley v. Railway Pass., etc., Co.*, 3 Biss. (C. C.) 399; *Sawtelle v. Railway Pass. Assur. Co.*, 15 Blatchf. (C. C.) 216; *Neill v. Travellers' Ins. Co.*, (U. C. C. P.) 17 Canadian L. J. 44; *Lowell v. Accident Ins. Co.*, 3 Ins. L. J. 877; 5 Ins. L. J. 559; *Wright v. Sun Mut. Ins. Co.*, 29 U. C. (C. P.) 221; *Tuttle v. Travellers' Ins. Co.*, 134 Mass. 175; s. c., 45 Am. Rep. 316; *National Benef. Assoc. v. Jackson*, 114 Ill. 533; s. c., 13 Am. & Eng. Corp. Cas. 597.

2. In *Barry v. U. S. Mutual Acc. Assoc.* (C. C. E. D. Wis. 1885), 23 Fed. Rep. 712, it was shown that the deceased sustained an accidental injury to an internal organ, and it was held that if the injury necessarily produced inflammation, and the inflammation produced a disordered condition of the injured part, whereby other organs of the body could not perform their natural and usual functions, and in consequence of which the injured person died, the original injury will be considered as the proximate and sole cause of death; but if an independent disease or disorder, not necessarily produced by the injury, supervened upon the injury, or if the alleged injury merely brought into activity a then existing but dormant disorder or disease, and death resulted wholly or in part from such disease, the injury cannot be considered the sole and proximate cause of death.

In *Smith v. Accident Ins. Co.*, L. R. 5 Exch. 302, the assured, while washing his feet in an earthenware pan, and resting them on its edge, broke the pan and cut his foot under the ankle against the sharp side. He had always been a sober and healthy man, and had never suffered from erysipelas at any time. The wound was carefully dressed, but five days afterwards erysipelas set in between the ankle and knee, about five or six inches above the

wound, and he died in three days of erysipelas, which was consequent upon the wound, and for which there was no other known cause. The policy insured against all cuts, etc., "where such accidental injury is the direct and sole cause of death to the insured," but not against "erysipelas or any other disease or secondary cause or causes arising within the system of the insured before, or at the time of, or following such accidental injury, whether causing such death directly or jointly with such accidental injury." A majority of the court held that the company were protected by the condition, and the case was distinguished from *Fitton v. Accidental Death Ins. Co.*, 17 C. B. (N. S.) 122, because in that case no reference was made to secondary causes (which clause the company had inserted after *Fitton's* case), and the hernia was there instantaneously caused by the accident. But *Kelly, C. B.*, in his dissenting opinion, urges that the true effect of the condition is to exempt the company only where erysipelas arises within the system and is collateral to the accident, and wholly independent of it. 8 Alb. L. J. 86.

In *Harris v. Travellers' Ins. Co.* (Superior Court of Chicago, 1868) the deceased was a fireman, who was accidentally buried under a falling wall, but soon rescued without apparent injury, and continued his work for three months, when he took poison. In suit to recover the insurance on the ground that the accident rendered him insane, it was not only held to be suicide if he was sane, but, if he was insane on account of the accident, the death was held too remote to be covered by the policy, which includes only proximate results. See, generally, *Trew v. Railway Pass. Assur. Co.*, 6 H. & N. 839; *Reynolds v. Accidental, etc., Ins. Co.*, 18 W. R. 1141; s. c., 22 L. T. (N. S.) 820; *Winspear v. Accidental, etc., Ins. Co.*, 6 L. R. (Q. B. Div.) 42; 43 L. T. 459; 29 W. R. 116; *Mallory v. Travellers' Ins. Co.*, 47 N. Y. 52; s. c., 7 Am. Rep. 470;

**7. Stipulations in the Policy Limiting the Liability of the Company.—**

(a) *The Party Insured is Required to Use all Due Diligence for Personal Safety and Protection.*—Policies of accident insurance contain various clauses limiting the liability of the company. The one which has been most frequently construed requires, in substance, that the insured shall use all due diligence for personal safety and protection. It is not a breach of this condition to step upon an insecure joist in the second floor of a house in course of construction for the insured;<sup>1</sup> nor for an engineer of a locomotive to attempt performance of what is properly the brakeman's duty, viz., crossing the tender of his locomotive to apply the brakes upon the next car;<sup>2</sup> nor for a passenger to attempt to board a train of cars in slow motion;<sup>3</sup> but an attempt to pass from one car to another at night may be unnecessary exposure;<sup>4</sup> driving into a railway yard and across tracks after warning of the danger is such exposure, as is also walking on a railroad track on a dark and rainy night.<sup>5</sup> Where the insured by a voluntary act exposed himself

Lawrence v. Accident Co., L. R. 7 Q. B. Div. 210; 50 L. J. (Q. B.) 522; 29 W. R. 802; Fitton v. Accidental Death Ins. Co., 17 C. B. (N. S.) 122; McCarthy v. Travellers' Ins. Co., 8 Biss. (C. C.) 362; North Am. Ins. Co. v. Burroughs, 69 Pa. St. 43.

The party insured is required to use all due diligence for personal safety and protection.

1. In Stone v. U. S. Casualty Co., 34 N. J. L. (5 Vroom) 371, the person injured stood upon a joist on the second floor of a building which was being erected for him, and it broke, causing him to fall and be killed, but this was held to be no want of due diligence.

2. In Providence Life, etc., Co. v. Martin, 32 Maryland, 310, the engineer of a locomotive slipped, fell, and was killed while going into the tender to put on a brake, which was properly the fireman's business, but he was held not to have been needlessly exposing himself.

3. In Schneider v. Provident, etc., Life Ins. Co., 24 Wis. 28, it was held that an attempt to get upon the cars whilst they are in slow motion is not wilful and wanton exposure to unnecessary danger. Sawyer v. U. S. Casualty Co. (Superior Court of Mass., Worcester), 8 Am. L. R. (N. S.) 233.

In Tooley v. Railway Pass., etc., Co., 3 Biss. (C. C.) 399, the assured took a ticket from A. to B. When the train reached B. he got out, and the signal was given to proceed to C., and the train had begun to move. Assured then attempted to get in whilst the train was in motion, and was killed. It was held to be natural and prudent for a man who wanted to go on in the train to get in while it was moving, and that the insurers were therefore liable.

4. A condition in a policy of accident insurance providing against getting in and out, etc., of moving cars and other conveyances will not include mere passing from one part to another of a train through which a passage was possible and contemplated, but such passing may be exposure to unnecessary danger, especially if done at night. Sawtelle v. Railway Pass. Assurance Co., 15 Blatchf. (C. C.) 216.

5. In Neill v. Travellers' Ins. Co. (U. C. C. P.), 17 Canadian L. J. 44, the insured, by driving into a railway yard and across the tracks after having been warned of danger, was held to have voluntarily incurred unnecessary danger, and a verdict for plaintiff was set aside and nonsuit entered.

In Lowell v. Accident Ins. Co., 3 Ins. L. J. 877, the jury found that walking on a railroad track on a dark and rainy night, at a time when the deceased knew that trains were frequently passing both ways, was not an "obvious risk," but the Lord Chief Justice said, "Very well, that is a verdict for the plaintiff, but I shall stay the execution, and if the question is one of law for the judge, I should decide it quite the other way, for I should say the deceased was running a risk which was very 'obvious' indeed." The verdict was afterwards set aside. 5 Ins. L. J. 559. See also Wright v. Sun Mut. Ins. Co., 29 U. C. (C. P.) 221.

In Tuttle v. Travellers' Ins. Co., 134 Mass. 175; s. c., 45 Am. Rep. 316, a policy of insurance against accident provided that there should be no recovery for death or injury in consequence of exposure to obvious or unnecessary danger, and that the insured should use all diligence for personal safety and protection. The in-

to a hidden danger, the existence of which he had no reason to suspect, in stepping from a train of cars standing upon a draw-bridge, he does not commit a breach of this condition;<sup>1</sup> nor is it a breach of this clause for a traveller while asleep or in a dazed and unconscious condition to involuntarily walk to the platform of a car and fall therefrom.<sup>2</sup> Where a party, insured against injuries effected through external, violent, and accidental means, receives an injury while in the discharge of his regular duties as yard-switchman or brakeman of a railway company, from which he dies, a recovery cannot be defeated on the ground of voluntary exposure to danger, when the accident is one contemplated by the parties to the insurance.<sup>3</sup>

sured was killed by a railway train while he was running on the track in front of it, in the night, to get on a train approaching in the other direction on a parallel track. *Held*, that there could be no recovery.

1. In *Burkhard v. Travellers' Ins. Co.*, 102 Pa. St. 262; s. c., 48 Am. Rep. 205, an accident policy excepted death or injury "by voluntary exposure to unnecessary danger," and "while walking or being on the road-bed or bridge of any railway." The insured stepped off a railway train stopped at a drawbridge at night, fell through a concealed hole in the bridge and was killed. *Held*, not within the exceptions, and the company was liable. The court observes: "To make him guilty of a 'voluntary exposure to danger' he must intentionally have done some act which reasonable and ordinary prudence would pronounce dangerous. The uncontradicted evidence shows that several other passengers got out of the coach, and some of them in advance of the insured. They certainly apprehended no danger. It is customary for male passengers to alight when a train stops for any length of time. No notice was given to passengers that it was dangerous to get out of the coach where it stood. So far as appears, the bridge, with the exception of this hole, was well covered with plank and entirely safe. When the intestate alighted other passengers were standing on the bridge near the brakeman. The latter was sitting on timber that was lying on the footwalk of the bridge, and was to be used in the repairs being made. The passengers had no knowledge of these repairs. The brakeman held his lantern so placed on the floor that another timber cast its shadow over this hole, making it impossible for the insured to see it. He could see that portion of the floor lighted by the lantern, and the passengers standing thereon. He could see the brakeman near them. He stepped out of the coach

in plain sight of the brakeman. He had a right to suppose he would land on a floor as firm as that on which the others stood. Neither word nor sight gave him any notice of danger. He did not approach the opening caused by the draw, and was not injured thereby. It is true he voluntarily left the car, but a clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto without any knowledge of the danger does not constitute a voluntary exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown the injury is accidental." The court distinguishes *Morel v. Miss. Valley Ins. Co.*, 4 Bush (Ky.), 535; *Lovell v. Accident Ins. Co.*, 3 Ins. Law Jour. 877; *Sawtelle v. Railway Pass. Ass. Co.*, 15 Blatchf. (C. C.) 216, and kindred cases.

2. In *Schneider v. Travellers' Ins. Co.*, 58 Wis. 13; s. c., 46 Am. Rep. 618, where a traveller by railway, while asleep and unconscious, involuntarily arose and walked to the car platform, and fell therefrom and was injured, *held*, not a case of "voluntary exposure," "design," or "self-inflicted injuries."

3. See, generally, *Shilling v. Acc. Death Ins. Co.*, 1 F. & F. (Eng.) 116; *National Beneficial Assoc. v. Jackson*, 114 Ill. 533; s. c., 13 Am. & Eng. Corp. Cas. 597.

In *Morel v. Mississippi Valley Life Ins. Co.*, 4 Bush (Ky.), 535, the plaintiff was insured against personal injury by any accident within the meaning of the policy. In travelling he inadvertently put his arm out of the car window, whereby his hand was injured. There was no clause in the policy requiring him to exercise diligent care. The company demurred,

(b) *The Traveller must Comply with the Rules of the Common Carrier.*—Where a policy provides that the insured must comply with the rules of the common carrier and exercise due diligence for self-protection, standing upon the steps of a car while approaching a station, in violation of a known rule of the company, will bar a recovery.<sup>1</sup>

(c) *Condition against Liability for Death caused by taking Poison.*—Where a policy provides that its benefits shall not extend to death or injury caused “by the taking of poison,” an involuntary taking of poison, by mistake, is within the provision, and bars a recovery.<sup>2</sup> Where, however, a policy was “conditioned to be void if he die by his own hand or act, voluntary or otherwise,” and death resulted from an overdose of medicine, taken by mistake, the provision was construed as intended to cover the varieties of suicidal self-destruction.<sup>3</sup>

(d) *Construction of Clause “Travelling by Public or Private Conveyance.”*—Although the decisions are not uniform, a policy insuring against “any accident while travelling by public or private conveyance, provided for the transportation of passengers,” will

and the court sustained the demurrer, and held that the injury, being caused by his own carelessness, gave him no right to compensation. Compare, however, *Farlow v. Kelly*, 11 Am. & Eng. R. R. Cas. 104, and note to that case, where the U. S. Supreme Court decided that such an act on the part of a passenger was not contributory negligence. This decision on this particular point conflicts with the weight of authority. See, further, *Hoffman v. Travellers’ Ins. Co.* (N. Y. Supreme Court, Clinton Circuit, Sept. 1871), reported in *Baltimore Underwriter*, Jan. 30, 1873, and 8 Alb. Law Jour. 87; *Pratt v. Travellers’ Ins. Co.* (N. Y. Supreme Court, Chemung Circuit, Oct. 1871), 8 Alb. L. J. 88; *Travellers’ Ins. Co. v. Seaver* (U. S. Supreme Court, unreported, cited Bliss on Ins. (2d Ed.) § 402); *Bon v. Railway Pass. Assoc.*, 56 Iowa, 664; s. c., 41 Am. Rep. 127.

1. *Traveller must Comply with the Rules of the Common Carrier.*—In *Ben v. Railway Pass. Assurance Co.*, 55 Iowa, 664; s. c., 41 Am. Rep. 127, the plaintiff was insured against accidents while travelling on conveyances of any common carrier, provided he complied with the rules and regulations of the carrier, and exercised due diligence for self-protection. While riding on a railway car, approaching a station, he stood on the steps, in violation of the carrier’s rule, known to him, and was thrown therefrom and injured. Held, that he could not recover on the policy.

2. *Death caused by accidentally taking Poison.*—In *Pollock v. United States Mutual Acc. Assoc.*, 102 Pa. St. 230, an ac-

cident policy declared that benefits shall not be held to extend to any case of death or personal injury unless the claimant shall establish by direct and positive proof that the death or personal injury “was caused by external, violent, and accidental means,” and that it shall not extend to any death or disability which may have been caused “by the taking of poison.” It was held that the association was not liable where the insured drank poison by mistake for a harmless beverage. The court remarks, “It is not necessary that the poison be taken with an intent to produce death, in order to defeat a claim flowing from the right of membership. If the poison be innocently taken, and without any knowledge of the injurious effect which it was likely to produce, and did produce, so far as the person taking it is concerned, the effect may be said to be accidental. If we go a step further, and admit in such case that the ‘means’ are accidental, yet it is one of the accidental means expressly excepted from the protective power of the certificate.”

3. *Death from an overdose of medicine taken by mistake is within a policy against death by accident* “conditioned to be void if he die by his own hand or act, voluntarily or otherwise,” the aim of the condition being merely to cover the varieties of suicidal self-destruction. *Penfold v. Universal Life Co.*, 85 N. Y. 317; s. c., 39 Am. Rep. 660.

Taking an overdose of laudanum to relieve pain is not within such clause. *Mutual Life Co. v. Laurence*, 8 Bradwell (Ill.), 488.



not cover an accident occurring in the course of the journey, but while the insured is pursuing a part of his journey on foot.<sup>1</sup>

(e) *Suicide while Insane.*—A policy of accident insurance providing that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by the taking of poison, or by suicide or self-inflicted injuries," will not exempt the company from liability to an insane person who commits suicide by hanging. The decision simply extends to accident insurance, a well-settled principle of insurance law, and declares that such a death is not only effected through violent and external means, but is also accidental because by an insane person.<sup>2</sup>

**8. Voiding the Policy by a Change of Occupation.**—Where a policy is issued to cover accidents occurring in the prosecution of a certain business, the following have been held not to be such changes of business as will increase the risk and render the policies void: Pitching hay while on a visit to a grandfather;<sup>3</sup> a school-teacher

**1. What is Construction of Clause "Travelling by Public or Private Conveyance."**—In *Northrup v. Railway Pass. Assurance Co.*, 2 Lans. (N. Y.) 166, an accident ticket insured against "any accident while travelling by public or private conveyance, provided for the transportation of passengers." The assured started by public conveyance for Madison County. On landing at the steamboat wharf at Geneva she started to walk from the steamboat to the railroad, about seventy rods, in further prosecution of her journey, and, while walking, slipped and fell on the sidewalk and received injuries from which she died. There were carriages to transport the passengers, but she chose to walk. The company contended that the contract only covered risks, "while travelling by public or private conveyance," and that a woman's legs could not be held to be either, within the meaning of the contract. The court held, however, that the risk covered the whole journey, and that constructively a person who was walking from steamboat to cars on a through trip was to be deemed travelling by public conveyance from one end of it to the other.

In *Ripley v. Railway Pass. Assurance Co.*, 2 Big. Cas. 738, the assured was going from Grand Haven, Michigan, to Dalton. He reached Muskegon Village at eleven o'clock at night, and thence started for Dalton on foot. When about half-way there, at midnight, he was waylaid and murdered. He held a traveller's ticket, and suit was brought upon it. The court below held that he could not recover, and the decision was subsequently affirmed by the United States Supreme Court. *Ripley v. Insurance Co.*, 16 Wall. (U. S.) 336.

**2. Suicide while Insane**—A very recent case in the United States Supreme Court presented the question whether a policy of insurance against "bodily injuries effected through external, accidental, and violent means," and occasioning death or complete disability to do business, and providing that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by the taking of poison, or by suicide or self-inflicted injuries," covered a death by self-hanging while the insured was insane. In holding that the company was not exempted from liability, the court decided that the clause of the policy as to "bodily injuries effected through external, accidental, and violent means" did not speak of what the injury was "caused by," but looked only to the "means" by which it is effected. No one doubts that hanging is a violent means of death. As it affects the body from without it is external, and according to the decisions as to suicide under policies of life insurance it cannot when done by an insane person be held to be other than accidental. *Accident Insurance Company of North America v. Crandall*, United States Supreme Court, Error to the Circuit Court for District of Illinois, March 7, 1887, not yet reported.

**3. In North Am. Life & Accident Ins. Co. v. Burroughs**, 69 Pa. St. 43, the insured was hurt in pitching hay while on a visit to his grandfather. The company objected that he did not give notice of, or pay for, the extra hazard of doing this work, which was outside his ordinary occupation. But the court said there was no evidence of any change in his occupation, and that what he did on this visit

out of employment engaging in the building of two dwelling-houses;<sup>1</sup> an engineer of a locomotive crossing the tender to apply the brakes on a car when this was the duty of the brakemen.<sup>2</sup> The question as to whether or not there is a change of occupation is for the jury.<sup>3</sup> An ironmonger, engaged in trade, who calls himself an esquire, does not thereby make a misrepresentation as to his occupation which will avoid the policy.<sup>4</sup> An insurance company which grants a policy covering death through external, violent, and accidental means to a yard-switchman or brakeman of a railroad company is considered to have contemplated the dangers of his employment and is liable to him in case of accident.<sup>5</sup>

**9. What is Total Disability.**—Accident insurance policies are now carefully drawn to avoid the payment of an indemnity for anything but total disability from the performance of the duties of the occupation in which the insured is engaged. The decisions, where the disability is partial, depend upon the clause in the policy. Where such clause read "any bodily injury to the said insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits," it was held, in effect, that a disability which incapacitated the assured from following his usual occupation, business, or pursuits," was a breach.<sup>6</sup>

did not amount to a change of business within the meaning of this policy.

1. In *Stone v. U. S. Casualty Co.*, 34 N. J. Law, 371, the company defended upon the ground that the policy became void if the assured changed his occupation to a more hazardous one, and claimed that the assured, who was a school-teacher, had so changed his business, because when the accident occurred he was engaged in the building of two dwelling-houses. The court charged that "changing occupation" meant an engaging in another employment as a usual business (a question for the jury), which the court above affirmed and said that it was preposterous to affirm that because he, a teacher out of employment, had two houses built by contract, he thereby became a builder by profession. See also *Provident Life Ins. & Investment Co. v. Fennell*, 49 Ill. 180.

2. In *Provident Life Insurance & Investment Co. v. Martin*, 32 Md. 310, the assured was a locomotive engineer. The company contended that, in climbing over the tender to apply the brakes on the next car, he was acting outside of his regular occupation and doing the work of a brakeman and thus avoiding the policy. But the court said there was no warranty or stipulation that the assured should not engage in any other occupation, nor that the company should be liable only for accidents occurring in the course of his regular employment, but, on the contrary, the policy covered all accidents, except certain specified ones.

3. *Stone v. U. S. Casualty Co.*, 34 N. J. Law, 371.

4. Where a man being engaged in trade as an ironmonger calls himself an esquire, and says nothing about the trade, this does not amount to a statement false in fact. At most he has not stated all he might have stated. But this only makes his statement imperfect, not untrue, and the court will not deem such an omission to be a *suppressio veri* or *suggestio falsi*. *Perrins v. Marine & Travellers, etc., Co.*, 2 E. & E. 317.

5. *National Beneficial Assoc. v. Jackson*, 114 Ill. 533; s. c., 13 Am. & Eng. Corp. Cas. 597.

6. In *Hooper v. The Accidental Death Ins. Co.*, 5 H. & N. 546, the insured was a solicitor, and while riding on horseback severely sprained his right ankle. On the same day he called in a surgeon, under whose care he remained for upwards of six weeks. For four weeks he was confined to his bedroom and an adjoining room on the same floor, and was unable to walk or stand, and for the next two weeks he could not leave the house. The plaintiff was able to write letters, read law and the like, while lying on the couch, but was unable to attend to business which could not be transacted in his house. The policy allowed five pounds per week for accidents which "shall cause any bodily injury to said insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits." The plaintiff claimed for four weeks total disability.

Where the clause read "accident and injury which totally disabled and prevented him from all kinds of business," it was held that there could be no recovery because it was not shown that there was a "total disability to labor."<sup>1</sup> Where the clause read "while totally disabled and prevented from the transaction of all kinds of business," it was held that such language could not be construed to mean "partially disabled from some kinds of business."<sup>2</sup> Where the clause read "wholly disable and prevent him from the prosecution of any and every kind of business pertaining to his occupation, and then only 'for such period of continuous total disability,'" it was held that total disability did not mean inability to do substantially "all kinds of his accustomed labor to some extent."<sup>3</sup>

**10. Notice of Accident to the Company.**—The policy usually calls for immediate notice of the accident to the company. How far the notice given complies with the stipulation in the policy is a question for the jury. Reasonable but not capricious evidence of immediate notice may be demanded.<sup>4</sup>

The defendants contended that he must be so disabled that the surgeon would forbid his doing any business at all, and said, if he had been a dancing-master, he might be said to be totally disabled. But so long as he could do any part of his work by himself or his clerk, he was not totally disabled, but only partially disabled. Pollock, C. B. said that there was no sound distinction between the case of a dancing-master and an attorney. For, if the dancing master could not dance, he might play an instrument and teach others how to use their limbs in dancing, and an attorney, prostrate, deprived of sense and motion, might to some extent, by partners and clerks, carry on his business. And he held that, if the plaintiff was wholly disabled from carrying on his business as he usually carried it on the company would be liable.

1. *Rhodes v. Railway Pass. Ins. Co.*, 5 Lans. (N. Y.) 71.

2. In *Lyon v. Railway Pass. Assur. Co.*, 46 Iowa, 631; s. c., 6 Repr. 169, an instruction to the jury upon a policy of accident insurance in case of total disability to transact all kinds of business that plaintiff might recover though he were able to do some parts of the accustomed work pertaining to his business, although he could not to some extent do all parts and engage in all the employments thereof is error. An instruction to the jury on such a policy, that the disability is to be referred to any business in which the assured is qualified to engage is error. The policy prescribes the terms of a contract of insurance, and where it stipulates that the company will indemnify the assured for loss of time while totally disabled he cannot recover except upon proof of total disability, nor would

the rule be varied if he should be totally disabled in his own pursuit and able to engage in some other employment.

3. *Saveland v. Fidelity & Casualty Co.* (Supreme Court, Wisconsin, November, 1886), 30 Northwestern Rep. 237.

4. **Notice to the Company.**—In *Provident Life Ins. & Inv. Co. v. Martin*, 32 Md. 310, the policy required notice to the company, when an injury occurred, "as soon thereafter as possible." The accident and death occurred July 21. Within less than a week thereafter the widow reported the death to the company's agent, who had already heard of the accident. She then proceeded to procure affidavits on August 18 and 28 and September 4, which were received by the agent and forwarded to Chicago, to the home office, about the latter date. The company contended that notice was not given soon enough, but the court said that this question was properly left to the jury, who found for the plaintiff, and added: "If it were a matter of law, our judgment thereon would coincide with the conclusion the jury must have reached."

Whether "immediate notice" such as the policy calls for is given is for the jury. *Lyon v. Ins. Co.*, 46 Iowa, 631; s. c., 6 Repr. 169. See also *Provident Life Ins. & Inv. Co. v. Baum*, 29 Ind. 236.

Reasonable but not capricious evidence of immediate notice of the loss to the company may be required. *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782.

Such evidence must be such as a court of justice would hold to be reasonable. *Trew v. Railway Pass. Assur. Co.*, 6 Jur. (N. S.) 759.

Notice within seven days may be demanded. *Gamble v. Accidental Ins. Co.*, 14 Irish R. (C. L.) 204 Exch.

**11. Measure of Damages.**—In England and the United States the measure of damages depends upon essentially different principles, because in the latter country it is the universal custom to measure this indemnity, in a clause of the policy, by a fixed sum payable for the weeks of total continuous disability from all work.<sup>1</sup>

**12. Miscellaneous Matters.—Arbitration.**—In England a condition in the policy as to arbitration is held to be a condition precedent, and requires arbitration in the manner prescribed.<sup>2</sup>

**Insurable Interest.**—Accident, like other insurance, must rest upon an insurable interest in the real payee. Every man has an insurable interest in his own life, and when he takes a policy payable to a payee named by him and accepted by the company, the company cannot set up a lack of insurable interest.<sup>3</sup>

**Locomotive Engineer may Recover upon Passenger's Ticket.**—It has been held that where a locomotive engineer purchased a passenger's insurance ticket and was accidentally killed while riding on an engine and in charge of it, he could recover.<sup>4</sup>

**Recovery over by Insurance Company.**—The right of an insurance company, compelled to pay damages under their policy, to recover over against the person or company whose act or negligence has caused the death or injury has been denied in two cases.<sup>5</sup>

**1. Measure of Damages.**—The measure of damages in cases where indemnity is payable for injury is not the proportion which the injury bears to the amount payable for loss of time and profits, which is the same thing, but the assured is to recover indemnity for the expense and pain and loss immediately connected with the injury, without taking in the remote consequences, and without exceeding in any event the total sum payable in case of death. *Theobald v. Railway Passengers' Assur. Co.*, 10 Ex. Ch. 45; *Art. Accident Insurance*, 8 Alb. L. J. 89.

**2 Arbitration.**—*Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782.

**3. Insurable Interest.**—In England it has been held that an accident insurance is within the statute 15 Geo. III. ch. 48, § 2 (which statute provides that it shall be competent to show that the policy was in fact made on account of a person other than the person with whom it is expressed to be made), and, like any other insurance on lives, must rest on an insurable interest in the real payee of the policy. and although the policy was payable to the deceased, and the suit was brought by his administratrix, it was really for the benefit of another party, who paid the premiums.

In *Provident Life Ins. & Inv. Co. v. Baum*, 29 Ind. 236, a policy was made payable to a payee who was accepted by the company. The company denied an insurable interest in the payee, but the court held that none need be proven, as every man has an insurable interest in

his own life, and the insured, in this case, had appointed and the company accepted the payee.

**4. Locomotive Engineer may Recover upon Passengers' Ticket.**—In *Brown v. Railway Pass. Assoc. Co.*, 45 Mo. 221, an accident ticket insuring against "any accident while travelling by public or private conveyance provided for the transportation of passengers" was purchased by a locomotive engineer. He was accidentally killed while riding on an engine, and in charge of it. (See this case doubted in 8 Alb. L. J. 91.)

**5. Recovery over by Insurance Company.**—In *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754, this right was denied upon the ground that the relation between the plaintiff and the assured was created by a contract to which the defendant was not a party, and that the damage to the plaintiff in being compelled to make good its contract with the assured was not a necessary or proximate result of the wrong done by the defendant in killing the assured.

In *Connecticut Mutual Life Ins. Co. v. N. Y. & N. H. R. R.*, 25 Conn. 265, the same rule was applied where the plaintiff sought to recover for the killing of its assured by negligence on the part of the railway.

**Authorities for Accident Insurance.**—*Accident Insurance*, 8 Alb. Law Jour. (1874) 85; *Bliss on Life Insurance* (2d Ed. 1874), § 395, p. 702; *May, Law of Insurance* (2d Ed. 1882), § 514, p. 780; *Porter, Laws of Insurance* (1884), chap. 24, p. 431.

## ACCOMMODATING—ACCORD AND SATISFACTION.

**ACCOMMODATING.**—By using the words “accommodating terms” in a contract, the parties must have intended that the purchase-money, or some part of it, should be permitted to remain in vendor’s hands, as if a loan for his convenience.<sup>1</sup>

**ACCOMMODATION PAPER.** See **BILLS AND NOTES.**

**ACCOMPLICE.** See **ACCESSORY.**

**ACCORD AND SATISFACTION.** See **BAILMENTS; BILLS AND NOTES; PAYMENTS.**

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| 1. <i>Definition. Effect.</i>        | 10. <i>Additional Security.</i>           |
| 2. <i>Tender not Accepted.</i>       | 11. <i>Payment by Note.</i>               |
| 3. <i>Must be Legal.</i>             | 12. <i>Note for Note.</i>                 |
| 4. <i>Advantageous to Creditors.</i> | 13. <i>Joint Obligors.</i>                |
| 5. <i>Performance.</i>               | 14. <i>Joint Tort-feasors.</i>            |
| 6. <i>Part Payment.</i>              | 15. <i>Joint Makers of a Note.</i>        |
| 7. <i>Payment in Property.</i>       | 16. <i>Joint Creditors.</i>               |
| 8. <i>New Consideration.</i>         | 17. <i>Fraud &amp; Misrepresentation.</i> |
| 9. <i>Note of Third Person.</i>      | 18. <i>When Set Aside.</i>                |

1. **Definition.**—Accord and satisfaction is the substitution of another agreement between the parties in satisfaction of the former one, and an execution of the latter agreement.<sup>2</sup>

Accord and satisfaction forms a complete bar to any further action on the original claim, but accord without satisfaction does not bar such action.<sup>3</sup>

Accord without satisfaction is not a good plea;<sup>4</sup> neither is satisfaction without accord.<sup>5</sup>

1. Plaintiff agreed to sell, and defendant to purchase, a brig, and the terms were to be accommodating. *Held*, under such a contract the vessel might pass by delivery. *Rice v. McLaren*, 42 Me. 157.

2. *Pulliam v. Taylor*, 50 Miss. 251, 257.

Accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions upon this account. 3 Black. Com. 15.

When executed, in parol, it is a good defence to an action on a covenant in a sealed instrument which sounds in damages, although secured by a penalty. *Cabe v. Jameson*, 10 Ired. (N. Car.) 193.

A promise to pay at a future time accrued damages may be pleaded as a release of, or a defence to, the original cause of action; but it will not sustain the plea of accord and satisfaction. *Herr v. O'Connor*, 63 Pa. St. 341.

3. *Bac. Abr. tit. Acc. and Satisf.*

4. *Parker v. Ramsbottom*, 3 B. & C. 257.

5. *Hardman v. Bellhouse*, 9 M. & W. 596.

An agreement or accord which is to operate as a satisfaction of an existing

liability must, before it can have that effect, be fully executed. It is merely executory, as long as by its terms something remains to be done in the future. *Bragg v. Pierce*, 53 Me. 65; *Kromer v. Heim*, 75 N. Y. 574; *Brooklyn Bank v. De Grauw*, 23 Wend. (N. Y.) 342; *Russell v. Lytle*, 6 Wend. (N. Y.) 390; s. c., 22 Am. Dec. 537; *Dolsen v. Arnold*, 10 How. Pr. (N. Y.) 530; *Geary v. Page*, 9 Bosw. (N. Y.) 300; *Tilton v. Alcott*, 16 Barb. (N. Y.) 598; *Noe v. Christie*, 51 N. Y. 272; *Mitchell v. Hawley*, 4 Den. (N. Y.) 414; *Brennan v. Ostrander*, 50 N. Y. Super. Ct. 426; *Rising v. Cummings*, 47 Vt. 345; *Piper v. Kingsbury*, 48 Vt. 480; *Ballard v. Noaks*, 2 Ark. 45; *Flack v. Garland*, 8 Md. 188, 191; *Hearn v. Kiehl*, 38 Pa. St. 147, 149; *Schilling v. Durst*, 42 Pa. St. 126; *McKean v. Reed*, Litt. Sel. Cas. (Ky.) 305; s. c., 12 Am. Dec. 318; *Clark v. Bowen*, 22 How. (U. S.) 270; *Heathcote v. Crookshanks*, 2 Term. R. 241.

At common law, without satisfaction, an accord is no bar to a suit upon the original obligation; but if the accord is founded upon a new consideration, and accepted as satisfaction, it operates as such satisfaction and bars the remedy upon the old contract. The circumstances

**2. Tender not Accepted.**—Tender of performance can never take the place of satisfaction, unless accepted. Accord to be good must be in full satisfaction, and must be executed; readiness to perform is not enough.<sup>1</sup>

of each case must determine whether there has been a new consideration in legal contemplation. *Hall v. Smith*, 15 Iowa, 584; *Babcock v. Hawkins*, 23 Vt. 561.

There is a distinction between an engagement to accept a promise in satisfaction and an agreement requiring performance of the promise. If the promise itself and not its performance is accepted in satisfaction, this is a good accord, and satisfaction without performance. But otherwise if the performance is required to discharge the demand. *Whitney v. Cook*, 53 Miss. 551; *Molyneux v. Collier*, 13 Ga. 406.

An acceptance of an agreement with mutual promises, on which the creditor has a legal remedy for its non-performance, is a satisfaction of a debt. *Goodrich v. Stanley*, 24 Conn. 613; *Billings v. Vanderbeck*, 23 Barb. (N. Y.) 546.

One security may sometimes be pleaded in bar of another. *Thatcher v. Dudley*, 2 Root (Conn.), 169; *Seaman v. Haskins*, 2 Johns. (N. Y.) Cas. 195; *Bank v. Letcher*, 3 J. J. Marsh (Ky.), 196.

An agreement by two, each having an action for false imprisonment pending against the other, to discontinue their respective actions, and an actual discontinuance accordingly is a good accord and satisfaction. *Foster v. Trull*, 12 Johns. (N. Y.) 456; *Vedder v. Vedder*, 1 Den. (N. Y.) 257.

The acceptance by a bailor from the bailee of a part payment, and of the bailee's notes for the residue of the value, is not—the notes being unpaid—an accord and satisfaction which waives the bailor's right to arrest. *Person v. Civer*, 29 How. Pr. (N. Y.) 432. See BAILMENTS.

A right of action by the owner of a chattel for injuries done to it in the possession of a bailee is not barred by a settlement between the owner and the bailee. *Rindge v. Coleraine*, 11 Gray (Mass.), 157.

Accord and satisfaction cannot discharge a specialty, though it will discharge damages arising from a breach of the specialty. *Mitchell v. Hawley*, 4 Den. (N. Y.) 414; s. c., 47 Am. Dec. 260; *Garvey v. Jarvis*, 54 Barb. (N. Y.) 179; *Esmond v. Van Benschoten*, 12 Barb. (N. Y.) 376.

1. *Russell v. Lytle*, 6 Wend. (N. Y.) 390. See PAYMENTS.

Accord with tender of satisfaction is insufficient. *Brooklyn Bank v. De Grauw*, 23 Wend. (N. Y.) 342; *Watkinson v. Inglesby*, 5 Johns. (N. Y.) 392; *Daniels v. Hallenbeck*, 19 Wend. (N. Y.) 408; *Dolzen v. Arnold*, 10 How. Pr. (N. Y.) 530; *Tilton v. Alcott*, 16 Barb. (N. Y.) 598; *Osborn v. Robbins*, 37 Barb. (N. Y.) 483; *Hawley v. Foote*, 19 Wend. (N. Y.) 517; *Crane v. Maynard*, 12 Wend. (N. Y.) 408; *Noe v. Christie*, 51 N. Y. 270; *Flack v. Garland*, 8 Md. 188, 191; *Hearn v. Kiehl*, 38 Pa. St. 147, 149; *Blackburn v. Ormsby*, 41 Pa. St. 57; *Coblentz v. Wheeler & Wilson Mfg. Co.*, 40 Ark. 180; *Cushing v. Wyman*, 44 Me. 121; *Molyneux v. Collier*, 13 Ga. 407; *Simmons v. Clark*, 56 Ill. 96; *Frost v. Johnson*, 8 Ohio, 393; *Smith v. Keels*, 15 Rich. (S. Car.) 318; *Maze v. Miller*, 1 Wash. (U. S.) 328.

But see *Tucker v. Edwards*, 7 Colo. 209, where it was held that where a plaintiff had his choice between two modes of satisfaction, the constant readiness of the defendant to do either is sufficient. He need not make actual tender until the plaintiff makes his choice.

"It ought to be executed; a different decision would overthrow all the books." *Allen v. Harris*, 1 Ld. Raym. 122.

"I, A, hereby agree to deliver B his mare, and I, B, agree to dismiss all suits against A, on delivery of said mare." was held not operative to dismiss the suit until the delivery of the mare. *Ogilvie v. Hallan*, 58 Iowa, 714.

To constitute a good accord and satisfaction, it must be accepted as such. *Barnes v. Lloyd*, 2 Miss. 584; *Evans v. Wells*, 22 Wend. (N. Y.) 325; *Eaton v. Lincoln*, 13 Mass. 424; *Young v. Jones*, 64 Me. 563; *Watson v. Elliott*, 57 N. H. 511; *Pettis v. Ray*, 12 R. I. 344.

A plea founded upon services should aver that the services were accepted in satisfaction of the plaintiff's demand. Without such averment of acceptance the plea is bad. *Johnson v. Hunt*, 81 Ky. 321.

Saying "it is not enough, but there will be no trouble," at the time of payment, is not an acceptance in full satisfaction. *Wiley v. Warden*, 27 Vt. 655.

To a declaration alleging a breach on

**3. Must be Legal.**—An accord and satisfaction to be valid must rest upon a legal consideration, and the thing to be done also must be legal.<sup>1</sup>

**4. Advantageous to Creditors.**—It must be advantageous to the creditor, and he must receive an actual benefit therefrom which he would not otherwise have had.<sup>2</sup>

an agreement therein set forth, and consequent damage to the plaintiffs, it was pleaded that a certain agreement had been come to between plaintiffs and defendants after disputes had arisen. The plea did not in terms admit or deny the alleged breach; nor did it in terms state that the agreement pleaded had been accepted by the parties in accord and satisfaction of the causes of action alleged in the declaration. *Held*, that such plea was bad. It could not be assumed that an agreement had been accepted in accord and satisfaction. *Barclay v. Bank of New South Wales*, L. R. 5 App. Cas. 374.

Acceptance by a ward, after he is of age, of promissory notes which the guardian had not collected, and was therefore liable to pay, is not a good plea to an action on the guardian's bond unless they are collected. *Com. v. Miller*, 5 T. B. Mon. (Ky.) 205.

But where a stockholder in a building association, under resolution of the association permitting borrowers to withdraw, on the payment of a stipulated amount, the stock to be then "withdrawn and cancelled," withdrew, paid off his loans and stock, which was then marked on the books as cancelled and withdrawn, it was held that the company could not afterwards recover for dues which subsequently accrued thereon. After an acceptance of the terms of the resolution and payment by the debtor of the sums found thereby to be due, the new contract was executed and a case of accord and satisfaction made out. *Miller v. Second Jefferson Building Assoc.*, 14 Wright (Pa.), 32.

Where a debtor gave a bond for the benefit of his creditors to a trustee, on which bond judgment was entered, and where one of his creditors accepted said judgment and acted on it, it was held to be a sufficient acceptance to make a valid accord and satisfaction. *Seaman v. Haskins*, 2 Johns. (N. Y.) Cas. 195.

It is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted it is accepted in satisfaction, and such that the party to whom it is offered is bound

to understand therefrom that if he takes it, he takes it subject to such condition. *Preston v. Grant*, 34 Vt. 201; *Towslee v. Healey*, 39 Vt. 522; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 553.

In cases of composition deeds or agreements between a debtor and his creditors an executory accord can sometimes serve as a bar to proceedings on the original claim; and they have been held upon grounds peculiar to that class of instruments to bar an action by a separate creditor, who had signed the composition, to recover his debt, although the composition agreement was still executory. *Good v. Cheeseman*, 2 B. & A. 335; *Bayley v. Homan*, 3 Bing. N. C. 915.

1. *Edgecombe v. Rodd*, 5 East, 294.

Where defendant pleads accord and satisfaction by articles prohibited from sale by statute, the plaintiff may treat the transaction as void; and if its validity is insisted upon by the defendant he may show that it falls within the statutory prohibitions. *Smith v. Grable*, 14 Iowa, 429; *Drisbach v. Keller*, 2 Pa. St. 77; *Walan v. Kerby*, 99 Mass. 1.

It cannot be predicated upon an illegal contract, such as one for the subletting of convicts. *Gordon v. Mitchell*, 68 Ga. 11.

A contract made by an aged man with his grandson, that if the latter will aid the grandfather in inducing a young lady to marry him, write letters to her, and use his influence with the lady to marry the grandfather, the latter will deliver to the grandson a note he holds against him for \$5000 is against the policy of the law, and is void. *Johnson v. Hunt*, 81 Ky. 321.

2. *Davis v. Noaks*, 3 J. J. Marsh. (Ky.) 494; *Logan v. Austin*, 1 Stewart (Ala.) 476.

Restoring to the injured party his chattels or land, of which he has been wrongly dispossessed by the defendant, is no consideration to support a promise by the injured person (to defendant) not to sue him for those injuries. *Keeler v. Neal*, 2 Watts (Pa.), 424.

Where A held a note against B and C, partners, and all three agreed that C should turn over the partnership property to B, who was to pay the note, it was held to be a good accord and satisfac-

5. **Not by Stranger.**—Performance must be by the debtor or his agent; not by a stranger, as the creditor is not bound to receive performance at the hands of such.<sup>1</sup>

6. **Part Payment.**—The payment in money of a part of the whole debt is not a good satisfaction, even if accepted,<sup>2</sup> unless

tion as between A and C. *Rusk v. Gray*, 83 Ind. 589.

1. *Clow v. Borst*, 6 Johns. (N. Y.) 37; *Daniels v. Hallenbeck*, 19 Wend. (N. Y.) 408; *Stark v. Thompson*, 3 T. B. Mon. (Ky.) 302.

A stranger voluntarily paying the amount due to the creditor does not acquire by such payment any right of action against the debtor; neither does such voluntary payment bar the creditor's right of action against the debtor. *Brown v. Chesterville*, 63 Me. 241.

But when the stranger acts as the debtor's agent, or the creditor accepts the payment in discharge of the debtor's liability, it will be a good satisfaction. *Rusk v. Soutter*, 67 Barb. (N. Y.) 371, 373; *Webster v. Wyser*, 1 Stew. (Ala.) 184; *Leavitt v. Morrow*, 6 Ohio St. 71; *Britton v. Lewis*, 8 Rich. (S. Car.) Eq. 271; *Simpson v. Eggington*, 10 Exch. 845; *Belshaw v. Bush*, 11 C. B. 191; *Snyder v. Pharo*, 25 Fed. Rep. 398.

Accord and satisfaction with a person acting without authority as administrator or executor of a deceased person becomes valid on his subsequently receiving letters testamentary or of administration. *Vroom v. Van Horne*, 10 Paige (N. Y.), 549; *Priest v. Watkins*, 2 Hill (N. Y.), 225.

2. *Line v. Nelson*, 38 N. J. L. 358; *Daniels v. Hatch*, 1 Zab. (N. J.) 391; *Warren v. Skinner*, 20 Conn. 557; *Vance v. Lukenbill*, 9 B. Mon. (Ky.) 249; *Jones v. Bullitt*, 2 Litt. (Ky.) 242; *Bryan v. Foy*, 69 N. Car. 45; *Hayes v. Davidson*, 70 N. Car. 573; *Mitchell v. Sawyer*, 71 N. Car. 70; *Moore v. Hylton*, 1 Dev. (N. Car.) Eq. 429; *Brooks v. Moore*, 67 Barb. (N. Y.) 394; *Geary v. Page*, 9 Bosw. (N. Y.) 290; *Harrison v. Close*, 2 Johns. (N. Y.) 450; *Johnston v. Brame*, 5 Johns. (N. Y.) 270; *Russell v. Lytle*, 6 Wend. (N. Y.) 390; *Inman v. Griswold*, 1 Cow. (N. Y.) 199; *Allen v. Roosevelt*, 14 Wend. (N. Y.) 100; *Dederick v. Leman*, 9 Johns. (N. Y.) 333; *Beardsley v. Davis*, 52 Barb. (N. Y.) 159; *Bunge v. Koop*, 5 Robt. (N. Y.) 1; *Bliss v. Shwartz*, 64 Barb. (N. Y.) 215; *Von Gerhardt v. Lighte*, 13 Abb. Pr. (N. Y.) 101; *Curran v. Rummell*, 118 Mass. 482; *Clifton v. Litchfield*, 106 Mass. 34; *Walan v. Kerby*, 99 Mass. 3; *Twitchell v. Shaw*, 10 Cush. (Mass.) 48; *Tuttle v.*

*Tuttle*, 12 Metc. (Mass.) 554; *Donohue v. Woodbury*, 6 Cush. (Mass.) 148; *Howe v. Mackay*, 5 Pick. (Mass.) 44; *Makepeace v. Harvard College*, 10 Pick. (Mass.) 208; *Shaw v. Clark*, 6 Vt. 507; *Miller v. Holden*, 18 Vt. 337; *Rising v. Cummings*, 47 Vt. 345; *Cavaness v. Ross*, 33 Ark. 572; *Eve v. Mosely*, 2 Strobb. (S. Car.) 203; *Sullivan v. Finn*, 4 Greene (Iowa), 544; *Spann v. Baltzell*, 1 Fla. 301; *Ramsdell v. U. S.*, 2 Ct. of Cl. 508; *St. Louis, etc., R. Co. v. Davis*, 11 Pac. R. (Kan.) 421.

Payment of a less sum of money than the whole debt without a release is no satisfaction of the plaintiff's claim. A mere agreement to accept less than the real debt would be *nudum pactum*. *Geiser v. Hershner*, 4 Gill & Johns. (Md.) 305; *Barber v. State*, 24 Md. 390; *Maddux v. Bevan*, 39 Md. 499; *Loney v. Bailey*, 43 Md. 22; *Oberndorff v. Bank of Baltimore*, 31 Md. 132; *Seymour v. Minturn*, 17 Johns. (N. Y.) 160; *Boyd v. Hitchcock*, 20 Johns. (N. Y.) 72; *Rose v. Daniels*, 8 R. I. 381; *Lathrop v. Page*, 129 Mass. 19.

Such release must be under seal. *Harrison v. Close*, 2 Johns. (N. Y.) 447; *Ryan v. Ward*, 48 N. Y. 204; *Gordon v. Moore*, 44 Ark. 349; *Mech. Bank v. Hazard*, 13 Johns. (N. Y.) 353.

Where the holder of a promissory note surrenders it to the maker and takes one of less amount in satisfaction, it is a full discharge, and no action can be maintained for the unpaid portion. The surrender is equivalent to a release under seal. *Draper v. Hitt*, 43 Vt. 439. See **BILLS AND NOTES.**

But taking a less amount than that which is due without surrendering the note is not a satisfaction. *Pearson v. Thomason*, 15 Ala. 700; *Silvers v. Reynolds*, 2 Harr. (N. J.) 275.

Taking a check or receipt for a smaller sum than the amount due on promissory notes in payment and satisfaction of the notes is not necessarily an attempt to discharge a larger sum by payment of a smaller; the notes being salable like any other personal property. *Rockwell v. Taylor*, 41 Conn. 55.

A being indebted to B in 125*l.* 7*s.* 9*d.* for goods sold and delivered, gave B a check for 100*l.*, payable on demand, which B accepted in satisfaction. *Held*



the amount is disputed at the time of the payment, or is contingent.<sup>1</sup>

to be a good accord and satisfaction. *Goddard v. O'Brien*, L. R. 9 Q. B. D. 37.

A receipt in full, when the whole amount has not been paid, will not prevent recovery of the balance due. *Ryan v. Ward*, 48 N. Y. 204; *Miller v. Coates*, 66 N. Y. 609; *Bunge v. Koop*, 48 N. Y. 225; *Harriman v. Harriman*, 12 Gray (Mass.), 341. See PAYMENTS.

A parol release of a judgment for less than the amount due is invalid although indorsed on the execution. *Weber v. Couch*, 134 Mass. 26.

The fact that the debtor is insolvent at the time when his creditor promises to accept from him a less sum than is due in full satisfaction of the debt does not affect the question of the consideration of such promise. *Pearson v. Thomason*, 15 Ala. 700.

Where the amount of payment exceeds the principal and only falls short in the calculation of interest, the accord and satisfaction will be valid. The question as to interest depends much on the circumstances of settlement, and its computation is not always precise. *Johnston v. Brannan*, 5 Johns. (N. Y.) 268; *Tenth Nat. Bank v. Mayor of N. Y.*, 4 Hun (N. Y.), 429; *Tuttle v. Tuttle*, 12 Metc. (Mass.) 551. *Compare Beer v. Foake*, L. R. 11 Q. B. D. 221.

Receiving part payment under protest, though tendered in full, will not establish accord and satisfaction. *People v. Supervisors of Cortland Co.*, 40 How. (N. Y.) 53.

In Maine it is provided by statute that any payment less than the amount actually due, which has been received in full payment, will bar further action on the original claim. *Weymouth v. Babcock*, 42 Me. 42; *Austin v. Smith*, 39 Me. 203.

Both parties, however, must concur in the agreement. It does not apply to a part payment with an agreement that the debtor shall have "his own time to pay the balance." *Mayo v. Stevens*, 61 Me. 561.

So in Georgia a part payment bars further action if the accord and satisfaction is actually executed. But not when only part of the amount agreed upon has been paid. *Rogers v. Ball*, 54 Ga. 15; *Tyler Cotton Press Co. v. Chevalier*, 56 Ga. 494; *Troutman v. Lucas*, 63 Ga. 466.

1. *Alvord v. Marsh*, 12 Allen (Mass.), 606; *Donohue v. Woodbury*, 6 Cush. (Mass.) 151; *Simmons v. Almy*, 103

Mass. 33; *Easton v. Easton*, 112 Mass. 443; *Stimpson v. Poole*, 141 Mass. 502; *Stockton v. Frey*, 4 Gill (Md.), 406; *Howard v. Norton*, 65 Barb. (N. Y.) 161; *Pierce v. Pierce*, 25 Barb. (N. Y.) 243; *Brooks v. Moore*, 67 Barb. (N. Y.) 393; *Powell v. Jones*, 44 Barb. (N. Y.) 521; *Palmerton v. Huxford*, 4 Denio (N. Y.), 166; *Taylor v. Nussbaum*, 2 Duer (N. Y.), 302; *Neary v. Bostwick*, 2 Hilt. (N. Y.) 514; *Ogborn v. Hoffmann*, 52 Ind. 439; *Warren v. Skinner*, 20 Conn. 559; *Potter v. Douglass*, 44 Conn. 541; *Bull v. Bull*, 43 Conn. 455; *McDaniels v. Lapham*, 21 Vt. 222; *Childs v. Millville Mut. Ins. Co.*, 56 Vt. 609; *McCall v. Nave*, 52 Miss. 494; *Tyler Cotton Press Co. v. Chevalier*, 56 Ga. 494; *Mathis v. Bryson*, 4 Jones (N. Car.) L. 508; *Wapello Co. v. Sinnaman*, 1 G. Greene (Iowa), 413; *Brick v. Plymouth Co.*, 63 Iowa, 462; *Cool v. Stone*, 4 Iowa, 219; *Harris v. Kennedy*, 48 Wis. 500; *Berdell v. Bissell*, 6 Col. 162; *Watson v. Elliott*, 57 N. H. 511; *Bryant v. Proctor*, 14 B. Mon. (Ky.) 451; *U. S. v. Childs*, 12 Wall. (U. S.) 232. *Compare Fulton v. Monona Co.*, 47 Iowa, 622; *Wilson v. Palo Alto Co.*, 65 Iowa, 18.

Where a plaintiff, after an injury sustained in his person from the tort of the defendant, agrees with the defendant or his agents that in satisfaction of such injury the defendant should pay the expenses incurred by the plaintiff by reason of his injury, and should furnish him with a free conveyance to his point of destination, and the defendant performs his part of the agreement, the plaintiff cannot recover further damages for the tort. *Stockton v. Frey*, 4 Gill (Md.), 406; *Coon v. Knap*, 8 N. Y. 402; *Ludington v. Miller*, 6 Jones & Sp. (N. Y.) 478; *Rideal v. Great W. R. Co.*, 1 F. & F. 706.

And where there is no express agreement that the amount paid shall be in satisfaction either in whole or in part of the cause of action, the presumption is that it was intended by the parties as a full recompense for the injury and operates as an accord and satisfaction barring a subsequent action to recover damages for the same injury. *Hinckle v. Minneapolis & St. L. R. Co.*, 15 Am. & Eng. R. R. Cas. 391; s. c., 31 Minn. 434.

Where D., a passenger, was injured by the negligence of a railroad company and accepted a sum of money in full satisfaction and discharge of all the claims and causes of action he had against the company, held, that the cause of action was

**7. Payment in Property.**—A money debt may be satisfied by payment in property, if so accepted, whatever its value may be.<sup>1</sup>

**8. New Consideration.**—Although an agreement by a creditor to accept payment of a part of his debt in satisfaction of the whole, together with payment of such part by the debtor, does not, generally speaking, constitute an accord and satisfaction, yet this rule of law contemplates a part payment that is strictly a mere part performance of the original obligation, and which in consequence confers no new benefit on the creditor, and imposes no new burden on the debtor. But where by a mode or time of part

the defendant's negligence, which had been satisfied in the deceased's lifetime, and that the death of D. did not create a fresh cause of action. *Read v. Great East. R. Co.*, L. R. 3 Q. B. 555.

Where a woman accepted \$55 in full payment and satisfaction of any claim for damages to certain city lots against a railroad by reason of the construction of said railroad; and where subsequently the grade in front of the lots was raised 5 feet to the great damage of said lots, it was held that she could not recover any further damages. *Kansas City v. Olathe R. Co.*, 30 Kan. 288.

A contractor's acceptance of payment from the government and his assurance that this payment will close the accounts was held to be a full discharge of all liabilities of the government for damages resulting from the contract. *Morris v. U. S.*, 4 Ct. of Cl. 354; *Murphy v. U. S.*, 14 Ct. of Cl. 508.

A written agreement acknowledging the receipt of promissory notes for a certain sum payable in three and twelve months in full satisfaction of an assault and battery, was held to be a bar to further proceedings. *Peace v. Stennett*, 4 J. J. Marsh (Ky.), 449. See also *Smith v. Kerr*, 1 Barb. (N. Y.) 155.

But where the plaintiff after being injured by a railroad accident, not supposing that he had received any serious injuries, accepted from the railroad a trifling sum in compensation for damage to his clothes, it was held that the receipt of this sum could not be set up as an accord and satisfaction for a patent and severe injury to the brain or spine. *Roberts v. Eastern Counties R. Co.*, 1 F. & F. 460.

Neither was it a defence to an action by a father for the seduction of his daughter that she had previously received an allowance for the support of a bastard child. *Sellers v. Kinder*, 1 Head. (Tenn.) 134.

1. *Blinn v. Chester*, 5 Day (Conn.), 360; *Bull v. Bull*, 43 Conn. 455; *Rose v.*

*Hall*, 26 Conn. 392; *Williams v. Stanton*, 1 Root (Conn.), 426; *Neal v. Handley*, 6 N. East. Repr. (Ill.) 45; *Fisher v. May*, 2 Bibb. (Ky.) 449; *Jones v. Bullitt*, 2 Litt. (Ky.) 242; *Reid v. Bartlett*, 19 Pick. (Mass.) 273; *Bliss v. Shwartz*, 64 Barb. (N. Y.) 215; *Bryant v. Gale*, 5 Vt. 416; *Ridlon v. Davis*, 51 Vt. 457.

An agreement to accept property in satisfaction is executed by a delivery to the person appointed by the party to receive it. *Anderson v. Highland Turnpike Co.*, 16 Johns. (N. Y.) 86; *Grocers' Bank of N. Y. v. Fitch*, 1 Th. & C. (N. Y.) 651.

An agreement that the debtor shall relinquish property in satisfaction of a debt is not valid, unless it is also agreed at what time it shall be relinquished. *Pence v. Smock*, 2 Blackf. (Ind.) 315; *State Bank v. Littlejohn*, 1 Dev. & Bat. (N. Car.) L. 563, 565.

It is, however, only when property is received in satisfaction, without any price being agreed upon at which it is to be estimated between them, that it becomes a valid accord and satisfaction. But when the debtor delivers to his creditor and the creditor receives property at a price agreed upon by them, and the amount thus paid is less than the debt, it is not accord and satisfaction notwithstanding the creditor agrees to take it as full payment of the debt. *Howard v. Norton*, 65 Barb. (N. Y.) 161.

Where a creditor agreed to take certain property of his debtor in satisfaction of his debt upon the faith of the representations of the debtor as to its condition, and he took it under such agreement after he had an opportunity to test their truth, *held*, that this was a good accord and satisfaction. *Williams v. Phelps*, 16 Wis. 80.

It is not a good accord and satisfaction, however, to pay a debt upon a revenue bond by delivery and acceptance of property. Collectors of revenue must receive money. *Martin v. U. S.*, 4 T. B. Mon. (Ky.) 487.

payment, variant from that provided for in the contract, a new benefit is or may be conferred or burden imposed, a new consideration arises out of the transaction, and gives validity to the agreement of the creditor.<sup>1</sup>

Payment in part at an earlier date or in a different place than that agreed upon is a good satisfaction, if so received.<sup>2</sup>

1. *Rose v. Hall*, 26 Conn. 392; *Warren v. Skinner*, 20 Conn. 557; *Blinn v. Chester*, 5 Day (Conn.), 359; *Bull v. Bull*, 43 Conn. 455; *Pearson v. Thomason*, 15 Ala. 700; *Higgins v. Halligan*, 46 Ill. 173; *Bailey v. Cowles*, 86 Ill. 333; *Vance v. Lukebill*, 9 B. Mon. (Ky.) 249; *Curran v. Rummell*, 118 Mass. 482; *Brooks v. White*, 2 Metc. (Mass.) 283; *Schmidt v. Ludwig*, 26 Minn. 85; *Mitchell v. Sawyer*, 71 N. Car. 70; *Hayes v. Davidson*, 70 N. Car. 573; *Watson v. Elliott*, 57 N. H. 511, 513; *Daniels v. Hatch*, 21 N. J. L. 391; *Douglass v. White*, 3 Barb. (N. Y.) Ch. 621; *Brooks v. Moore*, 67 Barb. (N. Y.) 394; *Taylor v. Nussbaum*, 2 Duer (N. Y.), 302; *Bowe v. Gano*, 9 Hun (N. Y.), 6.

Where A, being indebted to B, and having an intention to petition in bankruptcy, proposed a compromise to B through his own attorney C, and where B agreed to receive a certain portion of the debt in full settlement, which portion A accordingly paid over to C, and C notified B that he had received the amount for him, to which B made no objection, and A in consequence took no further steps to become a bankrupt,—*held*, that the payment to C was in effect a payment to B; and that A's abandoning his intention of becoming a bankrupt was a sufficient consideration for receiving a part of the debt in settlement of the whole. *Hinckley v. Arey*, 27 Me. 362.

Procuring a written agreement from one probably liable on the default of the defendant that he will take no advantage of the discharge of the defendant is a good consideration to make part payment a satisfaction. *Booth v. Campbell*, 15 Md. 569.

Where the answer set forth that a certain contract was assigned to the plaintiff in full payment and satisfaction of a certain note sued on, it is immaterial how much was due on the contract. *Luke v. Johnnycake*, 9 Kan. 511.

An agreement by a creditor to release a portion of his debt in consideration that the debtor, who was insolvent, would apply the yearly proceeds of his personal labor in payment of the residue is valid. *Merchants' Bank v. Davis*, 3 Ga. 112; *Molyneaux v. Collier*, 13 Ga. 407.

In an action on a liquidated debt of \$299, the creditor orally agreed to accept \$150 in full if the debtor paid the costs and expenses. The \$150 was paid. The debtor subsequently paid the costs. *Held*, that the last payment made a sufficient additional consideration, and that the transaction was a good accord and satisfaction. *Mitchell v. Wheaton*, 46 Conn. 315.

Where a debtor transfers specific property to trustees for the use of his creditors under a mutual agreement signed by the creditors whereby they accept the property in full satisfaction and discharge of their several demands, there is a valid accord and satisfaction. *Bartlett v. Rogers*, 3 Sawy. (U. S.) 62; *Therasson v. Peterson*, 4 Abb. Ct. App. (N. Y.) 396; *Watkinson v. Inglesby*, 5 Johns. (N. Y.) 386; *McCreary v. McCreary*, 5 Gill & J. (Md.) 147; *Murray v. Snow*, 37 Iowa, 410.

Where a debtor has induced a number of creditors to accept a composition less than their entire demand, each acting upon the faith of the engagement of the others, it will be a valid accord and satisfaction. Such a composition would be enforced, as it would otherwise operate as a fraud upon the other creditors who were induced by it to accept the composition. *Daniels v. Hatch*, 1 Zab. (N. J.) 391; *Murray v. Snow*, 37 Iowa, 410; *Fellows v. Stevens*, 24 Wend. (N. Y.) 294; *Greenwood v. Lidbetter*, 12 Price, 183; *Steinman v. Magnes*, 11 East, 390.

Where the assignee of a note has joined in such a composition, and the satisfaction has been duly executed, it will be a valid accord and satisfaction so as to bar the assignee to recover from his assignor. *Pontions v. Durlinger*, 59 Ind. 27.

But an agreement by a creditor with his debtor to accept a certain percentage of the debt in full satisfaction thereof, "provided that no other creditor shall receive more than the same percentage of his claim," is void for want of consideration. *Perkins v. Lockwood*, 100 Mass. 249; *Bemis v. Hoseley*, 16 Gray (Mass.), 63.

2. *Smith v. Brown*, 3 Hawks (N. Car.), 580; *Jones v. Bullitt*, 2 Bush (Ky.), 49;

**9. Note of Third Person.**—The note of a third person for a less amount than due, given and received in payment, is a good satisfaction.<sup>1</sup>

**10. Additional Security.**—It is the general rule that giving further security for part of a debt, or other security, though for a less sum than the debt, and acceptance of it in full of all demands, make a valid accord and satisfaction.<sup>2</sup>

*Fenwick v. Phillips*, 3 Metc. (Ky.) 87; *Williams v. Langford*, 15 B. Mon. (Ky.) 566; *Ricketts v. Hall*, 2 Litt. (Ky.) 249; *Brooks v. White*, 2 Metc. (Mass.) 283; *Bowker v. Childs*, 3 Allen (Mass.), 434; *Barry v. Goodrich*, 98 Mass. 335; *Schweider v. Lang*, 29 Minn. 254; *Levy v. Very*, 12 Ark. 148; *Rose v. Hall*, 26 Conn. 392. *Robertson v. Campbell*, 2 Call (Va.), 421; *Reid v. Hibbard*, 6 Wis. 175, 193.

A contract was made to pay \$2000 in Mississippi, but the creditor agreed to accept \$1500 in full satisfaction if paid in New York. *Held*, that this was a sufficient consideration to bind the payee if the tender of payment in New York was made before the withdrawal of the proposition reached Mississippi. *Jones v. Perkins*, 29 Miss. 139.

If it is agreed to pay at an earlier date, such payment must be made promptly to make it a valid satisfaction. *Harding v. Commercial Loan Co.*, 84 Ill. 251; *Robertson v. Campbell*, 2 Call (Va.), 421.

When an agreement is made by a debtor to deliver, in full satisfaction of a larger sum due, his notes or money for a less sum, even though there is a consideration for the agreement it must, in order to operate as a discharge, be fully and fairly performed in all its parts, both in time and amount. *Memphis v. Brown*, 1 Flipp. (U. S.) 188.

Though part payment of a debt is not a sufficient consideration for the release of the whole, nevertheless a release under seal of a judgment is valid, the seal importing a consideration. *Maclary v. Reznor*, 3 Del. Ch. 445.

A mere offer of the judgment creditor to accept a less amount in satisfaction of the judgment, if the offer is not accepted by the debtor, will not be a sufficient accord and satisfaction to bar the recovery of the full amount of the judgment. *Bird v. Smith*, 34 Me. 63; s. c., 56 Am. Dec. 635.

1. *Brassell v. Williams*, 51 Ala. 349; *Letcher v. Bank*, 1 Dana (Ky.), 82; *Smith v. Bettger*, 68 Ind. 254; *Lee v. Oppenheimer*, 32 Me. 253; *Goodnow v. Smith*, 18 Pick. (Mass.) 414; *Brooks v. White*, 2 Metc. (Mass.) 283; *Guild v. Butler*, 127 Mass. 386; *Webb v. Goldsmith*, 2 Duer

(N. Y.), 413; *Frisbie v. Larned*, 21 Wend. (N. Y.) 450; *Booth v. Smith*, 3 Wend. (N. Y.) 66; *Le Page v. McCrea*, 1 Wend. (N. Y.) 164; *Stagg v. Alexander*, 55 Barb. (N. Y.) 70; *Conkling v. King*, 10 Barb. (N. Y.) 375; *Bliss v. Schwartz*, 64 Barb. (N. Y.) 215; 7 Lans. (N. Y.) 186; *Boyd v. Hitchcock*, 20 Johns. (N. Y.) 76; *Bunge v. Koop*, 5 Rob. (N. Y.) 12; *Stefford v. Bacon*, 1 Hill (N. Y.), 522; *Currie v. Kennedy*, 78 N. Car. 91; *Dryden v. Stephens*, 19 W. Va. 1.

But where the note of the third party is obviously void, as the note of an infant; and where such note has been successfully defended on such ground, the accord and satisfaction will be set aside as void for want of consideration. *Wentworth v. Wentworth*, 5 N. H. 410.

Where the note of a third person, payable to the creditor, is given in payment of a debt, but is not indorsed by the debtor, it does not extinguish the debt, but is considered only to be collateral security. *Hunter v. Moul*, 98 Pa. St. 13.

Where A owed B, and C owed A, it was agreed between the parties that B should receive C's note in satisfaction of his debt. C was insolvent at the time, but the fact was not known. *Held*, that A's debt was extinguished. *Cadens v. Teasdale*, 53 Vt. 469.

The giving and receiving of one obligation in lieu of another, the parties to which or some of them are different, may be pleaded as an accord and satisfaction. But to render it available the condition of one or both parties must be rendered better. *Bullen v. McGillicuddy*, 2 Dana (Ky.), 90; *Mehan v. Thompson*, 71 Me. 492.

Where a note of a third party for the full amount has been given and accepted in payment of a preceding debt, it extinguishes even a judgment debt. *State Bank v. Fletcher*, 5 Wend. (N. Y.) 85; *Booth v. Smith*, 3 Wend. (N. Y.) 66; *Jones v. Ransom*, 3 Ind. 327; *Sanders v. Branch Bank at Decatur*, 13 Ala. 353.

2. *Boyd v. Hitchcock*, 20 Johns. (N. Y.) 76; *Le Page v. McCrea*, 1 Wend. (N. Y.) 164; *Nevins v. Deperries*, 1 Edm. (N. Y.) Sel. Cas. 196; *Pardee v. Wood*, 8 Hun (N. Y.), 584; *Dolsen v. Arnold*,

**11. Payment by Note.**—It is the well-settled rule in most of the States that a note of the debtor given and received in payment of a pre-existing debt does not extinguish the right of action on the debt, unless it be expressly so understood by the parties.<sup>1</sup> (See *BILLS AND NOTES.*)

10 How. Pr. (N. Y.) 529; Kellogg v. Richards, 14 Wend. (N. Y.) 116; Strong v. Dean, 55 Barb. (N. Y.) 337; Gunn v. McAden, 2 Ired. (N. Car.) Eq. 79; Gordon v. Price, 10 Ired. (N. Car.) 385; Colburn v. Gould, 1 N. H. 279; Pulliam v. Taylor, 50 Miss. 251; Glenn v. Smith, 2 Gill & J. (Md.) 494; Mason v. Campbell, 27 Minn. 54; McIntyre v. Kennedy, 29 Pa. St. 448, 454; Whitsett v. Clayton, 5 Colo. 476; Maze v. Miller, 1 Wash. (U. S.) 328.

If a creditor receive from his debtor in satisfaction of his claim a note for a less sum, signed by the debtor and his wife, which all the parties at the time suppose is binding upon her, and such note is afterward paid out of her separate property, it will constitute a valid discharge of the original debt. *Bowker v. Harris*, 30 Vt. 424.

So is a note for less amount than the debt indorsed by a third party a good accord and satisfaction. *Varney v. Conery*, 77 Me. 527.

Where a promise by a debtor to pay a smaller sum than that which is due to extinguish an existing debt is reinforced by the debtor's giving, as additional security, a mortgage of real estate in which his wife joins, the pledge of her inchoate right of dower for such payment is sufficient to make it a valid accord and satisfaction. *Keeler v. Salisbury*, 33 N. Y. 648.

Where one party furnished another with money, and accepted a note therefor with the understanding that the payor should procure third parties to assign to himself certain liens on lands claimed by the payee, which liens the payor should hold for the benefit of the payee in satisfaction of the note, such agreement amounted to an accord and satisfaction and constituted a payment of the note. *Treadwell v. Himmelmann*, 50 Cal. 9.

In the absence of fraud, an acceptance by the creditor of a third person's deed of all his title in certain land may be a good consideration to sustain an agreement to take a part for the whole debt, although the title fail. *Reed v. Bartlett*, 19 Pick. (Mass.) 273.

When a draft upon a third person is offered by the debtor and accepted in full satisfaction by the creditor, who there-

upon surrenders the evidences of indebtedness and the draft is duly paid, it amounts to a good accord and satisfaction. *Stagg v. Alexander*, 55 Barb. (N. Y.) 70. Compare *Weddigen v. Boston Elastic Fabr. Co.*, 100 Mass. 422; *Wentworth v. Wentworth*, 5 N. H. 410.

The acceptance of an Eastern draft, though for less than the amount of a judgment, may be good as an accord and satisfaction thereof. *Reid v. Hibbard*, 6 Wis. 175.

But where a debtor, merely for the purpose of securing a part of the note and not by way of substitution, gives a mortgage on his own estate alone, it is a mere accord without satisfaction, and does not extinguish the debt. *Platts v. Walrath, Hill & Den. Suppl.* (N. Y.) 59.

The acceptance of a new security for an existing debt does not operate as a payment unless so intended by the parties. *Kemmerer's Appeal*, 102 Pa. St. 558.

So an assignment of property by deed to secure debts, with a power of sale on giving six months' notice, will not be a valid satisfaction, but only a collateral security even where no notice has been given; such an assignment will at no time bar an action on the original debt unless specially provided in the deed. *Emes v. Widdowson*, 4 C. & P. 151; *Jones v. Fennimore*, 1 Greene (Iowa), 134; *Stone v. Miller*, 16 Pa. St. 450.

1. *Glenn v. Smith*, 2 Gill & J. (Md.) 493; *Larrabee v. Talbott*, 5 Gill (Md.), 426; *Wyman v. Rae*, 11 Gill (Md.), 416; *Mudd v. Harper*, 1 Md. 110; *Young v. Hibbs*, 5 Nebr. 433; *Jones v. Johnson*, 3 W. & S. (Pa.) 276; *Estate of Davis*, 5 Whart. (Pa.) 530; *Weakly v. Bell*, 9 Watts (Pa.) 273; *Brown v. Olmsted*, 50 Cal. 162; *Steamb. Charlotte v. Hammond*, 9 Mo. 59; *Sellars v. Johnson*, 65 N. Car. 104; *Hill v. Sleeper*, 58 Ind. 221; *Bishop v. Welch*, 35 Ind. 521; *Nightingale v. Chafee*, 11 R. I. 609; *Wilbur v. Jernegan*, 11 R. I. 113; *Swain v. Frazier*, 35 N. J. Eq. 326; *Judge v. Fiske*, 2 Speer's L. (S. Car.) 436; *Exp. Williams*, 17 S. Car. 396; *Brown v. Duncel*, 46 Mich. 29; *Mason v. Warner*, 43 Mich. 439; *Jeffrey v. Cornish*, 10 N. H. 505; *Wright v. First Crockery Ware Co.*, 1 N. H. 281; *Wil-*

**12. Note for Note.**—The giving of a new note for an old one, which has become due, does not extinguish the old note nor the debt unless it is so expressly agreed; especially where the creditor thereby would be deprived of surety.<sup>1</sup> (See *BILLS AND NOTES.*)

**13. Joint Obligor.**—An accord and satisfaction with one of several

*belm v. Schmidt*, 84 Ill. 183; *Dougal v. Cowles*, 5 Day (Conn.), 511; *Brugman v. McGuire*, 32 Ark. 733; *Costar v. Davies*, 8 Ark. 213; *Keel v. Larkin*, 72 Ala. 493; *Graves v. Shulman*, 59 Ala. 406; *Sheehy v. Mandeville*, 6 Cranch (U. S.), 253; *Re Hurst*, 1 Flipp. (U. S.) 462; *Bank of U. S. v. Daniel*, 12 Pet. (U. S.) 32; *Risher v. The Frolic*, 1 Woods (U. S.), 92; *Sibree v. Tripp*, 15 M. & W. 23.

Giving a note is no payment of a book debt. It only suspends the right of action during the time allowed for payment by the note. *Putnam v. Lewis*, 8 Johns. (N. Y.) 389; *Burdick v. Green*, 15 Johns. (N. Y.) 247; *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409; *Murray v. Gouverneur*, 2 Johns. Cas. (N. Y.) 438, note; *Herring v. Sanger*, 3 Johns. Cas. (N. Y.) 71, note; *Frisbie v. Larned*, 21 Wend. (N. Y.) 450; *Conkling v. King*, 10 Barb. (N. Y.) 372; *Hughes v. Wheeler*, 8 Cow. (N. Y.) 77; but see *Myers v. Wells*, 5 Hill (N. Y.), 463.

This principle does not hold good, however, when the note has been transferred. *Harris v. Johnston*, 3 Cranch (U. S.), 308.

In Massachusetts, Maine, and Vermont the doctrine has been held that a note given and received in payment of an antecedent account is a bar to an action on the account, whether the note is paid or not. *Fowler v. Bush*, 21 Pick. (Mass.) 230; *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158; *Wyman v. Fabeus*, 111 Mass. 81; *Homes v. Smyth*, 16 Me. 177; *Bangor v. Warren*, 34 Me. 324; *Shumway v. Reed*, 34 Me. 560; *Newall v. Hussey*, 18 Me. 249; *Varner v. Nobleborough*, 2 Greenl. (Me.) 121; *Stephens v. Thompson*, 28 Vt. 77; *Hutchins v. Olcott*, 4 Vt. 549; *Kimball v. The Anna Kimball*, 2 Cliff. (U. S.) 4; *Hudson v. Bradley*, 2 Cliff. (U. S.) 130.

Giving a negotiable note in these States is not payment so as to prevent the vendor from retaining the goods until payment in case of the buyer's insolvency while the note is yet unnegotiated. *Arnold v. Delano*, 4 Cush. (Mass.) 33.

The presumption in Massachusetts that a note is payment of a contract debt is subject to qualification, and may be rebutted and controlled by evidence or by the admitted facts of the case. *Parham Sewing-machine Co.*

*v. Brock*, 113 Mass. 194; *Appleton v. Parker*, 15 Gray (Mass.) 176; *Morton v. Austin*, 12 Cush. (Mass.) 392; *Taft v. Boyd*, 13 Allen (Mass.), 86; *Curtis v. Hubbard*, 9 Metc. (Mass.) 328; *Butts v. Dean*, 2 Metc. (Mass.) 76; *Lovell v. Williams*, 125 Mass. 439; *Re Clapp*, 2 Low. (U. S.) 226. The same is held in Maine. *Perrin v. Keene*, 19 Me. 355. And in Vermont. *Lazell v. Lazell*, 12 Vt. 448, where it was held not to be extended to a case in which the note was lost.

The doctrine held in those States that the delivery and acceptance of a promissory note in payment of a pre-existing debt extinguishes the debt does not extend to checks, even from a third party upon a fourth. *Weddigen v. Boston Elastic Fabr. Co.*, 100 Mass. 422; *Marratt v. Brackett*, 60 Me. 524.

A void note received in payment of a debt does not extinguish the debt; as in the case of a note given for a patent right, which fact was not recorded on the face of the note as required by statute. *Graham's Estate*, 14 Phila. (Pa.) 280.

1. *Hess v. Dille*, 23 W. Va. 90; *Merchants' Bank v. Good*, 21 W. Va. 455.

One note is paid by another when the latter is accepted as payment; and if it be negotiable the presumption is that it is so received. *Weston v. Wiley*, 78 Ind. 54.

Whether a new note takes the place of the old and cancels it, or the old note is actually paid and a new note is discounted for the amount of it, it is a renewal, if a renewal is intended. It is the intention of the parties and their understanding of it which makes it a renewal. *Flanagan v. Hambleton*, 54 Md. 222; *U. S. Bank v. Bank of Georgia*, 10 Wheat. (U. S.) 333; *Slaymaker v. Gundacker*, 10 S. & R. (Pa.) 83; *Gault v. McGrath*, 8 Casey (Pa.), 397; *Hacker v. Perkins*, 5 Whart. (Pa.) 95; *Cake v. Lebanon Bank*, 86 Pa. St. 303; *Re Dixon*, 2 McCrary (U. S.), 556; *Auburn City Bank v. Hunsiker*, 72 N. Y. 252; *Second Nat. Bank v. Poucher*, 56 N. Y. 348; *Cadiz Bank v. Slemmons*, 34 Ohio St. 142.

A note given in satisfaction of a prior one operates as a discharge, and releases the sureties thereon. *Wolf v. Fink*, 1 Pa. St. 435.

obligors, whether they are bound jointly or jointly and severally, discharges the others, and may be pleaded in bar by all; but to have this effect there must be a technical release under seal.<sup>1</sup>

1. Line *v. Nelson*, 38 N. J. L. 358; Cornell *v. Masten*, 35 Barb. (N. Y.) 157; Rowley *v. Stoddard*, 7 Johns. (N. Y.) 207; Frink *v. Green*, 5 Barb. (N. Y.) 455; Booth *v. Campbell*, 15 Md. 569; Goss *v. Ellison*, 136 Mass. 503; American Bank *v. Doolittle*, 14 Pick. (Mass.) 123; Stimpson *v. Poole*, 141 Mass. 502; Ward *v. Johnson*, 13 Mass. 148; Tuckermann *v. Newhall*, 17 Mass. 581; Shaw *v. Pratt*, 22 Pick. (Mass.) 305; Smith *v. Bartholemew*, 1 Metc. (Mass.) 276; Burson *v. Kincaid*, 3 Pa. 57; U. S. *v. Thompson*, Gilp. (U. S.) 614; Lovejoy *v. Murray*, 3 Wall. (U. S.) 1; Elliott *v. Holbrook*, 33 Ala. 659; Brown *v. Marsh*, 7 Vt. 327; Vandever *v. Clark*, 16 Ark. 331; Armstrong *v. Hayward*, 6 Cal. 183; Drinkwater *v. Jordan*, 46 Me. 432; Berry *v. Gillis*, 17 N. H. 9; McAllister *v. Dennin*, 27 Mo. 40; Ayer *v. Ashmead*, 31 Conn. 447.

Accord and satisfaction with one of several inures to the benefit of all. Wallace *v. Rensall*, 7. M. & W. 204; Nicholson *v. Revill*, 4 A. & E. 675.

A release without a seal will have the same effect if the instrument itself shows a consideration. Heckman *v. Manning*, 4 Colo. 543.

But an unsealed instrument given without consideration in terms releasing one of several joint debtors, but expressly reserving the creditors' rights against the others, will not discharge them. Honegger *v. Weinstein*, 47 N. Y. Super. Ct. 125; Northern Ins. Co. *v. Potter*, 63 Cal. 157.

Where a creditor receives from one of a number of joint and several debtors by successive guardian bonds, a sum considerably less than the aggregate amount of their indebtedness, and gives him an instrument under seal releasing all claims against him or his representatives, and covenanting to execute any and all instruments which may be necessary to relieve the party making such payment from all liability to the other joint debtors, such instrument will have the effect of an equitable release to the other debtors of all in excess of their aliquot portion of the joint indebtedness. Dudley *v. Bland*, 83 N. Car. 220.

A release to one of two joint and several obligors is a release of both, but a covenant not to sue one of two obligors cannot have the effect of a release of both. Crane *v. Alling*, 15 N. J. L. 423; Walker *v. McCulloch*, 4 Me. 421; Rus-

sell *v. Adderton*, 64 N. Car. 417; Winston *v. Dalby*, 64 N. Car. 299.

An instrument not under seal purporting to discharge one of two joint debtors from his share of the debt for a consideration stated is no defence to an action against the joint debtors. McAllester *v. Sprague*, 34 Me. 296.

If the creditor of a corporation by an instrument under seal release a stockholder from all personal liability for his debt, he thereby discharges the corporation and the other stockholders to the same extent as the one to whom the release is executed, and if it be only for his proportion of the debt the company and other stockholders are released *pro tanto*. Prince *v. Lynch*, 38 Cal. 528; Phoenix Bank *v. Bumstead*, 18 Pick. (Mass.) 77.

The voluntary release of one joint-judgment debtor releases his co-defendant. Lamb *v. Gregory*, 12 Neb. 506; U. S. *v. Thompson*, Gilp. (U. S.) 614; Collier *v. Field*, 1 Mon. Terr. 612.

A mere judgment against one of several co-debtors without execution will not be an accord and satisfaction so as to discharge the co-debtors. McLaurine *v. Monroe*, 30 Mo. 462.

An accord and satisfaction with one of several joint debtors on payment of his proportion of the debt does not discharge the others if it was not the intention of the parties. Burke *v. Noble*, 48 Pa. St. 168; Noble *v. Burke*, 5 Phila. (Pa.) 526.

In Tennessee it was held that the jury, under proper instructions, must judge whether the effect of a release of the obligor in an instrument was to discharge a co-obligor entirely or to discharge one from the joint liability for his co-obligor's half of the obligation. Richardson *v. McLemore*, 5 Baxt. (Tenn.) 586.

In the same State accord and satisfaction to be a valid release need not be under seal, although it must be signed. An unsigned entry on a note, "Received of M. \$1063, his part, principal and interest of this to date," was held not to operate as a release to M., and parol evidence was not admissible to show that such release was intended by the parties. Simpson *v. Moore*, 6 Baxt. (Tenn.) 371.

A judgment confessed by one partner operates as a satisfaction and releases the firm. Frisbie *v. Larned*, 21 Wend. (N. Y.) 450.

A creditor of a dissolved partnership accepted in part satisfaction of his claim

**14. Joint Tort-feasors.**—A written instrument given to one of two joint tort-feasors, and reciting the receipt from him of a certain sum "as full payment as per claim," is a bar to an action against the other tort-feasors, and oral evidence is inadmissible to show that the sum paid was intended to be received as part and not as full payment.<sup>1</sup>

the note of one of the partners, and promised to discharge the maker from liability for the partnership debt. *Held*, to be an effectual release of the other partners. *Luddington v. Bell*, 77 N. Y. 138; s. c., 33 Am. Rep. 601; *Waydell v. Luer*, 3 Den. (N. Y.) 410; *Arnold v. Camp*, 12 Johns. (N. Y.) 409; *Gray v. Brown*, 22 Ala. 262.

But a release of one partner does not release the other if the release so provides. *Williams v. Hitchings*, 10 Lea (Tenn.), 326.

So it was held not to be the release of a partnership debt, but merely a covenant to indemnify the partner who paid the money, where the creditor, upon receiving nearly one half of the amount of a partnership's obligation from one of the partners, signed a receipt which contained the following clause: "I do hereby consent and agree that the other partners shall and will duly pay the balance on said obligation without further cost and detriment to said T." (the paying partner). *Hendrick v. O'Neill*, 48 Ga. 631.

1. *Goss v. Ellison*, 136 Mass. 503.

Accord and satisfaction by one of several obligors or wrong-doers is a satisfaction as to all; and a partial satisfaction by one of several wrong-doers is a satisfaction *pro tanto* as to all. *Merchants' Bank v. Curtis*, 37 Barb. (N. Y.) 317.

Where the amount of damages for an injury by two or more joint tort-feasors to plaintiff is undecided, and not susceptible of estimation, the release of one of them for a certain sum releases them all—*Long v. Long*, 57 Iowa, 497; *Urton v. Price*, 57 Cal. 270—unless the creditor has expressly renewed his right against the other debtors. *Irwin v. Scribner*, 15 La. Ann. 583. And this holds good even where it was provided that the other defendants were not to be affected by the stipulation, and that plaintiff reserved all rights against them. *Mitchell v. Allen*, 25 Hun (N. Y.) 543.

After judgment has been rendered, the tort-feasors become joint debtors, and the judgment creditor may compromise with one and discharge him from liability, without affecting the liability of the others for the balance remaining due on

the judgment or discharging them therefrom. *Irvine v. Millbank*, 36 N. Y. Super. Ct. 264.

In an action against two joint carriers for negligence, a parol release of one before suit, was considered a release of both, though the release had been made at the request of the party not released, and with the express understanding that it should not affect the rights of the plaintiff against this party. *Bronson v. Fitzhugh*, 1 Hill (N. Y.), 185.

In an action of trespass against two persons for assault and battery, judgment was obtained against one by default. The plaintiff, while suit against the second one was pending, released the judgment against the first defendant, in order to render him a competent witness. *Held*, that the release discharged both defendants. *Allen v. Wheatley*, 3 Blackf. (Ind.) 332.

So where a convict, injured by the negligence of the contractors under whom he was employed, received compensation from the State, he was debarred from suing the contractors. *Metz v. Soule*, 40 Iowa, 236.

Where the facts in the case are such that the amount of damages sustained by the injured party can be made certain, it becomes a question of fact for the court and the jury to decide whether he has received full satisfaction for his injuries through an accord and satisfaction with one of the defendants. In such a case, a release of one of the wrong-doers, not under seal, will be explained according to the intention of the parties, and a release of one will not release all. *Ellis v. Esson*, 50 Wis. 138; *Brown v. Cambridge*, 3 Allen (Mass.), 475; *Stone v. Dickinson*, 5 Allen (Mass.), 29; *Shaw v. Pratt*, 22 Pick. (Mass.) 307; *Pond v. Williams*, 1 Gray (Mass.), 630, 636; *McCrillis v. Hawes*, 38 Me. 568; *Gilpatrick v. Hunter*, 24 Me. 18; *Eastman v. Green*, 34 Vt. 390; *Spencer v. Williams*, 2 Vt. 209; *Chamberlin v. Murphy*, 41 Vt. 110; *Sloan v. Herrick*, 49 Vt. 328; *Ellis v. Bitzer*, 2 Ohio, 89; *Knickerbacker v. Colver*, 8 Cow. (N. Y.) 111; *Matthews v. Chicopee Co.*, 3 Robt. (N. Y.) 712; *Bank v. Messenger*, 9 Cow. (N. Y.) 37; *Irvine v. Milbank*, 15 Abb. Pr. (N. Y.) N. S. 378.



**15. Joint Makers of a Note.**—The discharge of one maker of a joint and several note discharges all the joint makers.<sup>1</sup> (See *BILLS AND NOTES*.)

**16. Joint Creditors.**—An accord and satisfaction with one of two or more joint creditors bars an action by the other creditors against the debtor.<sup>2</sup>

**17. Fraud and Misrepresentations.**—Accord and satisfaction procured by the debtor's wilfully misrepresenting or suppressing any

*Merchants' Bank v. Curtis*, 37 Barb. (N. Y.) 319; *Snow v. Chandler*, 10 N. H. 92; *Bloss v. Plymale*, 3 W. Va. 393; *Line v. Nelson*, 38 N. J. L. 358; *Gunther v. Lee*, 45 Md. 60; *Bonney v. Bonney*, 29 Iowa. 448; *Neligh v. Bradford*, 1 Nebr. 451.

So, where a release of one of several obligors showed upon its face, and in connection with the surrounding circumstances, that it was not the intention of the parties to release the co-obligors, and the court was convinced that the whole scheme of procuring a separate release of one of the obligors was a plan of all for escaping the full payment of an honest debt, the instrument was construed merely as a covenant not to sue, and the co-obligors were held not to be discharged. *Parmelee v. Lawrence*, 44 Ill. 405.

A release under seal, however, of one of several joint wrong-doers releases them all. The sealed instrument implies a sufficient consideration for the release, and a proviso reserving the right of action against the others is void. *Ruble v. Turner*, 2 Hen. & Mun. (Va.) 88; *Gilpatrick v. Hunter*, 24 Me. 18; *Gunther v. Lee*, 45 Md. 60.

In Alabama, all releases take effect according to the intentions of the parties, and an acceptance of a partial satisfaction from one joint trespasser, with receipt accordingly, is only available to the others as part satisfaction. *Smith v. Gayle*, 58 Ala. 600.

1. *Crawford v. Roberts*, 8 Ore. 324.

But the mere promise to release one of the makers of a joint and several note because of his paying a part thereof is without lawful consideration, and void. *Smith v. Bartholomew*, 1 Metc. (Mass.) 256; *Small v. Older*, 57 Iowa. 326.

C. & W. gave a joint and several note to H. for \$71. H. made a verbal agreement with W. that if he would pay him \$21.55 he would not call on W. for the payment of the note, but would look to C. for the residue. W. thereupon paid the \$21.55, which was indorsed on the note. H. afterward brought an action on the

note against C. & W., and they pleaded the agreement with H. and the acceptance of the \$21.55 in bar of the action. It was held that the agreement between H. and W. and the acceptance of the \$21.55 was no satisfaction of the note, nor bar to plaintiff's action. *Harrison v. Close*, 2 Johns. (N. Y.) 448.

2. *Austin v. Hall*, 13 Johns. (N. Y.) 286; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Myrick v. Dame*, 9 Cush. (Mass.) 248; *Kimball v. Wilson*, 3 N. H. 96. But see *Upjohn v. Ewing*, 2 Ohio St. 13; *Reigart v. Ellmaker*, 14 S. & R. (Pa.) 121; *Eisenhart v. Slaymaker*, 14 S. & R. (Pa.) 153.

A and B bought a quantity of railroad iron on joint account and sold the iron to a corporation in their joint name. After the sale A settled with the corporation, taking in payment part cash and part railroad stock and giving a receipted bill for the price of the iron in full with interest. B afterward commenced a suit against the railroad company for his proportion of the amount, joining A as plaintiff. It was held that the settlement made by A with the corporation released the latter from liability. *Osborn v. Martha's Vineyard R. Co.*, 140 Mass. 549.

So is accord and satisfaction with one partner of a firm good against the other partners, and a release by one partner will be a release by all. *Yandes v. Lefavour*, 2 Blackf. (Ind.) 371; *Gregg v. James*, 1 Ill. 107; *White v. Jones*, 14 La. Ann. 681; *Vanderburgh v. Bassett*, 4 Minn. 242; *Allen v. Farrington*, 2 Sneed (Tenn.), 526; *Scott v. Trent*, 1 Wash. (Va.) 77; *Salmon v. Davis*, 4 Binn. (Pa.) 375; *Noyes v. New Haven, etc., R. Co.*, 30 Conn. 1; *Doremus v. McCormick*, 7 Gill (Md.), 49.

Where one partner signs a general release to a debtor of the firm and it does not appear to what demands it is intended to apply, or that the subscribing partner has any separate demand against the debtor, the release will be a discharge from debts due to the partnership. *Emerson v. Knower*, 8 Pick. (Mass.) 63.

## ACCORD AND SATISFACTION—ACCORDING.

material fact in the statement of his affairs is void; and a sealed release based thereon will be set aside.<sup>1</sup>

**18. When Set Aside.**—An accord and satisfaction will be set aside if it is shown that the parties to the transaction were mutually mistaken in regard to some facts.<sup>2</sup>

**ACCORDING.**—The words "according to" a contract, or law, or statute imply that everything has been done in compliance with the terms of the instrument, law, or statute referred to, it being understood that the construction of the law or statute is governed by the recognized principles of the law at the time the words were used.<sup>3</sup>

1. *Stafford v. Bacon*, 1 Hill (N. Y.), 532; *Dolsen v. Arnold*, 10 How. Pr. (N. Y.) 531; *Pierce v. Drake*, 15 Johns. (N. Y.) 475; *Willson v. Foree*, 6 Johns. (N. Y.) 110; *Central Bank v. Pindar*, 46 Barb. (N. Y.) 467; *Baker v. Spencer*, 58 Barb. (N. Y.) 248; *Brown v. Montgomery*, 20 N. Y. 287; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Galoupeau v. Ketchum*, 3 E. D. Smith (N. Y.) 175; *Bridge v. Batchelder*, 9 Allen (Mass.), 394; *Ilsley v. Jewett*, 2 Metc. (Mass.) 168; *Abercrombie v. Mosely*, 9 Port. (Ala.) 145; *Maynard v. Johnson*, 4 Ala. 116; *Mooring v. Mobile Marine Ins. Co.*, 27 Ala. 254; *Long v. Spruill*, 7 Jones (N. Car.), 96; *Reynolds v. French*, 8 Vt. 85; *Watson v. Owens*, 1 Rich. (S. Car.) 111; *Newall v. Hussey*, 18 Me. 249; *Comstock v. Smith*, 23 Me. 202; *Pope v. Tunstall*, 2 Ark. 209; *Cave v. Hall*, 5 Mo. 59; *Slocumb v. Holmes*, 2 Miss. 139.

A composition and discharge will be set aside where it was induced by representations of insolvency and poverty, while the debtor previously had made a fraudulent conveyance of his property. *Richards v. Hunt*, 6 Vt. 251; s. c., 27 Am. Dec. 545.

Where no consideration has passed, equity will not enforce the execution of a release given by a layman in plain ignorance of the law, when dealing with a lawyer and led by him to do the very opposite of what he at the time expressed his intention to do, and this although no false statement was made. *Mellon v. Webster*, 5 Mo. App. (Mo.) 449.

A person injured by alleged negligence of the servants of a railroad company executed a paper purporting to be a written release discharging his right of action against the company for his injuries. The release was signed by him while he was under the influence of opiates administered to alleviate his pains caused by said injuries, he being unable to understand what he was doing. The release was set aside as void. *Chicago, etc., R. Co. v. Doyle*, 18 Kan. 58.

Where a judgment debtor furnished his own money to a third party with instructions to buy from his creditor the judgment against him for a smaller amount in full satisfaction of the whole, and this third party did so satisfy the judgment without disclosing the real facts, it was held that such satisfaction was void and the payment only partial. *Shaw v. Clark*, 6 Vt. 507; s. c., 27 Am. Dec. 578.

A release by an ignorant woman who was injured by the negligence of a company, and which release was signed by her during the illness caused by said injuries, and upon the inducements of the company's physician who attended her, and in the absence of her friends, was held to be void. *Eagle Packet Co. v. Defries*, 94 Ill. 598.

A release to be available as a bar to an action at law must have been obtained while the signer was absolutely free from duress, as in the case of a seaman who gave a release to the master of a vessel of all claims for damages for assault and battery. Such release must appear to be a reasonable satisfaction. *Mitchell v. Pratt*, Taney (U. S.), 448; *Rourke v. Story*, 4 E. D. Smith (N. Y.) 54.

2. *Calkin v. Griswold*, 11 Hun (N. Y.), 210; *Burr v. Veeder*, 3 Wend. (N. Y.) 412; *Mowatt v. Wright*, 1 Wend. (N. Y.) 355, 360; *Wheadon v. Olds*, 20 Wend. (N. Y.) 174.

But where the accord was made upon the advice of a third party, who was mistaken as to some facts, the consequent satisfaction formed a bar to further action if the principals in the transaction were not mistaken about the facts. *Thompson v. Bennett's Adm'r*, 34 Mo. 477.

A condition of an accord agreement, like that of any other contract, may be waived by both parties. *Cary v. McIntyre*, 7 Colo. 173.

3. The words "according to the form of the statute" at the head of the proclamations, indorsed on a fine, import that

**ACCOUNT—ACCOUNT STATED.** See ACCOUNT RENDER; AGENCY; ATTORNEY AND CLIENT; AUDITOR; BOOKS AS EVIDENCE; EXECUTOR AND ADMINISTRATOR; GUARDIAN AND WARD; INTEREST; LIMITATIONS; PARTNERSHIP; TRUSTS.

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|-------------------------------------|-------------------------------------|
| 1. <i>Definition.</i>               | 10. <i>Third Parties.</i>           |
| 2. <i>Open Account.</i>             | 11. <i>Set-off.</i>                 |
| 3. <i>Settled Account.</i>          | 12. <i>Illegal.</i>                 |
| 4. <i>Account Stated.</i>           | 13. <i>New Promise.</i>             |
| 5. <i>Official Accounts.</i>        | 14. <i>Balance.</i>                 |
| 6. <i>How Stated.</i>               | 15. <i>Interest.</i>                |
| 7. <i>Acquiescence, Admissions.</i> | 16. <i>Parties not Merchants.</i>   |
| 8. <i>Reasonable Time.</i>          | 17. <i>Opening the Account.</i>     |
| 9. <i>To Whom Stated.</i>           | 18. <i>Surcharging, Falsifying.</i> |

1. **Definition.**—An account is a list or statement of monetary transactions, such as payments, purchases, sales, debts, credits, etc., in most cases showing a balance or result of comparison between items of an opposite nature, *e.g.*, receipts and payments.<sup>1</sup>

A detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation.<sup>2</sup>

the fine was proclaimed as required by the statute. *Doe v. Harrison*, 3 B. & Ad. 765.

Where coaches and cabriolets are allowed by statute to stand in certain places, according to the statutes made for that purpose, and a subsequent statute gives the vestrymen of a church a right to make certain regulations as to where a certain stand should be, a coach or cabriolet, after a prohibition from the vestrymen, from such stand cannot be said to stand there, according to the statutes, and may be impounded. *Frost v. Williams*, 7 Ad. & Ell. 773.

The insertion of a clause in a bond enlarging it so as to include a subsequent advance, the accompanying mortgage remaining unchanged, does not affect the operation of the mortgage, nor enlarge the meaning of the words "according to the conditions of said bond" in said mortgage so as to include the advance. *Stoddard v. Hart*, 23 N. Y. 556.

From the averment that defendant "subscribed for twenty shares of the capital stock," etc., "according to the statute incorporating the company," etc., it would be intended that he had done everything required by the charter in order to become a subscriber, and especially so on general demurrer. *Fiser v. Railroad Co.*, 32 Miss. 360.

A devise to the next male heir nearest in kindred and relation to testator "according to law" was construed to mean that the estate should go in the same manner the law would have given it to

the heir of the testator. *McIntyre v. Ramsey*, 23 Penn. 317.

An averment that an affidavit was made according to law will be held to mean within the time required by law. *McElhaney v. Gilleland*, 30 Ala. 183.

Where a statute provides that appeals from justices must be tried, according to equity and justice without regard to any defect in the summons, or other process before the justice, a defect in a notice cannot be considered on appeal. *Abrams v. Johnson*, 65 Ala. 465.

1. *Sweet's Law Dict.*

2. *Bouvier's Law Dict.*

The term implies that one is responsible to another for moneys or other things, either on the score of contract or of some fiduciary relation of a public or private nature, created by law or otherwise. *Whitwell v. Willard*, 1 Metc. (Mass.) 216. It cannot include a claim to have taxes on land refunded on the ground that they were excessive through the wrongful and illegal conduct of the assessor. *Stringham v. Winnebago Co.*, 24 Wis. 594.

A statement of a balance of account without disclosing debits and credits is not an account. A balance is but the conclusion or result of the debit and credit sides of an account. An account is a detailed statement of mutual demands in the matter of debt and credit between parties, arising out of contract or some fiduciary relation. *McWilliams v. Allan*, 45 Mo. 573.

**2. Open Accounts.**—An open account is one in which some item of the contract is not settled by the parties, whether the account consists of one item or many; or where there have been running or current dealings between the parties, and the account is kept open with the expectation of further dealings.<sup>1</sup>

**3. Settled Accounts.**—A voluntary settlement of accounts between parties affords presumption that all items properly chargeable at the time were included. This presumption is not conclusive, but clear and convincing proof that such items were unintentionally omitted is necessary to sustain a subsequent claim to recover them.<sup>2</sup>

Account as used in a bequest of "all my accounts" does not include a savings-bank account. *Gale v. Drake*, 51 N. H. 78.

The fact that a person has a copy of an account against another person is no evidence that he is the owner, nor is it any evidence of authority to collect it. *Dutcher v. Beckwith*, 45 Ill. 460.

1. *Sheppard v. Wilkins*, 1 Ala. 62; *Goodwin v. Harrison*, 6 Ala. 438. Every new item in a running open account draws with it all preceding items. *Ring v. Jamison*, 2 Mo. App. 584.

Where all the items in an account relate to one transaction, it constitutes a continuous account, regardless of intervening statements of balance. *Lamb v. Hanneman*, 40 Iowa, 41.

A creditor is not bound to furnish an itemized account before bringing suit for amount due. *Foster v. Newbrough*, 66 Barb. (N. Y.) 645.

Where the facts show various transactions running through a series of years, entirely separate and independent, and payment made on items wholly disconnected with prior transactions, it is not an instance of a running account. *Compton v. Johnson*, 1 West. Repr. (Mo.) 395.

2. *Bull v. Harris*, 31 Ill. 487; *Lee v. Reed*, 4 Dana (Ky.), 109; *Kennedy v. Williamson*, 5 Jones L. (N. Car.) 284; *Stebbins v. Niles*, 25 Miss. 267; *Leighton v. Grant*, 20 Minn. 345; *Rowell v. Marcy*, 47 Vt. 627; *Lockwood v. Thorne*, 18 N. Y. 285; *McNeil v. Baker*, 6 W. Va. 153.

A settled account will, generally, be deemed conclusive between the parties, unless some fraud, mistake, omission, or inaccuracy is alleged and shown. *Ruffner v. Hewitt*, 7 W. Va. 585. See *Bull v. Harris*, 31 Ill. 487; *Lee v. Reed*, 4 Dana (Ky.), 109; *Farmer v. Barnes*, 3 Jones Eq. (N. Car.) 109; *Kennedy v. Williamson*, 5 Jones L. (N. Car.) 284; *Bourke v. James*, 4 Mich. 336; *Mills v. Geron*, 22 Ala. 669.

In an assumpsit for work and labor the plaintiff cannot avoid a settlement of the account between himself and the defendant for mistakes or errors in items thereof. Such avoidance can only be had in an action to set aside the settlement. *Roach v. Gilmer*, 3 Utah, 389.

An account settled cannot be opened if it appears that the plaintiff was aware when he made the settlement of the facts on which he bases his claim to relief. *Quinlan v. Keiser*, 66 Mo. 603.

Where on the settlement of an account the debtor agrees to give his note for the balance, but fails to do so, the account becomes due immediately. *Kronenberger v. Binz*, 56 Mo. 121.

The execution of a note raises a presumption that all matters between the parties up to that date have been settled. *Allen v. Bryson*, 25 N. W. Repr. (Iowa) 820; *Grimmell v. Warner*, 21 Iowa, 12.

A payment made and accepted as an adjustment of an unsettled or unliquidated demand will operate as a satisfaction, although shown to be much less than the creditor was entitled to receive and would have received had he brought an action. The fact that the creditor dissented at the time of the settlement can make no difference, if he finally accepted the debtor's offer and agreed to the settlement. *Roach v. Gilmer*, 3 Utah, 389.

A settlement between the parties is *prima facie* to be taken as a settlement of all demands, but is not conclusive, and is no bar to a recovery for matter not included in the settlement, though existing at the time, and evidence is admissible to show that certain matters were not so included. *Normandin v. Gratton*, 12 Oreg. 505; s. c., 8 Pac. Repr. 653.

The mere settlement of an account does not in itself constitute an agreement, or amount to a contract, though there may be evidence of a contract. *Peterson v. U. S.*, 2 Wash. (U. S.) 40. See 1 Myers Fed. Dec. 21.

**4. Account Stated.**—When two persons, having had monetary transactions together, close the account by agreeing to the balance appearing to be due from one of them, this is called an account stated. It is of importance from the fact that it operates as an admission of liability by the person against whom the balance appears; or, in the language of the common law, "the law implies that he against whom the balance appears has engaged to pay it to the other;" and on this implied promise or admission an action may be brought.<sup>1</sup>

A settled account may be corrected when proved to have been made under a mutual mistake as to important facts. *Newell v. Smith*, 3 Atl. Repr. (Conn.) 674.

1. Sweet's Law Dict.; Black Com. 111, 164; Chitty on Contracts, 599 *et seq.*; *Reinhardt v. Hines*, 51 Miss. 344; *McCall v. Nave*, 52 Miss. 494; *Stebbins v. Niles*, 25 Miss. 267; *Hawkins v. Long*, 74 N. Car. 781; *Stenton v. Jerome*, 54 N. Y. 480; *May v. Kloss*, 44 Mo. 300; *Zacarino v. Pallotti*, 49 Conn. 360.

An account closed is not an account stated. *Bass v. Bass*, 8 Pick. (Mass.) 187; *Volkening v. De Graaf*, 81 N. Y. 268; *Mandeville v. Wilson*, 5 Cranch. (U. S.) 15. See ACCOUNT SETTLED, *ante*.

An account stated must be made with knowledge, or opportunity of knowledge, on the part of the debtor of all the circumstances. *Kinney v. Heatley*, 7 Pac. Repr. (Oregon) 359.

An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect to such transactions, as distinguished from a mere admission or acknowledgment. It is a new cause of action. It is not a contract upon a new consideration, and does not create an estoppel, but establishes *prima facie* the accuracy of the items charged without further proof. *McKinster v. Hitchcock*, 26 N. W. Repr. (Neb.) 705.

The mere rendering of an account does not make it an account stated, and an omission to object to it raises only a presumption of assent, which may be rebutted by circumstances tending to a contrary inference. *Guernsey v. Rexford*, 63 N. Y. 631.

An account stated may consist of but a single bill of goods. 2 Chitty on Contr. (11th ed.) 962; *Cobb v. Arundell*, 26 Wis. 553; *Highmore v. Primrose*, 5 M. & S. 65; *Lane v. Hill*, 18 Q. B. 252. Compare *Texas, etc., R. Co. v. Smith*, 29 Alb. L. J. 85.

Where the account is stated with refer-

ence to only one item, that item must consist of a debt then due and owing. *Lemere v. Elliott*, 6 H. & N. 656; *Gough v. Findon*, 7 Exch. 48; *Lubbock v. Tribe*, 3 M. & W. 607; *Tucker v. Barrow*, 7 B. & C. 623; *Green v. Davies*, 4 B. & C. 235; *Whitehead v. Howard*, 5 Moore, 105.

The charges may all be on one side. 2 Chitty on Contr. (11th Am. Ed.) 962; *Rutledge v. Moore*, 9 Mo. 537; *Kock v. Bonitz*, 4 Daly (N. Y.), 117.

Where the evidence of plaintiffs showed that defendants had rendered statements of purchases and sales of stocks as they were severally made, and monthly statements of account, and that when the account was finally closed there was a balance shown to be due to plaintiffs by defendants' books, for which balance plaintiffs received a check as payment, such acceptance of the check was an adjustment of the account; and the evidence did not tend to show a cause of action, and the jury were properly directed to find for the defendants. *Pyncheon v. Day*, 5 West'n Repr. (Ill.) 698.

**Principles.**—An account stated is a demand on one side which is admitted on the other for a definite amount due; and the admission must be voluntary, but need not be in express terms. *Powell v. Pacific R. Co.*, 65 Mo. 658.

The acknowledgment must be unqualified. *Calvert v. Baker*, 4 M. & W. 417; *Evans v. Verity*, R. & M. 239.

To maintain an action upon an account stated, an account balanced and rendered, with an assent to the balance, express or implied, must be proved. *Volkening v. De Graaf*, 81 N. Y. 268. See *Cape Girardeau, etc., R. Co. v. Kimmel*, 58 Mo. 83.

Admission of balance due on account renders a party liable in account stated. *Tassey v. Church*, 4 Watts & S. (Pa.) 141; s. c., 39 Am. Dec. 65.

If the agreement as to amount due is the result of an error in regard to the items, or in the computation of interest,

The simple rendering of an account between the parties and agreeing upon the amount due are sufficient facts on which to

it is not conclusive. *Town v. Wood*, 37 Ill. 512.

It is not necessary to prove an express promise to pay. *Claire v. Claire*, 10 Neb. 54. See *Cochrane v. Allen*, 58 N. H. 250; *Atwater v. Fowler*, 1 Edw. Ch. (N. Y.) 417; *Terry v. Sickles*, 13 Cal. 427; *Stebbins v. Niles*, 25 Miss. 267. Compare *Killam v. Preston*, 4 W. & S. (Pa.) 15.

An account cannot be stated with reference to a debt payable on a contingency. *Baker v. Heard*, 5 Exch. 959.

To prove an account stated, it is not always necessary to show actual examination and assent. Receipt by the party, and the elapsing of a reasonable time without any objection to the account, are an implied admission that the account is correct, and truly though not conclusively stated. *Benites v. Hampton*, 3 Utah, 369; s. c., 3 Pac. Repr. 206.

Where there are cross-demands, it is not necessary that the items should consist of debts due *in presenti*, or that they should be legal debts; but equitable claims may also be brought into the account. *Laycock v. Pickles*, 4 B. & S. 497.

But where the account is stated with reference to only one item, that item must consist of a debt then due and owing. *Lemere v. Elliott*, 6 H. & N. 656; *Gough v. Findon*, 7 Exch. 48; *Tucker v. Barrow*, 7 B. & C. 623; *Whitehead v. Howard*, 5 Moore, 105.

An agreement to pay future compound interest cannot be enforced as an account stated. *Young v. Hill*, 67 N. Y. 162; s. c. 23 m. Rep. 99.

An account stated cannot be based on an appraisal where it does not appear that both parties mutually agreed on the appraisers, or recognized them as authorized to bind them by their action. *Chicago, etc., R. Co. v. Peters*, 45 Mich. 636. See *Bates v. Townley*, 2 Exch. 152.

The omission of a debtor to dispute the accuracy of an account within a reasonable time after it is presented to him has no further effect than to enable the creditor to recover the amount of it without proof of the correctness of any of its items. It is not an estoppel, but the account is still open to impeachment for errors and mistakes, and the debtor may still insist upon the statute of limitations as a defence. *Bucklin v. Chapin*, 1 Lans. (N. Y.) 443.

An account examined and signed by

the parties will be deemed a stated account, notwithstanding it contains the phrase "errors excepted." *Branger v. Chevalier*, 9 Cal. 353.

Where the uncontroverted testimony before a referee disclosed that there was an account stated between the parties on a certain date, and it also appears by the referee's own report that he could not have arrived at the conclusion held in said report without holding that the parties were not bound by said stated account, held, that this was error, and that the report of the referee should not have been confirmed. *Killops v. Stevens*, 29 N. W. Repr. (Wis.) 390.

**Persons not Concluded.**—An insane person, nor an infant, is not concluded by an account stated. 1 *Chitty's Cont.* (11th Am. Ed.) 187, and cases cited. Nor an ignorant person who cannot read. *Guenivet v. Perret*, 18 La. Ann. 356. Compare *Stewart v. Connor*, 13 Ala. 94.

A kept cash with a banker, and the balances to his credit were stated from time to time in a pass-book. He became a lunatic, but the account continued to be kept by his family; and in the pass-book, the entries in which were in the banker's handwriting, a balance was stated to the credit of A. Held, that this was not evidence to support a count on an account stated with A, in an action by his representative against the banker to recover the amount of such balance. *Tarback v. Bispham*, 2 M. & W. 2.

Although the party who receives the account stated may be estopped to deny its correctness by omission to object, the principle does not apply to the party who furnishes the account; as to him, it contains certain admissions and is generally regarded as correct, but it is nevertheless open to explanation for any omissions or mistakes. *Schettler v. Smith*, 2 J. & Sp. (N. Y.) 17. See *Nau-man v. Zoerhlaut*, 21 Wis. 472.

The presentation by a party to his debtor of an account in which he charges a gross sum for services does not preclude the creditor from showing what the services were reasonably worth, and recovering a larger sum than that at which they were so charged by him. *Williams v. Glenny*, 16 N. Y. 389; *Stryker v. Cassidy*, 76 N. Y. 50; *Harrison v. Ayers*, 18 Hun (N. Y.), 336.

When a party to whom a bill for services is presented for payment, upon paying a part of the amount, objects to

maintain an action;<sup>1</sup> but if one of the parties does not agree to the balance, an action upon an account stated cannot be maintained.<sup>2</sup>

An admission by a party of a specific amount as due, which amount is the balance of an account, will empower the court to give judgment for such sum as an account stated.<sup>3</sup>

Although an account stated may be founded upon a mere equitable liability, it must be a direct liability from the defendant to the plaintiff.<sup>4</sup>

If the plaintiff declare upon an account stated with him in a representative character,—for instance, as executor,—it must appear that the defendant admitted that the debt was due to the plaintiff in that character.<sup>5</sup>

**5. Official Account.**—An account stated by an accounting officer is not conclusive nor *prima-facie* evidence of the indebtedness of the government, nor can an action be brought upon it.<sup>6</sup>

the bill, it does not become an account stated, so as to conclude the party presenting it, or prevent his recovering what his services were worth. *Brownson v. Hoffman*, 7 Hun (N. Y.), 674.

But where, previous to signing, a party objects to the items in the statement of an account as incorrect, but afterwards signs it as correct, he waives his objections to the account. *Roach v. Gilmer*, 3 Utah, 389; *McDaniels v. Lapham*, 21 Vt. 222; *McDaniels v. Bank*, 29 Vt. 230.

When a sum of money is secured by a deed and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account and promises to pay it, an action will not lie as on a stated account, but must be brought upon the security. *Young v. Hill*, 67 N. Y. 162; s. c., 23 Am. Rep. 99. See *Middleditch v. Ellis*, 2 Exch. 623.

1. *Hutchinson v. Market Bank*, 48 Barb. (N. Y.), 302; *Cobb v. Arundell*, 26 Wis. 553; *Claire v. Claire*, 10 Neb. 54; *Knowles v. Michel*, 13 East, 249.

2. *Cape Girardeau, etc., R. Co. v. Kimmel*, 58 Mo. 83; *Volkening v. De Graaf*, 81 N. Y. 268; *Porter v. Cooper*, 1 C. M. & R. 387.

Where, in an action, plaintiff failed to show any assent, express or implied, on the part of defendants, that they were indebted to plaintiff in the balance claimed and no amendment of the pleadings was asked, *held*, that a dismissal of the complaint was proper, although there might have been some evidence of indebtedness. *Volkening v. De Graaf*, 81 N. Y. 268.

3. *May v. Klass*, 44 Mo. 300.

4. *Chitty's Cont.* (11th Am. Ed.) 962.

*Baker v. Heard*, 5 Exch. 959; *Petch v. Lyon*, 9 Q. B. 147.

The defendant promised the plaintiff, orally, that if certain goods were supplied to A, a third party, he would see the plaintiff paid for them. The plaintiff accordingly supplied the goods, and A left the country without having paid for them. The defendant subsequently orally acknowledged his liability to the plaintiff for the price of the goods. *Held*, that the plaintiff was not entitled to recover, upon the account stated, founded upon the acknowledgment; for, although the admission of a liability to pay a liquidated sum is *prima-facie* evidence of an account stated, evidence had been properly given to show the nature of the consideration upon which it was founded; and, it appearing that the sum acknowledged was not the subject of a direct liability from the defendant to the plaintiff, a verdict for the defendant had been rightly entered. *Wilson v. Marshall*, 2 Ir. R. C. L. 356; 14 W. R. 699—Exch. Cham.

The circumstance that the Statute of Frauds bars a party from recovering upon a mere parol contract does not prevent the liability created thereby from forming a good ground for an action founded upon a subsequent statement of accounts between the parties. *Id.*

5. *Chitty's Cont.* (11th Am. ed.) 964.

6. *McKnight v. U. S.*, 13 Ct. of Cl. 292. U. S. Treasury settlements are only *prima-facie* evidence of the correctness of the balance certified; it is competent for accounting officers to correct mistakes and to restate the balance. *Soule v. U. S.*, 100 U. S. 8; s. c., B'k 25,

**6. How Stated.**—To make an account stated there must be a mutual agreement between the parties as to the allowance or disallowance of their respective claims; and to establish such an account so as to preclude a party from impeaching it, save for fraud or mistake, there must be proof of assent to the account as rendered, either express or implied from failure to object within a reasonable time after presentation.<sup>1</sup>

L. C. P. Co. 536; U. S. v. Eckford, 1 How. (U. S.) 250.

In suits brought by the government against individuals, no claim for a credit shall be admitted upon trial unless it has been presented to the accounting officers of the Treasury and by them disallowed. Railroad Co. v. U. S., 101 U. S. 453; s. c., B'k 25, L. C. P. Co. 1068; Halliburton v. U. S., 13 Wall. (U. S.) 63; s. c., B'k 20, L. C. P. Co. 533; U. S. v. Giles, 9 Cranch (U. S.), 212.

In Hunt v. Edger, 93 Ind. 311, the court said: "The inference, therefore, appears to us to be obvious that the annual settlement of a county treasurer with the county commissioners, as to its conclusiveness, ought to rest, and does in fact rest, upon substantially the same basis as that occupied by formal settlements made by private parties having mutual dealings, and presumably representing adverse interests."

In Washington Co. v. Parlier, 5 Gilm. (Ill.) 232, an action against a collector of revenue for failing to pay over an alleged amount of public money still remaining in his hands, the court said: "In making this settlement, the commissioners act as the agents of the county, and do not adjudicate as a court. They could enter up no judgment against the defendant for the balance found due, nor have they any means of enforcing payment of such balance, except by a resort to the ordinary courts of law. As the fiscal agents of the county, their mistakes may be inquired into and corrected as well as those of an individual acting in his own behalf. The record of this settlement is but a memorandum of the transaction, and is only *prima-facie* evidence of the correctness of the result stated."

The rule of the construction thus announced by the Supreme Court of Illinois is supported by apparently well-considered cases in other States. Supervisors v. Birdsall, 4 Wend. (N. Y.) 453; People *ex rel.* v. Supervisors, 65 N. Y. 222; Supervisors v. Jones, 19 Wis. 61; County of Marion v. Phillips, 45 Mo. 75; State v. Roberts, 62 Mo. 388; Howe v. State, 53 Miss. 57.

1 C. of L.—8

1. Lockwood v. Thorn, 11 N. Y. 170, 18 N. Y. 290; Stenton v. Jerome, 54 N. Y. 480; Volkening v. De Graaf, 81 N. Y. 268; Avery v. Leach, 9 Hun (N. Y.), 106; Kock v. Bonitz, 4 Daly (N. Y.), 117; Bruen v. Hone, 2 Barb. (N. Y.) 586; Hutchinson v. Market Bank, 48 Barb. (N. Y.) 302; Homes v. DeCamp, 1 Johns. (N. Y.) 34; Union Bank v. Knapp, 3 Pick. (Mass.) 96; s. c., 15 Am. Dec. 181; Tharp v. Tharp, 15 Vt. 105; Brown v. Van Dyke, 8 N. J. Eq. 795; s. c., 55 Am. Dec. 250; Robertson v. Wright, 17 Pratt (Va.), 534; Rufner v. Hewitt, 7 W. Va. 585; Reinhart v. Hines, 51 Miss. 344; Anding v. Levy, 57 Miss. 51; s. c., 34 Am. Rep. 435; McCall v. Nave, 52 Miss. 494; Stebbins v. Niles, 25 Miss. 267; Coopwood v. Bolton, 26 Miss. 212; Langdon v. Roane, 6 Ala. 518; Darby v. Lastropes, 28 La. Ann. 605; Mansell v. Payne, 18 La. Ann. 124; Terry v. Sickles, 13 Cal. 427; Pulliam v. Booth, 21 Ark. 420; Cape Girardeau, etc., R. Co. v. Kimmel, 58 Mo. 83; May v. Kloss, 44 Mo. 300; White v. Hampton, 10 Iowa, 238; Bouslog v. Garrett, 39 Ind. 338; Cobb v. Arundell, 26 Wis. 553; Albrecht v. Gies, 33 Mich. 389; White v. Campbell, 25 Mich. 463; Smith v. Kennedy, 1 Wash. Ter. 55; Wiggans v. Burkham, 10 Wall. (U. S.) 129; Lane v. Hill, 18 Q. B. 252; Calvert v. Baker, 4 M. & W. 417; Lemere v. Elliott, 6 H. & N. 656.

The rule applies to accounts between merchants residing in different countries. Freeland v. Heron, 7 Cranch (U. S.), 147; 1 Myer's Fed. Dec. 21, § 17; Stebbins v. Niles, 25 Miss. 267; Murray v. Toland, 3 Johns. Ch. (N. Y.) 569; Bainbridge v. Wilcocks, 1 Baldw. (U. S.) 539; 1 Myer's Fed. Dec. 21, § 17.

**What Transactions amount to Statement of Account between Parties generally.**—Where A was shown an account, and he objected to one of the items, but made no remark with respect to the rest, *held*, evidence of an account stated by him of the items of the account to which no objection was made. Chisman v. Count, 2 M. & G. 317; 2 Scott N. R. 569.

But receiving an account rendered,



The defendant must be shown not only to have admitted a debt, but also, expressly or by inference, he must have acknowledged that some certain amount of money was due from him. The acknowledgment must be unqualified, and not contingent or in the alternative.<sup>1</sup>

and making no objection, or admitting its correctness, does not preclude the debtor, when sued upon it, from controverting particular charges; it is a circumstance for the consideration of the jury. *Bertrand v. Taylor*, 32 Ark. 470.

If a merchant neglects, after a reasonable time, to object to an account rendered by his factor, showing sales at a price below that at which the factor was authorized to sell, he is deemed to acquiesce in it, and it is treated as a stated account. *Richmond Mfg. Co. v. Starks*, 4 Mason (U. S.), 297.

The adjustment of a loss by fire will sustain an action as upon an account stated. *Smith v. Glens Falls Ins. Co.*, 66 Barb. (N. Y.) 556.

An admission by a defendant that so much was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, will support a count for an account stated, though not for goods sold and delivered. *Knowles v. Michel*, 13 East, 249; s. p., *Pinchon v. Chilcott*, 3 C. & P. 236.

Where the parties, in settlement of a disputed claim, agree upon the amount due, and the one against whom the claim was made executes a written agreement to pay the sum so fixed, in an action upon the agreement he is precluded from setting up as a defence that nothing was in fact due. *Dunham v. Griswold*, 100 N. Y. 224.

Where a merchant furnishes goods to workmen on orders from their employer and receives his pay from the employer on presentation of the orders, the amount being fixed by the orders and deducted from the wages of the workmen, the arrangement is evidence of an account stated. *Bull v. Brockway*, 48 Mich. 523.

1. Where a commercial agent purchased for and shipped to his principal two boat-loads of potatoes, furnishing invoices, statements of account, bills of purchase, quantities, commissions and expenses, crediting the principal with advances, and claiming a certain balance, and the principal examined such account, making no objection thereto except as to the quantity of potatoes furnished, whereupon the agent deducted the items objected to, leaving them to

be settled after the potatoes should be received, and the principal paid the balance of the account, *held*, that there was an account stated which could not properly be opened without legal evidence of fraud, misconduct, or mistake. *Gilchrist v. Brooklyn Grocers' Mfg. Ass'n*, 66 Barb. (N. Y.) 390.

If interest be credited to one of two partners upon the books of the firm kept by its clerk, on moneys advanced beyond the capital agreed to be furnished by him, and the other partner, on examining the account with such clerk, makes no objection to it, that is sufficient to establish an account stated between them, and such interest should be allowed upon an accounting. *Lloyd v. Carrier*, 2 Lans. (N. Y.) 364.

Where one partner renders to the other a statement purporting to set forth all debits and credits, the account so rendered, if not objected to in a reasonable time, becomes an account stated. *Lawrence v. Ellsworth*, 41 Ark. 502.

Where a loss by fire is adjusted and the insurer promises to pay the amount, it becomes an account stated. *Smith v. Glens Falls Ins. Co.*, 66 Barb. (N. Y.) 556; 62 N. Y. 85.

In an action by the executors of the payee of a note against the makers, the executors proved the note, with the following indorsement upon it, signed by the makers and one of the executors: "Hull, 1838.—Memorandum, that the sum of 1*l.* 7*s.* 6*d.*, one quarter's interest, was paid on the within note. William Purdon, Thomas Purdon,"—*held* sufficient evidence of an account stated with the executors, without any proof of the time of the testator's death. *Purdon v. Purdon*, 10 M. & W. 562; 12 L. J. Exch. 3.

An agreement respecting the transfer of an interest in land, required by the Statute of Frauds to be in writing and signed, cannot be enforced by an action upon the agreement against the transferee for the stipulated consideration, notwithstanding that the transfer has been effected, and nothing remains to be done but to pay the consideration; but if, after the transfer, the transferee admits to the transferor that he owes him the stipulated price, the amount may be recovered as money due upon an account

**7. Acquiescence—Admissions.**—The acquiescence of the parties must depend upon the special circumstances of each case in general. When a party indebted upon an account receives and retains it

stated. *Cocking v. Ward*, 1 C. B. 858; 15 L. J. C. P. 246

A balance stated by the parties after a hearing before referees had commenced, and which was reported to the referees, and entered by them on their minutes, concludes the parties. *Clark v. Fairchild*, 22 Wend. (N. Y.) 576.

**What do not.**—Mere admissions not strong or pertinent enough to constitute an agreement will not sustain an account stated. *Kirtan v. Wood*, 1 Mood & Rob. 253; *Lane v. Hill*, 18 Ad. & El. (N. S.) 252; *Morton v. Rogers*, 14 Wend. (N. Y.) 576. Nor an acknowledgment of a sum due. *Evans v. Verity, Ryan & M.* 239. Nor an acknowledgment wrongfully obtained, or not intended. *Stenton v. Jerome*, 54 N. Y. 480; *Tucker v. Barrow*, 1 M. & R. 518. Nor acceptance by one not duly authorized. *Thallimer v. Brinckerhoff*, 4 Wend. (N. Y.) 394. Nor the offer to pay a less sum. *Atkinson v. Woodall*, 31 L. J. M. C. 174. Nor a qualified acknowledgment. *Evans v. Verity, R. & M.* 230.

So a mere conjecture expressed by one party to another, as to a certain sum being due to the latter, affords no proof of an account stated, unless it be adopted by the latter. *Hughes v. Thorpe*, 5 M. & W. 656. Nor does a mere offer to pay a sum of money, unaccompanied by any admission that there was a debt due. *Wayman v. Hilliard*, 7 Bing. 101.

An account rendered by a husband to his wife of the receipt and expenditure by him of moneys belonging to her separate estate, although retained by her without objection for four months, does not thereby become conclusive upon her as an account stated. *Southwick v. Southwick*, 1 Sweeny (N. Y.), 47.

A computation of interest due upon a bond and mortgage, made out by the holder and delivered to the mortgagor, is not conclusive as an account stated; and the omission of the latter to object to it merely raises a presumption of its correctness, which may be rebutted by proof. *Guernsey v. Rexford*, 63 N. Y. 631.

Among the papers of a testator were found two letters, sealed and directed, "For G., my late servant." G. had been in his service as housekeeper for some years before his death, but had left him for some time previously to that event. These letters contained promis-

sory notes for large sums of money; and one of the letters stated that the testator inclosed 200*l.* as a mark of respect; and the other letter stated that the inclosed was for her long and faithful services. G. applied to the executors for payment of the notes, and upon seeing the notes they paid her a portion, and promised to pay the remainder, but afterwards refused to do so. *Held*, as an action was not maintainable by G. upon the notes, which were in effect a legacy, and an informal one, in not being duly attested as required by 7 Will. 4 and 1 Vict. c. 26, and therefore void, that the action was not maintainable on an account stated, inasmuch as the promise of the executors was made on a supposed debt which in fact was not due. *Gough v. Findon or Tindon*, 7 Exch. 48; 21 L. J. Exch. 58.

In an action for goods sold, and on an account stated, to recover the value of growing poles purchased from the plaintiff by the defendant, and afterwards carried away by them, it appeared that, at the time of the bargain, some memorandums in writing had been made, but which were neither stamped nor signed by the parties; and that the defendant, after the poles were carried away, admitted that a balance was due to the plaintiff, who, under these circumstances, was nonsuited. *Held*, that such nonsuit was proper, as it was not proved that the defendant had admitted a precise and definite sum to be due to the plaintiff; and, therefore, that he could not recover on the account stated, without reference to the memoranda, which were not admissible. *Teall v. Auty*, 4 Moore, 542.

An acceptor of a bill of exchange, on application to him for payment, answered that the bill had been altered as to the acceptance, by being made payable at a particular place; that he never made it payable there, nor elsewhere than at his own house; and that he should take such steps as the law would authorize on the subject; that he had been prepared for payment, and the party might have had the money by calling at his house. *Held*, that this was no acknowledgment of a subsisting debt. *Calvert v. Baker*, 4 M. & W. 417.

The plaintiff demanded 40*l.* upon an agreement by the defendant, an incoming tenant, to pay for growing crops; he offered to pay 17*l.* *Held*, no evidence

beyond such time as is reasonable under the circumstances, and, according to the usage of the business, for examining and returning it, without communicating any objections, he is considered to acquiesce in its correctness, and he becomes bound by it as an account stated. Signature to the account or express admission is not necessary.<sup>1</sup>

to support an account stated. *Wayman v. Hilliard*, 7 Bing. 101; 4 M. & P. 729.

Where there have been no pre-existing mutual accounts or dealings, a statement furnished and retained without objection will not constitute an account stated. *Mellon v. Campbell*, 11 Pa. St. 415.

A copy of account against a person from the books of a corporation, given to him by the book-keeper of the corporation, who also performed the duties of secretary and assistant-treasurer thereof, upon his request, is not binding upon such corporation as an account stated, in the absence of any authority in such book-keeper to bind the corporation, or of any intention on his part to do so. *Harvey v. West Side Elevated R. Co.*, 13 Hun (N. Y.), 392.

An award is generally not evidence of an account stated as between the parties to the submission. *Bates v. Townley*, 2 Exch. 152. Compare *Keen v. Batshore*, 1 Esp. 194; *Salmon v. Watson*, 4 Moore, 73.

An account stated cannot be based on an appraisal where it does not appear that both parties mutually agreed are the appraisers, or recognized them as authorized to bind them by their action. *Chicago, etc., R. Co. v. Peters*, 45 Mich. 636. See *Buschman v. Morling*, 30 Md. 384.

The retention of an account containing an item of loan to a third person for whom the party receiving the account is not responsible is not an acquiescence. *Porter v. Lobach*, 2 Bosw. (N. Y.) 188; *Spangler v. Springer*, 22 Pa. St. 454.

An account stated cannot be based on an appraisal where it does not appear that both parties mutually agreed on the appraisers, or recognized them as authorized to bind them by their action. *Chicago, etc., R. Co. v. Peters*, 45 Mich. 636.

The rule of acquiescence ought not to be applied to a party who claims that the statute of limitations began to run from the time of rendering the account. *White v. Campbell*, 25 Mich. 463; *Rutledge v. Moore*, 9 Mo. 537; *Carver v. Hayes*, 47 Me. 257; *Morse v. Allen*, 44 N. H. 33; *Hughes v. Thorpe*, 5 M. & W. 656; *Lane v. Hill*, 18 Q. B. 252; *Calvert v. Baker*, 4 M. & W. 417; *Evans v. Verity*, R. & M. 239; *Burgh v. Legge*, 5 M. & W. 418.

Where objection was made to an item of credit in an account rendered by one party to another, and notice of the objection was given at the time of its rendering, or soon after, and the balance shown by the account so rendered was carried forward into subsequent accounts rendered, which were received and filed without objection, but without waiving or withdrawing the objection to the disputed item of credit, and the party rendering the accounts afterwards settled and paid the balance exhibited against him by his accounts so rendered, and obtained a receipt therefor, under an agreement that the said disputed item should remain open, and not be considered as acquiesced in by the other party, *held*, that as to the disputed item of credit, the accounts so rendered are not to be regarded as accounts stated. *Dudley v. Geauga Iron Co.*, 13 Ohio St. 168.

A letter containing merely a conjecture as to the amount due is not evidence of an account stated. *Hughes v. Thorpe*, 5 M. & W. 656.

A mere offer to pay a sum of money, unaccompanied by any admission that there is a debt due, will not constitute an account stated. *Wayman v. Hilliard*, 7 Bing. 101.

It is for the court to decide whether a conversation amounts to an account stated. *Bishop v. Cambre*, 3 C. & P. 55.

Where, on a settlement of accounts between the plaintiff and the defendant, a balance was struck, which the defendant agreed was correct, adding, however, that when he had done certain things there would not be much, if anything, between them, it was *held* that this was good evidence of an account stated. *Rigby v. Jeffrys*, 7 Dowl. 561. See *Calvert v. Baker*, 4 M. & W. 417; *Evans v. Verity*, R. & M. 239.

An allegation that the plaintiff and the defendant "have had accountings and settlements" is not an averment of an account stated. *Ward v. Farrelly*, 9 Mo. App. 370.

1. *White v. Hampton*, 10 Iowa, 238; s. c., 62 Am. Dec. 81; *Smith v. Marvin*, 27 N. Y. 137; *Bullard v. Raynor*, 30 N. Y. 197; *Guernsey v. Rexford*, 63 N. Y. 631; *Volkening v. De Graaf*, 81 N. Y. 268; *Powell v. Noye*, 23 Barb. (N. Y.) 184;

But the silence of the party to whom the account is sent may

Lockwood v. Thorne, 11 N. Y. 179; Owen v. Boerum, 23 Barb. (N. Y.) 187; Towsley v. Denison, 45 Barb. (N. Y.) 490; Avery v. Leach, 9 Hun (N. Y.), 106; Bruen v. Hone, 2 Barb. (N. Y.) 586; Murray v. Toland, 3 Johns. Ch. (N. Y.) 569; Atwater v. Fowler, 1 Edw. Ch. (N. Y.) 417; Philips v. Belden, 2 Edw. Ch. (N. Y.) 1; Hutchinson v. Market Bank, 48 Barb. (N. Y.) 302; Case v. Hotchkiss, 1 Abb. App. Dec. (N. Y.) 324; Gilchrist v. Brooklyn, etc., Assoc. 66 Barb. (N. Y.) 390; 59 N. Y. 495; Brown v. Vandyke, 8 N. J. Eq. 795; s. c., 55 Am. Dec. 250; Darlington v. Taylor, 2 Grant (Pa.), 195; Bevan v. Cullen, 7 Pa. St. 281; Thurmond v. Sanders, 21 Ark. 255; Shepard v. Bank, 15 Mo. 148; Powell v. Pacific R. Co., 65 Mo. 658; Langdon v. Roane, 6 Ala. 518; s. c., 41 Am. Dec. 60; Burden v. McElmoyle, 1 Bail. Ch. (S. Car.) 375; Gooch v. Vaughan, 92 N. Car. 610; Hawkins v. Long, 74 N. Car. 781; Stebbins v. Niles, 25 Miss. 267; Coopwood v. Bolton, 26 Miss. 212; Rufner v. Hewett, 7 W. Va. 585; Townes v. Birchett, 12 Leigh (Va.), 173; Craighead v. Bank, 7 Yerg. (Tenn.) 799; Tharp v. Tharp, 15 Vt. 105; Freeman v. Howell, 4 La. Ann. 196; s. c., 50 Am. Dec. 561; Darby v. Lastrapes, 28 La. Ann. 605; Mansell v. Payne, 18 La. Ann. 124; Terry v. Sickles, 13 Cal. 427; Treas v. Truitt, 2 Colo. 489; Benites v. Hampton, 3 Utah, 369; Cobb v. Arundell, 26 Wis. 553; White v. Campbell, 25 Mich. 463; Freeland v. Heron, 7 Cranch (C. C.), 147; Baker v. Biddle, Baldw. (U. S.) 394; Wiggins v. Burkham, 10 Wall. (U. S.) 129; Marye v. Strouse, 6 Sawy. (U. S.) 204; s. c., 5 Fed. Repr. 483; Willis v. Jernegan, 2 Atk. 251; Sherman v. Sherman, 2 Vern. 276.

In Pennsylvania the receipt of an account by a debtor without objection makes it *prima-facie* evidence of the claim. Verrier v. Guillon, 97 Pa. St. 63. See Spangler v. Springer, 22 Pa. St. 454.

In Wharton v. Anderson, 28 Minn. 301, the court said: "There is some confusion in the books as to the precise effect of a stated account upon the rights of the parties, but we are inclined to the opinion that it is only *prima-facie* evidence of the correctness of the balance, and not conclusive upon it, unless in arriving at the agreed balance there has been some concession made upon items disputed between the parties, so that the balance is the result of a compromise, or some act has been done or forborne in

consequence of the accounting, and relying upon it, which would put the party claiming the benefit of it in a worse position than as though it had not been had, so as to bring the case within the principles of an estoppel *in pais*. A stated account not affected by such new consideration or estoppel may be impeached for mistake or error in law or in fact with respect to the items included in it, or for omission of items. These positions are sustained by weighty authority."

The acceptance and retention of an account without objection, although tending to establish an admission of its correctness, is not conclusive; it may be met by proof of mistake undiscovered while the account was so retained, and the question then becomes one of fact for a jury. Sharkey v. Mansfield, 90 N. Y. 227.

The rule that delay in objecting to an account stated will be deemed an acquiescence applies to corporations. Bradley v. Richardson, 2 Blatchf. (U. S.) 354.

An account containing an item of a loan to a third person, for which the party to whom the account is stated is not responsible, does not become conclusive by being retained for several months. Porter v. Lobach, 2 Bosw. (N. Y.) 188. See Spangler v. Springer, 22 Pa. St. 454.

If the party has previously disclaimed all liability upon the account, he is not bound to examine the items and object to them. Quincy v. White, 63 N. Y. 370.

Where two statements are made of the account, and the first is approved, no notice need be taken of the second one. Cartwright v. Greene, 47 Barb. (N. Y.) 9.

An account rendered by a husband to his wife, of moneys disbursed for her use, out of her separate estate, does not become any account stated, though retained without objection. Southwick v. Southwick, 1 Sweeny (N. Y.), 47.

Where the pass-book of a depositor in a bank is written up and delivered to him and retained without objection, it constitutes an account stated. Marye v. Strouse, 6 Sawyer (U. S.), 204; s. c., 5 Fed. Repr. 483; Leather Manuf. Bank v. Morgan, 117 U. S. 96; Schneider v. Irving Bank, 1 Daly (N. Y.), 500; Hutchinson v. Market Bank, 48 Barb. (N. Y.) 302; Welsh v. German Am. Bank, 73 N. Y. 424; Peddicord v. Connard, 85 Ill. 102; Craighead v. Bank, 7 Yerg. (Tenn.) 399; Union Bank v. Knapp, 3 Pick. (Mass.) 96; s. c., 15 Am. Dec. 181. Compare Picket v. Merchants' Bank, 32 Ark.

be explained by showing that he was absent from home, suffering

346; *Ex parte* Randleson, 2 Deac. & Chit. 534.

The writing-up of a depositor's bank-book and return of checks and vouchers, if it becomes an account stated by his negligence in not discovering and giving notice of errors, can yet be impeached for fraud or mistake. *Welsh v. German Am. Bank*, 73 N. Y. 424.

A depositor who had been in the habit of checking out all his money shortly after he deposited it, was notified of a balance long after he supposed he had exhausted his account, and immediately withdrew it. He made no inquiry or objection, but sued the bank, nearly two years afterwards, for an alleged balance. *Held*, that the depositor's course in withdrawing the balance on notification of it was a strong case of acquiescing in an account stated, which required him to bring himself within some rule that would allow him to impeach it, and that he had the burden of impeaching it. *Amer. Nat. Bank v. Bushey*, 45 Mich. 135; and where the pass-book is written up several times upon the same basis, and the amounts shown thereon drawn out, and several years elapse before a formal demand is made for the amount of missing checks claimed to be charged thereon in error, there is clear evidence of an account settled. *Clark v. Mechanics' Nat. Bank*, 15 Week. Dig. (N. Y.) 505.

A presented his account to B, who corrected some items. *Held*, it became an account stated as to the items not objected to, binding upon B's representatives. *Sergeant v. Ewing*, 36 Pa. St. 156.

A father who receives a bill of goods charged to his account, and retains it for a year without objection, must be deemed to have acquiesced in its correctness, and cannot afterward insist that the goods were sold to his son, and that the latter was not authorized to buy goods on his credit. *Avery v. Leach*, 9 Hun (N. Y.), 106.

The defendant on being shown the plaintiff's account by the clerk of the latter, objected to one item, but made no remark as to the others, and promised to send corn for the balance. *Held*, to be sufficient evidence of an account stated. *Chisman v. Count*, 2 M. & G. 307; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129; *Sergeant v. Ewing*, 36 Pa. St. 156; *Lockwood v. Thorne*, 11 N. Y. 170; s. c., 62 Am. Dec. 81.

Where an account was presented to

the debtors, and they asked time to pay by instalments on account of the heavy balance, and one month afterward sent a check for an instalment, and they gave no notice that they rejected the account after examination,—*held*, that they must be deemed to have acquiesced. *Macpherson v. Small*, 41 N. Y. Super. Ct. 536.

A delivered goods to B, to be sold and the proceeds applied upon a debt due from A to B. A claimed a balance due him, and proved that B admitted the correctness of the amount, and said he would pay it over. *Held*, that though the sale was absolute in law, there was evidence that it was accompanied by a trust that the defendant should account for the proceeds, and that the facts showed a sufficient consideration for the account stated by B to entitle A to recover the balance, as money due upon an account stated. *Howard v. Brownhill*, 2 Com. L. R. 125; s. c., 23 L. J. Q. B. 23.

Where a person who had worked for another fifteen or twenty years, and had received from his employer's book-keeper several statements of his account from the books, each beginning with the balance on the last preceding statement, and kept the next to the last some seven months, until the last was rendered, before making any objection thereto,—*held*, that the effect of his receiving and keeping the statements was to make them accounts stated, and cast the burden of impeaching them for error upon the party alleging it. *Wiley v. Brigham*, 16 Hun (N. Y.), 106.

Where the E. Bank receiving from H., one of its customers, a sight draft for collection, forwarded the same for that purpose to its correspondent, the Y. Bank, which sent it to a third bank, but in the mean time, supposing it to have been paid, gave the E. Bank credit therefor in its semi-monthly account, and the latter credited the amount to H., but, being afterward notified by the Y. Bank of the mistake, refused to take back the draft, claimed that the latter bank should suffer the loss, on the ground of delay in collecting, and continued for two and a half years afterward to render accounts to H. without charging the draft back to him,—*held*, that there was an account stated between the E. Bank and H. in respect to the draft, which precluded it from denying its liability therefor. *Harley v. Eleventh Ward Bank*, 76 N. Y. 618.

Drawing for the balance as shown by

from illness, or expected shortly to see the other party and intended and preferred to make his objections in person.<sup>1</sup>

If a party pays the balance of an account stated under duress of goods or person, he is not bound by such payment.<sup>2</sup> Or gives

the account stated is an admission of its correctness. *Lockwood v. Thorne*, 11 N. Y. 170; s. c., 62 Am. Dec. 81. Also a payment of the balance. *Bruen v. Hone*, 2 Barb. (N. Y.) 586. Also the correction of the account by the debtor. *Sergeant v. Ewing*, 36 Pa. St. 156.

A party stated an account and sent it with a check for the balance by a messenger to the other party. Objection was made that the balance was too small, but the check was received and cashed. *Held*, that the party was concluded by the acceptance. *Davenport v. Wheeler*, 7 Cow. (N. Y.) 231.

Defendant immediately after the receipt of an account stated for goods sold to him, and which had already been under his control and inspection for five months, made two part payments thereon. In the letter containing the last payment he acknowledged that there was a balance still due, provided the goods still on hand were "up to the contract." *Held*, that from these facts the law raised an implied agreement that the account was correct. *Samson v. Freedman*, 102 N. Y. 699.

Where the account was rendered by a mistake, the silence of the party will not make it an account stated. *Polhemus v. Heiman*, 50 Cal. 438.

A plaintiff put in evidence an account signed by the defendant, showing a balance of 321*l.* 5*s.* to be due. The first item in this account was, "To principal and interest of old account with Dr. J. French, transferred as per letter, 146*l.* 3*s.* 6*d.*" The letter was as follows: "I hereby acknowledge to have received from J. M. French, Esq., 321*l.* 5*s.*, and should I die during my absence from England, or at any time before the said debt is liquidated, it is my desire that he should be paid out of whatever property I might possess at the time of my death, with legal interest on the same." *Held*, that the plaintiff was not entitled to recover the 146*l.* 3*s.* 6*d.*, the evidence showing a mere promise, without consideration, to pay the debt of a third person. *French v. French*, 3 Scott, N. R. 121; 2 M. & G. 644.

Where an account has been assigned, an admission made either before or after the assignment may be proved. *Powell v. Pacific R. Co.*, 65 Mo. 658.

Evidence tending to show that the account was received and held by the de-

fendant, who offered no objection to it, will not supply an omission to plead an account stated. *Ward v. Farrelly*, 9 Mo. App. 370; *Emery v. Pease*, 20 N. Y. 62.

The signature of a party's name to an account current is not conclusive evidence of his owing the amount stated; but the implied admission may be rebutted by competent proof as fraud, error, or mistake. *Nichols v. Alsop*, 6 Conn. 477; *Perkins v. Hart*, 11 Wheat. (U. S.) 237; *Stewart v. Conner*, 13 Ala. 94.

1. *Wiggins v. Burkham*, 10 Wall. (U. S.) 129; *Lockwood v. Thorne*, 18 N. Y. 289.

Silence on the part of one receiving an account will not give it the force of an account stated, unless the circumstances are such as to justify an inference of his assent to its correctness. If he has previously disclaimed all liability upon the account, he is not bound to examine the items and object to them, upon its delivery to him, in order to avoid the effect of silence as an admission. *Quincey v. White*, 63 N. Y. 370.

Where a person for whose account goods had been sold by another, on receiving from the latter an account of sales, called on him several times for the purpose of getting explanations and a more detailed account, and was promised such an account when receiving a payment, but was never furnished therewith, though he waited a long time and wrote for it, *held*, that he had not in any way so acquiesced in the account so rendered to him as to make it binding on him as an account stated. *Carpenter v. Nickerson*, 7 Daly (N. Y.), 424.

2. *Stenton v. Jerome*, 54 N. Y. 480; *Dunham v. Griswold*, 100 N. Y. 224; *Kelsey v. Hobby*, 16 Pet. (U. S.) 269. See *Quincey v. White*, 63 N. Y. 370; *Tucker v. Barrow*, 7 B. & C. 623.

Where an agreement is made by parties in satisfaction of a claim in dispute between them, where each is cognizant of all the facts, and no fraud or imposition is practised, it is valid and binding upon them, regardless of the merits of the original claim, and cannot be set aside unless it be shown that the same was procured by duress. If such an agreement be procured by threats of criminal prosecution it may be avoided; but a threat of legal process, even includ-

a receipt for a balance accompanied by a protest against one of the items.<sup>1</sup>

Giving a note for a balance is not necessarily an admission of correctness of the account, but may be *prima-facie* evidence of a settlement.<sup>2</sup>

ing arrest and imprisonment, is not sufficient to constitute duress. *Dunham v. Griswold*, 100 N. Y. 224.

1. *Smith v. Drew*, 10 Ben. (U. S.) 614.  
2. *Morton v. Rogers*, 14 Wend. (N. Y.) 576; *McDougall v. Cooper*, 31 N. Y. 498; *Sherman v. McIntyre*, 7 Hun (N. Y.), 592; *Dutcher v. Porter*, 63 Barb. (N. Y.) 15; *Smith v. Holland*, 61 Barb. (N. Y.) 333; *Treadwell v. Abrams*, 15 How. Pr. (N. Y.) 219; *Rosencrantz v. Mason*, 85 Ill. 262; *Hill v. Sloan*, 59 Ind. 181; *Dunbar v. Miller*, 1 Brock. (U. S.) 85. See *Burmester v. Hogarth*, 11 M. & W. 97; *Oliver v. Dovatt*, 2 Moo. & Rob. 230; *Jardine v. Payne*, 1 B. & A. 663.

A promissory note is evidence of a settlement between the parties thereto, and may be received in evidence in support of the common count upon an account stated. *Orr v. Hopkins*, 1 Pac. Repr. (N. Mex.) 181.

It is *prima-facie* evidence that, at the date of it, there was a settlement of all demands between the parties. *Dutcher v. Porter*, 63 Barb. (N. Y.) 15. In *Stiles v. Brown*, 1 Gill (Md.), 350, it was held that the giving of a note for the balance forecloses an inquiry into all antecedent transactions, unless on the ground of error or fraud.

In August, 1844, the defendant gave the plaintiff a promissory note for 23*l.* 2*s.* 8*d.*, which the note described as being the amount of interest due on a note for 117*l.* 4*s.*, dated 6th July, 1838, up to 6th July, 1844. *Held*, to be evidence of an account stated in August, 1844, of a subsisting debt of 117*l.* 4*s.* *Perry v. Slade*, 8 Q. B. 115.

A note payable five years after date, for value received, is evidence of an account stated, against which the Statute of Limitations does not commence running until the maturity of the note. *Fryer v. Roe*, 12 C. B. 437.

**I O U.**—The plaintiff lent money to A upon B's promise to become surety for its repayment, and, after the money was advanced, A and B signed and delivered to the plaintiff the following memorandum: "We jointly and severally owe you £60." *Held*, evidence for the jury of an account stated by A and B jointly. *Buck v. Hurst*, L. R. 1 C. P. 297.

An I O U in the defendant's writing,

not addressed to any one, but produced by the plaintiff, is *prima-facie* evidence of an account stated with him. *Douglas v. Holme*, 4 P. & D. 685; 12 A. & E. 641; s. p., *Payne v. Jenkins*, 4 C. & P. 324.

At the sale of an estate, one of the conditions being that a deposit should be paid immediately, a lot was knocked down to a person, who having no money with him, an arrangement was entered into, with the sanction of the vendor's solicitor, in virtue of which the vendee gave his I O U, addressed to the auctioneer, for the deposit, and signed a memorandum that he had purchased the property and paid the deposit, and bound himself to complete the purchase, which memorandum was also signed by the auctioneer as agent of the vendor. The bargain having afterwards gone off, *held*, that the auctioneer might recover the amount of the I O U under an account stated. *Cleave v. Moors*, 3 Jur. N. S. 48, Exch.

The directors of a mine conducted on the cost-book principle, wanting money to work the mine, entered into an agreement that they should each take 100 shares in it, at 1*l.* per share, and each of them accordingly gave his I O U to the secretary for 100*l.* *Held*, evidence of an account stated between the secretary and a director who had given his I O U pursuant to the agreement. *Graves v. Cook*, 2 Jur. N. S. 475, Exch.

Upon a sale of a leasehold, the vendee agreed to pay a deposit of 50*l.*, and the residue on completion. Instead of actually paying the 50*l.*, he gave the vendor 5*l.* and an I O U for 45*l.* *Held*, that the vendor, failing to make a good title, was not entitled to recover the 45*l.*, as money due upon an account stated, and that the defence was admissible under the plea of never indebted. *Wilson v. Wilson*, 14 C. B. 616; 2 C. L. R. 818; 18 Jur. 581; 23 L. J. C. P. 137.

Where a defendant verbally agreed to purchase of the plaintiff the lease and good-will of his premises, and on being asked for a deposit, gave an I O U for 25*l.*, but afterwards refused to complete the purchase, *held*, that the I O U was evidence of an account stated. *Lemere v. Elliott*, 6 H. & N. 656; 7 Jur. N. S. 1206; 30 L. J. Exch. 350; 4 L. T. N. S. 304.

**8. Reasonable Time.**—What is a reasonable time where there is no dispute as to the facts is matter of law. But where the proofs are contradictory, the question is one of law and fact; and in that case may properly be submitted to the jury, under the instructions of the court as to the law.<sup>1</sup> It is to be determined by reference

1. *Wiggins v. Burkham*, 10 Wall. (U. S.) 129; s. c., 19 L. C. P. 885; 1 Myer's Fed. Dec. 18; *Terry v. Sickles*, 13 Cal. 427; *Gatling v. Newell*, 9 Ind. 577; *Lockwood v. Thorne*, 18 N. Y. 285; *Roth v. Buffalo*, etc., R. Co., 34 N. Y. 548; *Kingsley v. Wallis*, 14 Me. 57; *Murray v. Smith*, 1 Hawks. (N. Car.) 41; *Darby v. Lastropes*, 28 La. Ann. 605; *Freeman v. Howell*, 4 La. Ann. 196; s. c., 50 Am. Dec. 561. See *Story's Eq. Juris.* § 520; *Sherman v. Sherman*, 2 Vern. 276; 2 Parsons Cont. 661.

Between merchants at home, an account which has been presented, and no objection made thereto after the lapse of several posts, is treated under ordinary circumstances as being by acquiescence a stated account. Between merchants in different countries, a rule founded in similar considerations prevails. If an account has been transmitted from one to the other, and no objection is made after several opportunities of writing have occurred, it is treated as an acquiescence in the correctness of the account transmitted, and therefore it is deemed a stated account. In truth, in each case the rule admits or rather requires the same general exposition. It is, that an account rendered shall be deemed an account stated from the presumed approbation or acquiescence of the parties, unless an objection is made thereto within a reasonable time. That reasonable time is to be judged of, in ordinary cases, by the habits of business at home and abroad; and the usual course is required to be followed, unless there are special circumstances to vary it or to excuse a departure from it. *L. Story's Eq. Juris.* (13th ed.), § 526. What constitutes a reasonable time in such a case is a question of law. *Oil Co. v. Van Etten*, 107 U. S. 129; *Perkins v. Hart*, 11 Wheat. (U. S.) 237; *Toland v. Sprague*, 12 Pet. (U. S.) 334; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129; *Lockwood v. Thorne*, 11 N. Y. 170; s. c., 62 Am. Dec. 81.

If an account is made up and sent by one party to the other by mail, and the latter keeps it for some considerable time without making any objection, he is held to have acquiesced in it. *Stenton v. Jerome*, 54 N. Y. 480; *Davenport v. Wheeler*, 7 Cow. (N. Y.) 231; *Bailey v. Bensly*, 87 Ill. 556.

If he retains the account, and permits several mails to pass without objecting to it, he will be held to have admitted its correctness. *Freas v. Truitt*, 2 Col. 489; *Brown v. Vandyke*, 4 Halst. Ch. (N. J.) 795; s. c., 55 Am. Dec. 250; *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 569. The court cannot take judicial notice of the car-time and number of mails. *Wiggins v. Burkham*, 10 Wall. (U. S.) 129. Several months is not a reasonable time. *Davenport v. Wheeler*, 7 Cow. (N. Y.) 231; *Wiley v. Brigham*, 16 Hun (N. Y.), 106. Three years is not a reasonable time. *Lawrence v. Ellsworth*, 41 Ark. 502.

Where the account is between merchants residing in different countries, two years is not a reasonable time. *Bainbridge v. Wilcocks*, 1 Baldw. (U. S.) 539; s. c., 1 Myer's Fed. Dec. 21, § 17. See *Bruen v. Hone*, 2 Barb. (N. Y.) 586; *Seymour v. Marvin*, 11 Barb. (N. Y.) 80. The time within which an account shall be taken as a stated one, unless objected to, cannot be definitely stated; it depends on the circumstances of the case, whether an acquiescence or a presumed agreement to the correctness of the account exists. *Bainbridge v. Wilcocks*, 1 Baldw. (U. S.) 539; 1 Myer's Fed. Dec. § 16.

The defendants asked the court to instruct as follows: "That if the plaintiff made out his account on the 16th of May, and then sent it to the defendants, it was within a reasonable time, if the defendants on the 28th of May, by letter, notified the plaintiff of their dissatisfaction with that account." The court refused the instruction. On appeal, the court said: "If the car-time between Hagerstown and Chicago were ten hours, and there were 'several posts' between the time when the account sent to the defendants, on the 16th of May, reached them, and the 28th of May, when they replied, the court properly refused the instruction asked. Whether these facts were in evidence does not appear. We are asked to take judicial notice of them. This we cannot do, however well satisfied we may be upon the subject. They should have been proved by proper testimony." *Wiggins Burkham*, 10 Wall. (U. S.) 129; s. c., 1 v. Myer's Fed. Dec. 18.

Full accounts were rendered by defendants to plaintiff from time to time,



to the relations of the parties, or the usual course of business of the particular class of persons concerned.<sup>1</sup>

**9. To whom Stated.**—The account must have been stated to the debtor himself or his agent, and it is not sufficient if made to a stranger.<sup>2</sup> If the account be stated to or by an agent, his authority must be shown.<sup>3</sup>

**10. Third Parties** who assume or guarantee a debt are bound by an account stated the same as the original debtor.<sup>4</sup>

**11. Set-off.**—If the buyer has stated an account with the vendor, in which the vendor has, by mutual agreement, received credit for the amount of goods sold, as a set-off against items admitted to be due by the vendor to the buyer, this is an equivalent to an actual cash payment by the buyer of the price of the goods.<sup>5</sup>

during the course of their joint business. All such accounts had been rendered before February, 1865, when, after a discussion of one item, the account was stated and settled. This was accepted until the fall of 1867, two and a half years thereafter. *Held*, that it was too late to open the account, except for fraud, error, or mistake. *Burke v. Isham*, 53 N. Y. 631.

Where a firm in New York City, on February 1st, sent an account stated to their customers in Ulster County, and on February 17th drew for the balance, and the draft was paid, *held*, that the account could not be opened, except for mistake or fraud. *Lockwood v. Thorne*, 11 N. Y. 170; s. c., 62 Am. Dec. 81.

1. *Freeman v. Howell*, 4 La. Ann. 196; s. c., 50 Am. Dec. 561.

2. *Breckon v. Smith*, 1 Ad. & El. 488; *Bates v. Townley*, 2 Exch. 152; *Tucker v. Barrow*, 7 Barn. & Cress. 623; *Hoffar v. Dement*, 5 Gill (Md.), 132; *Thurmond v. Sanders*, 21 Ark. 255.

The statement may be in writing or by word of mouth. *Singleton v. Barrett*, 2 Crompt. & J. 368.

In an action on an account stated against the three defendants as partners, in which the defendant H. alone appeared and answered, it appeared on the trial, after evidence showing that the defendants B. and M. originally composed the firm, under the name of B. & M., and that the defendant H. subsequently became a partner, and the firm-name was, therefore, changed to B., M. & Co.; that the plaintiff sent by mail, from Stockton, his place of residence, a copy of an account, inclosed in an envelope and properly directed to the defendant H. at Frisco, his residence and post-office address. This account was headed "B. & M. in acct. with L. Benites," and contained a large number of items running through several

years, only one of which was charged to the firm of B., M. & Co., and showed a balance of \$1663.70 due to the plaintiff. No letter or other writing accompanied it explaining it, or why it was sent to the defendant H., nor demanding payment. There was no evidence whatever showing the distance between Stockton and Frisco, nor the time required for transportation of the mail between those places, nor the number or frequency of mail communication between them, nor the length of time which had elapsed after the mailing of said account to the defendant H. before the commencement of this action; nor did it appear when this action was commenced. There was evidence that the defendant H. received the account. *Held*, that no account stated between the parties was shown, and a ruling on the trial refusing to admit a copy of such account in evidence against the defendants was not error. *Benites v. Hampton*, 3 Utah, 369.

3. *Harvey v. West Side, etc., R. Co.*, 13 Hun (N. Y.), 392; *Thallimer v. Brinckerhoff*, 4 Wend. (N. Y.) 394.

4. *Bullock v. Boyd*, 1 Hoffm. Ch. (N. Y.) 294; *Buck v. Hurst*, L. R. 1 C. P. 297.

5. *Benjamin on Sales* (Bennett's Ed.), § 711; *Livingstone v. Whiting*, 15 Q. B. 722; s. c., 19 L. J. Q. B. 528. See *Dudley v. Geauga Iron Co.*, 13 Ohio St. 168; *Bushee v. Allen*, 31 Vt. 631; *Filer v. Peebles*, 8 N. H. 226; *White v. Whiting*, 8 Daly (N. Y.), 23; *Smith v. Tucker*, 2 E. D. Smith (N. Y.), 193; *Johnson v. Johnson*, 4 Call (Va.), 38.

An itemized account for cotton sold and shipped by defendant to plaintiffs, on which he claimed a balance due him, and pleaded it as a set-off, having been furnished by him to them, as he testified, and retained by them without objection to the weights of the cotton as therein

Where there are cross-demands, it is not necessary that the items should consist of debts due *in presenti*, or that they should be legal debts, but equitable claims may also be brought into the account.<sup>1</sup>

**12. Illegal.**—A claim which is absolutely void by reason of an illegality or immorality in the consideration cannot be relied on in support of a count upon an account stated.<sup>2</sup>

**13. New Promise.**—The stating of an account is in the nature of a new promise.<sup>3</sup>

specified; that portion of the account cannot be excluded as evidence, on motion, because defendant further states that he did not himself weigh the cotton, but that the weights were furnished to him by the public weigher. *Sloan v. Guice*, 77 Ala. 392.

1. *Laycock v. Pickles*, 4 B. & S. 497, 506.

2. *Dunbar v. Johnson*, 108 Mass. 519; *Keane v. Brandon*, 12 La. Ann. 20. See *Thomas v. Hawkes*, 8 M. & W. 140; *Cooking v. Ward*, 1 C. B. 858, 870; *Kennedy v. Brown*, 13 C. B. N. S. 677; *Mosstyn v. Mostyn*, 39 L. J. Chan. 780.

It is no bar to action on account stated, that the defendant's indebtedness was for liquors sold by the plaintiff on Sunday, contrary to law, if the account was not stated on Sunday; but if the sale was illegal for want of a license, the action on an account stated could not be maintained. *Melchoir v. McCarty*, 31 Wis. 605; s. c., 11 Am. Rep. 605. See *Dunbar v. Johnson*, 108 Mass. 519.

*Compare* *Suc. of Ross*, 22 La. Ann. 480; *Smith v. Marvin*, 27 N. Y. 137; *Bullard v. Raynor*, 30 N. Y. 197; *Young v. Hill*, 67 N. Y. 162; s. c., 23 Am. Rep. 99.

3. 3 *Parsons Cont.* (7th Ed.) 83; *Smith v. Glens Falls Ins. Co.*, 66 Barb. (N. Y.) 556; *Holmes v. DeCamp*, 1 Johns. (N. Y.) 34; *Montgomerie v. Ivers*, 17 Johns. (N. Y.) 38; *Hoyt v. Wilkinson*, 10 Pick. (Mass.) 31. See *White v. Campbell*, 25 Mich. 463; *McClellan v. West*, 70 Pa. St. 183; *Johns v. Lantz*, 63 Pa. St. 324; *Benites v. Hampton*, 3 Utah, 369; *Foster v. Allanson*, 2 T. R. 479. *Compare* *Verrier v. Guillon*, 97 Pa. St. 63.

Under a statute providing that the acknowledgment of a debt must be in writing and signed by the party to be charged, in order to take the debt out of the statute of limitations, an account stated, which is not supported by evidence of some writing signed by the party to be charged, will not prevent the running of the statute against the previously existing liabilities included therein. *Chace v. Trafford*, 116 Mass. 529; s. c., 17 Am. Rep. 171.

A mutual account which has been closed by stoppage of business transactions between the parties does not become by such cessation an account stated, so as to be withdrawn from the exception in the statute of limitations in favor of merchants' accounts. *Mandeville v. Wilson*, 5 Cranch (U. S.), 15.

In August, 1844, the defendant gave the plaintiff a promissory note for 23*l.* 2*s.* 8*d.*, which the note described as being the amount of interest due on a note for 117*l.* 4*s.*, date July 6, 1838, up to July 6, 1844. *Held*, to be evidence of an account stated in August, 1844, of a subsisting debt of 117*l.* 4*s.* *Perry v. Slade*, 8 Q. B. 115.

When the defendant claims the benefit of the statute on the ground that the account sued on has been converted into a stated one, through his assent to it as rendered to him, it is not enough to substantiate the defence that there is no evidence as to whether he objected or not, nor is it sufficient to sustain such a defence to prove that upon and after the exhibition of the account he remained perfectly passive. He must go further. He must show some word or act marking or implying that he assented to the account. *White v. Campbell*, 25 Mich. 463.

A, on August 6, 1868, agreed in writing to pay B a sum of money in August, 1870; immediately afterwards A presented to B an account of moneys previously advanced by him to B, or to B's use. On February 2, 1869, A wrote to B, in answer to a letter received from him, stating that he preferred to give no reply, and that he placed his papers in the hands of counsel; also calling B's attention to the fact that he seemed to have forgotten that A had paid him certain amounts. In August, 1870, B's counsel wrote to A's counsel demanding payment of the full sum due from A to B by the terms of the agreement in writing. A's counsel answered that A would pay the amount, less the sums paid by A to and for B, as appeared by the account theretofore furnished. B's counsel replied, declining the offer. In an action

**14. Balance.**—The balance of a stated account is principal: it cannot be re-examined to ascertain the items or their character.<sup>1</sup>

**15. Interest.**—An account stated draws interest from the time it was rendered.<sup>2</sup>

**16. Parties not Merchants.**—The doctrine of liability from retaining a stated account without objection has been held to be only applicable between merchants; but between other parties such retention is a circumstance for the consideration of the jury.<sup>3</sup>

brought on March 6, 1875, by B against A, to recover the amount due on the instrument in writing. *held*, that the rendering of the account by A to B had not prevented the statute of limitations from running against the same, and that therefore A could not set up the amount due on the account as a set-off to B's claim. *Held, further*, that there was nothing in A's letter to B, or B's silence after its reception, which would estop B from setting up the bar of the statute of limitations to A's claim of set-off. *Held further*, that there was nothing in the correspondence between B's counsel and A's counsel which suspended B's right of action, or amounted to a promise by B to pay the account, or constituted an agreement by him that it should apply as payment on the contract, so as to bar the running of the statute of limitations thereon, and enable A to take advantage of the same as a set-off. *Verrier v. Guillon*, 97 Pa. St. 63.

1. *McClelland v. West*, 70 Pa. St. 183; *Hawkins v. Long*, 74 N. Car. 781; *Marye v. Strouse*, 6 Sawy. (U. S.) 204; s. c., 5 Fed. Repr. 483; *Hodge v. Manley*, 25 Vt. 210; s. c., 60 Am. Dec. 253; *Orr v. Hopkins*, 1 Pac. Repr. (N. Mex.) 181.

2. *Case v. Hotchkiss*, 1 Abb. App. Dec. (N. Y.) 324.

Compound interest is not recoverable merely because included in an account stated. *Young v. Hill*, 67 N. Y. 162; s. c., 23 Am. Rep. 99.

3. *Auding v. Levy*, 57 Miss. 51; s. c., 34 Am. Rep. 435. See *Rich v. Eldredge*, 42 N. H. 153; *Southwick v. Southwick*, 1 Sweeny (N. Y.), 47. Compare *Tounes v. Birchett*, 12 Leigh (Va.), 173; *Shepard v. Bank*, 15 Mo. 148.

The *Albany Law Journal* in reviewing this case says: "This point does not seem to have been raised or passed upon in *Lockwood v. Thorne*, 11 N. Y. 170, a case between tanners and leather merchants; *Stenton v. Jerome*, 54 N. Y. 480, a stockbroker and a customer; *Case v. Hotchkiss*, 1 Abb. App. Dec. (N. Y.) 324, attorney and client; *Towsley v. Denison*, 45 Barb. (N. Y.) 490, a vender of stone and a canal contractor. So of

*Terry v. Sickles*, 13 Cal. 427, where it does not appear that the parties were merchants. *White v. Hampton*, 10 Iowa, 238, is not at all in point. The question does not seem to have been raised in *Tharp v. Tharp*, 15 Vt. 105. All these cases, however, enforce the doctrine of account stated between others than merchants as an estoppel."

In *Brown v. Kimmel*, 67 Mo. 430, a case for professional services, which holds the contrary doctrine, the court said: "The rule at best is a very flexible one, and undoubtedly depends in its application on the circumstances of each case, to be judged by the nature of the transaction, the habits of the business in which it occurs, and the course of trade."

In *Marye v. Strouse*, 6 Sawy. (U. S.) 204; s. c., 5 Fed. Repr. 483, it was held that the writing-up of a pass-book between a broker and his customer made it an account stated; and in *Leather, etc., Bank v. Morgan*, 117 U. S. 96, it was held that the balancing of a pass-book between a bank and depositor made it an account stated. The court said: "The object of a pass-book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his pass-book to be written up and returned with the vouchers is therefore, in effect, a demand to know what the bank claims to be the state of his account; and the return of the book with the vouchers is the answer to that demand, and, in effect, imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it."

A pass-book kept by an employee, occasionally handed in to the book-keeper of the employer, by whom all necessary entries were made therein, is an account stated between the parties. *Burke v. Wolfe*, 6 Jones & S. (N. Y.) 263.

**17. Opening the Account—Fraud—Mistake.**—If there has been any mistake, omission, accident, fraud, or undue advantage by which the account stated is vitiated and the balance incorrectly stated, it will not be conclusive between the parties, but it may be opened and re-examined.<sup>1</sup>

See *Shepard v. Bank*, 15 Mo. 148; *Powell v. Pacific R. Co.*, 65 Mo. 658; *White v. Hampton*, 10 Iowa, 238; *White v. Campbell*, 25 Mich. 463; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129; s. c., B'k 19 L. C. P. 885; *Union Bank v. Knapp*, 3 Pick. (Mass.) 96; s. c., 15 Am. Dec. 181; *Bank v. Stickney*, 4 Scam. (Ill.) 4; *Fallansbee v. Parker*, 70 Ill. 11; *Peddle v. Connard*, 85 Ill. 102; *Harley v. Eleventh Ward Bank*, 76 N. Y. 618.

1. *Story's Eq. Juris.* (13th Ed.) 523; *Samson v. Freedman*, 102 N. Y. 699; *Carpenter v. Kent*, 101 N. Y. 591; *Sharkey v. Mansfield*, 90 N. Y. 227; *Harley v. Eleventh Ward Bank*, 76 N. Y. 618; *McIntyre v. Warren*, 3 Abb. App. Dec. 99; *McDougall v. Cooper*, 31 N. Y. 498; *Lockwood v. Thorne*, 18 N. Y. 157; *Kock v. Bonitz*, 4 Daly (N. Y.), 117; *Wilde v. Jenkins*, 4 Paige (N. Y.), 481; *Newell v. Smith*, 3 Atl. Repr. (Conn.) 674; *Forman v. Brooks*, 9 Pick. (Mass.) 212; *Chatam v. Niles*, 36 Conn. 403; *Goodwin v. U. S. Ins. Co.*, 24 Conn. 591; *Vandeveer v. Statesir*, 39 N. J. L. 593; *Brown v. Vandyke*, 8 N. J. Eq. 795; s. c., 55 Am. Dec. 250; *Shirk's App.* 3 Brew. (Pa.) 119; *Jones v. Dunn*, 3 W. & S. (Pa.) 109; *Hawkins v. Long*, 74 N. Car. 781; *Sloan v. Guice*, 77 Ala. 392; *Rembert v. Brown*, 17 Ala. 667; *Petec v. Crawford*, 51 Miss. 43; *La Trobe v. Hayward*, 13 Fla. 190; *Houston, etc., R. Co. v. Snelling*, 59 Tex. 116; *Horan v. Long*, 11 Tex. 230; *Bertrand v. Taylor*, 32 Ark. 470; *Roberts v. Totten*, 13 Ark. 609; *Kronenberger v. Binz*, 56 Mo. 121; *Carroll v. Paul*, 16 Mo. 226; *St. Louis, etc., Co. v. Colorado Nat. Bank*, 8 Colo. 70; *Branger v. Chevalier*, 9 Cal. 353; *Eddie v. Eddie*, 61 Ill. 134; *Gage v. Parmelee*, 87 Ill. 329; *Kinney v. People*, 3 Scam. (Ill.) 357; *Wharton v. Anderson*, 28 Minn. 301; *White v. Campbell*, 25 Mich. 463; *Bankhead v. Alloway*, 6 Cold. (Tenn.) 56; *Dickerson v. Nabb*, *Sneed* (Ky.), 320; s. c., 2 Am. Dec. 725; *Oil Co. v. Van Etten*, 107 U. S. 325; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129; s. c., 1 Myer's Fed. Dec. 18; *Perkins v. Hart*, 11 Wheat. (U. S.) 237; *Chappedelaine v. Dechenaux*, 4 Cranch (U. S.), 306; s. c., 1 Myer's Fed. Dec. 22.

What is sufficient evidence of misrepresentation to open an account stated. *Upton v. Bedlow*, 4 Daly (N. Y.), 216.

If the error or fraud affects all the items of the account it will be opened *de novo*. *Branger v. Chevalier*, 9 Cal. 353.

A written acknowledgment that an account is correct, made without consideration, will not estop a party from showing that it is incorrect as against parties having notice of its incorrectness before acting upon it. *Higham v. Harris*, 8 N. East. Repr. 255.

One is not precluded from showing the actual state of an account because he may have gratuitously stated the amount of it different from what it in truth was, unless some element of estoppel intervenes. *Higham v. Harris*, 5 West. Repr. (Ind.) 644.

A settlement of an account between parties, involving the receipt and disbursement of moneys, will not preclude a party to such settlement from afterward preferring a claim for overcharges and misrepresentations in respect to the subject-matter settled, if afterward discovered. *Anthony v. Day*, 52 How. Pr. (N. Y.) 35.

An account settled by bond or release may be opened for fraud or collusion, or where the settlement was made under suspicious circumstances; but in such a case the burden is upon the complainant. *Love v. White*, 4 Hayw. (Tenn.) 210. See *Kelsey v. Hobby*, 16 Pet. (U. S.) 269; *Gray v. Washington*, *Cooke* (Tenn.), 321.

If a person is of weak mind the court will open an account stated, if it is shown that an undue advantage has been taken of him. *Rembert v. Brown*, 17 Ala. 667. See *Compton v. Greer*, 2 Dev. Eq. (N. Car.) 93.

In an action upon an account stated, where the answer denies the allegations of the petition, and alleges affirmatively that an account existed between plaintiffs and defendant; that plaintiffs were defendant's bankers; and that they, with intent to defraud defendant, concealed from him the real condition of the account, and failed to credit him with deposits made by him, and charged him with items with which he was not chargeable, *held*, that the allegations of fraud contained in the answer were sufficient, if proven, to vitiate the account stated, if one existed; and that the question of such fraudulent concealment should be

Where, after a settlement and adjustment of an account between the parties, a mistake as to one item thereof is discovered, and an action is brought to correct the mistake, this does not give to the defendant a right to have the whole account opened. The

submitted to the jury with other issues in the case. *McKinster v. Hitchcock*, 26 N. W. Repr. (Neb.) 705.

A stipulation that the settlement of the accounts was "subject to the correction of errors and omissions which may be hereafter found therein" does not render it any the less a settled account, and subject to all the rules applicable to stated accounts. *Young v. Hill*, 67 N. Y. 162; s. c., 23 Am. Rep. 99.

**When it cannot be opened.**—A mere allegation of error is not sufficient. *Gilchrist v. Brooklyn Grocers' Assoc.*, 66 Barb. (N. Y.) 390; 59 N. Y. 495; *Forman v. Brooks*, 9 Pick. (Mass.) 212.

It will not be opened for a clerical error, when such error does not affect the result. *Wilson v. Frisbie*, 57 Ga. 269. Nor if the plaintiff was aware when he made the settlement of the facts on which he bases his claim to relief. *Quinlan v. Keiser*, 66 Mo. 603. See *Hager v. Thompson*, 1 Black. (U. S.) 80.

An account which has been closed for over six years cannot be opened on the ground of a recently discovered mistake. *Randel v. Ely*, 6 Brews. (Pa.) 270.

If the party has been negligent in detecting the errors, the account will not be opened. *Leather Mfrs.' Bank v. Morgan*, 117 U. S. 96; *Bruen v. Hone*, Barb. (N. Y.) 586; *George v. Johnson*, 45 N. H. 456; *Stearns v. Page*, 7 How. (U. S.) 819; *Winston v. Street*, 2 Patt. & H. (Va.) 169; *Fraser v. Hext*, 2 Strob. Eq. (S. Car.) 250; *Gregory v. Forrester*, 1 McC. Ch. (S. Car.) 318, 332; *Hutchins v. Hope*, 7 Gill (Md.), 119; *Burke v. Isham*, 53 N. Y. 631; *Augsbury v. Flower*, 68 N. Y. 619; *Dakin v. Demming*, 6 Paige (N. Y.), 95; *Ogden v. Astor*, 4 Sandf. Ch. (N. Y.) 311; *Atwater v. Fowler*, 1 Edw. Ch. (N. Y.) 417; *Randel v. Ely*, 3 Brews. Pa. 270.

Lapse of time is no bar to the opening of a stated account where there has been fraud, even if the party committing the fraud be dead. *Botifeur v. Weyman*, 1 McC. Ch. (S. Car.) 156. See *Ogden v. Astor*, 4 Sandf. Ch. (N. Y.) 311.

Where the parties have acquiesced in a settlement for a long period, there must be clear and distinctive evidence of fraud or mistake to open a stated account. *Augsbury v. Flower*, 68 N. Y. 619.

Where the parties took the balance

from the books of one of them, and each agreed to waive all claims against each other which were not included in the balance, the subsequent discovery of the omission of an item which would affect the balance is not ground for opening the account. *Hamilton, etc., Co. v. Goodrich*, 6 Allen (Mass.), 191.

A settlement deliberately made, followed by an agreement in writing, signed and sealed by the parties, though one was compelled from necessity to retire from the business, and withdraw his capital and was laboring at the time under financial embarrassment as well as great mental anguish, will not be set aside on trivial grounds. *Gage v. Parmelee*, 87 Ill. 329.

After a judgment, an execution and sale under a mortgage bond, the court will not open the account, though there be some degree of irregularity in the accounts if from the whole they appear to be fairly closed. *Bloodgood v. Zeily*, 2 Caine's Cas. (N. Y.) 124.

A stated account cannot be opened for a mistake in law. *Commissioners v. Gherky*, *Wright* (Ohio), 493.

Items for liquor and tobacco extravagantly used, do not furnish ground for opening an account. *Iley v. Niswanger*, 1 McC. Ch. (S. Car.) 523.

An agent for the collection of rents, rendered regular accounts, and submitted his books for inspection; but the principal, in consequence of his aversion to investigating accounts, and of his great confidence in the agent, signed receipts in full, and settlements of the accounts without examination. *Held*, that the accounts would not be opened except for fraud clearly proved, or for the correction of specific errors pointed out by the plaintiff in his bill. *Phillips v. Bellden*, 2 Edw. Ch. (N. Y.) 1. See *Ogden v. Astor*, 4 Sandf. Ch. (N. Y.) 311.

When a creditor knowingly signs a statement acknowledging the satisfaction of a claim recited in it, he cannot afterwards maintain an action upon that claim against his debtor upon the ground of mistakes in the account, without first notifying him of those mistakes, and requiring correction. *Roach v. Gilmer*, 3 Utah, 389.

A, being surveyor to trustees of a turnpike road, delivered annual accounts, in which the real expenditure

mistake may be corrected and the right of the parties readjusted in regard thereto; but in other respects defendant is bound by the account, actually settled, unless he can show some mistake or fraud in the settlement in respect to other items.<sup>1</sup>

was understated. These accounts were believed by the trustees to be correct, as A intended, and they were acted upon on that assumption. There was no actual fraud by A, his object being to make the apparent expenditure as light as possible, and to avoid complaints from the trustees. Eventually the omitted items were brought into one account on the discovery of their omission by the trustees, who, however, refused to pay the same. A having brought an action, *held*, that he could not recover, on the ground that a man shall not be allowed to affirm at one time and deny at another, making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. *Cave v. Mills*, 7 H. & N. 913.

A mere threat to sue upon a claim, and to arrest the person against whom it is made in such suit, or by virtue of an execution which may be issued upon a judgment obtained therein, is not such duress as will avoid a promise to pay the claim, induced by the threat. *Dunham v. Griswold*, 100 N. Y. 224. See DURESS.

**Pleadings.**—The pleadings should set forth the items of the mistake or fraud and distinctly allege that such items were omitted or fraudulent. *Story's Eq. Juris.* §§ 523, 527; *Thelkeld v. Dobbins*, 45 Ga. 144; *Langdon v. Roane*, 6 Ala. 518; s. c., 41 Am. Dec. 60; *Walker v. Driver*, 7 Ala. 683; *Kronenberger v. Binz*, 56 Mo. 121; *Badger v. Badger*, 2 Cliff. (U. S.) 137; *Redman v. Green*, 3 Ired. Eq. (N. Car.) 54; *Praitt v. Weyman*, 1 McC. Ch. (S. Car.) 156; *Horan v. Long*, 11 Tex. 230; *Bullock v. Boyd*, 1 Hoffm. Ch. (N. Y.) 294; *Nourse v. Prime*, 7 Johns. Ch. (N. Y.) 69; *Young v. Hill*, 67 N. Y. 162; s. c., 23 Am. Rep. 99; *Towsley v. Denison*, 45 Barb. (N. Y.) 490. See *Hampton v. Michael*, 6 Gratt. (Va.) 151; *Glenn v. Salter*, 50 Ga. 170; *Champion v. Joslyn*, 44 N. Y. 653; *Bright v. Coffman*, 15 Ind. 371.

The particular act of fraud, misrepresentation, or concealment must be stated distinctly, also how, when, and in what manner it was perpetrated. The charges must be definite and reasonably certain, capable of proof and clearly proved. If a mistake is alleged, it must be stated with precision and made apparent, so

that the court may rectify it, with a feeling of certainty that they are not committing another and perhaps greater mistake, and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether by the exercise of ordinary diligence the discovery might not have been before made. *Stearns v. Page*, 7 How. (U. S.) 819; s. c., Bk 12, L. C. P. 928; 1 Myer's Fed. Dec. 26, § 30; *Chubbuck v. Vernam*, 42 N. Y. 432.

A plaintiff cannot impeach an account stated, set up by the defendant, unless he has alleged the error or mistake therein in his pleadings; and when that defence is set up to a general bill for an account, it is *prima facie* a bar to the suit until specific errors therein are assigned, and he must, therefore, amend his bill so as to set them up.

An account stated or settled is a mere admission that the account is correct. It is not an estoppel, but is still open to impeachment for mistakes and errors. Its effect is to establish, *prima facie*, the accuracy of the items without proof, and the party seeking to impeach it is bound to show authoritatively the mistake or error alleged. *Barker v. Hoff*, 52 How. Pr. (N. Y.) 382.

Where an account is stated, including a usurious transaction, and the balance assigned, the assignee cannot set up the usury, to defeat an item included in the account; it is a defence personal to the borrower. *Bullard v. Raynor*, 30 N. Y. 197.

1. *Carpenter v. Kent*, 101 N. Y. 591; *Consequa v. Fanning*, 3 Johns. Ch. (N. Y.) 587; s. c., 17 Johns. (N. Y.) 511; *Pauling v. Creagh*, 54 Ala. 646; *Bankhead v. Alloway*, 6 Coldw. (Tenn.) 56; *Higginson v. Fabre*, 3 Dessau (S. Car.), 89.

Where an error occurs by the omission to include a certain sum, such error may be corrected, and the sum collected. *McDougall v. Cooper*, 31 N. Y. 498.

Where a party has his pass-book written up by a bank, he cannot, after a considerable lapse of time, open the settlement to recover unlawful interest charged him. *Peddycord v. Connard*, 85 Ill. 102. See *Radcliffe v. Wightman*, 1

## ACCOUNT STATED—ACCOUNT RENDER.

**18. Surcharging—Falsifying.**—Where the mistake, or omission, or inaccuracy, or fraud, or imposition is not shown to affect or stain all the items of the transaction, the court will allow the account to stand with liberty to the plaintiff to surcharge or falsify it; the effect of which is to leave the account in full force and vigor as a stated account, except so far as it can be impugned by the opposing party.<sup>1</sup>

### ACCOUNT RENDER.

1. *Definition.*
2. *History, in England and the United States.*
3. *When Account lies, and on what Demands.*
4. *Process.*
5. *Defence.*
6. *Arbitration.*
7. *Judgment quod computet.*
8. *Auditors.*
9. *Final Judgment.*
10. *Error and Execution.*
11. *Account Render as it exists in the United States.*

**1. Definition.**—Account is a writ or action brought against a person who, by means of his office as a guardian, or for some business he has undertaken as an agent, or some money he has received for another, ought to render an account to him, and refuses to do it; and he that calls him to an account shall recover of him not only what shall be found due, but damages also for the wrong done him.<sup>2</sup>

**2. History.**—Account is a very ancient common-law writ, now nearly obsolete, the object of which was to compel parties to render a true statement of monetary transactions which had arisen between them. In England for many years recourse has usually been had to courts of equity, as those courts extended their remedy to many cases of implied and constructive trusts, as well as to matters of fraudulent contrivance and tortious misconduct, which the action at common law could never have reached.<sup>3</sup> A full account of the action and its process may be found in Bacon's Abr., "Account," where the difficulties attending the common-law action are set forth more at large. The reproaches cast upon it would not seem, however, to be altogether well founded, as will

McC. Ch. (S. Car.) 408; Bullard v. Raynor, 30 N. Y. 197. Compare Bullock v. Boyd, Hoffm. Ch. (N. Y.) 294; Barrow v. Rhinelander, 1 Johns. Ch. (N. Y.) 550.

1. 1 Story's Eq. Juris. (13th Ed.) § 523. See Gover v. Hall, 3 Har. & J. (Md.) 43; Brown v. Vandyke, 4 Hals'd Eq. (N. J.) 795; s. c., 55 Am. Dec. 250; Bullock v. Boyd, 1 Hoffm. Ch. (N. Y.) 294; Bruen v. Hone, 2 Barb. (N. Y.) 586; Phillips v. Belden, 2 Edw. Ch. (N. Y.) 1.

Surcharging applies to the balance of the whole account, and supposes credits omitted which ought to be allowed. Falsification applies to some items of the debits, supposing it to be wholly false or in part erroneous. Bruen v. Hone, 2 Barb. (N. Y.) 586.

Where the plaintiff opens a stated ac-

count, and falsifies certain charges in it, the defendant may open it also, and correct a mistake in the rate of interest. Higginson v. Fabre, 3 Dessau (S. Car.), 89. See Floyd v. Priester, 8 Rich. Eq. (S. Car.) 248.

The account may be falsified by showing that a wrong charge was included in it. Young v. Hill, 67 N. Y. 162; s. c., 23 Am. Rep. 99.

**Authorities for Account.**—Story's Equity Jurisprudence; Parsons on Contracts; Wharton on Contracts; Chitty on Contracts, 11th Am. Ed.; Greenleaf on Evidence; Abbott's Trial Evidence.

2. Imp. M. Pl. 143; Troubat & Haly's Pr. (5th Edit.) vol. ii. p. 138.

3. Wharton's Law Lexicon (7th Edit.), "Account."

appear from an examination of the case of *Godfrey v. Saunders*,<sup>1</sup> where, after a bill for an account had been fruitlessly pending in chancery for more than twelve years, it was finally determined in this form of action in the course of two years. By the judicature Act 1873, sec. 34 (3), all causes and matters for the taking of partnership or other accounts have been assigned to the Chancery Division of the High Court of Justice.

In most of the States of the United States, the right to the common-law action exists, and in some it has been rendered very effective by certain statutory enactments; but inasmuch as discovery is the main object sought by the action, to enable the plaintiff to give evidence of his right, and that can be more readily obtained and questions in dispute more readily settled in equity, resort is generally had to that jurisdiction in those States where a separate tribunal exists. In New York the action of account has fallen into disuse, the remedy there adopted being by bill in chancery.<sup>2</sup> In Massachusetts, the courts having power to appoint auditors, *assumpsit* has been substituted.<sup>3</sup> In Pennsylvania the jury are authorized by statute<sup>4</sup> to settle the accounts and find the sum actually due to the plaintiff or defendant. Under the authority of the compulsory arbitration laws, cases of account render may be referred to arbitrators, who are "to determine on the whole merits of the cause, and report the balance due by either party to the other."

**3. When Account lies.**—By the common law, account lay only against a guardian in soccage, bailiff, or receiver, or by one in favor of trade and commerce against another wherein both were named merchants; that is to say, against all who had charge or possession of the lands, goods, chattels, or moneys of another with a liability to render an account thereof, such as partners, trustees, guardians, and all who could be specially described as above. It was the proper form of action between partners, one of whom cannot bring *assumpsit* against the other unless there be an account settled between them, and a balance struck.<sup>5</sup> As the action lies only on the ground that money, or its equivalent, has come to the hands of the defendant, to be accounted for, it cannot be maintained against a dormant partner who has received nothing, and has therefore no account to render;<sup>6</sup> nor will account lie against an active partner unless it can be shown that money of the firm has come into his hands.<sup>7</sup> It is said that at common law it only lies between two merchants; not where the partnership consists of a larger number.<sup>8</sup> When there are two defendants the

1. 3 Wils. 94.

2. *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 351.

3. *Fanning v. Chadwick*, 3 Pick. (Mass.) 420, 424.

4. Act 4th April, 1831, P. L. 492; Purdon, 54.

5. *Foster v. Allenson*, 2 T. Rep. 479;

1 C. of L.—9

*Moravia v. Levy*, cited in 2 T. Rep. 483; *Andrews v. Allen*, 9 S. & R. (Pa.) 241.

6. *Spear v. Newell*, 2 Paine (U. S.), 267.

7. *Demmy v. Dougherty*, 1 Pears. (Pa.) 236.

8. *Beach v. Hotchkiss*, 2 Conn. 425; *Appleby v. Brown*, 24 N. Y. 143. But



plaintiff must show a joint liability.<sup>1</sup> The action also lay against an attorney-at-law for money received for his client;<sup>2</sup> by a landlord against a tenant, under a lease in which the rent was a share of the profits; between principal and factor; and, generally, wherever one person has received money as the agent of another.<sup>3</sup>

By various statutes passed in England, the last being 4 Anne, ch. 16, sec. 27, the right of action, heretofore limited to the parties to the contract, on the ground of privity between them, was given to executors, executors of executors, and to administrators; and was allowed to be maintained against the executors and administrators of every guardian, bailiff, and receiver, and also by one joint tenant and tenant in common, his executors and administrators, against the other, as bailiff, for receiving more than his just share and proportion; and against his executors and administrators. The action therefore now lies not only against all who can be charged as bailiff or receiver, but also against their personal representatives, and against joint tenants, or tenants in common without any actual appointment as bailiff or receiver. These statutes have become either part of the common law in the United States, or their substance for the most part has been incorporated into various statutes. There is this difference between the liability of a bailiff and receiver, for a bailiff is entitled to a just allowance for his charges and expenses; but this distinction does not apply to partners, for one partner, even though charged as receiver, is entitled to every just allowance against the other.<sup>4</sup> Though an infant may be an executor, or may be charged in trover, being a tort, he is not liable if he be made factor, bailiff, or receiver, for what he does during his infancy, either in law or in equity, for the same reason that other acts of his bind him not.<sup>5</sup> So also an executor who makes a profit of the estate of his testator is not, for this reason, liable to an action of account render, for it is a tort;<sup>6</sup> nor does such an action lie by a legatee against an executor.<sup>7</sup>

**4. On what Demands Account lies.**—Account lies only for a thing uncertain, arising out of a contract, express or implied, but not for any tort or certain debt. It will not, therefore, lie to recover *mesne profits*.<sup>8</sup> Nor for rent reserved on a lease; nor against a lessee or bailee of goods who wastes them, or who refuses to deliver them.

see *Whelen v. Watmough*, 15 S. & R. (Pa.) 153; *Portsmouth v. Donaldson*, 32 Pa. St. 202.

1. *Griffith v. Willing*, 3 Binn. (Pa.), 317.

2. *Bredin v. Kingland*, 4 Watts (Pa.), 420.

3. *Long v. Fitzsimmons*, 1 W. & S. (Pa.) 530; *Shriver v. Nimmick*, 41 Pa. St. 91; *Harrington v. Deane*, Hob. 36.

4. *James v. Browne*, 1 Dall. (U. S.) 340.

5. *Co. Litt.* 172.

6. *Anon.* 1 Hayw. (N. Car.) 226; *Conklin v. Bush*, 8 Pa. St. 514.

7. *Eaves v. Eaves*, Mart. (La.) 45. In Pennsylvania this action is expressly allowed against an executor for the recovery of a legacy. 24th Feb., 1834, P. L. 83; *Purdon*, 54. So, also, Vermont and Connecticut to residuary legatees. See *Rev. Stat. of Conn.* 1875, p. 467, and *Vermont Rev. St.* of 1880.

8. *Harker v. Whitaker*, 5 Watts (Pa.),

474.

5. **Process.**—The process in account render issues upon a *præcipe*, and the writ is in the usual form of personal actions. Where imprisonment for debt is abolished bail is not demandable. If no appearance is entered, the plaintiff may take judgment *quod computet*, by default, which is, however, interlocutory only.<sup>1</sup> The declaration must charge the defendant, in a proper manner,<sup>2</sup> as bailiff, receiver, or guardian, for there is a difference as to the liability of the defendant in this respect.<sup>3</sup> Where the defendant is charged as receiver the rule is imperative that the plaintiff shall set forth by whose hands the money was received; and if he be charged as bailiff, the declaration must describe the goods of which he had the care and management.<sup>4</sup> Defects in the declaration must be taken advantage of on demurrer, or they will be cured by final judgment. The authorities on this head are collected in 1 Vin. Abr., "Account," F. pl. 9, margin. A variance between the declaration and evidence was fatal, but it is now amendable even at the trial.<sup>5</sup>

6. **Defence.**—The pleas in defence are *ne unques* bailiff or receiver, *plene computavit* (fully accounted), or a release, or non-age or payment; and these pleas may be joined. Pleas in bar to the right of action must be so pleaded, and cannot afterwards be pleaded before the auditors;<sup>6</sup> but, except in case of a release, or *plene computavit*, if the defendant be once chargeable, he cannot plead in bar, but must plead before auditors.<sup>7</sup>

7. **Arbitration.**—Under the compulsory arbitration laws of Pennsylvania, the arbitrators appointed by virtue thereof have power to determine the whole merits of the cause, and to frame an account from which they deduce their award.

8. **Judgment quod computet.**—In the action of account there are two judgments. The first is that the defendant do account; for which purpose the court assigns auditors to take and declare the account between the parties. This judgment is interlocutory only, and a writ of error does not lie thereon.<sup>8</sup> Though if the defendant has pleaded in bar, and the bar is adjudged good, the plaintiff may have a writ of error, for this judgment is final until reversed.<sup>9</sup>

9. **Auditors.**—In Pennsylvania the act of 4th of April, 1831,<sup>10</sup> provides that the jury, in an action of account render, shall have full power to settle the accounts between the parties, and find in favor of the plaintiff, or one or more of the defendants, such sum or sums as shall appear to be due. When this course is adopted a formal

1. Kitchen v. Strawbridge, 4 Wash. C. C. (Pa.) 841.

2. Hughes v. Worsley, 15 Miss. 492; McKay v. Brown, 13 Vt. 593; Smith v. Smith, 2 Root (Conn.) 42; Barnum v. Landon, 25 Conn. 137; Wilson v. Wilson, 2 South. (N. J.) 791; Wright v. Guy, 10 S. & R. (Pa.) 227.

3. Troubat & Haly's Pr. (5th Edit.) vol. ii. sec. 1690.

4. McMurray v. Rawson, 3 Hill (N. Y.), 59.

5. McAdam v. Orr, 4 W. & S. (Pa.) 550.

6. Lee v. Abrams, 12 Ill. 111; Kelly v. Kelly, 3 Barb. (N. Y.) 419.

7. Morgan v. Adams, 37 Vt. 233.

8. Beitter v. Zeigler, 1 P. & W. (Pa.) 135.

9. 1 Vin. Abr., "Account," U. pl. 22, margin.

10. P. L. 492; Purdon, 54.

judgment *quod computet* is not necessary. Where, however, this course is not allowable, and the court, on motion of the plaintiff, has assigned auditors, the proceedings before them are in the nature of a new action, and the defendant is put to plead whatever matter discharges him from liability to the plaintiff, in consequence of not having accounted with him as he ought. As has already been said, what might have been pleaded in bar to the action shall not be allowed as a discharge before the auditors; nor can anything be pleaded before the auditors contrary to what has been previously pleaded and found by verdict.<sup>1</sup> The judgment *quod computet* settles conclusively the liability of the defendant to account, but it does not prevent him from demanding an issue upon each and every item with which the plaintiff seeks to charge him in account. The auditors may make the proper charges and allow the proper credits without regard to the judgment to account, for it is not to be inferred from this judgment that the defendant has received all the precise sums and at the precise times mentioned in the declaration.<sup>2</sup> If the matters offered by the defendant before the auditors are disputed by the plaintiff, he may demur or take issue. These demurrers or issues are certified by the auditors to the court, where the matter of law is decided by the court, and of fact by a jury; which being returned to the auditors, they report an account accordingly.<sup>3</sup> If either party has cause of complaint against the auditors, redress is to be had by application to the court. And in all cases of dispute before auditors the exception must be taken before them, and certified as above in the shape of an issue for trial; it is too late to file exceptions to the report after it has been returned.<sup>4</sup> The auditors must examine all articles of account, though incurred since the writ, and the whole must be brought down to the time

1. Sutton v. Adams, 45 Pa. St. 67; Bishop v. Eagle, 10 Mod. 22; Geoffrey, v. Saunders, 3 Wils. 113, 114; Spear v. Newell, 2 Paine (U. S.), 267; Spencer v. Usher, 2 Day (Conn.), 116; Cro. Car. 116; Porter v. Wheeler, 37 Vt. 281; Baxter v. Thompson, 26 Vt. 559; Day v. Lockwood, 24 Conn. 185.

2. Newbold v. Sims, 2 S. & R. (Pa.) 317.

3. Crousillat v. McCall, 5 Binn. (Pa.) 433; Miller v. Anspach, cited in Troubat & Haly's Practice (5th Edit.), vol. ii. § 1705, note. *Per curiam*.—The practice in this action has been long well settled, and has been recognized, in Pennsylvania, in the case of Crousillat v. McCall, 5 Binn. (Pa.) 433.

If the matters offered by either party are disputed by the other, he may either demur or take issue before the auditors. If there are more points of dispute than one, there may be a demurrer, or an issue on each, which are to be certified

by the auditors to the court, and then the matters of law will be decided by the court and the issues in fact by a jury, after which the account will be finally settled by the auditors, according to the results of the trial. If either party desires an issue and the auditors refuse permission, the court will set the matter to rights. So, if the auditors conduct themselves with any manner of impropriety, to the injury of either party, redress may be had on application to the court. The exceptant does not allege that he put in his plea before the auditors, and claimed an issue thereon; the exception now filed is, in fact, the claim of an issue. It is too late, therefore; and it would introduce irregularity and confusion into the proceedings of an action already sufficiently complicated to allow it. The court must, therefore, treat the exception as a mere nullity.

4. Snyder v. Castor, 4 Yeates (Pa.), 358; Crousillat v. McCall, 5 Binn. (Pa.) 433.

when the auditors make an end of their account.<sup>1</sup> It is the province of the auditors to weigh the evidence, and investigate the facts and determine thereon, and a report will not be set aside for a mistake of fact.<sup>2</sup> The report must be a special one, and not merely an award of a balance.<sup>3</sup>

**10. Final Judgment.**—If the report certify that the defendant refused to account, judgment shall be that the plaintiff recover according to the value mentioned in the declaration.<sup>4</sup> If it contain an account in favor of the plaintiff, the judgment is that the plaintiff do recover against the defendant so much as he (the defendant) is found in arrears.<sup>5</sup> The judgment carries costs,<sup>6</sup> and where the defendant has resisted the plaintiff's claim by pleading, there shall be a judgment for damages.<sup>7</sup> The plaintiff may have judgment for a greater amount than the damages laid in the declaration.<sup>8</sup> The auditors may report a balance in favor of the defendant,<sup>9</sup> but it is doubtful whether judgment can be entered on such a report.<sup>10</sup>

**11. Error and Execution.**—To the final judgment a writ of error lies; but although it be found erroneous and reversed, the first judgment will stand in force, for the two judgments are distinct and perfect. If on error, after the last judgment, the first is reversed, the last is consequently reversed also.<sup>11</sup>

This action is the first of a civil nature to which process of execution against the person was given, and in which the action of debt was given against the jailer who let any one escape committed to prison for arrearages of account found by auditors.<sup>12</sup> This right is, of course, lost where imprisonment for debt is abolished. The other executions in this action are the same as in all the personal civil actions.

**12. Account Render as it exists in the United States.**—Although in those States which have independent courts of chancery a bill in equity has generally superseded the old common-law action of account, there are many States in which this action still exists, and in which it has been brought at various times, as Connecticut, Illinois, Maine, Maryland, Massachusetts, Mississippi, New York, Pennsylvania, Rhode Island, Vermont.<sup>13</sup> It is also an avail-

1. *Robinson v. Bland*, 2 Burr. 1086; *Cousher v. Tulam*, 4 Wash. C. C. (Pa.) 442.

2. *Parker v. Avery*, Kirby (Conn.), 353; *Wood v. Barney*, 2 Vt. 369.

3. *Shewell v. Fell*, 4 Yeates (Pa.), 51; *Willson v. Willson*, 2 South. (N. J.) 791; *Finney v. Harbeson*, 4 Yeates (Pa.), 514; *Spencer v. Usher*, 2 Day (Conn.), 116; *Thomas v. Alsop*, 2 Root (Conn.), 12.

4. *Williams v. White*, Cro. Eliz. 806; *Pierce v. Clark*, Lutw. 63.

5. 1 Selw. N. P. 5.

6. *Harrison v. Warner*, 3 Luz. L. Reg. 225.

7. *Gratz v. Phillips*, 5 Binn. (Pa.) 568.

8. *Gratz v. Phillips*, 5 Binn. (Pa.) 568.

9. *Dickerson v. Whittlesay*, 2 Root (Conn.), 121.

10. *McCall v. Crousillat*, 3 S. & R. (Pa.) 7.

11. 1 Vin. Abr.; "Account," pl. 22.

12. Statute Westm. 2, 13 Edw. I. c. 11.

13. *Barnum v. Landon*, 25 Conn. 137; *Spalding v. Day*, 37 Conn. 428; *Day v. Lockwood*, 24 Conn. 185; *Usher v. Spencer*, 2 Day (Conn.), 120; *Starkey v. Peters*, 18 Conn. 181; *Smith v. Brush*, 11 Conn. 159; *Pond v. Pond*, 2 Root (Conn.), 41; *Smith v. Smith*, 2 Root (Conn.), 42; *Smith v. Chapman*, 5 Conn. 14; *Lacon v. Davenport*, 16 Conn. 341; *Mantz v. Col-*

able action in the United States courts.<sup>1</sup> In 1818 in New York, Chancellor Kent, sitting in Equity, declared, in the case of *Duncan v. Lyon*,<sup>2</sup> that "courts of law and equity have concurrent jurisdiction in matters of account, and it is conceded that an action of account at law may be brought by one partner against another;" but in 1843 the Supreme Court said that the action had become obsolete.<sup>3</sup> Since which time the action seems to have been brought only four times.<sup>4</sup> It is recognized by the statute law.<sup>5</sup> In Connecticut the action of account at common law has been allowed in several cases,<sup>6</sup> even against three defendants where the action is against them jointly, notwithstanding the statute<sup>7</sup> that an action instituted against two or more defendants to compel them to render an account shall be by bill in equity, it being held that that statute has reference to cases where the defendants are sued to answer severally.<sup>8</sup> It also lies before a justice of the peace,<sup>9</sup>

lins, 4 H. & McH. (Md.) 65; *Gibbs v. Claggett*, 2 Gill & J. (Md.) 14; *Green v. Johnson*, 3 Gill & J. (Md.) 389; *Sargent v. Parsons*, 12 Mass. 149; *Fowle v. Kirkland*, 18 Pick. (Mass.) 299. The action of account render has been abolished in Massachusetts. Rev. Stats. c. 118, § 43; *Appleby v. Brown*, 24 N. Y. 143; *Bredin v. Deven*, 2 Watts (Pa.), 95; *Bredin v. Kingland*, 4 Watts (Pa.), 420; *Long v. Fitzsimmons*, 1 W. & S. (Pa.) 530; *Griffith v. Willing*, 3 Binney (Pa.), 317; *Irvine v. Hanlin*, 10 S. & R. (Pa.) 220; *Dennison v. Goehring*, 7 Pa. St. 175; *Perch v. Quiggle*, 57 Pa. St. 247; *Dureya v. Witcomb*, 31 Vt. 395; *Hydeville Co. v. Barnes*, 37 Vt. 588; *Foster v. Ives*, 53 Vt. 458. The action of account has been established by statute in Vermont. Revised Laws, 1880, §§ 1202-1217; *Lee v. Abrams*, 12 Ill. 111; *Crow v. Mark*, 52 Ill. 332; *Hunt v. Gorden*, 52 Miss. 194; *Knowles v. Harris*, 5 R. I. 402; *Closson v. Means*, 40 Me. 337; *Gratz v. Phillips*, 3 Binn. (Pa.) 474; *Smith v. Woods*, 3 Vt. 485; *McPherson v. McPherson*, 11 Ired. (N. Car.) 391; *Hale v. Hale*, 3 Day (Conn.), 377.

1. *Jordan v. Wilkins*, 2 Wash. C. C. 482; *Cousher v. Tulam*, 4 Wash. C. C. 442; *Spear v. Newell*, 2 Paine (U. S.), 268; *Travers v. Dyer*, 16 Blatchf. C. C. 178.

2. 3 Johns. Ch. (N. Y.) 351.

3. The words of the court (Bronson, J.) are as follows: "In this State it does not appear that more than one action of account was ever brought before—*Jacobs v. Fountain*, 19 Wend. 121—and the present experiment will probably be the last. In England the action seems not to have been brought more than a dozen times within the last two centuries, and in most of the cases the difficulty has been about the form of the

remedy rather than the rights of the parties. One of the last cases which I have noticed in the English books was brought in 1768 and ended in 1770—*Godfrey v. Saunders*, 3 Wils. 73. But it is worthy of remark that the account was never taken. The case was decided on demurrer to a plea before the auditors. Ch. J. Wilmot said he was glad to see the action revived, but at the same time told the counsel the court was in 'some doubt how the judgment must be entered and about the damages,' and he recommended expedition, as the plaintiff was very old and the cause had been depending (in chancery and at law) fourteen years, and it was high time it should be ended. . . . There have been three cases since that time. . . . In some of the States the action is in use in a modified form, to supply the defect in their system from the want of a court of equity. In this State there is no such reason for attempting to revive and remould a remedy which was always difficult and has now become obsolete." *McMurray v. Rawson*, 3 Hill (N. Y.), 59.

4. *Kelly v. Kelly*, 3 Barb. (N. Y.) 419; *Woolever v. Knapp*, 18 Barb. (N. Y.) 265; *Hall v. Fisher*, 20 Barb. (N. Y.) 441; *Appleby v. Brown*, 24 N. Y. 143.

5. 1 N. Y. Rev. S. 750, § 9; 2 *ibid.* 385, § 49.

6. *Mumford v. Avery*, Kirby (Conn.), 163; *Wetmore v. Woodbridge*, Kirby (Conn.), 164; *Griggs v. Dodge*, 2 Day (Conn.), 28; *Smith v. Chapman*, 5 Conn. 14; *Oveatt v. Sage*, 7 Conn. 95; *Lacon v. Davenport*, 16 Conn. 331; *Barnum v. Landon*, 25 Conn. 137.

7. Rev. Stat. 478.

8. *Barnum v. Landon*, 25 Conn. 137.

9. Rev. Stat. 1875, title 19, ch. 17, § 3; *Bulkly v. Lewis*, 1 Root (Conn.), 217.

## ACCOUNT RENDER—ACCOUNTABLE.

and by residuary legatees against executors.<sup>1</sup> The jurisdiction of equity is concurrent.<sup>2</sup> In Massachusetts, where the action originally lay,<sup>3</sup> it has been abolished.<sup>4</sup> In Maine the action has been expressly sanctioned by statute.<sup>5</sup>

The States in which the action of account render appears to be most in use are Connecticut, Vermont, and Pennsylvania,—in Vermont under a statute,<sup>6</sup> and in Connecticut and Pennsylvania at common law. In the last two States certain statutes have been passed which render this action more effective and less dilatory. In every case, however, the old common-law process is preserved, and the statutory modifications have extended the right of action, or have altered the rules of evidence or pleading only; except in Pennsylvania, where the right has been given to the jury to settle the account and find a final judgment, without the necessity of appointing auditors.<sup>7</sup> The reports of Vermont abound with cases which may be found cited in the Revised Statutes of 1880, page 277, etc. The only modification that need be noticed is the right of the defendant to plead before the auditors any plea in bar, just as if no judgment *quod computet* had been rendered.<sup>8</sup> In Connecticut the most important change is that jurisdiction is given to justices of the peace.<sup>9</sup>

**ACCOUNTABLE.**—A party has a reasonable ground to expect upon receiving notes indorsed by the payee's name, followed by the word "accountable," that said payee would be "subject to pay," "responsible," or "liable for," or make good the amount of said notes as soon as they became due and payable, without subjection to a previous demand upon the makers.<sup>10</sup> A provision making an officer "accountable to" another may imply authority to remove him.<sup>11</sup>

**ACCOUNTABLE RECEIPT.**—An accountable receipt is an instrument acknowledging the receipt of money or personal property, coupled with an obligation to account for or pay or deliver the whole or some part of it to some person.<sup>12</sup>

1. Rev. Stat. 1875, title 19, ch. 17, § 4.

2. Ibid. ch. 4, § 6.

3. Fowle v. Kirkland, 18 Pick. (Mass.) 299.

4. R. S. c. 118, § 43.

5. R. S. c. 115, § 57.

6. Rev. St. 1880, §§ 1202-1217.

7. Act 4th April, 1831, P. L. 492; Purdon, 54.

8. Vermont Rev. St. 1880, § 1205.

9. Conn. R. St. 1875, title 19, ch. 17, § 3.

10. Furber v. Caverly, 42 N. H. 74.

A bequest of personal estate declaring that legatee shall not be accountable for depreciation of farming implements and stock, with a devise over of the residence, held to give an absolute title in the farming implements and stock. Breton v. Mockett, 9 Ch. Div. 95.

11. McPhillips v. McPhillips, 9 R. I. 536.

12. State v. Riebe, 27 Minn. 315. "Boston, Aug. 15, 1868. Received of Wm. J. Dale, Surgeon-General of Mass., my discharge and check, No. 6979 for \$100. George P. Gill. Witness, Frederick P. Cutting." This, not acknowledging that anything has been received to be accounted for, is not an accountable receipt within a statute making an accountable receipt for money, goods, or other property a subject of forgery, and is fatal to an indictment for forgery as of an accountable receipt. Commonwealth v. Lawless, 101 Mass. 32. See State v. Wheeler, 19 Minn. 98; R. v. West, 2 C. & K. 496. See ACQUITTANCE.

**Definition.** *ACCOUNT-BOOKS—ACCRETION.* In whom Title vests.

**ACCOUNT-BOOKS.** See BOOKS AS EVIDENCE.

**ACCRETION—ALLUVION—AVULSION—RELICION.** See ACCESSION; BOUNDARIES; RIPARIAN RIGHTS; SALVAGE; WATERS.

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| 1. <i>Definition.</i>                                   | 5. <i>Rivers and Streams.</i>          |
| 2. <i>In whom Title vests.</i>                          | 6. <i>Islands formed by Accretion.</i> |
| 3. <i>Must be Slow to vest Title in Riparian owner.</i> | 7. <i>Seaweed.</i>                     |
| 4. <i>Relicion.</i>                                     | 8. <i>Stranded Property.</i>           |

1. **Definition.**—Accretion is the increase of real estate by the addition of portions of soil by gradual deposition through the operation of natural causes to that already in possession of the owner. The term "alluvion" is applied to the deposit itself, while accretion rather denotes the act.<sup>1</sup>

2. **In whom Title vests.**—All lands gained from the sea by alluvion, where the gain is by small and imperceptible degrees, shall go to the owners of the land adjoining.<sup>2</sup>

1. 3 Washb. on Real Prop. 451; Bouvier's Law Dict., title "Accretion."

2. 2 Blacks. Com. 262; Middleton v. Pritchard, 3 Scam. (Ill.) 510; Hagan v. Campbell, 8 Port. (Ala.) 9; s. c., 33 Am. Dec. 267; Camden & Atlantic Land Co. v. Lippincott, 45 N. J. L. 405; Mulry v. Norton, 100 N. Y. 424; East Hampton v. Kirk, 84 N. Y. 218; Lammers v. Nissen, 4 Neb. 250.

The principle that accretion by alluvion belongs to the owner of the shore upon which it is deposited rests on the consideration that, while he is liable to lose soil by the action of the water, he should also have the benefit of accretion by the same action. It in no manner depends upon the duty of keeping up levees and embankments to guard against the overflow of the river. Municipality No. 2 v. Cotton Press, 18 La. 122; s. c., 36 Am. Dec. 625.

The title to lands reclaimed from the water of a harbor, like the title to natural accretion, was held to be in the owner of the adjoining property. Lockwood v. N. Y. & H. R. Co., 37 Conn. 387.

When soil has been wrongfully deposited by human hands in the ocean or other public waters, in front of the uplands, so that the water-line is carried further out, the same rule applies as when such a deposit has been gradually made by natural causes, i. e., the accretion becomes the property of the owner of the upland, and his title still extends to the water-line.

Plaintiff owned a lot in the city of B., bounded easterly by the water-line of the East River, and southerly by the central line of J. Street, which street terminated

at said water-line. A wharf had been built in front of his lot, extending to the centre of said street, which plaintiff maintained, receiving wharfage from all persons using the same. The city authorities built a pier at the end of the street, shutting off from the water that portion of plaintiff's wharf in front of his half of the street. In an action to recover damages, held, that the erection of the pier was a wrongful interference with plaintiff's rights, and rendered the city liable; that the pier was to be considered as an accretion, and so much of it as was in front of his half of the street became his; also, that plaintiff was entitled to recover, as damages, the wharfage received by the city from that portion of the pier in front of his land; that defendant, having wrongfully collected the wharfage, was not entitled to any allowance for expenses incurred in collecting the same, or for the cost of building the wrongful structure, or keeping it in repair. Steers v. Brooklyn, 101 N. Y. 51. Compare 3 Washb. on Real Prop. (4th Ed.) 55; citing Austin v. Rutland R. Co., 45 Vt. 215.

Where the sea instead of retreating encroaches on the land, property so gradually submerged belongs to the State. Wilson v. Shiveley, 11 Oregon, 215.

But the owner of a beach which is suddenly overflowed, and which years afterward reappears, retains title thereto. Mulry v. Norton, 100 N. Y. 424.

A party as a riparian owner cannot be protected as to accretions to his land which are not in existence and which may or may not exist in the future. Taylor v. Underhill, 40 Cal. 471.

3. **Must be slow.**—Accretion, to vest a title in the owner of the abutting shore, must be so slow that its increase should be imperceptible;<sup>1</sup> but if sudden and considerable it belongs to the sovereign.<sup>2</sup>

4. **Reliction.**—Reliction is the increase of land by the retreat or recession of water from the shore of a sea, river, or lake.<sup>3</sup>

5. **Accretion on Rivers and Streams.**—The owner of land on a stream has a right to all the accretions thereto caused by the deposition of alluvion thereon, without regard to the question whether such accretions were formed solely by natural causes, or by such causes influenced by the artificial works of others, and without regard to the question whether such stream is navigable or not.<sup>4</sup>

1. Angell on Watercourses, § 53; Halsey v. McCormick, 18 N. Y. 147; Emans v. Turnbull, 2 Johns. (N. Y.) 314; Mulry v. Norton, 100 N. Y. 424; Cook v. McClure, 58 N. Y. 437; Lovington v. St. Clair, 64 Ill. 56; s. c., 23 Wall. (U. S.) 68; Kraut v. Crawford, 18 Ia. 549; Benson v. Morrow, 61 Mo. 352; Hopkins Academy v. Dickinson, 9 Cush. (Mass.) 551.

The test of what addition is gradual and imperceptible is that though the witnesses may see from time to time that progress has been made they could not perceive it while the progress was going on. County of St. Clair v. Lovington, 23 Wall. (U. S.) 46; s. c., 16 Am. Rep. 516.

2. 2 Blacks. Com. 261; Emans v. Turnbull, 2 Johns. (N. Y.) 314.

Where considerable quantities of soil are by a sudden action of the water taken from the land of one and deposited upon or against the land of another it is called "avulsion," and the title to such soil remains in the original owner, unless he fails to claim his right of ownership until it has united with the soil of the other owner. Angell on Watercourses, § 60; 3 Washb. R. P. 60; Woodbury v. Short, 17 Vt. 387.

3. Bouvier's Law. Dict.

Land lost by submergence may be regained by reliction, unless the submergence has been followed by such a lapse of time as precluded the identity of the land from being established. Mulry v. Norton, 100 N. Y. 424.

Reliction takes place most frequently in lakes and ponds. The owner of land bounded on a lake, whether navigable or not, has title to the land left dry by the gradual and imperceptible recession of the water. Warren v. Chambers, 25 Ark. 120; s. c., 4 Am. Rep. 23; Banks v. Ogden, 2 Wall. (U. S.) 57; Granger v. Swart,

1 Woolw. (U. S.) 88; Murry v. Sermon, 1 Hawks (N. Car.), 56; Boorman v. Sunnuchs, 42 Wis. 233.

But in Louisiana it has been held that alluvion which forms upon the shores of Lake Pontchartrain is not susceptible of private ownership: such alluvion does not, therefore, become the property of owners of lots fronting on said lake. It is the accretion made by rivers and streams only that belong to the proprietors of adjacent lands. Zeller v. Southern Yacht Club, 34 La. Ann. 837.

Where the boundary line of land bordering on an artificial pond was expressed in the deed "to commence at a stake near the high-water mark of the pond, and to run thence along the high-water mark of said pond to the upper end of said pond," it was held that the boundary line was fixed and permanent, and that the grantee was not entitled to any accretions or land left dry by the pond's receding, although the gradual and imperceptible result of natural causes. It would have been otherwise had the deed not permanently fixed the boundary line. Cook v. McClure, 58 N. Y. 437; s. c., 17 Am. Rep. 270; but see Mansur v. Blake, 62 Me. 38.

In order to entitle the adjoining property-holders to the right of possession of the land left bare by the receding water the recession must be slow, gradual, and imperceptible. In case of a sudden and sensible recession of the water the ownership of the land will not be changed. Warren v. Chambers, 25 Ark. 120; s. c., 4 Am. Rep. 23; Lynch v. Allen, 4 Dev. & B. (N. Car.) 62; Woodbury v. Short, 17 Vt. 387; Boorman v. Sunnuchs, 42 Wis. 233; Murry v. Sermon, 1 Hawks (N. Car.) 56.

4. New Orleans v. U. S., 10 Pet. (U. S.) 662; Jones v. Soulard, 24 How. (U. S.) 41; Saulett v. Shepherd, 4 Wall. (U. S.) 502;



6. *Islands*.—If an island is formed by accretion in an unnavigable stream, the ownership of such island will be determined by

*Schools v. Risley*, 10 Wall. (U. S.) 110; *Jones v. Johnston*, 18 How. (U. S.) 150; *Handly v. Anthony*, 5 Wheat. (U. S.) 380; *Barney v. Keokuk*, 94 U. S. 324; *Lovington v. County of St. Clair*, 64 Ill. 56; s. c., 16 Am. Rep. 516; *Godfrey v. City of Alton*, 12 Ill. 29; *Seaman v. Smith*, 24 Ill. 523; *Lammers v. Nissen*, 4 Neb. 245; *Halsey v. McCormick*, 18 N. Y. 147; *Wetmore v. Atl. White Lead Co.*, 37 Barb. (N. Y.) 70; *Posey v. James*, 7 Lea (Tenn.), 98; *Minto v. Delaney*, 7 Oregon, 337; *Giraud v. Hughes*, 1 Gill & J. (Md.) 249; *Patterson v. Gelston*, 23 Md. 432; *Chapman v. Hoskins*, 2 Md. ch. 485; *DeLord v. New Orleans*, 11 La. Ann. 699; *Municipality No. 2 v. Cotton Press*, 18 La. 122; s. c., 36 Am. Dec. 624; *Kennedy v. Municipality No. 2*, 10 La. Ann. 54; *Barrett v. New Orleans*, 13 La. Ann. 105; *Benson v. Morrow*, 61 Mo. 353; *Smith v. St. Louis Schools*, 30 Mo. 290; *Adams v. Frothingham*, 3 Mass. 353; *Deerfield v. Arms*, 17 Pick. (Mass.) 41; s. c., 28 Am. Dec. 271; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544; *Nichaus v. Shepherd*, 26 Ohio St. 45; *Kraut v. Crawford*, 18 Iowa, 549; *Morgan v. Scott*, 26 Pa. St. 51; *Miller v. Hepburn*, 8 Bush (Ky.), 326. Compare *Ferrière v. New Orleans*, 35 La. Ann. 209.

Even where the alluvion is formed at a bar which existed at the time the original grant of the land was made, but which was not included in the survey, being covered with water during the greater part of the year, the government's surveyor running the line as near the bank as possible, considering the river the line, the owner of the land was held to be entitled to it, though at low water the distance across the bar to the water was nearly half a mile. *Stephenson v. Goff*, 10 Rob. (La.) 99; s. c., 43 Am. Dec. 171; but see *Fulton v. Frandolig*, 63 Tex. 330.

The right to accretions as such in the bed of a river depends on actual contiguity. Any separation of the claimant's land from the alluvion by the land of another defeats the claim. *Re State Reservation Comm'rs*, 37 Hun (N. Y.), 537; *Bates v. Illinois, etc., R. Co.*, 1 Black. (U. S.) 204; *Saulett v. Shepherd*, 4 Wall. (U. S.) 502; *Posey v. James*, 7 Lea (Tenn.), 98; *Bristoll v. Carroll County*, 95 Ill. 84; *Beaufort v. Duncan*, 1 Jones (N. Car.), 234; *New Orleans v. Gravier*, 11 Mart. (La.) 620.

Where a new shore is formed on a not navigable river from the opposite side by

the wearing-away of the stream, the land on the new shore is to be divided between the owners entitled to it, according to the following rule: Give to each owner a share of the new shore line in proportion to what he held in the old shore line, and complete the division of the land by running a line from the bound between the parties on the old shore to the point thus ascertained on the new. *Batchelder v. Keniston*, 51 N. H. 496; s. c., 12 Am. Rep. 143; *Johnston v. Jones*, 1 Black (U. S.), 209; *Deerfield v. Arms*, 17 Pick. (Mass.) 41; s. c., 28 Am. Dec. 276; *Knight v. Wilder*, 2 Cush. (Mass.) 199; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 552; *Wonson v. Wonson*, 14 Allen (Mass.), 85; *O'Donnell v. Kelsey*, 10 N. Y. 412; *Winnisimmet Co. v. Wyman*, 11 Allen (Mass.), 438. Compare *Rust v. Boston Mill Corp.*, 6 Pick. (Mass.) 158; *Sparhawk v. Bullard*, 1 Metc. (Mass.) 96; *Emerson v. Taylor*, 9 Greenl. (Me.) 43; *Gray v. Deluce*, 5 Cush. (Mass.) 9; *Mott v. Thayer*, 2 Bosw. (N. Y.) 10.

A tract of land bordering upon the Mississippi River was divided into parcels, some of which subdivisions or lots extended to the river bank, as it then was. These lots became the property of various persons. Subsequently there were accretions along the river front, and in adjusting the matter of such accretions among the several adjacent riparian owners it was held the proper mode was to measure the entire river front as it was found to be when the lots were laid out, and note the aggregate number of feet frontage, as well as that of each lot; then measure a line drawn as nearly as may be with the middle thread of so much of the stream as lies opposite the shore line so measured; then divide the thread line into as many equal parts as there are lineal feet in the shore line, giving to each proprietor as many of these parts as his property measures feet on the shore line; and then complete the division by drawing lines between the points, designating the lot or parcel belonging to each proprietor both upon the shore and river lines. *Kehr v. Snyder*, 114 Ill. 313.

Accretions to a strip of land in a city along the river bank, which is reserved for a public highway and other public uses, partakes of the same nature as the original reservation; and the city holds title to it subject to the same uses and

the *filum aquæ*. It belongs to the owner of the land on whose side of this line it is formed; or if the island is situated on the line, so much of it as lies on his side, while the other part belongs to the owner of the other shore.<sup>1</sup>

conditions. The city has no right, however, to make an unqualified disposition of it to a railroad company to be held and used as private property, but may grant the right of way over it to such railroad company. *Cook v. City of Burlington*, 30 Iowa, 94; s. c., 6 Am. Rep. 649. See also *Godfrey v. City of Alton*, 12 Ill. 29; s. c., 52 Am. Dec. 476.

The riparian owner has the title to all the alluvial deposits on his property, and it does not matter whether the property has changed from rural to urban or whether a street has been laid out between a tract of land and the river. As long as the vacant strip between the river and the street has never expressly been dedicated to public use it belongs, with its accretion, to the owner of the land, and the legislature cannot deprive him of his right. It would be otherwise, however, if, on the plan by which the street was laid out, said strip had been marked "quay," or with any other word indicative of the intent to dedicate it to public use. *Municipality No. 2 v. Cotton Press*, 18 La. 122; s. c., 36 Am. Dec. 624; *Wetmore v. Atlantic, etc., Co.*, 37 Barb. (N. Y.) 70; *Banks v. Ogden*, 2 Wall. (U. S.) 57; *Donovan v. New Orleans*, 35 La. Ann. 461.

Where in a city a street is laid out, extending to a navigable river, accretions formed at the foot of the street are considered a continuation of the street; and adjoining owners will not have the right to close up the space between the river and the end of the street, although they have a statutory right to erect piers and bulkheads and fill up the river-bed in front of their lands. *People v. Lambier*, 5 Denio (N. Y.), 9; s. c., 47 Am. Dec. 273.

A riparian proprietor is entitled to the accretions made to his land by the river, and the statute of limitations in its application to such accretions relates back to the time it began to run in favor of the riparian owner as to the main bank. The accretions, in becoming a part of the land to which they are joined, take the title and condition of that land just as it exists at the time of their formation. If the riparian owner is barred, or partially barred, by the statute of limitations as to the bank, he will be barred as to the accretions in like manner, although they may have been de-

posited but a year or a day. *Campbell v. Laclede Gas Co.*, 84 Mo. 353.

Where the owner of land bordering upon a stream sees his land wearing away by the water he may rubble or secure his bank in any way so as to keep the channel in its present location, but he may not build a bulkhead and throw the current on the opposite shore. *Gerish v. Clough*, 48 N. H. 9; s. c., 2 Am. Rep. 165; *Angell on Watercourses*, §§ 330-334; but see *Diedrich v. Northwestern R. Co.*, 42 Wis. 248.

1. *McCullough v. Wall*, 4 Rich. (S. Car.) L. 68; s. c., 53 Am. Dec. 715; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268; s. c., 16 Am. Dec. 342; *Deerfield v. Arms*, 17 Pick. (Mass.) 41; s. c., 28 Am. Dec. 276; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548; *Middleton v. Pritchard*, 3 Scam. (Ill.) 510.

If an island was washed away, in whole or in part, after it was surveyed and then reformed on the same bed, the owner of it, as it was before it was so washed away, would be entitled to it; but if it was washed away and the land sought to be recovered was made by deposits to and against the survey of the main land, then such deposits became the property of the owner of the survey. *Buse v. Russell*, 86 Mo. 209.

At common law only those rivers were deemed navigable in which the tide ebbs and flows; and grants of land bounded on rivers or upon the margin of the same, or along the same above tide-water, carry the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage as a public highway. 3 Kent's Com. 427.

In the United States various opinions have been held by the courts about the term "navigable rivers." In some States all rivers "of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they flow, to market, or for the floating of vessels, boats, rafts, or logs," are called "navigable rivers," and the abutting owners own only to high-water mark. In others the common-law rule prevails, and the owners

## 7. Seaweed.—Seaweed which by action of the elements or the

of land situated on these rivers above tide-water own to the centre of the stream, subject to the easement of navigation. In some, the decisions are both ways. *Carson v. Blazer*, 2 Binn. (Pa.) 475; s. c., 4 Am. Dec. 463; *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. (Pa.) 71; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112; *Flanagan v. Philadelphia*, 42 Pa. St. 230; *Barclay R. Co. v. Ingham*, 36 Pa. St. 200; *Bird v. Smith*, 8 Watts (Pa.), 439; *Union Canal v. Landis*, 9 Watts (Pa.), 228; *Cates v. Wadlington*, 1 McCord (S. Car.), 580; s. c., 10 Am. Dec. 699; *Bullock v. Wilson*, 2 Porter (Ala.), 436; *Elder v. Burrus*, 6 Humph. (Tenn.) 358; *Wilson v. Forbes*, 2 Den. (N. Car.) 30; *Collins v. Benbury*, 3 Ired. (N. Car.) 277; s. c., 38 Am. Dec. 722; *Ingram v. Threadgill*, 3 Ired. (N. Car.) 59; *McManus v. Carmichael*, 3 Iowa, 1; *Tomlin v. Dubuque*, etc., R. Co., 32 Iowa, 106; *Haight v. Keokuk*, 4 Iowa, 199; *Musser v. Hershey*, 42 Iowa, 356; *Wood v. Hustis*, 17 Wis. 417; *Cobb v. Smith*, 16 Wis. 692; *Harrington v. Edwards*, 17 Wis. 586\*; *The Montello*, 20 Wall. (U. S.) 430; *Wisconsin River Co. v. Lyons*, 30 Wis. 61; *Weise v. Smith*, 3 Oregon, 445; *Felger v. Robinson*, 3 Oregon, 455; *Bowman v. Wathen*, 2 McLean (U. S.), 376; *Railroad Co. v. Schurmeir*, 7 Wall. (U. S.) 272; *Barney v. Keokuk*, 94 U. S. 324; *Martin v. Waddell*, 16 Pet. (U. S.) 376; *Pollard's Lessee v. Hogan*, 3 How. (U. S.) 212; *Goodtitle v. Kibbe*, 9 How. (U. S.) 471; *Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443; *Com. v. Chapin*, 5 Pick. (Mass.) 199; *Com. v. Charlestown*, 1 Pick. (Mass.) 180; s. c., 11 Am. Dec. 161; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268; *Stover v. Freeman*, 6 Mass. 435; s. c., 4 Am. Dec. 155; *Adams v. Pease*, 2 Conn. 481; *East Haven v. Hemingway*, 7 Conn. 186; *Middletown v. Sage*, 8 Conn. 221; *Chapman v. Kimball*, 9 Conn. 38; *Berry v. Snyder*, 3 Bush (Ky.), 266; *Miller v. Hepburn*, 8 Bush (Ky.), 326; *Berry v. Carle*, 3 Greenl. (Me.) 266\*; *Spring v. Russell*, 7 Greenl. (Me.) 273; *Spring v. Seavey*, 8 Greenl. (Me.) 138; *Wadsworth v. Smith*, 11 Me. 278; s. c., 26 Am. Dec. 525; *Granger v. Avery*, 64 Me. 292; *Browne v. Kennedy*, 5 Harr. & J. (Md.) 195; s. c., 9 Am. Dec. 503; *Hayes v. Bowman*, 1 Rand. (Va.) 417; *Mead v. Haynes*, 3 Rand. (Va.) 33; *Bell v. Gough*, 3 Zab. (N. J.) 656; *Townsend v. Brown*, 4 Zab. (N. J.) 80; *Cobb v. Davenport*, 3 Vroom (N. J.), 369; *Stevens v. Pater-son*, etc., R. Co. 5 Vroom (N. J.), 537;

*Arnold v. Mundy*, 1 Halst. (N. J.) 1; s. c., 10 Am. Dec. 356; *Morgan v. Reading*, 3 Sm. & M. (Miss.) 366; *The Magnolia v. Marshall*, 39 Miss. 109; *Lorman v. Benson*, 8 Mich. 18; *Rice v. Ruddeman*, 10 Mich. 126; *Ryan v. Brown*, 18 Mich. 196; *Walker v. Board of Public Works*, 16 Ohio, 540; *Lamb v. Ricketts*, 11 Ohio, 311; *Gavitt v. Chambers*, 3 Ohio, 495; *Benner v. Platter*, 6 Ohio, 505; *Blanchard v. Porter*, 11 Ohio, 138; *Cox v. State*, 3 Blackf. (Ind.) 193; *Young v. Harrison*, 6 Ga. 141; *Middle-town v. Pritchard*, 3 Scam. (Ill.) 500; *Board of Trustees v. Haven*, 5 Gilm. (Ill.) 548; *City of Chicago v. Lafin*, 49 Ill. 177; *Braxton v. Bressler*, 64 Ill. 488; *Comm'rs of the Canal Fund v. Kempshall*, 26 Wend. (N. Y.) 404; *Varick v. Smith*, 5 Paige (N. Y.), 137; *Palmer v. Mulligan*, 3 Cai. (N. Y.) 307; s. c., 2 Am. Dec. 270; *People v. Platt*, 17 Johns. (N. Y.) 195; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90; s. c., 11 Am. Dec. 249; *Exp. Jennings*, 6 Cow. (N. Y.) 518; *Canal Appraisers v. People*, 17 Wend. (N. Y.) 574; *Shaw v. Crawford*, 10 Johns. (N. Y.) 236; *Starr v. Child*, 20 Wend. (N. Y.) 152; *Morgan v. King*, 35 N. Y. 455; *People v. Canal Appraisers*, 33 N. Y. 461; *O'Fallon v. Daggett*, 4 Mo. 343; *Benson v. Morrow*, 61 Mo. 345; *Jones v. Soulard*, 21 How. (U. S.) 41.

Owners of land bounded by unnavigable rivers, or of navigable rivers above tide-water, in States where the soil under water has not been made by statute, the property of the State, own to the middle of the stream, unless the conveyance denotes an intention to stop short of that. *McCullough v. Wall*, 4 Rich. (S. Car.) L. 68; s. c., 53 Am. Dec. 715; *The Magnolia v. Marshall*, 39 Miss. 109; *Eusminger v. People*, 47 Ill. 384; *Berry v. Snyder*, 3 Bush (Ky.), 266; *Wood v. Hustis*, 17 Wis. 418; *Luce v. Carley*, 24 Wend. (N. Y.) 451; *Cobb v. Smith*, 16 Wis. 692; *Lowell v. Robinson*, 16 Me. 357; s. c., 33 Am. Dec. 671; *Ross v. Faust*, 54 Ind. 471; *Cold Springs Iron-works v. Talland*, 9 Cush. (Mass.) 496; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268; *Hatch v. Dwight*, 17 Mass. 289; and see *Ridgway v. Ludlow*, 58 Ind. 248, where the same principle is applied to a lake. And it is not changed where by means of a dam a mill-pond is formed. The abutting owners own yet to the middle of the stream. *Hathorne v. Stinson*, 3 Fairf. (Me.) 183; *Lowell v. Robinson*, 16 Me. 357; *Waterman v. Johnson*, 13 Pick. (Mass.) 261; *Finley v. Hershey*, 41

movements of the sea is cast upon the beach is considered to be accretion, and belongs to the owner of the beach.<sup>1</sup>

**8. Stranded Property.**—Property carried away by a flood and stranded on another's land remains the property of the one who owns it at the time of the flood. He can reclaim it or abandon it as he pleases. His refusal to remove it from the land where it was stranded does not divest him of his right in it, nor does it bar his right of entry to reclaim it. The owner of the soil has no lien on it, and cannot convert it to his own use; but he may, after notice given, cast it back into the stream.<sup>2</sup>

Iowa, 389. See BOUNDARIES; RIPARIAN RIGHTS.

When, however, the deed clearly indicates that it was the intention of the grantor to exclude the stream, it will be so excluded. *Child v. Starr*, 4 Hill (N. Y.), 369; *Kingman v. Sparrow*, 12 Barb. (N. Y.) 201; *Yates v. Van De Bogert*, 56 N. Y. 526; *Bradford v. Cressey*, 45 Me. 9; *Dunlap v. Stetson*, 4 Mason (U. S.), 349; *McCullough v. Wall*, 4 Rich. (S. Car.) L. 68; s. c., 53 Am. Dec. 715.

Riparian proprietor's ownership of land under water, where it exists, is measured by lines at right angles to the bank, without regard to the course of the line bounding the remainder of the tract, and without regard to the depth of the water. The middle of such lines, drawn from bank to bank, will be the *filum aqua*. *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544.

Where a river changes its course so as to cut off a point of the property of a landowner, this will not change the ownership; the title to the island thus formed will still be in the original owner. *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544; *Bonewits v. Wygant*, 75 Ind. 41.

If the river in changing its course leaves its bed dry, and seeks a new one, the owners on both sides of the old bed will have the title to land thus formed; the dividing line being the former *filum aqua*. *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544.

Where the intermediate space between a survey on the mainland of the Missouri River and a surveyed island, at the times of the surveys, consisted of a slough, and since then the slough has so filled up as to connect the island and the mainland and to make them one continuous tract of land, the adjacent owners of the island and the survey are entitled to the accretions to their respective lands; but if the slough simply filled up from the bottom, or by deposits within its bed, and the accretions did not form on the one side

or the other, then the centre of the slough as it was before the water left it is the boundary between the survey and the island. Where the shore lines of two tracts of land divided by a watercourse receive accretions until they come together, the line of contact will then be the division line. If the slough gradually filled up as the water receded, the same principle is applied, and the new land belongs to the riparian owner from whose shore the water receded, and it is immaterial whether the water was navigable in the common-law sense or general acceptance of the term, or was a non-navigable stream. *Buse v. Russell*, 86 Mo. 209.

Alluvion, whether it effects an accretion to the shore, or whether it forms islands, alters the position of the original *filum aqua*, and it will always be located by taking the middle of a line, drawn at right angles from bank to bank, no matter how recently the bank may be formed. *Miller v. Hepburn*, 8 Bush (Ky.), 326; *Clark v. Campan*, 19 Mich. 329; *Knight v. Wilder*, 2 Cush. (Mass.) 202; *Bay City Gas-light Co. v. Industrial Works*, 28 Mich. 182; *Stolp v. Hoyt*, 44 Ill. 220; *Deerfield v. Arms*, 17 Pick. (Mass.) 41; *Bonewits v. Wygant*, 75 Ind. 41.

1. *Phillips v. Rhodes*, 7 Metc. (Mass.) 323; *Emans v. Turnbull*, 2 Johns. (N. Y.) 322; *Anthony v. Gifford*, 2 Allen (Mass.), 550; *Mather v. Chapman*, 40 Conn. 382; *Church v. Meeker*, 34 Conn. 432. But not the seaweed that grows and accumulates on the bed of a navigable river, below low-water mark. *Chapman v. Kimball*, 9 Conn. 38; *Hollister v. Union Co.*, 9 Conn. 443. And seaweed floating between high and low water-mark, although the bottom of the mass may touch the beach, is the property of the public. *Anthony v. Gifford*, 2 Allen (Mass.), 549.

2. *Foster v. Juniata Bridge Co.*, 16 Pa. St. 393; s. c., 55 Am. Dec. 506; *Ester v. Edwards*, 4 Watts (Pa.), 65.

The owner of land on which property of another is cast by a storm or a flood,

## ACCRUE—ACCUMULATED SURPLUS.

**ACCRUE—ACCRUED—ACCRUING.**—These words, in their generally received sense, are used of something which is to be added or attached to something else.<sup>1</sup> Due and payable.<sup>2</sup> Vested.<sup>3</sup>

**ACCUMULATED SURPLUS** (of a corporation).—It is the fund

although he has no title to it, is not bound to preserve it for the owner. He may free his land from the incumbrance. *Proctor v. Adams*, 113 Mass. 377; *Livezey v. Philadelphia*, 64 Pa. St. 106.

The owner of the stranded property has, however, the right to enter the premises on which it was stranded and retake it, but is bound to do as little damage as possible. *Berry v. Carle*, 3 Greenl. (Me.) 269\*; *Treat v. Lord*, 42 Me. 552; *Carter v. Thurston*, 58 N. H. 104; s. c., 42 Am. Rep. 584; *Sheldon v. Sherman*, 42 N. Y. 484; *Hetfield v. Baum*, 13 Ired. (N. Car.) L. 394; *Brown v. Chadbourn*, 31 Me. 9; s. c., 50 Am. Dec. 641.

To exempt the owner of the stranded property from liability for any injury which the owner of the land on which it was stranded may have sustained, he must be entirely free of negligence. *Thompson v. Androscoggin Co.*, 54 N. H. 545; *Sheldon v. Sherman*, 42 N. Y. 484; *Livezey v. Philadelphia*, 64 Pa. St. 106; *Lehigh Bridge Co. v. Lehigh Coal & N. Co.*, 4 Rawle (Pa.), 9; s. c., 26 Am. Dec. 111.

It seems, however, that the owner of the property, although not guilty of negligence, will be responsible for the damage done by it if he reclaims it. *Gould on Waters*, § 102; *Reeder v. Anderson*, 4 Dana (Ky.), 193; *Chase v. Corcoran*, 106 Mass. 286; *Moore v. Erie R. Co.*, 7 Lans. (N. Y.) 39; *Sheldon v. Sherman*, 42 N. Y. 484. See SALVAGE.

**Authorities for Accretion.**—*Washburne on Real Property*; *Bouvier's Law Dict.*; *Blacks. Com.*; *Kent's Com.*; *Angell on Watercourses*.

1. *Johnson v. Humboldt*, 91 Ill. 95.

2. *Mundt v. Sheboygan, etc.*, 31 Wis. 451; *Kennedy v. Barrier*, 36 Mo. 128; *Hall v. Pritchett*, 3 Q. B. Div. 215; *Fay v. Halloran*, 35 Barb. (N. Y.) 297.

3. *Hartshorne v. Ross*, 2 Disney (Ohio), 15.

**Cause of Action shall accrue or shall have accrued.**—The sixth section of the act provides that suit must be brought "within one year from the time the cause of action accrued." When, then, did the cause of action accrue? We think the cause of action accrued whenever the defendant's liability became perfect and complete. *Kennedy v. Barrier*, 36 Mo. 128.

The statute likewise provides that notice shall be given to the company "within thirty days after such claim or demand shall have accrued." The time of payment of the laborers was on the 15th day of each month, and it was customary for them to wait until the 15th of the next month for payment for all work done by them after the 15th of the last month. We are of opinion that the demand of the plaintiff did not accrue until the 15th day of December. *Mundt v. Sheboygan, etc.*, 31 Wis. 451.

**All Rights that had accrued.**—We suppose the term "accrued" is equivalent in its meaning to the word "vested," which necessarily implies that something has been imparted to or conferred upon a third person. *Hartshorne v. Ross*, 2 Disney (Ohio), 15.

The terms "shall have accrued" have in one case been held to mean "shall have existed," where there has been an inchoate right or title, effect to which, however, could not be given until there was some intrusion upon that right. *Weber v. Harbor Commissioners*, 18 Wall. 57.

**Accrue and Occur distinguished.**—The word "occur" means "to happen" in its general and most popular sense, whilst the word "accrue" is to be added or attached to something else, in its generally received sense. *Johnson v. Humboldt*, 91 Ill. 95.

**Costs that have accrued.**—"All the costs that have accrued," when the words are used in the compromise of a pending suit, or in a private statute providing for such compromise, mean costs that would follow the judgment, and do not include attorney's fees. *Tallassee Man. Co. v. Glenn*, 50 Ala. 489.

**Accruing or Owning.**—"When the words 'accruing or owing' are used, as they plainly are, to designate two classes of debts, they can receive each a distinct meaning only by taking one as denoting debts which are not yet payable, and the other as denoting those which are." *Dresser v. Johns*, 6 C. B. (N. S.) 434, citing *Jones v. Thompson*, 27 Law J. Q. B. 234.

**Accruing.**—It is intended to apply to those cases in which there is a *debitum in presenti solvendum in futuro*. *Jones v. Thompson, supra*.

## ACCUSE—ACCUSTOMED—ACKNOWLEDGMENT.

the corporation has in excess of its capital stock after payment of its debts.<sup>1</sup>

**ACCUMULATION.** See DEVISE; TRUST; WILLS.

**ACCUSE—ACCUSED.**—The expression "to accuse" is used to denote the bringing a charge against one before some court or officer; and the person thus charged is often referred to as the "accused."<sup>2</sup>

**ACCUSTOMED.**—Where a deed conveyed a water privilege with the power and appurtenances as they now exist, with the right to rebuild and repair the dam, and to pass and repass, in the use of the same, "over the accustomed way," it was held that the right of way must be regarded as limited to the last accustomed way.<sup>3</sup>

**ACKNOWLEDGMENT.** See CONVEYANCES; DEED; LIMITATIONS (STATUTE OF); NOTARY.

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|--------------------------------|---|
| 1. <i>Definition.</i>          | 8. <i>Subsequent Acknowledgment.</i>      |
| 2. <i>Who may take.</i>        | 9. <i>Proof by Subscribing Witnesses.</i> |
| 3. <i>Who may not take.</i>    | 10. <i>Married Women.</i>                 |
| 4. <i>The Certificate.</i>     | 11. <i>Divorce—Abandonment.</i>           |
| 5. <i>Corporations.</i>        | 12. <i>Legacy.</i>                        |
| 6. <i>Impeachment—Fraud.</i>   | 13. <i>Agent—Attorney.</i>                |
| 7. <i>Validating Statutes.</i> | 14. <i>By Order of Court.</i>             |

1. **Definition.**—The act of one who has executed a deed in going before some competent officer or court and declaring it to be his act or deed, together with the certificate of the officer that it has been so acknowledged.<sup>4</sup>

1. *People's Ins. Co. v. Parker*, 6 Vroom (N. J.), 578. Compare *State ex rel., etc., v. Utter*, 5 Vroom (N. J.), 489.

2. *People v. Braman*, 30 Mich. 468.

**Threat to accuse.**—It has been held that a threat to procure witnesses to support a complaint already made is not a threat to accuse. *Rex v. Gill*, 1 Lewin C. C. 305.

**"Threat of Accusation."**—It has been held that a threat to cause process falsely stated to have been issued not to be served on a party for a crime was within the statute; the court remarking that "a threat of accusation, in the sense of the statute, comprehends a threat to use any of the preliminary means necessary to cause a person to be proceeded against for a criminal offence." *Com. v. Murphy*, 12 Allen, 449; *Com. v. Dorns*, 108 Mass. 488.

A threat to accuse need not be a threat to charge before any judicial tribunal; a threat to charge before any third person is sufficient. *Robinson's Case*, 2 Moo. & Rob. 14.

**"Is accused."**—The first ground of appeal presents for inquiry what is meant by the word "accused." Though frequently used in that sense, it does not necessarily import the charge of a crime by judicial procedure. "In its popular sense it is used to express a charge or

imputation merely. In this sense, one may be accused of that which is no legal offence; as, if he is charged with immoral or disgraceful conduct or official delinquency. It certainly is not synonymous with "arrested under criminal process." Popular sense will support the construction that a slave is "accused" when the commission of a capital felony is charged or imputed to him. *State v. South*, 5 Rich. (S. C.) 489.

**"Charge and accuse."**—The term "charge and accuse" thus used, and in this connection, does not mean to actually charge before a grand jury or a magistrate, but to impute to him these offences falsely, as a means of inducing him to pay money to avoid such actual prosecution. *Com. v. O'Brien et al.*, 12 Cush. (Mass.) 90.

3. *Ferris v. Knowles*, 41 Conn. 308. Cf. *Queen v. Mayor*, 8 Ad. & Ell. 182.

**Accustomed Way.**—Where a deed of a tannery and dam gave the right to rebuild and to pass and repass in the use of the same over the "accustomed way," held, that the covenant referred to a custom existing at the date of the deed, and that it gave no right to rebuild at a previous and different locality. *Ferris v. Knowles*, 41 Conn. 308.

4. *Bouvier's Law Dict.; Brown's Law Dict. (Sprague's Ed.)*

**2. Who may take.**—In the various States, the officers qualified to take acknowledgments are named by statute.<sup>1</sup> An attesting witness may take an acknowledgment;<sup>2</sup> also American consuls in foreign countries;<sup>3</sup> a judge of a Supreme Court, as he is inclusively a justice of the peace;<sup>4</sup> an officer *de facto*;<sup>5</sup> a deputy in the name of the principal;<sup>6</sup> a provost-marshal in a place under military occupation;<sup>7</sup> a relative of the party making the acknowledgment.<sup>8</sup> The attorney for the husband may take the

Hill v. Bacon, 43 Ill. 477, holds the act to be simply ministerial. See Biscoe v. Byrd, 15 Ark. 655; Learned v. Riley, 14 Allen (Mass.), 109; Odiorne v. Mason, 9 N. H. 30; Crumbaugh v. Kugler, 2 Ohio St. 373. Compare Wasson v. Connor, 54 Miss. 352; Kefr v. Russell, 69 Ill. 666; s. c., 18 Am. Rep. 634.

Under the Ohio statute a deed must be acknowledged to pass title. Smith v. Hunt, 13 Ohio, 260.

Under the New York and Texas statutes a deed must be acknowledged to hold good against subsequent purchasers. Morss v. Salisbury, 48 N. Y. 636; Wood v. Chapin, 13 N. Y. 509; Menley v. Zeigler, 23 Tex. 88.

A notary public or justice of the peace cannot properly take the acknowledgment of a person to a deed if he believes him mentally incompetent to make a will; nor may he take an acknowledgment through a third person. Hoban v. Piquette, 52 Mich. 346.

A certificate of acknowledgment written on a piece of paper separate from the deed, and pasted to it, is, if in proper form, a valid certificate. Schramm v. Gentry, 63 Tex. 583.

The acknowledgment must all be in writing, it cannot be partly in writing and partly in parol. Ennor v. Thompson, 46 Ill. 214; Lindley v. Smith, 46 Ill. 523.

**Sheriff's Deed.**—A sheriff's deed made in 1878 was executed by one acting as deputy sheriff. Held, that such deputy was the proper person to acknowledge its execution, and a certificate of acknowledgment by the district clerk that "personally appeared H., sheriff of T. Co., by S., deputy, to me well known, and acknowledged that he executed the foregoing deed for the purposes and consideration and in the capacity therein set forth and expressed," being formal in all other respects, was sufficient. Terrell v. Martin, 64 Tex. 121.

1. The mayor of a town cannot take acknowledgments under a statute authorizing mayors of cities to do so. Dundy v. Chambers, 23 Ill. 312.

**Federal Statutes.**—U. S. R. S. §§ 1071, 1778; vol. 2, §§ 251, 451.

2. Baird v. Evans, 58 Ga. 350.

3. Scanlan v. Wright, 13 Pick. (Mass.) 523; s. c., 25 Am. Dec. 344; Palmer v. Stevens, 11 Cush. (Mass.) 147; Welsh v. Hill, 2 Johns. (N. Y.) 373.

4. Middlebury College v. Chenny, 1 Vt. 336. Under the N. Y. statute the vice-chancellor had no power to take acknowledgments. Ridabock v. Levy, 8 Paige (N. Y.), 197; s. c., 35 Am. Dec. 682.

5. Brown v. Lunt, 37 Me. 423; Woodruff v. McHarry, 56 Ill. 218; Prescott v. Hayes, 42 N. H. 56; Hamilton v. Pitcher, 53 Mo. 354.

6. Emmal v. Webb, 36 Cal. 203; Muller v. Boggs, 25 Cal. 175; Touchard v. Crow, 20 Cal. 150; Lynch v. Livingston, 8 Barb. (N. Y.) 463; Rose v. Newman, 26 Tex. 131; Cook v. Knott, 28 Tex. 85; Babbitt v. Johnson, 15 Kan. 252; Gibbons v. Gentry, 20 Mo. 468; Abrams v. Ervin, 9 Iowa, 87; Woodruff v. McHarry, 56 Ill. 218; Hope & Sawyer, 14 Ill. 254; Kemp v. Porter, 7 Ala. 138; McRaven v. McGuire, 9 Smed. & M. (Miss.) 34; Gordon v. Leech, 81 Ky. 229; Drye v. Cook, 14 Bush (Ky.), 459; Talbott v. Hooser, 12 Bush (Ky.), 408; Moore v. Farrow, 3 A. K. Marsh (Ky.), 41; Beaumont v. Yeatman, 8 Humph. (Tenn.) 542.

In some States the deputy may take acknowledgments in his own name. Touchard v. Crow, 20 Cal. 150; Cook v. Knott, 28 Tex. 85; McCraven v. McGuire, 23 Miss. 100; McRaven v. McGuire, 9 Smed. & M. (Miss.) 34; Beaumont v. Yeatman, 8 Humph. (Tenn.) 542; Talbott v. Hooser, 12 Bush (Ky.), 408.

In Mississippi and Alabama clerks of probate courts may take acknowledgments. James v. Fisk, 9 Smed. & M. (Miss.) 144; s. c., 47 Am. Dec. 111; McCraven v. McGuire, 23 Miss. 100; Halso v. Seawright, 65 Ala. 431.

In California a deputy recorder may take an acknowledgment in the name and as the act of his principal. Muller v. Boggs, 25 Cal. 175.

7. Paul v. Carpenter, 70 N. Car. 502.

8. A commissioner of deeds, in taking

wife's acknowledgment.<sup>1</sup> Such persons, however, must be properly qualified, as notaries public or other public officers, to take such acknowledgments. A trustee of a trust deed.<sup>2</sup> An officer of a corporation whose duty it is to countersign and register its deeds.<sup>3</sup> A commissioner holding office "during pleasure of the governor" may take acknowledgments after the governor's term of office has expired.<sup>4</sup>

**3. Who may not take Acknowledgments.**—An officer whose term of office has terminated.<sup>5</sup> A party interested in the conveyance cannot take the acknowledgment,<sup>6</sup> and the recording of such deed will

an acknowledgment of the execution of a deed, acts ministerially and not judicially; and it is not therefore any valid objection to his act that he is related to the parties. *Lynch v. Livingston*, 6 N. Y. 433; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

1. Magistrates interested in the transaction are not competent to take the examination of a married woman for the conveyance of her land. The solicitor of the husband is not as such disqualified. *Romanes v. Frazier*, 16 Grant Ch. (U. C.) 97; 17 Id. 267.

2. *Bennett v. Shipley*, 82 Mo. 448. Compare *Darst v. Gale*, 83 Ill. 136.

If the married woman acknowledges before her trustee a deed to his wife of the land in satisfaction of the trust deed, it is void. *Jones v. Porter*, 59 Miss. 628.

A deed of trust is executed by a man and his wife to two trustees to secure a debt, the grantors in the deed acknowledge it before one of the grantees, a trustee, as a notary public, and on this acknowledgment it is admitted to record. Held, such acknowledgment and recordation are invalid, and the deed is an absolute nullity as to the married woman, and is to be regarded as an unrecorded deed as to the male grantor. *Tavener v. Barrett*, 21 W. Va. 658.

3. *Sawyer v. Cox*, 63 Ill. 130.

4. *Thorn v. Frazier*, 60 Tex. 259.

5. *Gilbraith v. Gallwan*, 78 Mo. 452. Compare *Grotenkemper v. Carver*, 4 Lea (Tenn.), 375.

When a justice of the peace has ceased to fill that office in the county, though filling the same office in another county, he has no authority to sign his name to a blank or defective certificate of acknowledgment, so as to make the certificate operate by relation as of the day of its date. *Carlisle v. Carlisle*, 78 Ala. 542.

One who was county judge at the time such office was abolished, and thereafter, in pursuance of the statute, county auditor and clerk of board of supervisors, had no power, as such last-named officer,

to take acknowledgments. *Goodykoontz v. Olsen*, 54 Iowa, 174.

6. *Hogans v. Carruth*, 18 Fla. 587; *Wasson v. Connor*, 54 Miss. 352; *Jones v. Parter*, 59 Miss. 628; *Green v. Abraham*, 43 Ark. 420; *Brown v. Moore*, 38 Tex. 645; *Wilson v. Traer*, 20 Iowa, 233; *Hammers v. Dole*, 61 Ill. 307; *West v. Krebaum*, 88 Ill. 263; *Stevens v. Hampton*, 46 Mo. 404; *Dail v. Moore*, 51 Mo. 589; *Groesbeck v. Seeley*, 13 Mich. 329; *Davis v. Beazley*, 75 Va. 491; *Withers v. Baird*, 7 Watts (Pa.), 227; s. c., 32 Am. Dec. 754. See *Dussaume v. Burnett*, 5 Iowa, 95. Compare *Lynch v. Livingston*, 6 N. Y. 422; *Kimball v. Johnson*, 14 Wis. 682. As regards these two cases, *Bliss, J.*, says (*Stevens v. Hampton, supra*): "They seem to recognize a contrary doctrine, although I think there is no real conflict. In the former case, an ordinary acknowledgment was held to be a ministerial act, and hence did not come under the prohibition against the action of judges or jurors who were relatives of the parties. In the latter case, a mortgage was given to a married woman to secure her for money loaned which belonged to her separate estate and was acknowledged before her husband. . . . Here the husband was not a party to the instrument, and could have no interest in the separate estate of the wife." Cf. *Nat. Bank v. Conway*, 14 Bank. Reg. 513.

Where one of the grantees was a judge of the court in which a sheriff's deed had to be acknowledged, held, no objection to the deed. *Lewis v. Curry*, 74 Mo. 49.

A person cannot take his own acknowledgment. *Groesbeck v. Seeley*, 13 Mich. 329; *Beaman v. Whitney*, 22 Me. 413; *Davis v. Beazley*, 75 Va. 491.

In New York it is held that relationship to one of the parties is no bar to taking the acknowledgment. *Lynch v. Livingston*, 6 N. Y. 433; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

A trustee who receives commissions is disqualified. *Brown v. Moore*, 38 Tex. 645. Compare *Dial v. Moore*, 51 Mo. 589.



not be constructive notice to subsequent purchasers.<sup>1</sup> An officer cannot take an acknowledgment outside of his jurisdiction,<sup>2</sup> but the parties obtaining such acknowledgment are estopped to deny its validity in the absence of fraud.<sup>3</sup>

A deed of trust acknowledged before the trustee therein, where its execution is duly proved, is good between the parties thereto and those claiming under them. *Siemers v. Kleeburg*, 56 Mo. 196; *Black v. Gregg*, 58 Mo. 565; *Bennett v. Shipley*, 82 Mo. 448.

An acknowledgment of the execution of a deed taken by a party to it does not authorize it to be recorded, and the record of it imparts no notice to subsequent purchasers or incumbrancers. But such acknowledgment taken before the curing act of March 8, 1883 (Ark.), was validated by that act, except in cases where it affected vested rights, or the conveyances of minors or insane persons. *Green v. Abrahams*, 43 Ark. 420.

1. *Brown v. Moore*, 38 Tex. 645; *Green v. Abraham*, 43 Ark. 420; *Stevens v. Hampton*, 46 Mo. 404; *Hainey v. Alberry*, 73 Mo. 427; *Hammers v. Dole*, 61 Ill. 307; *Dusssauve v. Burnett*, 5 Iowa, 103; *Wilson v. Traer*, 20 Iowa, 231; *Barney v. Sutton*, 2 Watts (Pa.), 31; *Withers v. Baird*, 7 Watts (Pa.), 227; s. c., 32 Am. Dec. 754; *Hastings v. Vaughn*, 5 Cal. 315; *Price v. McDonald*, 1 Md. 403; *Johns v. Scott*, 5 Md. 81; *Beauman v. Whitney*, 20 Me. 413; *Shults v. Moore*, 1 McLean (U. S.), 520.

The deed is good as between the parties, and should prevail against subsequent deeds to those who had actual notice. *Stevens v. Hampton*, 46 Mo. 404; *Dusssauve v. Burnett*, 5 Iowa, 103; *Beauman v. Whitney*, 20 Me. 413; *Caldwell v. Head*, 17 Mo. 561; *Cooly v. Rankin*, 11 Mo. 647.

2. *Gitting v. Hall*, 1 H. & J. (Md.) 14; s. c., 2 Am. Dec. 502; *Johns v. Reardon*, 3 Md. Ch. 57; *Harris v. Burton*, 4 Harr. (Del.) 66; *Share v. Anderson*, 7 Serg. & R. (Pa.) 43; s. c., 10 Am. Dec. 421; *Howard*, etc., *Assoc. v. McIntyre*, 3 Allen (Mass.), 572; *Hughes v. Wilkinson*, 37 Miss. 482; *Garrison v. Hayden*, 1 J. J. Marsh. (Ky.) 222; *McCulloch v. Myers*, 1 Dana (Ky.), 522; *Dickerson v. Talbot*, 14 B. Mon. (Ky.), 60; *Hedger v. Ward*, 15 B. Mon. (Ky.) 106; *Moore v. Vance*, 1 Ohio, 12; *Lynch v. Livingston*, 8 Barb. (N. Y.) 463; 6 N. Y. 422; *Thurman v. Cameron*, 24 Wend. (N. Y.) 91; *Jackson v. Hunter*, 1 Johns. (N. Y.) 495; *Jackson v. Colden*, 4 Cow. (N. Y.) 266.

See, as to power of officers to take acknowledgments outside of county or ju-

risdiction, *Learned v. Riley*, 14 Allen (Mass.), 109; *Odiorne v. Mason*, 9 N. H. 30; *Duly v. Brooks*, 30 Mo. 515; *Biscoe v. Byrd*, 15 Ark. 655; *Hughes v. Wilkinson*, 37 Miss. 482; *Crumbaugh v. Kugler*, 2 Ohio St. 373; *Moore v. Moore*, 3 Ohio St. 154; *Hopkins v. Menderback*, 5 Johns. (N. Y.) 231; *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Colton v. Seavey*, 22 Cal. 496.

If no place appears in the certificate it is presumed that the officer acted within his jurisdiction. *Rockleff v. Norton*, 19 Me. 279; *Bradley v. West*, 60 Mo. 33; *Huxley v. Harrold*, 62 Mo. 516; *Sidwell v. Birney*, 69 Mo. 144; *Dunlap v. Daugherty*, 20 Ill. 397; *Morrison v. White*, 16 La. Ann. 100; *Carpenter v. Dexter*, 8 Wall. (U. S.) 513.

The instrument may be referred to aid the certificate if no locality appears. *Brooks v. Chaplin*, 3 Vt. 281; s. c., 23 Am. Dec. 209; *Fuhrman v. Loudon*, 13 S. & R. (Pa.) 386; s. c., 15 Am. Dec. 608; *Truluck v. Peeples*, 1 Ga. 3. Or parts of the certificate itself, such as the caption, seal, the accompanying certificate, from another State, of official character, etc. *Sidwell v. Birney*, 69 Mo. 144; *Robidoux v. Cassilegi*, 10 Mo. App. 516; *Chiniquy v. Catholic Bishop*, etc., 41 Ill. 148; *Dunlap v. Daugherty*, 20 Ill. 397; *Hardin v. Osborne*, 60 Ill. 93; *Wright v. Wilson*, 17 Mich. 192; *Adams v. Medsker*, 25 W. Va. 128. Compare *Willard v. Cramer*, 36 Iowa, 22; *Hardin v. Kirk*, 49 Ill. 153.

The omission of the venue in an acknowledgment taken by a justice of the peace. *Held*, obviated by proof that such officer was at the time a justice of the peace in the county where it was taken, and as such took it. Also that judicial notice is taken as to justices of the peace by the courts in the county. *Graham v. Anderson*, 42 Ill. 514. See *Irving v. Brownell*, 11 Ill. 402; *Dunlap v. Daugherty*, 20 Ill. 397; *Harding v. Osborne*, 60 Ill. 93; *Scott v. Gallagher*, 11 S. & R. (Pa.) 347.

The name of the county where the acknowledgment is taken must appear. *Willard v. Cramer*, 36 Iowa, 22; *Dunlap v. Daugherty*, 20 Ill. 397; *Chiniquy v. Bishop of Chicago*, 41 Ill. 148; also the State, *Hardin v. Osborne*, 60 Ill. 93.

3. The proof of fraud must be clear and convincing. *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Meyer v. Gossett*, 38

**4. The Certificate.**—The certificate is legal evidence of the execution of the deed.<sup>1</sup> The official character of the person taking the acknowledgment must appear in the certificate, and when so appearing is *prima-facie* evidence of his authority<sup>2</sup> and jurisdic-

Ark. 377; *Miller v. Wentworth*, 82 Pa. St. 280; *Johnson v. Van Velsor*, 43 Mich. 208; *Hourtienne v. Schnoor*, 33 Mich. 274; *Barnett v. Proskauer*, 62 Ala. 486; *Stevens v. Hampton*, 46 Mo. 404.

1. *Young v. Duvall*, 109 U. S. 573.

2. *Thompson v. Morgan*, 6 Minn. 292; *Baze v. Arper*, 6 Minn. 220; *Thurman v. Cameron*, 34 Wend. (N. Y.) 87; *Trustees v. McKechnie*, 90 N. Y. 618; *Belo v. Mayer*, 79 Mo. 67; *Harding v. Curtis*, 45 Ill. 252; *Irving v. Brownell*, 11 Ill. 402; *Wright v. Bundy*, 11 Ind. 398; *Johnson v. Haines*, 2 Ohio, 55 s. c.; 15 Am. Dec. 533; *Evans v. Lee*, 11 Nev. 194; *Bell v. Fry*, 5 Dana (Ky.), 341; *Coles v. Miller*, 8 Gratt (Va.) 6; *Hassler v. King*, 9 Gratt. (Va.) 115; *Tuten v. Gazen*, 18 Fla. 751; *Ruggles v. Bucknor*, 1 Paine (U. S.), 358; *Carpenter v. Dexter*, 8 Wall. (U. S.) 513.

A notary's seal is evidence of his official character. *Harding v. Curtis*, 45 Ill. 252.

Where a certificate contains no evidence of the official character of the officer, such character may be proved *alibunde*. *Bennet v. Paine*, 7 Watts (Pa.), 334; s. c., 32 Am. Dec. 765. See *Jeffreys v. Callies*, 4 Dana (Ky.), 470; *Vanness v. Bank*, 13 Pet. (U. S.) 21; *Shults v. Moore*, 1 McLean (U. S.), 520.

A commissioner appointed by the governor of a State to take acknowledgments in another State is an officer of the State from which he derives his appointment. The courts of that State are bound to take judicial notice of his official acts, and these require no other authentication than his seal of office. *Smith v. Van Gilder*, 26 Ark. 527; *Irving v. Brownell*, 11 Ill. 402; *Vance v. Schuyler*, 6 Ill. 160.

But if the certificate does not state that the commissioner is authorized to take acknowledgments, the defect is fatal. *Uhler v. Hutchinson*, 23 Pa. St. 110.

**Acknowledgment of Deeds in Another State—Official Character of the Person taking it—How shown.**—A deed for an interest in land in Illinois was executed by parties resident of another State, and acknowledged by them before a justice of the peace in such other State. The county clerk of the proper county, in his certificate of the official character of the justice of the peace, failed to certify that

he himself was the clerk of a court of record. *Held*, that was not required, and that the deed was admissible in evidence without being so certified. The statute relating to conveyances provides that where a deed is acknowledged or proved before a justice of the peace of another State, there shall be added a certificate of the "proper clerk," under the seal of his office, of the official character of such justice of the peace. The "proper clerk" in such section is the one in whose office the evidence of the official character of justices of the peace is kept and preserved by law, and he is not required to certify that he is a clerk of a court of record. *Grand Tower, etc., Co. v. Gill*, 111 Ill. 541.

A certificate which recited that it was made before the clerk of a county court, and which bore the imprint of the seal of said court, but failed to state, and it was not otherwise shown, that said court was a court of record, or that the clerk was the holder of its seal, is defective. *Fogg v. Holcomb*, 64 Iowa, 621.

A deed conveying land lying in West Virginia, in which it is recited that the grantors are "of the county of Fayette, in the State of Pennsylvania," with a certificate of two justices of its acknowledgment before them indorsed thereon, headed "Fayette County, ss.," and also accompanied by a certificate under the seal of the Court of Common Pleas of Fayette County, State of Pennsylvania, that the said two justices were at the time of said acknowledgment of Fayette County, in the State of Pennsylvania, was properly admitted to record in this State upon said certificates, it sufficiently appearing therefrom that the "Fayette County" mentioned was of the State of Pennsylvania. *Adams v. Medsker*, 25 W. Va. 128.

The Wisconsin Statute, 1858, as amended 1859, did not prescribe the form of a certificate of acknowledgment of a deed executed out of a State before a notary public, or require it to be made in accordance with the laws of the place where it was made; and such a certificate is sufficient where it would have been in substantial compliance with the laws of this State, if made here. Where, therefore, a deed of substitution by an attorney in fact to convey land was acknowledged before a notary public in the District of

tion,<sup>1</sup> and the certificate, in the absence of fraud, is conclusive of the facts recited.<sup>2</sup> The evidence of official character may appear either in the body of the certificate or in the signature.<sup>3</sup>

Columbia, and the notary's certificate failed to recite, as required by the laws of Congress then in force in said district, that the grantor named in the deed was well known to him, or that his identity was proved, etc., *held*, that the certificate was sufficient. *Knight v. Leary*, 54 Wis. 460.

See generally *Livingston v. McDonald*, 9 Ohio, 168; *Johnson v. Haines*, 2 Ohio, 55; *De Segond v. Culver*, 10 Ohio, 188; *Ewing v. Savary*, 3 Bibb. (Ky.) 235; *Bell v. Fry*, 5 Dana (Ky.), 341; *Harding v. Curtis*, 45 Ill. 252; *Dawson v. Hayden*, 67 Ill. 52; *Adams v. Bishop*, 19 Ill. 395; *McCormick v. Evans*, 33 Ill. 327; *Hope v. Sawyer*, 14 Ill. 254; *Buckmaster v. Job*, 15 Ill. 328; *Bennet v. Paine*, 7 Watts (Pa.), 334; *Scott v. Gallagher*, 11 S. & R. (Pa.) 347; *Hultz v. Ackley*, 63 Pa. St. 142; *Crispen v. Hannavan*, 50 Mo. 415; *Smith v. Van Gilder*, 26 Ark. 527; *Coles v. Miller*, 8 Gratt. (Va.) 6; *Hassler v. King*, 9 Gratt. (Va.) 115. *Eaton v. Woydt*, 32 Wis. 277; *Wells v. Atkinson*, 24 Minn. 161; *Morton v. Smith*, 2 Dill. (U. S.) 316; *Willink v. Miles*, Pet. C. C. 429.

1. *Rockleff v. Morton*, 19 Me. 274; *Bradley v. West*, 60 Mo. 33.

2. *Wright v. Bundy*, 11 Ind. 398; *McNeely v. Rucker*, 6 Blackf. (Ind.) 391; *Hill v. Bacon*, 43 Ill. 477; *Monroe v. Poorman*, 62 Ill. 528; *Lickmon v. Harding*, 65 Ill. 505; *Kerr v. Russell*, 69 Ill. 666; s. c., 18 Am. Rep. 634; *Russell v. Baptist Theo. Sem.*, 73 Ill. 337; *Tunison v. Chamblin*, 88 Ill. 379; *Baldwin v. Snowden*, 11 Ohio St. 203; *Hartley v. Frosh*, 6 Tex. 208; *Smith v. McGuire*, 67 Ala. 34; *Johnson v. Wallace*, 53 Miss. 331; s. c., 24 Am. Rep. 699; *Stone v. Montgomery*, 35 Miss. 83; *Allen v. Lenoir*, 53 Miss. 321; *Meyer v. Gossett*, 38 Ark. 377; *Miller v. Wentworth*, 82 Pa. St. 280; *Heeter v. Glasgow*, 79 Pa. St. 79; *Hall v. Patterson*, 51 Pa. St. 289; *Michener v. Cavender*, 38 Pa. St. 334; *Louden v. Blythe*, 27 Pa. St. 22; *Shrader v. Decker*, 9 Pa. St. 14; *Barnett v. Barnett*, 15 Serg. & R. (Pa.) 72; *Jamison v. Jamison*, 3 Whart. (Pa.) 457; *Withers v. Baird*, 7 Watts (Pa.), 227; *Priest v. Cummings*, 16 Wend. (N. Y.) 617; *Tooker v. Sloan*, 30 N. J. Eq. 394; *Greene v. Godfrey*, 44 Me. 25; *Bissett v. Bissett*, 1 H. & McH. (Md.) 211; *Ridgeley v. Howard*, 3 H. & McH. (Md.) 321; *Young v. Duval*, 109 U. S. 573; *Paxton v. Marshall*, 18 Fed. Rep. 361.

The following cases hold that the certificate is only *prima-facie* evidence of the facts recited, but it will be found on examination that the cases generally involve questions of fraud, duress, or failure to observe the requirements of statute. *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 161; *Jackson v. Hayner*, 12 Johns. (N. Y.) 468; *Jackson v. Cairns*, 20 Johns. (N. Y.) 300; *Jackson v. Perkins*, 2 Wend. (N. Y.) 308; *People v. Galloway*, 17 Wend. (N. Y.) 540; *Thurman v. Cameron*, 24 Wend. (N. Y.) 87; *Gillett v. Stanley*, 1 Hill (N. Y.), 121; *Sanford v. McLean*, 3 Paige (N. Y.), 122; *Knowles v. McCamly*, 10 Paige (N. Y.), 346; *Linsley v. Brown*, 13 Conn. 192; *Smith v. Ward*, 2 Root (Conn.), 378; s. c., 1 Am. Dec. 80; *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Louden v. Blythe*, 16 Pa. St. 532, 27 Pa. St. 22; *Dodge v. Hollinshead*, 6 Minn. 25; *Dewey v. Campau*, 4 Mich. 565; *Stevens v. Doe*, 6 Blackf. (Ind.) 475; *Bailey v. Landingham*, 53 Iowa, 722; *Ray v. Crouch*, 10 Mo. App. 321; *Steffen v. Bauer*, 70 Mo. 399; *Eyster v. Hathaway*, 50 Ill. 521; *Smith v. McGuire*, 67 Ala. 34; *Allen v. Lenoir*, 53 Miss. 321; *Cent. Bank v. Copeland*, 18 Md. 305; *Lucas v. Cobbs*, 1 Dev. & B. (N. Car.) 228; *Phillips v. Green*, 3 A. K. Marsh (Ky.), 7; *Woodhead v. Foulds*, 7 Bush (Ky.), 222; *Ford v. Teal*, 7 Bush (Ky.), 156; *Young v. Duvall*, 109 U. S. 573.

A certificate which does not clearly show that it was issued by an officer duly authorized is fatally defective, *Cassell v. Cooke*, 8 Serg. & R. (Pa.) 268; s. c., 11 Am. Dec. 610.

A commissioner's certificate is presumptive evidence of the execution and acknowledgment of a deed out of the State. *Hultz v. Ackley*, 63 Pa. St. 142.

An officer who has taken an acknowledgment may issue the certificate at any time thereafter while he remains in office, provided rights of third parties have not intervened. *Hannon v. Magee*, 57 Miss. 410.

3. *Johnson v. Haines*, 2 Ohio, 278; s. c., 15 Am. Dec. 533; *Cassell v. Cooke*, 8 Serg. & R. (Pa.) 368; s. c., 11 Am. Dec. 610.

A defective or informal certificate of acknowledgment, to which the officer's name is signed, may operate as an attestation; but this effect cannot be allowed to a printed form of certificate to which his name is not signed, although his name and style of office are written by

An officer cannot impeach his certificate.<sup>1</sup>

Nothing will be presumed in favor of a certificate. It must comply substantially with the statutory requirements, and state all the facts necessary to show valid official act.<sup>2</sup> Thus, an examination made in a language the person did not understand is not valid.<sup>3</sup>

Officers have the right, or may be compelled by *mandamus*, to correct at any time a mistake in their certificate; and when so amended it will have the same effect as if it had been properly made at first.<sup>4</sup> The omission of unimportant words is usually

him in the body of the paper. *Carlisle v. Carlisle*, 78 Ala. 542.

As to what constitutes a description of official character, see *Sparrow v. Hovey*, 41 Mich. 708; *Final v. Backus*, 18 Mich. 218; *Livingston v. McDonald*, 9 Ohio, 168; *Rowley v. Berrian*, 12 Ill. 200; *McIntire v. Ward*, 5 Binn. (Pa.) 296; s. c., 6 Am. Dec. 417.

In *Van Ness v. Bank*, 13 Pet. (U. S.) 17, construing a Maryland statute, it was held that no description of official character is necessary.

1. A mortgage bore the notarial seal and signature of "S. S.," but S. S. testified that he never affixed his seal to it, and that he believed himself to have been the only S. S. notary in Cincinnati. Held, that the seal *prima facie* proved itself, and that the presumption in favor of the deed was not rebutted. *Wright v. Bundy*, 11 Ind. 398. See *Stone v. Montgomery*, 35 Miss. 83. Compare *Garth v. Fort*, 15 Lea (Tenn.), 683.

2. *Jacoway v. Gault*, 20 Ark. 190; *McDaniel v. Needham*, 61 Tex. 269. As to what is a substantial compliance with the statute, see *Monroe v. Arledge*, 23 Tex. 478; *Belcher v. Weaver*, 46 Tex. 293; *Watkins v. Hall*, 57 Tex. 1; *Tubbs v. Gatewood*, 26 Ark. 128; *Cavender v. Smith*, 5 Iowa, 157; *Tiffany v. Glover*, 3 Green (Iowa), 387; *Dickerson v. Davis*, 12 Iowa, 353; *Newman v. Samuels*, 17 Iowa, 528; *Todd v. Jones*, 22 Iowa, 146; *Rosenthal v. Griffin*, 23 Iowa, 263; *Robson v. Thomas*, 55 Mo. 581; *Alexander v. Merry*, 9 Mo. 510; *Spitznagle v. Vanhersch*, 13 Neb. 338; *Becker v. Anderson*, 11 Neb. 497; *Bigelow v. Livingston*, 28 Minn. 57; *Wells v. Atkinson*, 24 Minn. 161; *Knight v. Leary*, 54 Wis. 459; *Hiles v. LaFlesh*, 59 Wis. 465; *Wilson v. Henry*, 40 Wis. 594; *Calumet, etc., Co. v. Russell*, 68 Ill. 426; *Alvis v. Morrison*, 63 Ill. 181; *Harvey v. Dunn*, 89 Ill. 585; *Tully v. Davis*, 30 Ill. 103; *Owen v. Norris*, 5 Blackf. (Ind.) 479; *Nelson v. Graff*, 44 Mich. 433; *Hopkins v. Delancy*, 8 Cal.

85; *Henderson v. Grewell*, 8 Cal. 581; *Bryan v. Ramirez*, 8 Cal. 461; *Welch v. Sullivan*, 8 Cal. 511; *Wood v. Cochrane*, 39 Vt. 544; *Chandler v. Spear*, 22 Vt. 388; *Sheldon v. Stryker*, 42 Barb. (N. Y.) 284; *Drye v. Cook*, 14 Bush (Ky.), 459; *Davis v. Bogle*, 11 Heisk. (Tenn.) 315; *Clements v. Pearce*, 63 Ala. 284; *Barnett v. Proskauer*, 62 Ala. 486; *Hobson v. Kissam*, 8 Ala. 357; *Basshar v. Stewart*, 54 Md. 376; *Warner v. Hardy*, 6 Md. 525; *Morse v. Clayton*, 21 Miss. 373; *Kelly v. Calhoun*, 95 U. S. 710; *Carpenter v. Dexter*, 8 Wall. (U. S.) 513; *Talbot v. Simpson*, Pet. C. C. 188.

The following cases hold that the statute must be strictly complied with: *Wetmore v. Laird*, 5 Biss. (U. S.) 160; *Knighton v. Smith*, 1 Oregon, 276; *Trammel v. Thurmond*, 17 Ark. 203; *Tully v. Davis*, 30 Ill. 103; *Myers v. Boyd*, 96 Pa. St. 427; *Rogers v. Adams*, 66 Ala. 600; *Ridgely v. Howard*, 3 H. & McH. (Md.) 321; *Dewey v. Campau*, 4 Mich. 565; *Buell v. Irwin*, 24 Mich. 145; *Mount v. Kesterson*, 6 Coldw. (Tenn.) 452; *Wickersham v. Reeves*, 1 Iowa, 413.

Where a commissioner takes an acknowledgment to a conveyance of land, he must comply with the statute of the State where the land is located. *Keller v. Moore*, 51 Ala. 340; *Brannon v. Brannon*, 2 Disney (Ohio), 224.

3. *Fisher v. Meister*, 24 Mich. 447.

The examination may be made by an interpreter, but he must be properly sworn. *Dewey v. Campau*, 4 Mich. 565; *Norton v. Meader*, 4 Sawy. (U. S.) 603. See also *De Arnaz v. Escandon*, 59 Cal. 486. Compare, as to swearing of interpreter, *Walter v. Weaver*, 57 Tex. 569.

4. *Jordan v. Corey*, 2 Ind. 385; s. c., 52 Am. Dec. 516; *Hutchinson v. Ainsworth*, 63 Cal. 286; *Wannall v. Kern*, 51 Mo. 150; *Miller v. Powell*, 53 Mo. 252; *Skinner v. Fulton*, 39 Ill. 484; *Calumet, etc., Co. v. Russell*, 68 Ill. 426; *Bowby v. Thunder*, 3 Atl. Repr. (Pa.) 588; *Fall v. Roper*, 3 Head (Tenn.), 485; *Brinkley*

not fatal to the validity of the certificate;<sup>1</sup> but parol evidence

*v. Tomeny*, 9 Baxt. (Tenn.) 275; *Elliott v. Peirsol*, 1 Pet. (U. S.) 328. *Compare* *Merritt v. Yates*, 71 Ill. 636; s. c., 22 Am. Rep. 128; *O'Farrall v. Simplot*, 4 Iowa, 381.

If proper privy examination was held, and an incorrect certificate made by mistake, it may be corrected; but if the required examination was not properly made, the certificate cannot be corrected. *Garth v. Fort*, 15 Lea (Tenn.), 683; *Looney v. Adamson*, 48 Tex. 621; *Johnson v. Taylor*, 60 Tex. 360.

The officer may be compelled by *mandamus* to correct his certificate, but a court of equity has no power to correct his mistakes. *Wannall v. Kern*, 51 Mo. 365; *Miller v. Powell*, 53 Mo. 252. This case is criticised in *Gilbraith v. Gallivan*, 78 Mo. 452. In *Simpson v. Montgomery*, 25 Ark. 365, it was held that equity would relieve as against such mistakes. See *Johnson v. Taylor*, 60 Tex. 360; *Dalton v. Rust*, 22 Tex. 133.

A justice of the peace cannot be compelled by *mandamus* to correct his certificate. *Merritt v. Yates*, 71 Ill. 636; s. c., 22 Am. Rep. 128.

A notary having made and delivered a defective certificate, cannot amend it in the absence of the grantor. *Enterprise Transit Co. v. Sheedy*, 103 Pa. St. 492; s. c., 49 Am. Rep. 130; *Merritt v. Yates*, 71 Ill. 636; s. c., 22 Am. Rep. 128.

An officer cannot correct his certificate after his term of office has expired. *Gilbraith v. Gallivan*, 78 Mo. 452. *Compare* *Grotenkemper v. Carver*, 4 Lea (Tenn.), 375.

When an acknowledgment is properly made but defectively certified, a party interested may have an action to correct the certificate; and where, in foreclosure proceedings, objection is made to the introduction of the mortgage on the ground that the certificate is defective, the plaintiff should be permitted to amend the complaint and prove that the acknowledgment was made in compliance with the statute, and have judgment reforming the certificate. *Hutchinson v. Ainsworth*, 63 Cal. 286.

In most cases the certificate may be admitted in evidence, although the mistake has not been corrected. *Merchants' Bank v. Harrison*, 39 Mo. 433; *Sharp v. Hamilton*, 12 N. J. L. 109; *Northrop v. Wright*, 7 Hill (N. Y.), 476.

Under the Ohio statute of 1857 an officer may correct his mistakes. *Kilbourn v. Fury*, 26 Ohio St. 153.

In Tennessee the officer may correct

his certificate by making oath in open court. *Brinkly v. Tomeny*, 9 Baxt. (Tenn.) 275; *Fall v. Roper*, 3 Head (Tenn.), 485; *Garth v. Fort*, 15 Lea (Tenn.), 683.

Art. 4353 of the Texas R. S. does not permit the validating of conveyances when in fact the law had not been complied with in taking the acknowledgment, but gives only a new remedy for ascertaining the fact that the acknowledgment was in fact properly made. *Johnson v. Taylor*, 60 Tex. 360.

**Presumption after Twenty Years' Registration.**—Where the deed has been registered for twenty years, but certificate is defective, the probate shall be presumed to be proper, and this presumption is conclusive and cuts off all inquiry on the subject. *Stroud v. McDaniel*, 12 Lea (Tenn.), 617. See *Riecke v. Westenhoff*, 10 Mo. App. 358. But lapse of time will not cure a certificate relating to trusts. *Fell v. Young*, 63 Ill. 106.

**1. Omissions which have been held not Fatal.**—"Personally" before the word known. *Rosenthal v. Griffin*, 23 Iowa, 263; *Todd v. Jones*, 22 Iowa, 146; *Hopkins v. Delany*, 8 Cal. 85; *Welch v. Sullivan*, 8 Cal. 511; *Alexander v. Merry*, 9 Mo. 514; *Davis v. Bogle*, 11 Heisk. (Tenn.) 315.

Of the words of identity. *Northrop v. Wright*, 7 Hill (N. Y.), 476; *Hunt v. Johnson*, 19 N. Y. 279; *Watkins v. Hall*, 57 Tex. 1; *Hiles v. La Flesh*, 59 Wis. 465; *Mount v. Kesterson*, 6 Coldw. (Tenn.) 452; *Hornbeck v. Mut. Building Ass'n*, 88 Pa. St. 64; *Bell v. Lyle*, 10 Lea (Tenn.), 44.

Of the surname. *Chandler v. Spear*, 22 Vt. 388.

The word "seal." *Nichols v. Stewart*, 15 Tex. 226.

Of the grantor's name, when it can be supplied from instrument or signature. *Wise v. Postlewait*, 3 W. Va. 452; *Phillips v. Ruble*, Litt. Sel. Cas. 221; *Magness v. Arnold*, 31 Ark. 103; *Sanford v. Bulkley*, 30 Conn. 344; *Wilcoxon v. Osborn*, 77 Mo. 621; *Lincoln v. Thompson*, 75 Mo. 613. Or the surname. *Chandler v. Spear*, 22 Vt. 388. See OMISSIONS, FATAL, *post*.

"Given under my hand and seal of office" where the official seal is in fact affixed. *Webb v. Huff*, 61 Tex. 678.

"And deed." *Spitznagle v. Vanhessh*, 13 Neb. 338.

"Her act and deed." *Stuart v. Dutton*, 39 Ill. 91; *Solyer v. Romanet*, 52 Tex. 562.

is not admissible to prove an essential fact which has been

"And acknowledged the said mortgage." *Basshor v. Stewart*, 54 Md. 376.

Of the name of the State. *Robidoux v. Cassilegi*, 10 Mo. App. 516. Or of the county where it is expressed in the deed. *Furhman v. Loudon*, 13 S. & R. (Pa.) 386; s. c., 15 Am. Dec. 608; *Ansier v. Schieffelin*, 72 Pa. St. 106; s. c., 13 Am. Rep. 659. Or of the place. *Rackleff v. Norton*, 19 Me. 274; *Huxley v. Harold*, 62 Mo. 516.

"Fully" before "known" in wife's acknowledgment. *Hartshorn v. Dawson*, 79 Ill. 108.

"Known," in "being made fully known," etc. *Hornbeck v. Mutual*, etc., Ass'n, 88 Pa. St. 64.

"Husband" where the blank is left unfilled. *Gorman v. Stanton*, 5 Mo. App. 585.

"Be" in the sentence "known to me to —" *Johnson v. Badger*, etc., Co., 13 Nev. 351.

"Before me" after the word "acknowledged." *Gordon v. Leech*, 81 Ky. 229.

"Are" after "who." *Hartshorn v. Dawson*, 79 Ill. 108.

"Consideration" in the sentence "for the consideration and purposes." *Monroe v. Arledge*, 23 Tex. 478.

The title of a trustee. *Dail v. Moore*, 51 Mo. 589.

"His" before "free and voluntary act." *Dickerson v. Davis*, 12 Iowa, 353.

"Appeared" after the word "personally." *Scharfenburg v. Bishop*, 35 Iowa, 60.

"Sealed and delivered" in wife's acknowledgment. *Barton v. Morris*, 15 Ohio, 408; *Mullins v. Weaver*, 57 Tex. 5. Compare *Toulmin v. Heidelberg*, 32 Miss. 268.

"Seal" before "of office" where statute does not require a seal. *Nichols v. Stewart*, 15 Tex. 226.

"Hand and seal" where seal was actually attached. *Harrington v. Fish*, 10 Mich. 415; *Webb v. Haff*, 61 Tex. 677.

Omitting "out of presence" when "separate and apart" is used. *Nippel v. Hammond*, 4 Colo. 211.

The following acknowledgment held sufficient: "State of Arkansas, Pulaski County. On this, the nineteenth day of May, 1877, before me, J. L. Bay, a notary public in and for said county, personally appeared Theodore B. Mills and Hannah A. Mills, his wife, grantors in the foregoing deed of conveyance, to me well known, who acknowledge that he had executed the same for the consideration and purposes mentioned. And on this

day voluntarily appeared before me ———, to me well known as the person whose name appears upon the within and foregoing deed, and in the absence ——— said husband declared that ——— had of her own free will executed the foregoing deed for the purposes therein contained and set forth, and that she relinquishes her dower in and to the property conveyed freely and without compulsion or undue influence of her husband. Witness," etc. (Signed and sealed by the notary.) *Donahue v. Mills*, 41 Ark. 421. Compare *Hartshorn v. Dawson*, 79 Ill. 108; *Merritt v. Yates*, 71 Ill. 636; s. c., 22 Am. Rep. 128.

Omissions which have been held fatal. — "And does not wish to retract" in wife's acknowledgment. *Linn v. Patton*, 10 W. Va. 187; *La Bourgeoise v. McNamara*, 5 Mo. App. 576.

"For the purposes herein set forth." *Little v. Dodge*, 32 Ark. 453; *Jacoway v. Gault*, 20 Ark. 190; *Shryock v. Cannon*, 39 Ark. 434; *Currie v. Kerr*, 11 Lea (Tenn.), 138.

"Known." *Tully v. Davies*, 30 Ill. 103. See *Brinton v. SeEVERS*, 12 Iowa, 389; *Rogers v. Adams*, 66 Ala. 600.

"Signed" in "signed, sealed, and delivered." *Smith v. Elliott*, 39 Tex. 201.

"Ill usage." *Hawkins v. Burress*, 1 H. & J. (Md.) 513.

"Acknowledged." *Dewey v. Campau*, 4 Mich. 565; *Harrington v. Fish*, 10 Mich. 415; *Newman v. Samuels*, 17 Iowa, 528; *Bowman v. Wettig*, 39 Ill. 416; *Pickney v. Burrage*, 31 N. J. Eq. 21.

"Voluntary." *Wickersham v. Reeves*, 1 Iowa, 413; *Newman v. Samuels*, 17 Iowa, 528.

The words "of identity." *Fryer v. Rockefeller*, 63 N. Y. 268; *Forgarty v. Finlay*, 10 Cal. 239; *Wolf v. Fogarty*, 6 Cal. 224; *Fell v. Young*, 63 Ill. 106; *Murphy v. Williamson*, 85 Ill. 149; *Coburn v. Harrington*, 114 Ill. 104; *Gove v. Cather*, 23 Ill. 634; *Shephard v. Carriel*, 19 Ill. 313; *O'Ferrall v. Simplot*, 4 Greene (Iowa), 162; *Smith v. Garden*, 28 Wis. 685.

Statement of the private examination of wife. *Harty v. Ladd*, 3 Oregon, 353; *Elliott v. Richardson*, 9 Baxt. (Tenn.) 293.

The omission of grantor's name. *Smith v. Hunt*, 13 Ohio St. 260; *Hayden v. Wescott*, 11 Conn. 129; *Buell v. Irwin*, 24 Mich. 145. Or of wife's name. *Merritt v. Yates*, 71 Ill. 636; s. c., 22 Am. Rep. 128; *Trustees v. Davidson*, 65 Ill. 124.

The insertion of grantee's name for

omitted;<sup>1</sup> redundant words may be rejected if the certificate is complete without them;<sup>2</sup> and clerical or grammatical errors may be corrected.<sup>3</sup> The use of words of equivalent import will not invalidate the certificate.<sup>4</sup> Words vital to the correctness of the

that of grantor. *Wood v. Cochrane*, 39 Vt. 544.

Mistake in Christian-name of grantor. *Boothroyd v. Engles*, 23 Mich. 19.

Omission of Christian-name of grantor in the signature. *Hiss v. McCabe*, 45 Md. 77.

"Sealed and delivered" in "signed, sealed, and delivered." *Toulman v. Heidelberg*, 32 Miss. 268. *Compare Barton v. Morris*, 15 Ohio, 408.

A notary's certificate was insufficient where the county for which the notary was appointed was not appended in connection with the words "notary public." *Willard v. Cramer*, 36 Iowa, 22.

A certificate by a justice of the peace, appended to a deed, which states that the grantors, man and wife, appeared before him, and that the wife, being examined apart, "acknowledged she signed the said deed of her own free will and accord, and without fear, constraint, or persuasion of her husband, who all acknowledged they signed, sealed, and delivered the same for the purposes therein contained," is not a substantial compliance with the requisitions of the statute, and does not render the deed admissible evidence without further proof. *Boykin v. Smith*, 65 Ala. 294.

The omission of the word "consideration" in the acknowledgment is fatal. But where the execution is otherwise proven at the trial it is admissible, notwithstanding the defective acknowledgment. *Griesler v. McKennon*, 44 Ark. 517; *Wright v. Graham*, 42 Ark. 140.

A certificate, formal in other respects, which declares that the party whose name appears to a deed to which the certificate is attached appeared "and acknowledged that ——" had signed, sealed, and delivered the same, is not sufficient. The certificate should have shown on its face that he, the one whose name appeared, acknowledged that he executed the same. *Huff v. Webb*, 64 Tex. 284; *Buell v. Irwin*, 24 Mich. 152.

1. *Rollins v. Menager*, 22 W. Va. 461; *Ridgely v. Howard*, 3 Har. & McH. (Md.) 321; *Montgomery v. Hobson*, Meigs (Tenn.), 437; *Westbrooks v. Jeffers*, 33 Tex. 86; *Smith v. Elliott*, 39 Tex. 201; *Hays v. Hays*, 5 Rich. L. (S. Car.) 31; *Barnett v. Barnett*, 15 Serg. & R. (Pa.) 72; *Williams v. Baker*, 71 Pa. St. 476; *Leckman v. Harding*, 65 Ill.

505; *Kerr v. Russell*, 69 Ill. 666; s. c., 18 Am. Rep. 634; *Ennor v. Thompson*, 46 Ill. 215.

2. *Stuart v. Dutton*, 39 Ill. 91; *Tourville v. Pierson*, 39 Ill. 446; *Chester v. Rumsey*, 26 Ill. 97; *Nelson v. Graff*, 44 Mich. 433; *Crowley v. Wallace*, 12 Mo. 143; *Whitney v. Arnold*, 10 Cal. 531; *Bradford v. Dawson*, 2 Ala. 203.

An acknowledgment as follows: "I further certify that the said instrument is executed and proved or acknowledged according to the laws of this State." The word "proved" is surplusage, as there is no certificate of proof to which it can apply. *Nelson v. Graff*, 44 Mich. 433.

3. As the words "foregoing mortgage" in the certificate to a deed. *Ives v. Kimball*, 1 Mich. 308. Or if the certificate bears prior or different date to the deed. *Gest v. Flock*, 2 N. J. Eq. 108; *Eaton v. Trowbridge*, 38 Mich. 454; *Gorman v. Stanton*, 5 Mo. App. 585.

The use of the words "a power of attorney" in place of "deed." *Hurt v. McCartney*, 18 Ill. 129.

No date. *Lea v. Polk, etc., Co.*, 21 How. (U. S.) 493; *Webb v. Huff*, 61 Tex. 677; *Wickes v. Caulk*, 5 H. & J. (Md.) 36; *Kelly v. Rosenstock*, 45 Md. 389; *Brooks v. Chaplin*, 3 Vt. 281; s. c., 23 Am. Dec. 209; *Rackleff v. Norton*, 19 Me. 274; *Huxley v. Harrold*, 62 Mo. 516.

Or grammatical errors. *Frostburg, etc., Ass'n v. Brace*, 51 Md. 508. See *Merritt v. Yates*, 71 Ill. 636; s. c., 22 Am. Rep. 128. Or the word "husband" instead of "deed." *Calumet, etc., Co. v. Russell*, 68 Ill. 426.

"Contract" for "retract." *Belcher v. Weaver*, 46 Tex. 293; s. c., 26 Am. Rep. 267.

The insertion of the wrong county in caption. *Angier v. Schieffelin*, 72 Pa. St. 106; s. c., 13 Am. Rep. 659.

**Erasures and Interlineations.**—See *Bowlby v. Thunder*, 3 Atl. Repr. (Pa.) 588; *Devinney v. Reynolds*, 1 W. & S. (Pa.) 328.

4. *Jacoway v. Gault*, 20 Ark. 190; *De-launay v. Burnett*, 9 Ill. 454; *Tiffany v. Glover*, 4 Iowa, 387; *Cavender v. Smith*, 5 Iowa, 157; *Dickerson v. Davis*, 12 Iowa, 353; *Hall v. Gittings*, 2 H. & J. (Md.) 380; *Alexander v. Merry*, 9 Mo. 514; *Chouteau v. Allen*, 70 Mo. 290; *Sheldon v. Stryker*, 42 Barb. (N. Y.) 284; *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552;

certificate cannot be supplied by intendment,<sup>1</sup> a defective certificate of acknowledgment may, from necessity, operate as a substitute for the formal attestation of a witness, to prevent the instrument being inoperative as a conveyance, because the officer before whom its execution is acknowledged imperfectly certifies the facts, from ignorance, mistake, or carelessness. In such cases, the officer making the certificate becomes a witness, and his signature an attestation.<sup>2</sup>

The omission of, or a mistake in, the date will not invalidate the certificate.<sup>3</sup>

*Thurman v. Cameron*, 24 Wend. (N. Y.) 187; *Kelly v. Calhoun*, 95 U. S. 710. Compare *Butterfield v. Beall*, 3 Ind. 203.

"Deposes and says" held equivalent to "acknowledge." *Chouteau v. Allen*, 70 Mo. 290.

"Executed" to "signed, sealed, and delivered." *Smith v. Williams*, 38 Miss. 48; *Dorn v. Best*, 15 Tex. 62; and, *vice versa*, *Belcher v. Weaver*, 46 Tex. 293; s. c., 26 Am. Rep. 267; *Stuart v. Dutton*, 39 Ill. 91; *Little v. Dodge*, 32 Ark. 453; *Tabbs v. Gatewood*, 26 Ark. 128.

"Willingly" to "without any bribe, threat, or compulsion." *Belcher v. Weaver*, 46 Tex. 293; s. c., 26 Am. Rep. 267.

"Executed" to "act and deed." *Sharp v. Hamilton*, 12 N. J. L. 109.

"Legally authorized and assigned" to "duly commissioned and sworn." *Hall v. Gittings*, 2 H. & J. (Md.) 380.

"Freely and of her own accord" to "freely as her voluntary act and deed." *Dundas v. Hitchcock*, 12 How. (U. S.) 256.

"For the purposes herein specified" equivalent to "for the purposes therein contained." *Davis v. Bogle*, 11 Heisk. (Tenn.) 317.

"Separate and apart" equivalent to "privily." *Coombes v. Thomas*, 57 Tex. 321.

"To be their act and deed for the uses and purposes therein mentioned," equivalent to "they signed, sealed, and delivered." *Sharp v. Hamilton*, 12 N. J. L. 109.

"Personally acquainted with" to "know personally." *Kelly v. Calhoun*, 95 U. S. 710.

"Acknowledge" when words of similar import are used. *Choteau v. Allen*, 70 Mo. 290.

On the same paper, and following the signatures to an assignment for the benefit of creditors, was written a notary's certificate of acknowledgment. It bore the same date as the assignment, and named as the persons acknowledging the ones who apparently executed the assign-

ment. It stated that the persons named were to the notary known "to be the individuals described in, and who executed, the same," instead of the words "the foregoing instrument." Held, that the words "the same" referred to the instrument to which the certificate was appended, and sufficiently identified it; and that the certificate showed a due acknowledgment of the instrument. *Smith v. Boyd*, 101 N. Y. 473.

Where a tax deed is executed by a deputy county clerk, an acknowledgment reciting that such deputy county clerk appeared before the acknowledging officer, and that he acknowledged the execution of the deed by him "as such county clerk," is sufficient; the words "as such county clerk" meaning "as such deputy county clerk." *Ward v. Walters*, 63 Wis. 39.

Phrases held not to be equivalent: "I am satisfied" not equivalent to "personally known." *Shepard v. Carriel*, 19 Ill. 313; *Fryer v. Rockefeller*, 63 N. Y. 268. Compare *Hiles v. La Flesh*, 59 Wis. 465.

1. *Newman v. Samuels*, 17 Iowa, 528; *Wickersham v. Reeves*, 1 Iowa, 413; *Fogarty v. Finlay*, 10 Cal. 239; *Jacoway v. Gault*, 20 Ark. 190; *Stanton v. Button*, 2 Conn. 527; *Hayden v. Wescott*, 11 Conn. 129; *Short v. Conlee*, 28 Ill. 219; *Tully v. Davis*, 30 Ill. 103; *Merritt v. Yates*, 71 Ill. 636; s. c., 22 Am. Rep. 128; *Gaines v. Catron*, 1 Humph. (Tenn.) 514; *Harrison v. Wade*, 3 Coldw. (Tenn.) 505.

2. *Sharpe v. Orme*, 61 Ala. 263; *Rogers v. Adams*, 66 Ala. 600; *Carlisle v. Carlisle*, 78 Ala. 542.

3. *Webb v. Huff*, 61 Tex. 677; *Irving v. Brownell*, 11 Ill. 402; *Huxley v. Harold*, 62 Mo. 516; *Sidwell v. Birney*, 69 Mo. 146; *Rackleff v. Norton*, 19 Me. 274; *Brooks v. Chaplin*, 3 Vt. 281; s. c., 23 Am. Dec. 209; *Gest v. Flock*, 1 Green's Ch. (N. J.) 108; *Kelly v. Rosenstock*, 45 Md. 389; *Wickes v. Caulk*, 5 H. & J. (Md.) 36; *Trulock v.*



The identity of the party making the acknowledgment is an essential feature, and must appear in the certificate.<sup>1</sup> The name

Peeples, 1 Ga. 3; Hobson v. Kissam, 8 Ala. 357; Bradford v. Dawson, 2 Ala. 203; Lea v. Polk, etc., Co., 21 How. (U. S.) 493; Yorty v. Paine, 62 Wis. 154.

B, a married woman, joined with C, her husband, and D, her brother, in a mortgage covering her undivided interest and the undivided interest of D in certain real estate; the mortgage was dated April 23, 1874, and the acknowledgment—which as to B was in the statutory form of a married woman's separate acknowledgment—was dated April 21, 1874. The mortgage was recorded April 24, 1874, and was given to secure a debt contracted by D individually. *Held*, a sale by virtue of it carried all the interest of B in the premises. Hagenbuch v. Phillips, 6 Eastern Repr. (Pa.) 802.

In Wickes v. Caulk, 5 H. & J. (Md.) 36, the deed offered in evidence was dated the 6th of October, 1707, and the acknowledgment was certified to have been made on the 6th October, but omitted to state the year, and the deed was recorded on the 8th of January, 1707. There, by inference and intendment, the time of recording was made to correct the date of the deed, and to supply the particular year in the acknowledgment. In Kelly v. Rosenstock, 45 Md. 389, the mortgage bore date the 6th of August, 1872, but the particular day of the month of August, 1872, upon which the acknowledgment was made, was omitted to be stated. *Held*, that by looking to the date of the mortgage, and the clerk's certificate endorsed thereon of the time when it was filed for record, the particular day of the month when the acknowledgment was made was with certainty supplied.

A tax deed was executed February 5, 1881, but the certificate of acknowledgment purported to bear date February 5, 1880. *Held*, that the mistake in the date of the certificate did not invalidate the deed, nor was the acknowledgment so defective as to prevent the deed from being lawfully recorded. Yorty v. Paine, 62 Wis. 154.

Where a mortgage was signed by the husband, and beneath his signature thereto the wife on the same day added: "I hereby join in the execution of the foregoing conveyance, in token that I relinquish all claim of dower in said premises," affixing her signature and seal; to which a justice of the peace added a certificate in these words: "Sworn to and subscribed before me

this day," bearing date seventeen days after the mortgage,—*held*, that the mortgage was neither attested nor acknowledged, and that it was, therefore, inoperative for any purpose. Dugger v. Collins, 69 Ala. 324.

It is no objection to the filing of the certificate of acknowledgment that the date of the certificate is written on an erasure. Anon., 16 C. B. 574.

1. Fryer v. Rockefeller, 63 N. Y. 268; Miller v. Link, 2 Thomp. & C. (N. Y.) 86; Pinckney v. Burrage, 31 N. J. L. 21; Hayden v. Wescott, 11 Conn. 129; Callaway v. Flash, 50 Mo. 420; Garnier v. Barry, 28 Mo. 438; Wolf v. Fogarty, 6 Cal. 224; Bryan v. Ramirez, 8 Cal. 461; Henderson v. Grewell, 8 Cal. 581; Fogarty v. Finlay, 10 Cal. 239; Kimball v. Semple, 25 Cal. 440; Becker v. Quigg, 54 Ill. 390; Coburn v. Herrington, 114 Ill. 104; Lindley v. Smith, 46 Ill. 523; Tully v. Davis, 30 Ill. 103; Shepard v. Carriel, 19 Ill. 313; Gove v. Cather, 23 Ill. 634; Reynolds v. Kingsbury, 15 Iowa, 238; Brinton v. Seevers, 12 Iowa, 389; Smith v. Garden, 28 Wis. 685; Johnson v. Walton, 1 Sneed (Tenn.), 258; Fall v. Roper, 3 Head (Tenn.), 485; Garnet v. Stockton, 7 Humph. (Tenn.) 84; Peacock v. Tompkins, 1 Humph. (Tenn.) 135. Compare Sanford v. Bulkley, 3 Conn. 348.

An examination of the cases which hold that the omission of words of identity is not a fatal defect show that there did not exist at the time a statute requiring such personal identification, or that the statute was substantially complied with. Northrop v. Taylor, 7 Hill (N. Y.), 476; Thurman v. Cameron, 24 Wend. (N. Y.) 87; Hunt v. Johnson, 19 N. Y. 279; West Point Iron Co. v. Reymert, 45 N. Y. 703; Sheldon v. Stryker, 42 Barb. (N. Y.) 284; Warner v. Hardy, 6 Md. 525; Sanford v. Bulkley, 30 Conn. 344; Hopkins v. Delany, 8 Cal. 85; Welch v. Sullivan, 8 Cal. 511; Tully v. Davis, 30 Ill. 103; Alexander v. Merry, 9 Mo. 514; People v. Cheeseman, 16 Am. & Eng. R. R. Cas. 400; s. c., 7 Colo. 376; Rosenthal v. Griffin, 23 Iowa, 263; Todd v. Jones, 22 Iowa, 146; Bell v. Evans, 10 Iowa, 353.

The omission of the words of identity can only be objected to by a subsequent purchaser for value. Choteau v. Burlando, 20 Mo. 482.

In the body of a deed, one of the grantors was described as Robert P. McClintock, and the deed was signed "R. Parker McClintock." The certificate of

of the grantor should appear, although it is now generally held that if the name can be ascertained from the deed, the certificate will be sustained.<sup>1</sup>

A certificate of acknowledgment to a deed, made by the officer merely on the assurance of another that the party executed it, is a nullity.<sup>2</sup>

acknowledgment showed that Robert P. McClintock acknowledged the deed. *Held*, that this was sufficient to show he and R. Parker McClintock were one and the same person. *Grand Tower, etc., Co. v. Gil*, 111 Ill. 541.

A sheriff's deed does not require the words of identity. *Ogden v. Walters*, 12 Kan. 282; *Lamorque v. Langlais*, 8 Mo. 328.

The officer is at liberty to judge for himself as to what is a sufficient acquaintance with the party to enable him to certify to the identity of the party. *Wood v. Bach*, 54 Barb. (N. Y.) 134; *Nippel v. Hammond*, 4 Colo. 211. See *Rexford v. Rexford*, 7 Lans. (N. Y.) 6; *Jones v. Bach*, 48 Barb. (N. Y.) 568.

In Tennessee the officer need not state in a married woman's acknowledgment that she is known to him. *Bell v. Lyle*, 10 Lea (Tenn.). 44.

Acknowledgment of a deed which fails to recite that the grantor was known to the officer is fatally defective; yet if it recites that the grantor signed the instrument in his presence, it may operate as an attestation. *Rogers v. Adams*, 66 Ala. 600.

The certificate must state that the subscribing witness knew the person who executed the deed, and a statement that he saw him sign it is not sufficient proof of his identity. *Jackson v. Osborn*, 2 Wend. (N. Y.) 555; s. c., 20 Am. Dec. 649. See also *Jackson v. Gould*, 7 Wend. (N. Y.) 366; *Dias v. Glover*, 1 Hoff. Ch. (N. Y.) 74.

The certificate of the officer to a deed executed by agents, to the effect that the agents, naming them, were personally known to him, and that each of them had acknowledged the execution of the deed as agent, and being otherwise sufficient, is a sufficient compliance with the statute requiring him to certify that they were the individuals who signed the instrument. *Little v. Weatherford*, 63 Tex. 638.

The use of the words "I am satisfied" in place of "personally known" held a fatal defect. *Shepard v. Carriel*, 19 Ill. 313; *Fryer v. Rockefeller*, 63 N. Y. 268. Compare *Hiles v. La Flesh*, 59 Wis. 405.

The omission of "personally" before the word "known," or "appeared" after "personally," held not a fatal defect. *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Shelden v. Stryker*, 42 Barb. (N. Y.). 284; *Warner v. Hardy*, 6 Md. 525; *Alexander v. Merry*, 9 Mo. 514; *Robson v. Thomas*, 55 Mo. 581; *Tully v. Davis*, 30 Ill. 103; *Rosenthal v. Griffin*, 23 Iowa, 263; *Todd v. Jones*, 22 Iowa, 146; *Scharfenburg v. Bishop*, 35 Iowa, 60; *Hopkins v. Delany*, 8 Cal. 85; *Welch v. Sullivan*, 8 Cal. 511; *Davis v. Bogle*, 11 Heisk. (Tenn.) 315. See *Hunt v. Johnson*, 19 N. Y. 279; *Jackson v. Gumaer*, 8 Cow. (N. Y.) 552; *Thurman v. Cameron*, 24 Wend. (N. Y.) 87; *Henderson v. Grewell*, 8 Cal. 581; *Bell v. Evans*, 10 Iowa, 353; *Tiffany v. Glover*, 3 Greene (Iowa), 387; *Delannay v. Burnett*, 4 Gilm. (Ill.) 454; *Kelly v. Calhoun*, 95 U. S. 710; *Carpenter v. Dexter*, 8 Wall. (U. S.) 513.

As to what has been held insufficient compliance with the statute, see *Becker v. Quigg*, 54 Ill. 390; *Brinton v. Seevers*, 12 Iowa, 389; *Gould v. Woodward*, 4 Greene (Iowa), 82; *Fryer v. Rockefeller*, 63 N. Y. 268; *Miller v. Link*, 2 T. & C. (N. Y.) 86; *Wolf v. Fogarty*, 6 Cal. 224.

**Negligence.**—A notary public is not liable for negligence in, and certifying to identity, when in reality he did not know the party, and party procuring certificate was guilty of contributory negligence. *Oakland Bank v. Murfey*, 9 Pac. Repr. 843. Compare *Fogarty v. Finlay*, 10 Cal. 239.

1. *Sanford v. Bulkley*, 30 Conn. 344; *Magness v. Arnold*, 31 Ark. 103; *Bradford v. Dawson*, 2 Ala. 203; *Lincoln v. Thomson*, 75 Mo. 613; *Wilcoxson v. Osborn*, 77 Mo. 621; *Wise v. Postlewait*, 3 W. Va. 452; *Chandler v. Spear*, 22 Vt. 388; *Lone v. Shields*, 3 Yerg. (Tenn.) 405; *Phillips v. Ruble*, Litt. Sel. Cas. (Ky.) 221; *Carpenter v. Dexter*, 8 Wall. (U. S.) 513; *Kelly v. Rosenstock*, 45 Md. 389.

Compare *Hayden v. Wescott*, 11 Conn. 129; *Hiss v. McCabe*, 45 Md. 77; *Smith v. Hunt*, 13 Ohio, 260. See *Wood v. Cochrane*, 39 Vt. 544.

2. *Mays v. Hedges*, 79 Ind. 288. See *Harrison v. McWhirter*, 12 Neb. 152.

It must appear from the certificate that the party has acknowledged or executed the instrument. This may be shown by the use of the word "acknowledged" or "executed," or as the statute may direct.<sup>1</sup>

A certificate must be construed with reference to the instrument it is attached to, and the instrument is allowed to help out the construction of the certificate. And if the certificate is inconsistent with the instrument and ambiguous, the court will look to the instrument, or any part of it, together with the certificate, in order to arrive at the true meaning of the officer.<sup>2</sup>

The signature of the officer must be affixed to the certificate. It is not a compliance with the statute if he signs his name in the

1. *Chouteau v. Allen*, 70 Mo. 290; *Ca-bell v. Grubbs*, 48 Mo. 353; *Ingraham v. Grigg*, 13 Sneed & M. (Miss.) 22; *Hoboken Land Co. v. Kerrigan*, 31 N. J. L. 13; *Stanton v. Button*, 2 Conn. 527; *Basshor v. Stewart*, 54 Md. 376; *Jackson v. Gilchrist*, 15 Johns. (N. Y.) 89; *Stuart v. Dutton*, 39 Ill. 91; *Short v. Conlee*, 28 Ill. 219; *Bryon v. Ramirez*, 8 Cal. 461; *Henderson v. Grewell*, 8 Cal. 581; *Wise v. Postlewait*, 3 W. Va. 452; *Smith v. Williams*, 38 Miss. 48; *Dorn v. Best*, 15 Tex. 62; *Jacoway v. Gault*, 20 Ark. 190; *Dewey v. Campau*, 4 Mich. 565. See EQUIVALENT WORDS, *ante*, p. 152.

The word "acknowledged" cannot be supplied by intentment or construction. *Stanton v. Button*, 2 Conn. 527; *Dewey v. Campau*, 4 Mich. 565. Compare *Chouteau v. Allen*, 70 Mo. 290; *Basshor v. Stewart*, 54 Md. 376.

Where the certificate is in the form of a *jurat*, held sufficient. *Ingraham v. Grigg*, 13 S. & M. (Miss.) 22.

Where the certificate fails to show a separate acknowledgment of the wife, but does show that she was privately examined, it is not invalid. *Kenneday v. Price*, 57 Miss. 771.

"Act and deed" is equivalent to "executed." *Sharp v. Hamilton*, 7 Halst. (N. J.) 109. See *Davis v. Bogle*, 11 Heisk. (Tenn.) 315; *Hall v. Thompson*, 1 S. & M. (Miss.) 443; *Brown v. Farran*, 3 Ohio, 140.

W. S., the attorney named in the deed for that purpose, appeared before a justice of the peace, and that officer certified that "personally appeared W. S., etc.," omitting the words "and acknowledged the said mortgage." In the same certificate the justice further certified that, at the same time, the mortgagee appeared and made oath that the consideration set forth in the mortgage was true and *bona fide*; and this certificate was appended to the mortgage in the usual way, and the mortgage was thereupon duly recorded.

On exception to the sale of the mortgaged premises, on the ground that the mortgage was not duly acknowledged, it was held that every reasonable intentment should be made in support of the certificate, and the instrument to which it was attached. That from the face of the whole writing, including the certificate, there was no doubt as to what was done, and that the act done was in accordance with the authority delegated. That the words omitted by mere clerical misprision were supplied by the context with positive certainty; and that what might be fairly and clearly understood or implied, in reading the acknowledgment in connection with the deed, was of the same effect as if it had been in terms expressed. *Basshor v. Stewart*, 54 Md. 376.

2. *Wilcoxson v. Osborn*, 77 Mo. 621; *Lincoln v. Thompson*, 75 Mo. 613; *Samuels v. Shelton*, 48 Mo. 444; *McClure v. McClurg*, 53 Mo. 173; *Wells v. Atkinson*, 24 Minn. 161; *Ives v. Kimball*, 1 Mich. 316; *Harrington v. Fish*, 10 Mich. 415; *Newton v. McKay*, 29 Mich. 1; *Nelson v. Graff*, 44 Mich. 433; *Calumet, etc., Co. v. Russell*, 68 Ill. 426; *Logan v. Williams*, 76 Ill. 175; *Hiles v. La Flesh*, 59 Wis. 465; *Chase v. Whiting*, 30 Wis. 544; *Middleton v. Findla*, 25 Cal. 80; *Chandler v. Spear*, 22 Vt. 388; *Brooks v. Chaplin*, 3 Vt. 281; s. c., 23 Am. Dec. 209; *Sanford v. Bulkley*, 30 Conn. 344; *Angier v. Schieffelin*, 72 Pa. St. 106; s. c., 13 Am. Rep. 659; *Furhman v. London*, 13 Serg. & R. (Pa.) 386; s. c., 15 Am. Dec. 608; *Basshor v. Stewart*, 54 Md. 376; *Kelly v. Rosenstock*, 45 Md. 389; *Hall v. Gettings*, 2 H. & J. (Md.) 380; *Wise v. Postlewait*, 3 W. Va. 452; *Sharpe v. Orme*, 61 Ala. 263; *Ingraham v. Grigg*, 13 Smed. & M. (Miss.) 22; *Morse v. Clayton*, 13 Smed. & M. (Miss.) 373; *Lone v. Shields*, 3 Yerg. (Tenn.) 405; *Kelly v. Calhoun*, 95 U. S. 710; *Carpenter v. Dexter*, 8 Wall. (U. S.) 515.

body of the certificate.<sup>1</sup> The signature must show the official character of the person taking the acknowledgment.<sup>2</sup>

If an official seal is prescribed by statute, the officer must use a seal complying with all the statutory requirements;<sup>3</sup> but if no

1. *Marston v. Brashaw*, 18 Mich. 81. *Jefferson, etc., Assoc. v. Heil*, 81 Ky. 513; *Carlisle v. Carlisle*, 78 Ala. 542.

2. *Johnston v. Haines*, 2 Ohio, 55; *Carlisle v. Carlisle*, 78 Ala. 542.

If the official character of the officer taking the acknowledgment appears in the body of the certificate, it is sufficient. *Brown v. Farrar*, 3 Ohio, 140.

Where the letters "J. P." were annexed to the official signature, and the certificate showed the official character of the officer, *held* sufficient. *Final v. Backus*, 18 Mich. 218. See *Rowley v. Berrian*, 12 Ill. 200.

Attached to a deed were two acknowledgments, one of the grantor, and the other of his wife. The second certificate immediately followed the first, and was the only one signed by the officer taking the acknowledgment. *Held*, that the certificates were in effect one certificate. *Wright v. Wilson*, 17 Mich. 192.

If the official character of the person taking the acknowledgment does not appear in the certificate, it may be proved *aliunde*. *Shults v. Moore*, 1 McLean (U. S.), 520; *Bennet v. Paine*, 7 Watts (Pa.) 334; *Scott v. Gallagher*, 11 S. & R. (Pa.) 347. Compare *Johnson v. Haines*, 2 Ohio, 55.

3. *Texas Land Co. v. Williams*, 51 Tex. 51; *McKellar v. Peck*, 39 Tex. 381; *Ballard v. Perry*, 28 Tex. 347; *Little v. Dodge*, 32 Ark. 453; *Dail v. Moore*, 51 Mo. 589; *Meskimen v. Day*, 10 Pac. Repr. (Kan.) 14; *Booth v. Cook*, 20 Ill. 129; *Skinner v. Fulton*, 39 Ill. 384; *Mason v. Brock*, 12 Ill. 273; *Moore v. Titman*, 33 Ill. 358; *Holbrook v. Nichol*, 36 Ill. 161; *Buel v. Irwin*, 24 Mich. 145; *Hastings v. Vaughn*, 5 Cal. 315; *Kemper v. Hughes*, 7 B. Mon. (Ky.) 255; *Miller v. Henshaw*, 4 Dana (Ky.) 325; *Fleming v. Richardson*, 13 La. Ann. 414; *McLaurin v. Wilson*, 16 Shand. (S. Car.) 402; *McCreary v. McCreary*, 9 Rich Eq. (S. Car.) 34; *Dunn v. Adams*, 1 Ala. 527; *Duncan v. Duncan*, 1 Watts (Pa.), 322; *Barney v. Sutton*, 2 Watts (Pa.), 31; *Richards v. Randolph*, 5 Mason (U. S.), 115.

In *Robinson v. Robinson*, 5 N. Eastern Repr. (Ill.) 188, the court said: "It is not essential to the validity of a deed that the notary's seal should be attached. A deed may be valid and binding on the parties who execute it, without any

acknowledgment before an officer. The purpose of the certificate of acknowledgment is to prove the execution of the deed; and where there is no certificate of acknowledgment other proof may be presented to prove the execution of the instrument; and when thus proven the deed is as operative and binding on the parties as it would be if properly acknowledged before an officer. There is ample evidence in the record to prove that the grantors executed the deed; and the fact that the notary failed to affix his official seal to the certificate of acknowledgment did not affect the validity of the instrument." See *Bank v. Pursly*, 3 T. B. Mon. (Ky.) 238; *Tyler v. Bank*, 7 T. B. Mon. (Ky.) 557; *Homes v. Smith*, 16 Me. 181.

The absence of a seal may be cured by a validating act. *Cole v. Wright*, 70 Ind. 179.

The seal must be on the same sheet with the deed and certificate. *Winkler v. Higgins*, 9 Ohio St. 599.

The official seal must be used; a private seal or scrawl will not answer. *Mason v. Brock*, 12 Ill. 273; s. c., 52 Am. Dec. 490; *Skinner v. Fulton*, 39 Ill. 484; *Dunn v. Adams*, 1 Ala. 527.

Unless permitted by statute. *Fogarty v. Sawyer*, 23 Cal. 570.

The courts are bound to take judicial notice of the seal of a commissioner appointed by the governor to take acknowledgments in another State. *Smith v. Van Gilder*, 26 Ark. 527; *Irving v. Brownell*, 11 Gilm. (Va.) 402.

Courts take notice of the seals of notaries public. *Yeaton v. Fry*, 5 Cranch (U. S.), 535; *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173; *Porter v. Judson*, 1 Gray (Mass.), 175; *Stoddard v. Sloan*, 65 Iowa, 680.

The record of a deed, acknowledged before a notary in this State, but not authenticated with his notarial seal, cannot be received in evidence. *Meskimen v. Day*, 35 Kan. 46.

The absence from a notary's seal of the emblems and devices required by the statute does not invalidate his certificate of the acknowledgment of a deed. *Sonfield v. Thompson*, 42 Ark. 46.

The omission of the word "seal" between "and" and "of office" is not a fatal defect. *Nichols v. Stewart*, 15 Tex. 226.

seal is required by statute, or a special form of seal prescribed, then the omission to affix a seal, or the use of such one as the officer may select, will not invalidate the certificate.<sup>1</sup>

Only purchasers for value can take advantage of a defective acknowledgment.<sup>2</sup> If the property has passed into the possession of a *bona-fide* purchaser without notice, or is in the possession of an innocent grantee, the certificate is conclusive,<sup>3</sup> and parol evi-

In *Webb v. Huff*, 61 Tex. 677, the court said: "But it is objected that the notary did not add the words 'Given under my hand and seal of office,' etc. These venerable words ought, no doubt, to be used by all notaries, especially as they have been adopted into the form given by the statute; but we do not think that their presence or their absence will affect the validity of the instrument. When the notary has appended his official signature and seal to the certificate, the seal gives authority to the document as well as to the signature. And it will add no weight whatever for him to append the words 'this is my seal,' 'this is my signature,' or any equivalent words."

1. *Davis v. Roosevelt*, 53 Tex. 305; *Collins v. Boyd*, 5 Dana (Ky.), 316; *Thompson v. Robertson*, 9 B. Mon. (Ky.) 383; *Harrison v. Simmons*, 55 Ala. 510; *Powers v. Bryant*, 7 Port. (Ala.) 9; *Jacques v. Weeks*, 7 Watts (Pa.), 261; *Farnum v. Buffum*, 4 Cush. (Mass.) 260; *Fund Com'rs v. Glass*, 17 Ohio, 542; *Irving v. Brownell*, 11 Ill. 402; *Cole v. Wright*, 70 Ind. 179; *Ingoldsbys v. Quan*, 12 Cal. 564; *Thompson v. Morgan*, 6 Minn. 202.

The official seal of which the courts will take notice—in the absence of statutory regulation—consists in an impression on wax or wafer affixed to the instrument, or upon the substance of the paper; and not in any particular words identifying the person of the officer. *Phillips, In re*, 14 Bankr. Reg. 219.

2. *Martin v. Halley*, 61 Mo. 196; *Bishop v. Schneider*, 46 Mo. 472; *Cho-teau v. Burlands*, 20 Mo. 482.

3. *Fitzgerald v. Fitzgerald*, 100 Ill. 385; *Kerr v. Russell*, 69 Ill. 666; s. c., 18 Am. Rep. 634; *Lickmon v. Harding*, 65 Ill. 505; *Board v. Davieson*, 65 Ill. 124; *Calumet, etc., Co. v. Russell*, 68 Ill. 426; *Marston v. Brittenham*, 76 Ill. 611; *Baldwin v. Snowden*, 11 Ohio St. 203; *McHenry v. Day*, 13 Iowa, 445; *De Arnaz v. Escandon*, 59 Cal. 486; *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442; s. c., 24 Am. Rep. 204; *Miller v. Wentworth*, 82 Pa. St. 280; *Heeter v. Glasgow*, 79 Pa. St. 79; s. c., 21 Am. Rep. 46; *Williams v.*

*Baker*, 71 Pa. St. 476; *Hall v. Patterson*, 51 Pa. St. 289; *Hayden v. Wescott*, 11 Conn. 129; *Elwood v. Klock*, 13 Barb. (N. Y.) 55; *Ridgely v. Howard*, 3 H. & McH. (Md.) 321; *Harkins v. Forsyth*, 11 Leigh (Va.), 29; *Johnson v. Wallace*, 53 Miss. 331; s. c., 24 Am. Rep. 699; *Shivers v. Simmons*, 54 Miss. 520; *Robinson v. Noel*, 49 Miss. 253; *Stone v. Montgomery*, 35 Miss. 83; *Willis v. Gatman*, 53 Miss. 731; *Shields v. Netherland*, 5 Lea (Tenn.), 193; *Harpending v. Wylie*, 14 Bush (Ky.), 380; *Cahall v. Citizens, etc., Assoc.*, 61 Ala. 232; *Walter v. Weaver*, 57 Tex. 569; *Kocurek v. Marak*, 54 Tex. 201; s. c., 38 Am. Rep. 623; *Davis v. Kennedy*, 58 Tex. 516; *Hartley v. Frosh*, 6 Tex. 208; *O'Farrell v. Simplot*, 4 Iowa, 396; *Stillwell v. Adams*, 29 Ark. 346; *Holt v. Moore*, 37 Ark. 145; *Elliott v. Piersol*, 1 Pet. (U. S.) 338; *Paxton v. Marshall*, 18 Fed. Repr. 361. Compare *Bridge v. Hare*, 98 Pa. St. 561.

Where the wife claimed that the interpreter did not correctly explain the contents of the deed to her, but said that it was a mortgage, *held*, that the certificate was conclusive of the facts recited. *De Arnaz v. Escandon*, 59 Cal. 486. Or that her signature was forged. *Kerr v. Russell*, 69 Ill. 666; s. c., 18 Am. Rep. 634. See *Lickman v. Harding*, 65 Ill. 505; *Johnson v. Van Velsor*, 43 Mich. 208.

To impeach the certificate of the acknowledgment of a deed, the proof must show a conspiracy between the officer taking the acknowledgment and the grantee, or that the officer practised imposition or fraud upon the grantor, and the testimony of the grantor alone is not sufficient to overcome the certificate and the officer's testimony in support of the same. *Fitzgerald v. Fitzgerald*, 100 Ill. 385. See *Warrick v. Hull*, 102 Ill. 280; *Worrall v. McDonald*, 66 Ala. 572; *Grotenkemper v. Carver*, 10 Lea (Tenn.), 280.

It may be regarded as well settled that except in such cases of fraud and collusion which are brought home to some party claiming under the deed, if the certificate is regular and complete, as in this case, no parol evidence will be received to contradict the facts set forth

dence cannot be introduced to impeach it, provided it is not defective upon its face.

5. **Corporation.**—The certificate should state the position of the officer affixing the corporate seal, his authority, that he knows the corporate seal, and that the same is affixed to the conveyance by order of the board of directors, or other trustees of the corporation, and that he subscribed his name thereto as a witness of the execution thereof.<sup>2</sup> In the absence of statutory provision, the

on the face of the certificate; and, on the other hand, if the certificate fails to state any essential fact, the existence of it cannot be proven by parol; her acknowledgment cannot rest partly in parol and partly in writing—it must all be in writing. *Ennor v. Thompson*, 46 Ill. 215; *Ridgely v. Howard*, 3 H. & McH. (Md.) 321; *Lickman v. Harding*, 65 Ill. 505; *Kerr v. Russell*, 69 Ill. 666; *Montgomery v. Hobson*, Meigs (Tenn.), 437; *Westbrooks v. Jeffers*, 33 Tex. 86; *Hays v. Hays*, 5 Rich. (S. Car.) 31; *Williams v. Baker*, 71 Pa. St. 476; *Barnett v. Barnett*, 15 Serg. & R. (Pa.) 72; *Rollins v. Menager*, 22 W. Va. 461.

A certificate is not successfully impeached by the testimony of the husband and wife that the husband remained in the clerk's office while the privy examination was taken, the husband stating that he does not remember whether he was out of hearing or not, and the wife being silent on this point, and saying that she signed the deed and acknowledged it. *Grottenkemper v. Carver*, 10 Lea (Tenn.), 280. See *Miller v. Marx*, 55 Ala. 322; *Smith v. McGuire*, 67 Ala. 34; *Kerr v. Russell*, 69 Ill. 666; s. c., 18 Am. Rep. 634. Or by the uncorroborated testimony of the wife. *Knowles v. Knowles*, 86 Ill. 1; *McPherson v. Sanborn*, 88 Ill. 150; *Biggers v. St. Louis*, etc., Co., 9 Mo. App. 210; *Smith v. Allis*, 52 Wis. 337; *Johnson v. Van Velsor*, 43 Mich. 208; *Hourtienne v. Schnoor*, 33 Mich. 274; *Allen v. Lenoir*, 53 Miss. 324; *Ins. Co. v. Nelson*, 103 U. S. 544.

1. *Watson v. Bailey*, 1 Binn. (Pa.) 470; s. c., 2 Am. Dec. 462; *Jourdan v. Jourdan*, 9 S. & R. (Pa.) 268; *Barnet v. Barnet*, 15 S. & R. (Pa.) 72; *Leftwich v. Neal*, 7 W. Va. 569; *Ennor v. Thompson*, 46 Ill. 214; *Harty v. Ladd*, 3 Oregon, 353; *Pool v. Chase*, 46 Tex. 207; *Coal Creek Co. v. Heck*, 15 Lea (Tenn.), 497; *Pribble v. Hall*, 13 Bush (Ky.), 161; *Paxton v. Marshall*, 18 Fed. Repr. 361.

The grantee in a mere quit-claim deed cannot be regarded as an innocent purchaser without notice of the rights of a prior purchaser from the same grantor by a deed defectively acknowledged. *Watson*

*v. Phelps*, 40 Iowa, 482; *Springer v. Bartle*, 46 Iowa, 688; *Fogg v. Holcomb*, 64 Iowa, 621.

2. *Lovett v. Steam Saw-mill Assoc.*, 6 Paige, Ch. (N. Y.) 60.

A conveyance of property by a corporation may be executed like a conveyance by an individual, through any agent having authority to represent the company for that purpose. It has been held that a statutory provision that it "shall be lawful for any corporation to convey lands by deed of bargain and sale, sealed with the common seal of said corporation, and signed by the president or presiding member or trustee, and two other members of the corporation, and attested by a witness" did not prohibit other methods of execution by authorized agents. *Morawetz on Corp.* (2d ed.), § 335; citing *Bason v. Mining Co.*, 90 N. Car. 417; *Morris v. Keil*, 20 Minn. 531.

In the absence of statutory provisions, the only formalities necessary to the valid execution of a deed by a corporation are sealing with the corporate seal and delivery. It is usual to sign the corporate name. *Ang. & Ames Corp.* § 225; *Flint v. Clinton Co.*, 12 N. H. 430.

But it is not necessary that the corporate name should be signed. *Ang. & Ames Corp.* § 225; *Osborne v. Tunis*, 1 Dutch. (N. J.) 633; *Cooch v. Goodman*, 2 Q. B. 580. Except where it is required by statute. *Isham v. Bennington Iron Co.*, 19 Vt. 251.

At common law, the signature of the corporation is its corporate seal. *City of Tiffin v. Shawhan*, 9 Am. & Eng. Corp. Cas. 556; *Gordon v. Preston*, 1 Watts (Pa.), 385; *Frankfort Bank v. Anderson*, 3 A. K. Marsh (Ky.), 932; *Beckwith v. Windsor Manuf. Co.*, 14 Conn. 594; *Doe v. Hogg*, 4 Bos. & P. 306.

A deed was made of the E. W. L. Co., and signed, "In witness whereof, we hereunto set our hands and seals. A. B., President, etc.; C. D., Treasurer, etc." The acknowledgment was in form, "Personally appearing, A. B and C. D. acknowledged the foregoing instrument to be their free act and deed before me," etc. *Held*, that it was a deed of the cor-

person affixing the corporate seal is the proper person to make the acknowledgment.<sup>1</sup>

**6. Impeachment—Fraud.**—When there is no appearance before an officer, his false certificate of acknowledgment is void; but when there is an appearance and acknowledgment of it in some manner, then the official certificate is conclusive of every fact appearing on its face; and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition, and where knowledge or notice of the fraud or imposition is brought home to the grantee.<sup>2</sup>

poration. *Tenney v. East Warren, etc., Co.*, 43 N. H. 343; see *McDaniels v. Flower, etc., Co.*, 22 Vt. 274.

In *Frostburg Mut. Build. Assoc. v. Brace*, 51 Md. 508, the certificate of the justice stated that the attorney of the corporation appeared and acknowledged the mortgage to be his act and deed, instead of the act and deed of the corporation. *Held*, that the acknowledgment was aided by intendment, and that it should be read and understood as the acknowledgment of the corporation by its attorney, according to what was the manifest intention.

A deed purporting to convey title to land, by a national bank, to which was signed the corporate name, with the bank seal affixed by "John Kerr, Prest.," and "R. P. Aunspaugh, Cashier," had affixed thereto the following certificate of acknowledgment: "This day personally appeared John Kerr, president of said First National Bank of the city of Dallas, and R. P. Aunspaugh, cashier of said bank, both of whom are to me well known, and severally acknowledged that they executed the above and foregoing instrument for the purposes and considerations therein contained" (signed by the officer and authenticated with his seal). *Held*, that the acknowledgment was a sufficient compliance with the statute requiring the president of a corporation, in making a deed, to acknowledge it to be "the act of the corporation." *Muller v. Boom*, 63 Tex. 91; *Monroe v. Arledge*, 23 Tex. 480.

To an assignment for the benefit of creditors executed by a corporation was appended a notary's certificate that M. C., president, and A. M., cashier, of the corporation, "acknowledged that they executed and delivered the same as their voluntary act and deed, for the uses and purposes therein contained." *Held*, that this was a sufficient certificate that the corporation acknowledged the instrument. *Eppricht v. Nickerson*, 78 Mo. 483.

By § 1745 Rev. Stat. of Ohio, the Mayor is intrusted with the custody and

use of the corporate seal; this being so, and the proper mode of executing a deed of land owned by the corporation being by affixing the seal of the corporation, *quære*, can the corporation empower the City Clerk to make a valid deed of corporate real property? *Tiffin v. Shawhan*, 43 Ohio, St. 178; s. c., 9 Am. & Eng. Corp. Cas. 556.

1. *Kelly v. Calhoun*, 95 U. S. 710.

2. *Meyer v. Gossett*, 38 Ark. 377; *Halt v. Moore*, 37 Ark. 148; *Johnson v. Wallace*, 53 Miss. 331; *Stone v. Montgomery*, 35 Miss. 83; *Hester v. Glasgow*, 79 Pa. St. 79; s. c., 21 Am. Rep. 461; *Singer Manuf. Co. v. Rook*, 84 Pa. St. 442; s. c., 24 Am. Rep. 204; *Michener v. Cavender*, 38 Pa. St. 337; *Williams v. Baker*, 71 Pa. St. 482; *Mays v. Hedges*, 79 Ind. 288; *Hartley v. Frost*, 6 Tex. 208; *Davis v. Kennedy*, 58 Tex. 516; *Baldwin v. Snowden*, 11 Ohio St. 203; *Marsh v. Mitchell*, 26 N. J. Eq. 497; *White v. Graves*, 107 Mass. 325; *Kerr v. Russell*, 69 Ill. 666; *Eyster v. Hathaway*, 50 Ill. 522; *Rollins v. Menager*, 22 W. Va. 461; *Worrell v. McDonald*, 66 Ala. 572; *Coleman v. Smith*, 55 Ala. 368; *Shields v. Netherlands*, 5 Lea (Tenn.), 193; *De Arnaz v. Escandon*, 59 Cal. 486; *Bissett v. Bissett*, 1 H. & McH. (Md.) 211; *Borland v. Walrath*, 33 Iowa, 133; *Hourtienne v. Schnoor*, 33 Mich. 274; *Smith v. Allis*, 52 Wis. 337; *Ins. Co. v. Nelson*, 103 U. S. 544. Compare *Bridge v. Hare*, 98 Pa. St. 561.

The following cases hold that the certificate is *prima-facie* evidence of the facts recited and of its own validity: *Jackson v. Hoyner*, 12 Johns. (N. Y.) 472; *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 161; *Hall v. Patterson*, 51 Pa. St. 289; *Borland v. Walrath*, 33 Iowa, 130; *Edgerton v. Jones*, 10 Minn. 429; *Annan v. Folsom*, 6 Minn. 500; *Dodge v. Hollinshead*, 6 Minn. 25; *Landers v. Bolton*, 26 Cal. 406; *Young v. Duvall*, 100 U. S. 573; *Belo v. Mayes*, 79 Mo. 67; *Wannell v. Kern*, 57 Mo. 480; *Steffern v. Bauer*, 70 Mo. 399; *Sharpe v. McPike*, 63 Mo. 300;

**7. Validating Statutes.**—A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden. Of this class

Clark *v.* Edwards, 75 Mo. 87; Webb *v.* Webb, 87 Mo. 540.

As the certificate forms part of the deed, is essential to its validity, and purchasers are invited to look to and rely upon it, the evidence impeaching it ought to be clear, convincing, and conclusive, reaching a high degree of certainty, leaving upon the mind no fair, just doubts. Smith *v.* McGuire, 67 Ala. 34; Tett *v.* Rogers, 12 Bush (Ky.), 564; Hughes *v.* Colman, 10 Bush (Ky.), 246; Kavanaugh *v.* Day, 10 R. I. 393; Russell *v.* Baptist, etc., Sem., 73 Ill. 337; Kerr *v.* Russell, 69 Ill. 666; Riecke *v.* Westenhoff, 10 Mo. App. 358; Smith *v.* Allis, 52 Wis. 337; Insurance Co. *v.* Nelson, 103 U. S. 544.

A married woman may show against all the world that she never made any acknowledgment at all of the execution of a deed, and that the certificate of acknowledgment is a forgery or entire fabrication of the officer; but if she actually made some kind of acknowledgment before an officer qualified to take it, his certificate will be conclusive as to the terms of the acknowledgment and the concomitant circumstances, in favor of all persons who, themselves innocent of fraud or of collusion to deceive or influence her, have taken the instrument on faith of the certificate. Donahue *v.* Mills, 41 Ark. 421.

Where a mortgage, or other conveyance, is duly acknowledged before a proper officer, and the requisite certificate of acknowledgment is affixed in the form prescribed by statute, this circumstance constitutes such cogent proof of a free agency and absence of restraint as to be perfectly conclusive, unless rebutted by clear proof of fraud or imposition practised on the grantor, in which the officer or the mortgagee participated. Downing *v.* Blair, 75 Ala. 216; Miller *v.* Marx, 55 Ala. 322; Moog *v.* Strang, 69 Ala. 98; Johnston *v.* Wallace, 53 Miss. 331; s. c., 24 Am. Rep. 699.

A certificate of acknowledgment to a deed, made by the officer merely on the assurance of another that the party executed it, is a nullity. Mays *v.* Hedges, 79 Ind. 288.

It may be shown that the officer had not jurisdiction. Scott *v.* Gallagher, 11 Serg. & R. (Pa.) 347. Or that he did have jurisdiction, although the certificate, by

clerical error, stated otherwise. Angier *v.* Schiefflin, 72 Pa. St. 106; s. c., 13 Am. Rep. 659; Bennett *v.* Paine, 7 Watts (Pa.), 334. Or that the court where the acknowledgment was taken was, or was not, a court of record. Pierce *v.* Hakes, 11 Harris (Pa.), 231.

Evidence can be given to show that the grantor, who had executed a deed fifty years before, was *non compos*. Jackson *v.* Schoonmaker, 4 Johns. (N. Y.) 161.

**Separate Acknowledgment of Wife.**—

The wife cannot impeach for fraud the certificate of her acknowledgment to a deed when the same is in conformity to the requisitions of the statutes, and when there is an adequate consideration paid to support the deed, if the purchaser neither participated in the fraud nor had knowledge of its existence. Davis *v.* Kennedy, 58 Tex. 516.

The validity of a deed made by a husband and wife in trust to secure money advanced, on the faith thereof, to the husband, an innocent third person, where the probate is in due form by the proper officers, cannot be impeached upon the ground that the deed and the certificate of privy examination were dated earlier than the date of actual execution, or that the married woman was not unable to appear before the clerk in proper person, or that the commission to take the privy examination was in blank when issued, or that the privy examination was not taken in the most approved mode. The fact that the husband misled the wife as to the nature of the instrument she was called upon by him to sign, and which she executed at his request and without reading it, does not constitute such fraud as will enable her to contradict, by parol, the certificate of acknowledgment and privy examination to a trust deed to secure money loaned to the husband, neither the creditor nor the trustee being present, nor having any reason to suspect the imposition. Shields *v.* Netherlands, 5 Lea (Tenn.), 193.

The unsupported testimony of the wife is insufficient. Knowles *v.* Knowles, 86 Ill. 1; Marston *v.* Brittenham, 76 Ill. 611. See notes, *ante*.

A wife may prove that she was a minor, although the certificate states that she was of age. Williams *v.* Baker, 71 Pa. St. 476.



are the statutes to cure irregularities where a statutory power has failed of due and regular execution through the carelessness of officers, or other cause.<sup>1</sup>

1. *Cooley's Const. Lim.* (4th Ed.) 462, 463. If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law. *Cooley Const. Lim.* (4th Ed.) 463. See 19 Am. Law Rev. 378, 379; 12 Cent. L. J. 2. In *Johnson v. Taylor*, 60 Tex. 360, the court said: "The statute does not attempt to create a right where none before existed, but simply to permit parties to show, if they can, by the judgment of a court, that which, before the statute was enacted, could only be shown by the certificate of the designated officer."

*Webb v. Den*, 17 How. (U. S.) 578; *Watson v. Mercer*, 8 Pet. (U. S.) 88; *Howard v. Moox*, 64 N. Y. 262; *Foster v. Essex Bank*, 16 Mass. 245; *Lycoming v. Union*, 15 Pa. St. 166; *Journey v. Gibson*, 56 Pa. St. 57; *Shonk v. Brown*, 61 Pa. St. 320; *Tate v. Stooltzfoos*, 16 S. & R. (Pa.) 37; s. c., 16 Am. Dec. 546; *Barnett v. Barnett*, 15 S. & R. (Pa.) 72; s. c., 16 Am. Dec. 516; *Underwood v. Lilly*, 10 S. & R. (Pa.) 97; *Watson v. Bailey*, 1 Binn. (Pa.) 476; *Dulany v. Tilghman*, 6 Gill & J. (Md.) 461; *Dengenhart v. Cracraft*, 36 Ohio St. 549; *Chesnut v. Shane*, 16 Ohio St. 599; s. c., 47 Am. Dec. 387; *Gibson v. Hibbard*, 13 Mich. 217; *Logan v. Williams*, 76 Ill. 175; *Maxey v. Wise*, 25 Ind. 1; *Newman v. Samuels*, 17 Iowa, 528; *Blount v. Janesville*, 31 Wis. 648; *Hoskinson v. Adkins*, 77 Mo. 537; *Dentzel v. Waldie*, 30 Cal. 142; *Danville v. Pace*, 25 Gratt. (Va.) 1; *Stroud v. McDaniel*, 12 Lea (Tenn.), 617; *Green v. Abraham*, 43 Ark. 420; *Johnson v. Taylor*, 60 Tex. 360. *Compare Ala. Ins. Co. v. Boykin*, 38 Ala. 510; *Rich v. Flanders*, 39 N. H. 304.

But such laws are unconstitutional so far as they affect vested rights (an examination of the cases cited above will show that they also sustain this rule). *Cooley's Const. Lim.* (4th Ed.) 472; *Green v. Drinker*, 7 W. & S. (Pa.) 440; *Southard*

*v. Cent. R. Co.*, 26 N. J. L. 13; *Grove v. Todd*, 41 Md. 633; s. c., 20 Am. Rep. 76; *Good v. Zercher*, 12 Ohio, 364; *Barton v. Morris*, 15 Ohio, 408; *Logan v. Williams*, 76 Ill. 175; *Russell v. Rumsey*, 35 Ill. 362; *Brinton v. Seevers*, 12 Iowa, 389; *Meighen v. Strong*, 6 Minn. 177; *Thompson v. Morgan*, 6 Minn. 292; *Car-penter v. Dexter*, 8 Wall. (U. S.) 513.

The purchaser of a mortgage is bound to take notice of an act validating acknowledgments. *Journey v. Gibson*, 56 Pa. St. 57.

A statute validating acknowledgments does not apply to tax deeds. *Goody-koontz v. Olsen*, 54 Iowa, 174.

A defective acknowledgment is not cured by a subsequent statute adopting the form used. *Texas Land Co. v. Williams*, 51 Tex. 51.

To make valid the defective acknowledgment of a deed, under an act legalizing the acknowledgment of all deeds which had been duly recorded, etc., it was not necessary that the record should be a literal copy in every respect of the instrument, but it was essential that it should embody every material part of the instrument, and that the language of the instrument should be so nearly copied into the record as that the subject-matter of the instrument could be identified with certainty by the record. *Fogg v. Holcomb*, 64 Iowa, 621.

Where land was conveyed by a deed defectively acknowledged, but duly recorded, and afterwards an act was passed by the legislature legalizing the acknowledgment, but before the passage of such act the grantor conveyed the same land to another, *held*, that, as between the parties, the case was the same as if there had been no acknowledgment certified upon the first deed, but its execution had been proved by parol; and that the second grantee, in the absence of proof that he was an innocent purchaser for value, could not claim title superior to the first grantee. *Fogg v. Holcomb*, 64 Iowa, 621; *Nolan v. Grant*, 53 Iowa, 392.

The act of Arkansas, 1883, to cure defective acknowledgments of deeds, etc., cannot operate in the supreme court in a case decided in the circuit court before its passage. The judgment of the circuit court must be tested by the law as it then existed. *Wright v. Graham*, 42 Ark. 140.

**8. Subsequent Acknowledgment.**—Where the acknowledgment of a deed is fatally defective as to the wife, no title passes, and a subsequent proper acknowledgment, after a conveyance to another party, will not cure the defective acknowledgment.<sup>1</sup> If a wife's acknowledgment is defective, she may make a new acknowledgment, which will relate back where the rights of third parties do not intervene.<sup>2</sup>

**9. Proof by Subscribing Witnesses.**—The statutes of many if not all the States provide for proving the execution of deeds and other instruments intended to be recorded by the oath of a subscribing witness or witnesses, or, when the witnesses cannot be had, by proof of the handwriting of the grantor and witnesses, which shall have the same effect as an acknowledgment. But the practice is very seldom resorted to. A defect in, or want of, an acknowledgment may frequently be cured in this way. But where a married woman is required to be examined by the officer, she must, in general, be present and acknowledge the instrument.<sup>3</sup>

**10. Married Women.**—At common law a married woman could not convey land by deed.<sup>4</sup> The statutes which exist in the several

1. *Durfee v. Garvey*, 65 Cal. 406; *Enterprise T. Co. v. Sheedy*, 103 Pa. St. 492.

2. *Cohall v. Mutual, etc., Assoc.*, 61 Ala. 232.

3. *Martindale on Conveyancing*, § 266. See *Wood v. Harrow*, 11 Johns. (N. Y.) 434; *Parker v. Phillips*, 9 Cow. (N. Y.) 94; *Jackson v. Vickory*, 1 Wend. (N. Y.) 406; *Johnson v. Prewitt*, 32 Mo. 553; *Simpson v. Simpson*, 93 N. Car. 373; *Davis v. Higgins*, 91 N. Car. 382.

When a deed has been duly acknowledged, although there appears to have been a subscribing witness, it is not necessary to call him for the purpose of proving its execution. *Simmons v. Havens*, 101 N. Y. 427.

Art. 5008 Pasch. Dig. (Tex.) provides for that purpose as follows: "The proof of any instrument of writing for the purpose of being recorded shall be by one or more of the subscribing witnesses personally appearing before some officer authorized to take such proof, and stating, on oath, that he or they saw the grantor or person who executed such instrument subscribe the same; or that the grantor or person who executed such instrument of writing acknowledged in his or their presence that he had subscribed and executed the same for the purposes and consideration therein stated; and that he or they had signed the same as witnesses at the request of the grantor or person who executed such instrument; and the officer taking such proof shall make a certificate thereof, sign and seal the same with his official seal." *Held*,

that the absence of the names of the witnesses in the certificate invalidated it. *McDaniel v. Needham*, 61 Tex. 269.

4. 2 Black. Com. 291, 292; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9; s. c., 21 Am. Dec. 245; *Davis v. Andrews*, 30 Vt. 681; *Pratt v. Battles*, 28 Vt. 685; *Concord Bank v. Bellis*, 10 Cush. (Mass.) 277; *Lowell v. Daniels*, 2 Gray (Mass.), 161; *Dow v. Jewell*, 18 N. H. 340; *Thayer v. Torrey*, 37 N. J. L. 339; *Perrine v. Perrine*, 3 Stock. (N. J.) 144; *Johns v. Reardon*, 11 Md. 465; *Young v. State*, 7 G. & J. (Md.) 253; *Lindley v. Smith*, 46 Ill. 523; *Hughes v. Lane*, 11 Ill. 123; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Russell v. Rumsey*, 35 Ill. 362; *Stuart v. Dutton*, 39 Ill. 91; *Baxter v. Bodkin*, 25 Ind. 172; *Owen v. Norris*, 5 Blackf. (Ind.) 479; *Dewey v. Campau*, 4 Mich. 565; *Pribble v. Hall*, 13 Bush (Ky.), 61; *Cope v. Meeks*, 3 Head (Tenn.), 388; *Laird v. Scott*, 5 Heisk. (Tenn.) 314; *Harston v. Doe*, 12 Leigh (Va.), 445; *Grove v. Zumbro*, 14 Gratt. (Va.) 501; *Lefevre v. Murdock*, *Wright* (Ohio), 205; *Ward v. McIntosh*, 12 Ohio St. 231; *Good v. Zercher*, 12 Ohio St. 364; *Degenhart v. Cracraft*, 36 Ohio St. 549; *Koltenbrock v. Cracraft*, 36 Ohio St. 584; *Tubbs v. Gatewood*, 26 Ark. 128; *Little v. Dodge*, 32 Ark. 453; *Landers v. Bolton*, 26 Cal. 408; *Ewald v. Corbett*, 32 Cal. 493; *Goode v. Smith*, 13 Cal. 81; *Chauvin v. Wagner*, 18 Mo. 531; *Wamsell v. Kem*, 57 Mo. 478; *Steffen v. Bauer*, 70 Mo. 399; *Bartlett v. O'Donohue*, 72 Mo. 563; *Goff v. Roberts*, 72 Mo. 570; *Bernard v. Elder*, 50 Miss. 336;

States authorizing conveyance of land by married women carefully regulate the manner of taking and forms of acknowledgment; and such statutes must, either strictly or in effect, substantially be followed.<sup>1</sup>

*Allen v. Lenoir*, 53 Miss. 321; *Hathaway v. Davenport*, 2 Jones L. (N. Car.) 152.

1. *Mason v. Brock*, 12 Ill. 273; s. c., 52 Am. Dec. 490; *Livingston v. Kettelle*, 1 Gilm. (Ill.) 116; s. c., 41 Am. Dec. 166; *Hughes v. Lane*, 11 Ill. 123; s. c., 50 Am. Dec. 434; *Calumet, etc., Co. v. Russell*, 68 Ill. 426; *Coleman v. Billings*, 89 Ill. 183; *Shroder v. Keller*, 84 Ill. 46; *Chesnut v. Shane*, 16 Ohio, 599; s. c., 49 Am. Dec. 387; *Purcell v. Goshorn*, 17 Ohio, 105; s. c., 49 Am. Dec. 448; *Carr v. Williams*, 10 Ohio, 305; s. c., 36 Am. Dec. 87; *Degenhart v. Cracraft*, 36 Ohio St. 549; *Scott v. Purcell*, 7 Blackf. (Ind.) 66; s. c., 39 Am. Dec. 453; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Goode v. Smith*, 13 Cal. 81; *Landers v. Bolton*, 26 Cal. 439; *Ewald v. Corbett*, 32 Cal. 493; *Leonis v. Lazzarovich*, 55 Cal. 52; *Muir v. Gallo-way*, 61 Cal. 498; *Chauvin v. Wagner*, 18 Mo. 531; *Wamsell v. Kem*, 57 Mo. 478; *Tubbs v. Gatewood*, 26 Ark. 128; *Little v. Dodge*, 32 Ark. 453; *Wentworth v. Clark*, 33 Ark. 432; *Shryock v. Cannon*, 39 Ark. 434; *Belcher v. Weaver*, 46 Tex. 293; s. c., 26 Am. Rep. 267; *Looney v. Adamson*, 48 Tex. 619; *Jourdan v. Jourdan*, 9 S. & R. (Pa.) 268; s. c., 11 Am. Dec. 730; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9; s. c., 21 Am. Dec. 245; *Mer-iam v. Harsen*, 2 Barb. Ch. (N. Y.) 232; *Den v. Geiger*, 9 N. J. L. 225; *Thayer v. Torrey*, 37 N. J. L. 339; *Young v. State*, 7 Gill & J. (Md.) 253; *Grave v. Todd*, 41 Md. 633; s. c., 20 Am. Rep. 76; *Harston v. Doe*, 12 Leigh (Va.) 445; *Langhorn v. Hobson*, 4 Leigh (Va.) 224; *Grove v. Zumbro*, 14 Gratt. (Va.) 501; *Den v. Lewis*, 8 Ired. (N. Car.) 70; s. c., 47 Am. Dec. 338; *Kottman v. Ayer*, 1 Strob. (S. Car.) 552; *James v. Fisk*, 9 S. & M. (Miss.) 144; s. c., 47 Am. Dec. 111; *Bernard v. Elder*, 50 Miss. 336; *Allen v. Lenoir*, 53 Miss. 321; *Henderson v. Rice*, 1 Cald. (Tenn.) 224; *Laird v. Scott*, 5 Heisk. (Tenn.) 314; *Gregory v. Ford*, 5 B. Mon. (Ky.) 471; *Nantz v. Bailey*, 3 Dana (Ky.), 111; *Martin v. Davidson*, 3 Bush (Ky.), 572; *Pribble v. Hall*, 13 Bush (Ky.), 61.

**Arkansas.**—Since the adoption of the Arkansas constitution of 1874, no acknowledgment by a married woman of her deed of conveyance of her separate property is necessary. *Donohue v. Mills*, 41 Ark. 421.

**Illinois.**—The act of March 27, 1869,

provides that any *feme covert*, being above the age of eighteen years, joining with her husband in the execution of any deed, mortgage, conveyance, power of attorney, or other writing of or relating to the sale, conveyance, or other disposition of lands or real estate, should be bound and concluded by the same, in respect to her right, title, claim, interest, or dower in such estate, as if she were sole and of full age; and the acknowledgment or proof of such deed, mortgage, conveyance, power of attorney, or other writing might be the same as if she were sole. Of this act this court, in *Hogan v. Hogan*, 89 Ill. 431, said: "This statutory enactment worked a marked change in the law. Thereafter the acknowledgment ceased to be the effective means to work the transfer of title. The certificate of her acknowledgment might thenceforth have been the same as that required in the case of a *feme sole*; and without any acknowledgment whatever, proof of her execution of a conveyance might have been made as at common law. So, also, from that time forth, her contract in writing, made jointly with her husband, for the disposition of her lands, became binding upon her, and might have been enforced in a court of chancery, and she compelled to a specific performance of the same." And so, too, for the same reason, the deed of a married woman may be reformed the same as one of a woman unmarried. *Knox v. Brady*, 74 Ill. 476; *Edwards v. Schoeneman*, 104 Ill. 278; *Bradshaw v. Atkins*, 110 Ill. 323.

The certificate of acknowledgment of a married woman to a conveyance which omits "and for the purposes therein expressed" is defective, and vitiates the validity of the conveyance. *Currie v. Kerr*, 11 Lea (Tenn.), 138.

Though the statute must be complied with in order to pass title to a married woman's separate property, it does not necessarily follow that an instrument willingly executed by her, and actually acknowledged as required by law, is absolutely void, simply because of the officer's failure to make the proper certificate which the facts authorized, and which the law required him to make. *Johnson v. Taylor*, 60 Tex. 360.

The acknowledgment of a married woman of the execution of a deed conveying her separate property which ac-

The certificate is an essential part of the due execution of a deed by which the real estate of a married woman is to be transferred. It cannot be aided by parol proof,<sup>1</sup> or corrected in equity;<sup>2</sup> it is *prima-facie* evidence that the statute has been complied with,<sup>3</sup> and, except as against *bona-fide* purchasers,<sup>4</sup> it may be impeached for fraud.<sup>5</sup>

Where the statute requires an examination of the wife apart from her husband, the failure to do so, and have such examination appear in the certificate substantially as the statute prescribes, is

knowledge states that she made herself a party to the deed "for the purpose of relinquishing her right of dower" in the lands described, she having no right of dower, present or prospective, but an estate in fee, must be considered and construed to be an acknowledgment of the due execution according to the import of the language of the deed. *Evans v. Summerlin*, 19 Fla. 858.

In a deed by husband and wife, conveying land patented to the husband, as assignee of a certificate, it is not necessary, as against one not a stranger to the title, that the separate acknowledgment of the wife should be in accordance with the statute regulating conveyances of her separate estate, there being nothing to show that the wife really owned the land in her own separate right. *Tom v. Sayers*, 64 Tex. 339.

1. *Jourdan v. Jourdan*, 9 Serg. & R. (Pa.) 268; s. c., 11 Am. Dec. 724; *Robinson v. Noel*, 49 Miss. 253; *Willis v. Gattman*, 53 Miss. 721; *Leftwich v. Neal*, 7 W. Va. 569; *First Nat. Bank v. Paul*, 75 Va. 594; s. c., 40 Am. Rep. 740; *Harty v. Ladd*, 3 Oregon. 353; *Pendleton v. Buitton*, 3 Conn. 406; *Hayden v. Westcott*, 11 Conn. 129; *Martin v. Hargardine*, 46 Ill. 322; *Graham v. Anderson*, 42 Ill. 514; *O'Terrall v. Simplot*, 4 Iowa, 381; *Smith v. Hunt*, 13 Ohio, 260; s. c., 42 Am. Dec. 201; *Gray v. Ulrich*, 8 Kan. 112. See *Elliott v. Piersol*, 1 McLean (U. S.), 11; s. c., 1 Peters (U. S.), 328.

In such a case, the *feme covert* will not be permitted by parol evidence to contradict the facts set out in the certificate of her privy examination, acknowledgment, and declaration, so as to avoid the effect of the deed of trust, unless she first establish by parol evidence, satisfactorily, that with the concurrence of those claiming under the deed of trust, the married woman has been defrauded or imposed upon by the pretended privy examination, acknowledgment, and declaration. *Rollins v. Menager*, 22 W. Va. 461.

2. *Barnett v. Shackelford*, 6 J. J. Marsh (Ky.), 532; s. c., 22 Am. Dec. 100;

*Campbell v. Taul*, 3 Yerg. (Tenn.) 548; *Shields v. Netherlands*, 5 Lea (Tenn.), 103; *Shields v. Netherlands*, 5 Lea (Tenn.), 194; *Barrett v. Tewsbury*, 9 Cal. 13; *Gebb v. Rose*, 40 Md. 387; *Grove v. Todd*, 41 Md. 633; *Sillman v. Cummins*, 13 Ohio, 116; *Kotenbrock v. Cracraft*, 36 Ohio St. 584; *Grapengather v. Fejervary*, 9 Iowa, 163; *Wannell v. Kern*, 51 Mo. 150; *Russell v. Rumsey*, 35 Ill. 362; *Lindley v. Smith*, 58 Ill. 250; *Dickinson v. Glenn*, 27 Conn. 104; *Lane v. McKeen*, 15 Me. 304; *Townley v. Chapin*, 12 Allen (Mass.), 476; *Jewett v. Davis*, 10 Allen (Mass.), 68; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9; *Drury v. Foster*, 2 Wall. (U. S.) 24.

Although a married woman cannot be compelled to execute the acknowledgment, yet a court of equity will enforce her contract. *Burns v. McGregor*, 90 N. Car. 222. Compare *Williams v. Baker*, 71 Pa. St. 476. See CERTIFICATE, *post*, p. 170.

The certificate to the deed of a married woman may be amended by supplying the omitted words, under section 2082 of the Code, and will relate to the execution of the deed as between the vendor and vendee, but not to the prejudice of intervening creditors or *bona-fide* purchasers. *Stroud v. McDaniel*, 12 Lea (Tenn.), 617.

3. *Young v. Duvall*, 109 U. S. 573; *Marsh v. Mitchell*, 26 N. J. L. 497; *De Arnaz v. Escandon*, 59 Cal. 486, and cases cited, *ante*, p. 147, note 2.

4. See cases cited, *ante*, p. 158, note 3.

5. See FRAUDS, *ante*, p. 160.

There must be some allegation of fraud, or imposition practised toward the wife,—some fraudulent combination between the parties interested and the officer taking the acknowledgment. *Worrell v. McDonald*, 66 Ala. 572.

See *White v. Graves*, 107 Mass. 325; s. c., 9 Am. Rep. 38; *Singer Manuf. Co. v. Rook*, 84 Pa. St. 442; s. c., 24 Am. Rep. 204; *Kerr v. Russell*, 69 Ill. 666; s. c., 18 Am. Rep. 634; *Johnson v. Wallace*, 53 Miss. 331; s. c., 24 Am. Rep. 699

pear that she "does not wish to retract;"<sup>1</sup> or that she willingly executes the deed;<sup>2</sup> or that she freely acts without any du-

*Moorman v. Board*, 11 Bush (Ky.), 135; *Pease v. Barbiers*, 10 Cal. 436; *Hutchinson v. Ainsworth*, 63 Cal. 286.

The words "and the deed being read to her" are not substantially the same as the words "being fully explained to her." *Watson v. Michael*, 21 W. Va. 568.

Where it appears to the court, or officer taking the acknowledgment of a married woman to a deed, that she is acquainted with its contents, and that they are familiarly known to her, he would be justified in certifying that she was made acquainted with the contents, and the design of the law would be accomplished, although the officer imparted no information to her. *Drew v. Arnold*, 85 Mo. 126.

But it may be remarked that a private explanation of the contents of the deed is not required by the Missouri statute. *Belo v. Mayes*, 79 Mo. 67; *Webb v. Webb*, 87 Mo. 510; *Ray v. Crouch*, 10 Mo. App. 321. Compare *Steffen v. Bauer*, 70 Mo. 399.

The phrase "she fully understood the contents of said deed" held not equivalent to "having the same fully explained to her." *Langton v. Marshall*, 59 Tex. 296.

Husband and wife sign deed conveying her inheritance in land, but the certificate of her acknowledgment fails to state that "the deed was explained to the wife." The husband died in 1865; the wife in 1870. In ejectment by the wife's heirs to recover the land, held, the deed was insufficient to pass the wife's interest, and her heirs are entitled to recover. The certificate must show that she knew what she was doing, did it willingly, and does not wish to retract, and substantially comply with the terms of the law in every particular. *Bolling v. Teel*, 76 Va. 487.

Where the married woman did not speak English, and the deed was explained to her by the officer through an interpreter of her own selection, she cannot be heard to say that he was incompetent or corrupt, or failed to interpret correctly. The proper practice in such cases is for the interpreter to be sworn. *Walter v. Weaver*, 57 Tex. 569.

Where the certificate states that she was made acquainted with the contents of the instrument, without stating that this was done by the certifying officer or any particular person held, a valid acknowledgment. *Jansen v. McCahill*, 22

Cal. 563. See *Kavanagh v. Day*, 10 R. I. 393; *Thomas v. Meier*, 18 Mo. 573; *Gregory v. Ford*, 5 B. Mon. (Ky.) 471; *Martin v. Davidson*, 3 Bush (Ky.), 572; *Tourville v. Pierson*, 39 Ill. 446.

The Ohio statute of 1831 required the officer to read or otherwise make known to the wife the contents of the deed; but it was held that the officer was not required to certify that he had done so. *Card v. Patterson*, 5 Ohio St. 319; *Chestnut v. Shane*, 16 Ohio, 599; *S. P. Stevens v. Doe*, 6 Blackf. (Ind.) 475; *Gregory v. Ford*, 5 B. Mon. (Ky.) 471; *Coleman v. Billings*, 89 Ill. 183.

An acknowledgment of a married woman who was certified to be deaf and dumb, that the nature of the transaction was duly explained to her by signs, and that she had in like manner signified her assent, was allowed by the court. *In re Harper*, 6 M. & G. 732; 7 Scott, N. R. 431.

1. *Linn v. Patton*, 10 W. Va. 187; *Bateman's Petition*, 11 R. I. 585; *McMullin v. Eagan*, 21 W. Va. 233; *Grove v. Zumbro*, 14 Gratt. (Va.) 501; *Belcher v. Weaver*, 46 Tex. 293; s. c., 26 Am. Rep. 267; *Ruleman v. Pritchett*, 56 Tex. 482; *Le Bourgeoise v. McNamara*, 5 Mo. App. 576; *Landers v. Bolton*, 26 Cal. 548.

The word "contract" held equivalent to "retract," 46 Tex. 293; s. c., 26 Am. Rep. 267.

In Ohio the omission of the words "that she is still satisfied therewith" held a fatal defect. *Ward v. McIntosh*, 12 Ohio St. 231. To same effect as regards the words "and does not wish to retract," *Hughes v. Lane*, 11 Ill. 123; *Chauvin v. Wagner*, 13 Mo. 531.

2. *Pratt v. Battels*, 28 Vt. 685; *Dennis v. Tarpenny*, 20 Barb. (N. Y.) 371; *Garrett v. Moss*, 22 Ill. 363; *McMullin v. Eagan*, 21 W. Va. 233; *Leftwich v. Neal*, 7 W. Va. 569; *Bartlett v. Fleming*, 3 W. Va. 163; *Bagby v. Emberson*, 79 Mo. 139; *Louden v. Blythe*, 27 Pa. St. 22; *Bateman's Petition*, 11 R. I. 585; *Henderson v. Rice*, 1 Coldw. (Tenn.) 223; *Laird v. Scott*, 5 Heisk. (Tenn.) 314; *Wright v. Duffield*, 2 Baxt. (Tenn.) 218; *Blackburn v. Pennington*, 8 B. Mon. (Ky.) 217; *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *Tubbs v. Gatewood*, 26 Ark. 128; *Stillwell v. Adams*, 29 Ark. 346; *Chaffe v. Oliver*, 39 Ark. 531; *Little v. Dodge*, 32 Ark. 453; *Bernard v. Elder*, 50 Miss. 336; *Jones v. Lewis*, 8 Ired. L. (N. Car.) 70; *Belcher v. Weaver*, 46 Tex. 293; s. c., 26 Am. Rep. 267.

ress.<sup>1</sup> Where the statute requires an express relinquishment of dower, the omission to so insert it is a fatal defect.<sup>2</sup>

11. Divorce—Abandonment.—A woman who has been divorced *a vinculo* is a *feme sole* and may make a conveyance of her property.<sup>3</sup> Where a husband has abandoned his wife, and a pre-

The word "understandingly" is equivalent to "freely" and "voluntarily." *Anderson v. Bewley*, 11 Heisk. (Tenn.) 29; *Moorman v. Board*, etc., 11 Bush (Ky.) 135; *Smith v. Elliott*, 39 Tex. 201. See *Battin v. Bigelow*, 1 Pet. C. C. 452.

"Their voluntary act and deed" held not a fatal defect. *Brown v. Farran*, 3 Ohio, 140.

The omission of the word "freely" held not to be a fatal defect. *Merriam v. Harsen*, 2 Barb. Ch. (N. Y.) 232. See *Allen v. Lenoir*, 53 Miss. 321.

"Freely and of her own accord" is equivalent to "freely as her voluntary act and deed." *Dundas v. Hitchcock*, 12 How. (U. S.) 256.

"Without any bribe, threat, or compulsion," equivalent to "willingly." *Belcher v. Weaver*, 46 Tex. 293; s. c., 26 Am. Rep. 267.

"Desired" to acknowledge is not equivalent to "willingly executed." *Bartlett v. Fleming*, 3 W. Va. 163.

"In due form" not equivalent to "voluntarily." *Lucas v. Cobbs*, 1 Dev. & B. (N. Car.) 228.

Omission of words "ill usage" in statutory form is fatal. *Hawkins v. Burress*, 1 H. & J. (Md.) 513.

If the certificate does not show that she executed the deed "without compulsion or undue influence of her husband," the deed is void. *Chaffe v. Oliver*, 39 Ark. 531.

**Voluntary Appearance.**—It is not essential that the officer's certificate show that she comes voluntarily. *Mickel v. Gardner*, 41 Ark. 491.

1. *Eadie v. Slimmon*, 26 N. Y. 9; *Motes v. Carter*, 73 Ala. 553; *Currie v. Kerr*, 11 Lea (Tenn.), 138; *Kocourek v. Marak*, 54 Tex. 201; s. c., 38 Am. Rep. 623; *Bagby v. Emberson*, 79 Mo. 139; *Marston v. Brittenham*, 76 Ill. 611; *Tapley v. Tapley*, 10 Minn. 448; *Wamboole v. Foote*, 2 Dak. 1; *Central Bank v. Copeland*, 18 Md. 305; *Little v. Dodge*, 32 Ark. 453.

A suit was brought to foreclose a mortgage made by husband and wife of land, a part of which belonged to him and a part to her. Her answer sets up that he obtained her signature by physical violence, and that he and the officer who took her acknowledgment, both of whom died before her answer was filed,

represented to her that the mortgage did not cover her land. Held, that her testimony is not sufficient to impeach the mortgage. *Ins. Co. v. Nelson*, 103 U. S. 544.

Where a note and mortgage by husband and wife, and the certificate of acknowledgment of the mortgage by both, are perfectly fair and regular on their face, a defence against them by the wife on the ground that they were executed by her under undue influence and coercion on the part of the husband, and that she never in fact acknowledged the mortgage, can be sustained only upon perfectly clear, convincing and satisfactory evidence; in general, the unsupported testimony of the wife alone, to contradict the certificate, will not be regarded as sufficient. *Smith v. Allis*, 52 Wis. 337.

When the testimony relied on to impeach the certificate is based on the fraud and duress of the husband in procuring the wife's signature, and the evidence of such fraud and duress proceeds from the husband and wife only, their credibility is affected by their interest; and when (as in this case) the testimony relates exclusively to occurrences between themselves, in the privacy of domestic life, and is uncorroborated by any other evidence, while the testimony is full and positive that the wife was informed of the contents of the conveyance, and that she voluntarily executed and acknowledged it, the evidence is not sufficient to overcome the certificate. *Smith v. McGuire*, 67 Ala. 34.

A threat to arrest the husband, who has committed a crime, is not duress as regards the wife. *Compton v. Bunker Hill Bank*, 96 Ill. 301; s. c., 36 Am. Rep. 147. A threat by the husband to poison himself does not constitute duress. *Wright v. Remington*, 41 N. J. L. 48; s. c., 32 Am. Rep. 180. Compare *Eadie v. Slimmon*, 26 N. Y. 9.

The word "restraint" held equivalent to "constraint." *Edmonson v. Harris*, 2 Tenn. Ch. 153.

2. *Becker v. Quigg*, 54 Ill. 390; *Lindley v. Smith*, 46 Ill. 524; *Thomas v. Meier*, 18 Mo. 573.

3. *Piper v. May*, 51 Ind. 283. See *Rosenthal v. Mayhugh*, 33 Ohio St. 155.

Where a decree of divorce obtained by a married woman is void, but she as-

## ACKNOWLEDGMENT—ACQUAINTED.

sumption of his death exists, and she has no other means of support than a house and lot on which they resided before such abandonment, she may convey the property as a *feme sole*.<sup>1</sup>

12. **Legacy.**—A release executed by a married woman of a legacy charged upon land cannot be recorded unless it be separately acknowledged by her.<sup>2</sup>

13. **By Agent—Attorney.**—When a deed is acknowledged by an agent or attorney, in order to bind the principal it must be made in his name. The signing must be expressed to be his act, done by his agent or attorney. Consequently, both the names of the principal and agent must, substantially, appear in the execution of the deed, showing not only that the grant and seal were those of the principal, but by whom these acts were done. If the deed be the deed of the attorney,—as, for instance, if by it *he* grants, or *he* sets *his* seal, and the like,—it is void as to the principal.<sup>3</sup>

14. **By Order of Court.**—When the legal title to land in trust was cast by descent upon a married woman, and the law required that a deed executed by her should be acknowledged as executed voluntarily, and she refused so to acknowledge it, the court compelled her by decree.<sup>4</sup>

**ACQUAINTED.**—When used in a certificate means to have a substantial knowledge of the subject-matter of the paper to which the certificate is affixed.<sup>5</sup>

sumes her maiden name, lives apart from her husband, and continuously acts and represents herself as a *feme sole*, a deed of conveyance of her separate real estate, made and acknowledged by her as an unmarried woman, is valid and binding. *Reis v. Lawrence*, 63 Cal. 129; s. c., 49 Am. Rep. 83.

1. *Rosenthal v. Mayhugh*, 33 Ohio St. 155.

**Married Woman living as Feme Sole.**—Where married woman has lived in United States separate and apart from her husband for more than 20 years, he never having been in the United States, and during such time she has had no relations with him, but has been living part of the time under her maiden name, and part of the time under the name and as the wife of a man with whom she has formed a meretricious connection, and she executed a deed as a *feme sole* of certain of her separate property acquired in the United States, she will not be permitted to fall back upon her marriage relation, and avoid her deed on the ground that the certificate of the notary does not recite that she was examined "separate and apart" from her husband: and such deed, executed as a *feme sole*, will be held valid. *Hand v. Hand*, 8 Pac. Repr. (Cal.) 705.

2. *Powell's Appeal*, 98 Pa. St. 403. See *French v. Strumberg*, 52 Tex. 92.

3. 3 Washburne Real Prop. (4th Ed.) 277; *Evans v. Wells*, 22 Wend. (N. Y.) 325; *Elwel v. Shaw*, 16 Mass. 42; *Fowler v. Shearer*, 7 Mass. 14; *Brinley v. Shaw*, 2 Cush. (Mass.) 337; *Mussey v. Scott*, 7 Cush. (Mass.) 215; *Shanks v. Lancaster*, 5 Gratt. (Va.) 110; *Hackney v. Butts*, 41 Ark. 394; *McDonald v. Bear River, etc., Co.*, 13 Cal. 235; *Clarke v. Courtney*, 5 Pet. (U. S.) 319.

*Venus*.—"Be it known that on this thirtieth day of June, A.D. 1856, personally came before me James O. Gill, by his attorney in fact, Robert Whitacre, the signer and sealer of the foregoing deed, and acknowledged the same to be his own free act and deed." *Held*, that this certificate is, in effect, that Whitacre appeared before the acknowledging officer as attorney in fact for Gill, and acknowledged that the deed executed by him as such attorney was Gill's free act and deed, and is a sufficient acknowledgment of Gill's deed. *Bigelow v. Livingston*, 28 Minn. 31.

4. *Perry on Trusts*, § 48, citing *Dundas v. Biddle*, 2 Pa. St. 160.

**Authorities for Acknowledgment.**—Washburne Real Prop.; Tiedeman on Real Prop.; Martindale Convey.; Boone Real Prop.; Proffatt on Notaries; Cooley's Const. Lim.

5. *Bohan v. Casey*, 5 Mo. App. 101.

## ACQUIESCED—ACQUIRED—ACQUITTAL.

**ACQUIESCED.**—This word denotes a mere submission to, and not approbation of or assent to, the thing acquiesced in.<sup>1</sup>

**ACQUIESCENCE.** See **ESTOPPEL**.

**ACQUIRED.**—In the law of descent the word includes all lands that came in any other way than by gift, devise, or descent from a parent or ancestor of a parent.<sup>2</sup>

In a California statute prohibiting the impairing of "rights acquired" under provision which the act repealed, the right to resort to an arbitrary presumption of detriment in an action for the conversion of personal property, previous to the trial at which the presumption would have arisen, was held not to be a "right acquired" within the meaning of the act.<sup>3</sup>

**ACQUITTAL.**—Where the accused was arraigned, a jury impanelled and sworn, and the cause given them in charge, no objection being interposed by the accused to the indictment or other proceedings, it was held that the dismissal of the indictment for an alleged insufficiency, which did not really exist, operated as an acquittal of the defendant.<sup>4</sup>

**ACQUITTANCE.**—This word denotes a release or written discharge of a sum of money or debt due; usually in the form of a receipt.<sup>5</sup>

Cf. *Ætna Fire Insurance Co. v. Tyter*, 16 Wend. (N. Y.) 385.

**Personally acquainted with.**—To be "personally acquainted with" and to "know personally" are equivalent phrases. Personal knowledge to the extent certified necessarily included the personal identity of the officers as well as the incumbency of their offices. A defect of such knowledge as to either point would be inconsistent with the language used, and falsify the certificate. *Kelly v. Calhoun*, 5 Otto (U. S.), 710.

1. *Allen v. McKeen*, 1 Sumner, 276. In order to negative submission to, or acquiescence in an interruption to twenty years' enjoyment of a light, it is not necessary that the party interrupted shall have brought an action or suit, or taken any active steps to remove the obstruction: it is enough to show that he has in a reasonable manner communicated to the party causing the interruption that he does not really submit to or acquiesce in it. *Glover v. Coleman*, L. R. 10 C. P. 108.

2. *Re Miller's Wills*, 2 Lea (Tenn.), 54.

3. *Tully v. Tranor*, 53 Cal. 274.

**Otherwise acquired.**—In the Tennessee statute of descents, where the words used are "actually purchased, or otherwise acquired," the last words have a limited meaning, as opposed to purchase by the actual payment of money or considera-

tion, and do not include lands acquired by descent. *Roberts v. Jackson*, 4 Yerg. (Tenn.) 308; *Hoover v. Gregory*, 10 Yerg. (Tenn.) 444.

4. *Lee v. State*, 26 Ark. 260. "Where the jury were discharged against the consent of the defendants (in a case of misdemeanor only) because the district-attorney was not prepared with evidence to support the prosecution, such a discharge was equivalent to an acquittal, and the defendants could never be brought to trial again for the same offence." *People v. Barrett & Ward*, 2 Cain's Cases (N. Y.), 304. So when the accused in a criminal prosecution is put upon trial, on a valid indictment, before a legal jury, and the jury is discharged by the court without good cause, and without the consent of the defendant, he has incurred the first peril, and the discharge of the jury is equivalent to an acquittal. *State v. Walker*, 26 Ind. 346. Cf. *Klock v. People*, Parker's Crim. Rep. (N. Y.) 676; *Com. v. Cook et al.*, 6 S. & R. (Pa.) 777; *Mounts v. State*, 14 Ohio, 295.

5. "A discharge, acquittance, or release—call it what you will—is as valid without a seal as with it." *Milliken et al. v. Brown*, 1 S. & R. (Pa.) 398.

**In Statute.**—"The word acquittance, although perhaps not, strictly speaking, synonymous with receipt, includes it."



**ACQUITTED.**—This word is a word of technical import, and must be understood in its technical sense, to wit, an acquittal on trial by a jury.<sup>1</sup>

**ACROSS.**—This word is used in its common acceptation, from one side to the other, unless there is evidence that the parties intended to use it in a different sense.<sup>2</sup>

**ACT.**—In the legal sense this word may be used to signify the result of a public deliberation. Also a decree, edict, law, judgment, resolve, award, determination. When a bill is duly passed by a legislative body it becomes an act of that body; that is, a thing done.<sup>3</sup>

*State v. Shelters*, 51 Vt. 102, where it was held that a writing in the common form of a receipt for money paid is an acquittance within the East. Stats. s. 1, c. 114, providing for the punishment of those who alter, forge, or counterfeit acquittances. The document called a "clearance" issued by friendly societies which purports to be a certificate that the member receiving it has paid all dues and demands up to a certain date is not an "acquittance or receipt for money" within s. 23 of 24 and 25 Vict. c. 98. *Reg. v. French*, L. R. 1 C. C. R. 217. A scrip certificate in a railway company is not an "accountable receipt" nor an "acquittance or receipt" within the meaning of the 11 Geo. 4 and 1 Will. 4, c. 66, s. 10; *Clark v. Newsam*, 1 Ex. 130; cf. *West's Case*, 1 Den. C. C. 258. To a bill of parcels of the following tenor, viz., "Mr. J. L. bought of E. & C.—the above charged to G. C.," the purchaser, J. L., added these words: "By order E. & C.;" it was held that this addition amounted to an acquittance of J. L. and was a forgery within the statute of 1804, c. 620, § 1; *Com. v. Ladd*, 15 Mass. 526.

**Receipt and Acquittance.**—A memorandum importing that one had paid a sum to another, but not importing any acknowledgment from that other of his having received it, is not such a receipt and acquittance as the statute 2 G. 2, c. 25, § 1, makes it capital to forge and utter. *R. v. Harvey*, 1 Russ. & Ry. 227.

1. *Thomas v. De Graffenreid*, 2 N. & M'C. (S. Car.) 143. "Saying that the plaintiff was 'discharged' is not sufficient; it is not equal to the word 'acquitted,' which has a definite meaning. Where the word 'acquitted' is used, it must be understood in the legal sense, namely, by a jury on the trial." *Morgan v. Hughes*, 2 Term Rep. 225, 231. "But in the case now under consideration, it is stated that he was 'acquitted by the grand jury's finding no bill.' The manner of acquittal is set down in such

a way as to show that it was not intended to be used in its technical sense. And although when a technical word is used without any qualification the court will give it its technical meaning; yet, when it is accompanied with such qualification as shows that it was intended to be understood in a different sense, it will be taken with such qualification. And although the declaration may not be drawn in the most technical form, I do not know that the facts could have been set out with more precision. If it had been 'discharged' instead of 'acquitted,' it is admitted that it would have been sufficient. And in common parlance I think 'acquitted' is as clearly expressive of the idea intended to be conveyed as 'discharged.'" *Teague v. Wilks*, 3 M'C. (S. Car.) 461.

2. Under a grant of a right of way, across the plaintiff's lot of land, the grantee has not a right to enter at one place, go partly across, and then come out at another place on the same side of the lot. *Comstock v. Van Deuten*, 5 Pick. (Mass.) 163.

In the deed conveying a lot of land, the grantor made the following reservation: "And the said A. hereby reserves to himself the right of passing and re-passing with teams in the most convenient place across the land conveyed." *Held*, that the term "across" did not necessarily confine the right of way to a transverse one, over the lot.

The contract declared upon, and proved by the memorandum produced, was that the horses were to run four miles "across a country." That is an expression of which we cannot take judicial notice. The meaning of that expression was a question for the jury, to be decided by them upon the evidence before them. The evidence showed that by this expression the rider is excluded from riding through an open gate. *Evans v. Pratt*, 3 M. & G. 759, 762.

3. *Chumatero v. Potts*, 2 Montana, 284.

**ACT OF GOD.** See ACCIDENT; CONTRACT.

1. **From what Duties a Person is excused by Act of God.**—If a man be prevented by the "Act of God" from the performance of a duty imposed by common law or by statute, he is excused.<sup>1</sup> A common carrier is an insurer of the goods which he carries, but he

An act in legislation is a statute or law made by a legislative body. *People v. Tephaine*, 3 Parker's Cr. R. 244.

**Judicial Act.**—"A judicial act is an act performed by a court touching the rights of parties or property brought before it by voluntary appearance, or by the prior action of ministerial officers; in short, by ministerial acts." *Flournoy v. Jeffersonville*, 17 Ind. 173.

**Ministerial Act.**—"A ministerial act may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done." *Ibid.*

**Act done, in Lease.**—A proviso in a lease giving power of re-entry if the lessee "shall do or cause to be done any act, matter, or thing contrary to and in breach of any of the covenants," does not apply to a breach of the covenant to repair, the omission to repair not being an act done within the meaning of the proviso. *Doe v. Stevens*, 3 B. & Ad. 299.

**Act of the Congress.**—The words "act of the Congress" are as strong and unequivocal as "statute of the Congress." *U. S. v. Smith*, 2 Mason, 143.

**Act or Intention, in Insurance Policy.**—The words "act" and "intention" mean the same as the word "act" alone, for act implies intention. *Chapman v. Republic Life Ins. Co.*, 6 Biss. 238. The condition of a policy of insurance was that it should be void in case the insured should "die by his own hand or act, voluntary or otherwise;" it was held that this did not cover the case of a death purely accidental from an overdose of poison. *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317.

**Act in his Official Capacity.**—A deputy sheriff is entitled, in respect to liabilities incurred by the doing of an act in his official capacity, to the protection of the short statute of limitations contained in the Code. The taking by a deputy sheriff of property, and the sale of that property under execution, are "acts in his official capacity," and he is entitled to the protection given by the Code. *Cumming v. Brown*, 43 N. Y. 514.

**Suffer any Act.**—Under a settlement providing a forfeiture when the life ten-

ant "should do or suffer any act" whereby the dividends should become payable to another person, the court said: "When the words 'shall do or suffer any act' are used, they are to be understood as meaning to endure or sustain, and to apply to something being done *in invitum*." *Roffey v. Bent*, L. R. 3 Eq. Cas. 759.

**In Pursuance of the Act.**—A thing is to be considered to be done in pursuance of the act when the person who does it is acting honestly and *bona fide*, either under the powers which the act gives, or in discharge of the duties which it imposes. *Smith v. Shaw*, 10 B. & C. 284; *Thomas v. Stephenson*, 2 El. & Bl. 108.

**Public Act.**—All acts for regulating the taking of fish are public statutes, and the court must *ex officio* take notice of them. *Burnham v. Webster*, 5 Mass. 266. A patent for land granted by a sister State is one of those public acts to which every other State is bound to give full faith and credit, under the Constitution of the United States. *Lassly v. Fontaine*, 4 Hen. & M. 146. If a statute makes it felony to steal the notes of any particular incorporated bank, the statute by which that bank was incorporated thereby becomes a public statute. *U. S. v. Porte*, 1 Cranch C. C. 369. To constitute a statute a public act, it is not necessary that it should be equally applicable to all parts of the State. It is sufficient if it extends to all persons within the territorial limits described in the statute. *Pierce v. Kimball*, 9 Me. 54. The charter of a village corporation is a public law, and need not be recited in pleading, as the court will take judicial notice thereof. *Village of Winooski v. Gokey*, 49 Vt. 282.

**Passing of the Act.**—The time defined by the words "passing of the Bankruptcy act, 1861," is the time when the act of 1861 received the royal assent, and not the time when it came into operation. *In re Dalzell*, L. R. 2 Ch. Div. 9; *Eliot v. Cranston*, 10 Rb. I. 88.

**Act in all my Business.**—A power of attorney "to act in all my business, in all concerns, as if I was present myself and to stand good in law in all my land and other business," gives no power to sell land. *Ashley v. Bird*, 14 Am. Dec. 313.

1. *Wear Commissioners v. Adamson*, 1 Q. B. D. 548.

is not responsible for a loss caused by an "Act of God."<sup>1</sup> It is important, therefore, to know exactly what is meant by the term "act of God."

**2. Definition.**—A loss is said to be caused by an act of God when it results immediately from a natural cause, without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ.

**3. The loss must result from a natural cause,** such as an extraordinary flood,<sup>2</sup> or a storm of unusual and extraordinary violence,<sup>3</sup> or a

1. *Riley v. Horne*, 5 Bing. 220; *Elliott v. Rossell*, 10 Johns. (N. Y.) Rep. 1.

Ordinarily, when a man contracts absolutely to do a certain thing, he is not excused by an event which renders the performance impossible. *Jemison v. McDaniel*, 25 Miss. 83. "Where it is an answer to an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract. *Baily v. De Crespigny*, L. R. 4 Q. B. 185. This . . . well shows the modern tendency . . . to reduce all the rules on this subject to rules of construction. By the modern understanding of the law, we are not bound to seek for a general definition of 'the act of God,' or *vis major*, but only to ascertain what kind of events were within the contemplation of the parties, including in the term 'event' an existing but unascertained state of facts. This is yet more apparent if one attempts to frame any definition of the term 'act of God.' It does not include every inevitable accident; contrary winds, for example, are not within the meaning of the term in a charter-party. Nor is the reason far to seek: the risk of contrary winds, though inevitable, is one of the ordinary risks which the parties must be understood to have before them and to take upon them in making such a contract." *Pollock on Contracts*, p. 366. If this notion of the "act of God" is borne in mind, it may serve to explain some cases which would otherwise appear anomalous.

Some contracts always contain express or implied conditions that if performance be rendered impossible by certain specified events the contract shall be discharged. Thus contracts whose performance depends upon the continued existence of a specified thing are discharged by the destruction of the thing from no default of either party. *Taylor v. Caldwell*, 3 B. & S. 826; *Walker v. Tucker*, 70 Ill. 527; *Dewey v. School Dist.* 19 Am. L. Reg. N. S. 550. and note; *Dexter v. Norton*, 47 N. Y. 62. In like

manner a contract whose performance depends upon the personal capacity of the parties is discharged by their death or incapacitating illness. *Hall v. Wright*, E. B. & E. (96 E. C. L. R.) 793; *Robinson v. Davison*, L. R. 6 Ex. 269; *Farrow v. Wilson*, L. R. 4 C. P. 744; *Scully v. Kirkpatrick*, 79 Pa. St. 324; *Allen v. Baker*, 86 N. Car. 91; *Siler v. Gray*, 86 N. Car. 566.

**2. International, etc., R. Co. v. Halloren**, 3 Am. & Eng. R. R. Cas. 343; s. c., 53 Tex. 46; *Baltimore, etc., R. Co. v. Sulphur Springs, etc., Dist.*, 2 Am. & Eng. R. R. Cas. 166; s. c., 96 Pa. St. 65; *Gates v. Southern Minn. R. Co.*, 2 Am. & Eng. R. R. Cas. 237; s. c., 28 Minn. 110; *Sheldon v. Sherman*, 42 N. Y. 484; *Reed v. Spaulding*, 30 N. Y. 630; *Lipford v. Railroad Co.*, 7 Rich. (S. Car.) 409; *Wallace v. Clayton*, 42 Ga. 443; *Lovering v. Buck Mt. Coal Co.*, 54 Pa. St. 291; *Bell v. McClintock*, 9 Watts (Pa.), 119; *Lehigh Br. Co. v. Lehigh, etc., Co.*, 4 Rawle (Pa.), 9; *Bietry v. New Orleans*, 22 La. Ann. 149; *Ill. Cent. R. Co. v. Bethel*, 11 Ill. App. 17; *China v. Southwick*, 12 Me. 238; *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457; *Shrewsbury v. Smith*, 12 Cush. (Mass.) 177; *Lapham v. Curtis*, 5 Vt. 371; *Higgins v. Chesapeake, etc., Co.*, 3 Harr. (Del.) 411; *Tenny v. Miner's Ditch Co.*, 7 Cal. 335; *Hoffman v. Tuolumne W. Co.*, 10 Cal. 413; *Wolf v. St. Louis, etc., Co.*, 10 Cal. 541; *Richardson v. Kier*, 34 Cal. 63; *Campbell v. Bear River Co.*, 35 Cal. 679; *Chidester v. Consolidated D. Co.*, 59 Cal. 197; *Nicholls v. Marsland*, L. R. 2 Ex. 1; s. c., L. R. 10 Ex. 255. It should be carefully observed that floods may be none the less extraordinary in their character because several happen in rapid succession of equal violence. This is merely evidence for the jury that the particular flood is not extraordinary, but is of a kind more or less likely to occur in the region. *Pittsburgh, etc., R. Co. v. Gilliland*, 56 Pa. St. 445.

**3. A storm of unusual and extraordinary violence.** *Philadelphia, etc., R. Co. v.*

severe frost,<sup>1</sup> or drought,<sup>2</sup> a sudden gust of wind or tempest,<sup>3</sup> lightning, earthquake, sudden death, or illness.<sup>4</sup>

4. The natural cause must be the immediate<sup>5</sup> and not the remote

Anderson, 6 Am. & Eng. R. R. Cas. 407; s. c., 94 Pa. St. 351; *Livezey v. Philadelphia*, 64 Pa. St. 106. A storm greater and more destructive than had been experienced within forty years. *Nashville, etc., R. Co. v. Davis*, 6 Heisk. (Tenn.) 261; *Nashville, etc., R. Co. v. King*, 6 Heisk. (Tenn.) 269; *Briddon v. Great Northern R. Co.*, 28 L. J. Ex. 51; *Balentine v. North Mo. R. Co.*, 40 Mo. 491; *Fenwick v. Schmaltz*, L. R. 3 C. P. 313.

1. The freezing of a canal. *Bowman v. Teal*, 23 Wend. (N. Y.) 306; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215; s. c., 28 Am. Dec. 521; *Allen v. Mercantile M. Ins. Co.*, 44 N. Y. 437; s. c., 4 Am. Rep. 700; *Wing v. N. Y., etc., R. Co.*, 1 Hilt. (N. Y.) 235; *contra*, *O'Connor v. Foster*, 10 Wall. (U. S.) 418; *Cooper v. Young*, 22 Ga. 272; *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361; s. c., 9 Am. & Eng. R. R. Cas. 188; *Engster v. West*, 35 La. Ann. 119; s. c., 48 Am. Rep. 232; *Field on Dam.*, § 386.

Or river. *Harris v. Rand*, 4 N. H. 259; s. c., 17 Am. Dec. 421; *Lowe v. Moss*, 12 Ill. 477; *West v. Berlin*, 3 Iowa 532; *Worth v. Edmunds*, 52 Barb. (N. Y.) 40; *Vail v. Pacific R. Co.*, 63 Mo. 230; *contra*, *Engster v. West*, 35 La. Ann. 119; s. c., 48 Am. Rep. 232. The freezing of goods in transit where there is no negligence on the part of the carrier. *Vail v. Pacific R. Co.*, 63 Mo. 230; *McGraw v. Baltimore, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 188; s. c., 18 W. Va. 361; *Wolf v. Am. Ex. Co.*, 43 Mo. 422; *Wing v. N. Y., etc., R. Co.*, 1 Hilt. (N. Y.) 235; *Swetland v. Boston, etc., R. Co.*, 102 Mass. 276.

2. *Ward v. Vance*, 93 Pa. St. 499.

3. The Lady Pike, 2 Biss. (U. S.) 141; *Gillott v. Ellis*, 11 Ill. 579; *Nugent v. Smith*, L. R. 1 C. P. 423; s. c., 14 Alb. L. J. 164. Where the plaintiff was injured by the fall of a liberty pole caused by a gale of wind, it was held that no one was responsible to him. *Allegheny v. Zimmerman*, 95 Pa. St. 287; s. c., 40 Am. Rep. 649. It has also been held that a failure of the wind causing a vessel to run aground and sink was an "act of God." *Colt v. McMeenhen*, 6 Johns. (N. Y.) 159; s. c., 5 Am. Dec. 200.

4. *Story Bail*, § 25; *Friend v. Wood*, 6 Grattan (Va.), 195; *McCall v. Brock*, 5 Strob. (S. Car.) 119. Where the principal in a recognizance to appear at court and answer to an indictment was thrown

from a horse and disabled, it was held that his illness so caused was an act of God, which excused him from appearing. *People v. Tubbs*, 37 N. Y. 586. As to sickness or death preventing performance of contract, see *ante*. Death by drowning. *Trew v. Railroad Pass. Ins. Co.*, 6 Hurl. & N. 839.

5. *Coosa River S. B. Co. v. Barclay*, 30 Ala. 120; *Railroad Co. v. Reeves*, 10 Wall. (U. S.) 176; *Michaels v. N. Y., etc., R. Co.*, 30 N. Y. 564; *Sprowl v. Kellar*, 4 Stew. & P. (Ala.) 382; *Steele v. McTyer*, 31 Ala. 667; s. c., 70 Am. Dec. 516.

In *Smith v. Sheppard* (Abbot on Ship, pt. 3, ch. 4, § 1), a vessel was lost by striking a floating mast attached to a vessel which had been sunk by getting on a bank that had suddenly and unexpectedly been made dangerous by an extraordinary flood. Coming in contact with the mast attached to the sunken ship, the defendant's vessel was forced by it upon the bank, altered suddenly by the flood, and was wrecked. The flood which changed the bank was the ultimate cause of the misfortune, but it was held to be too remote. The immediate cause of the loss was the coming in collision with a floating mast which someone had attached to the sunken vessel. To the same effect see *McArthur v. Sears*, 21 Wend. (N. Y.) 190; *Merritt v. Earle*, 31 Barb. 38; s. c., 29 N. Y. 115; *Trent & Mersey Nav. Co. v. Wood*, 4 Dougl. 290; *Hays v. Kennedy*, 41 Pa. St. 378; *McHenry v. Phila., etc., R. Co.*, 4 Harr. (Del.) 448; *Chicago R. Co. v. Shea*, 66 Ill. 471.

Running on a sand-bar recently formed. *Friend v. Woods*, 6 Gratt. (Va.) 189.

On the other hand, act of God is, according to some authorities, an occurrence which is beyond the bounds of human ability to prevent, and is therefore to be considered as a phrase tantamount to "inevitable accident." *Jones on Bailments*, 104-5; *Story on Bail*, 489. Thus the striking of a vessel upon a rock unknown to the master—*Williams v. Grant*, 1 Conn. 437; s. c., 7 Am. Dec. 255—or the running upon an unknown snag in a river, while following the usual course of navigation, have both been held to excuse the carrier from responsibility. *Smyrl v. Niolon*, 2 Bailey (S. Car.), 421; s. c., 23 Am. Dec. 146; *John-*

cause; and it must be free from the intervention of any human agency.<sup>1</sup>

5. **Negligence.**—It follows that if a man's negligence has in any way contributed to the injury which has been brought about, he will not be excused.<sup>2</sup> But if the negligence is only the remote

son v. Friar, 4 Yerg. (Tenn.) 48; s. c., 26 Am. Dec. 215; Faulkner v. Wright, 1 Rice (S. Car.), 108; Gordon v. Buchanan, 5 Yerg. (Tenn.) 71; Turney v. Wilson, 7 Id. 340; Collier v. Valentine, 11 Mo. 299; s. c., 49 Am. Dec. 81; Fish v. Chapman, 2 Ga. 349; Neal v. Saunderson, 2 Sm. & Mar. (Miss.) 572; s. c., 41 Am. Dec. 609; Walpole v. Bridges, 5 Blackf. (Ind.) 222.

It must be borne in mind that charters often contain clauses exempting the carrier from responsibility for losses caused by the "perils of the sea," or "the perils of navigation." The phrases are not synonymous with act of God, but have a broader meaning and embrace a larger variety of causes. Ferguson v. Brown, 12 Md. 9; Christenson v. Am. Ex. Co., 15 Minn. 270; Bouvier's Law Dict.; Brown's Law Dict. 2d Ed.; 41 Am. Dec. 281, note; Story on Bailments, § 512.

See Reg. v. Bennett, Bell C. C. 1, where fireworks kept by the prisoner either accidentally or through the negligence of his servants exploded, and, setting fire to a neighboring house, caused a person's death. *Held*, that the illegal act of the prisoner in keeping the fireworks was too remotely connected with the death to support an indictment for manslaughter.

1. Steele v. McTyer, 31 Ala. 667; s. c., 70 Am. Dec. 516; Transportation Co. v. Tiers, 4 Zab. (N. J.) 697; s. c., 64 Am. Dec. 304; Dunson v. N. Y., etc., R. Co., 3 Lans. (N. Y.) 265; Michaels v. N. Y., etc., R. Co., 30 N. Y. 564; Reed v. Spaulding, 30 N. Y. 630; McArthur v. Sears, 21 Wend. (N. Y.) 190; Campbell v. Moore, Harp. (S. C.) 468; Levezey v. Phila., 64 Pa. St. 106; Phila., etc., R. Co. v. Anderson, 6 Am. & Eng. R. R. Cas. 407; s. c., 94 Pa. St. 351; Polock v. Pioche, 35 Cal. 416. *Contra*: Railroad Co. v. Reeves, 10 Wall. (U. S.) 176; Morrison v. Davis, 20 Pa. St. 171; Denny v. N. Y., etc., R. Co., 11 Gray (Mass.), 481.

A loss arising from an accidental fire is not caused by an act of God unless the fire was started by lightning or some other superhuman agency. Forward v. Pittard, 1 Term R. 27; Miller v. Steam Nav. Co., 10 N. Y. 431.

A loss caused by the great fire in Chicago did not result from the act of God. Chicago, etc., R. Co. v. Sawyer, 69 Ill.

285; s. c., 18 Am. Rep. 613; Merchants' Des. Co. v. Smith, 76 Ill. 542; Thoroughgood v. Marsh, 1 Cowen (N. Y.) 105; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Rockingham, etc., Ins. Co. v. Boscher, 39 Me. 253; Parker v. Flagg, 26 Me. 291; Hale v. N. J., etc., Co., 15 Conn. 539; Cox v. Peterson, 30 Ala. 608; Hunt v. Morris, 6 Mart. (La.) 676; Gilmore v. Carman, 1 Smed. & M. (Miss.) 279; Chevallier v. Straham, 2 Texas, 115; Singleton v. Hilliard, 1 Strob. (S. Car.) 203; Patton v. McGrath, Dudley (S. Car.), 159; Graff v. Bloomer, 9 Pa. St. 114; Garrison v. Memphis Ins. Co., 19 How. (U. S.) 315; Lyon v. Meils, 6 How. (U. S.) 419; Hall v. Railroad Cos., 13 Wall. (U. S.) 372; Grille v. General S. Co., L. R. 1 C. P. 600; Morewood v. Pollock, 1 El. & B. 743; Hyde v. Trent, etc., Co., 5 Term R. 389.

But where a fire was driven into a town from burning woods by a tornado and destroyed a lot of freight cars, the loss did result from an act of God. P. R. Co. v. Fries, 87 Pa. St. 234. Nor is the explosion of a steam boiler an act of God. McCall v. Brock, 5 Strob. (S. Car.) 119; Buckley v. Naumkeag, etc., Co., 24 How. (U. S.) 386; Caldwell v. N. J. S. Co., 56 Barb. 425; s. c., 47 N. Y. 282; The Edwin, 1 Sprague (U. S.), 477; Hill v. Sturgeon, 28 Mo. 323.

2. Thus, where the master of a vessel, without reasonable necessity, deviated from his course, it was held to be such negligence as to render the shipowners liable for a loss arising from the "dangers of the sea." Crosby v. Fitch, 12 Conn. 410; Pruitt v. Railroad Co., 62 Mo. 527; Bowman v. Teall, 23 Wend. (N. Y.) 306; Swetland v. B. & A. R., 102 Mass. 276; Wing v. N. Y. & E. R., 1 Hilt. (N. Y.) 235; McPadden v. Railroad Co., 44 N. Y. 478; Heazle v. Railroad Co., 76 Ill. 501; Railroad Co. v. Reeves, 10 Wall. (U. S.) 176; Richards v. Gilbert, 5 Day (Conn.), 415; Sherman v. Wells, 28 Barb. (N. Y.) 403; Fergusson v. Brent, 12 Md. 9; Sprowl v. Kellar, 4 Stew. & P. (Ala.) 382; Hill v. Sturgeon, 28 Mo. 323.

What such negligence must amount to in order to create liability differs in every case. It is, however, clear that if it be in direct casual connection with the in-

cause of the accident, or if the act alleged to amount to negligence only consists of a failure to provide full and efficient safeguards against violent and extraordinary winds, storms, rains, etc., this will not be held to constitute grounds of liability.<sup>1</sup> The carrier is not bound to show that it was absolutely impossible, under any circumstances, to prevent the loss; it is sufficient if he proves that by no reasonable precaution under the circumstances could it have been prevented.<sup>2</sup>

jury, and a violation of such reasonable care as a cautious and prudent man would take to protect his property against loss by ordinary storm, wind, rain, etc., then the person who is guilty of such negligence will be liable for the harm done. *Converse v. Brainerd*, 27 Conn. 607; *Amentrout v. Railroad Co.*, 1 Mo. App. 158; *Backhouse v. Sneed*, 1 Murphy (N. C.), 173; *Bailiffs of Romney Marsh v. Trinity House*, L. R. 5 Exch. 208; *Wing v. N. Y. & E. R.*, 1 Hilton (N. Y.), 235; *N. J. Steamboat Co. v. Tiers*, 4 Zab. (N. J.) 697; *Seigel v. Eisen*, 41 Cal. 109; *Vail v. Railroad Co.*, 63 Mo. 230; *Condict v. Railroad Co.*, 54 N. Y. 500; *Donny v. Railroad Co.*, 13 Gray (Mass.), 481; *Penn. R. Co. v. Mitchell*, 4 Weekly Notes of Cases (Phila.), 3; *Nashville, etc., R. Co. v. David*, 6 Heisk. (Tenn.) 261; *Wolf v. Am. Ex. Co.*, 43 Mo. 422; *Klauber v. Am. Ex. Co.*, 21 Wis. 21.

Where goods on board a vessel were injured by the bursting of a pipe which had frozen, it was held that although a hard frost may be considered an act of God, yet the master was bound to guard against the known effects of frost on water-pipes, and was therefore negligent. *Siordet v. Hall*, 4 Bing. 607.

A man is negligent if he does not take precautions against such rises or high water in a stream as are usual and ordinary, and reasonably anticipated at particular periods of the year. *Dorman v. Ames*, 12 Minn. 451.

1. If the act of God was of such an overwhelming and destructive character as by its own force, and independently of the particular negligence alleged or shown, to produce the injury, there would be no liability though there was some negligence on the part of the carrier. To create liability, it must have required the combined effect of the act of God and the concurring negligence of the party to produce the injury. *Balt., etc., R. Co. v. Sulphur Springs, etc., Dist.*, 2 Am. & Eng. R. R. Cas. 166; s. c., 96 Pa. St. 65.

Though in default, the carrier may show that the loss would have happened without such default. *Collier v. Valentine*, 11 Mo. 299; s. c., 49 Am. Dec. 81.

Where a canal boat was delayed on account of the lameness of a horse, and an extraordinary flood caught the boat and damaged the cargo, it was held that the use of the lame horse could not be considered as the proximate cause of the loss, and the carrier was excused. *Morrison v. Davis*, 20 Pa. St. 171; 57 Am. Dec. 695.

2. In the recent case of *Nugent v. Smith*, L. R. 1 C. P. D. 19, 423, the defendant, a common carrier by sea, received from the plaintiff a mare to be carried from London to Aberdeen. In the course of the voyage, the ship encountered rough weather, and the mare received such injuries that she died. The jury found that the injuries were caused partly by more than ordinary bad weather, and partly by the violent struggling of the mare herself, without any negligence on the part of the defendant's servants. The Court of Common Pleas held that the defendant was liable, and said that in order to constitute an act of God "the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the defendant could not by any amount of ability foresee would happen; or, if he could foresee that it would happen, could not by any amount of care and skill resist so as to prevent its effect." This ruling was reversed by the Court of Appeals. "All that can be required of the carrier," said Cockburn, C. J., "is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers usually have recourse, he does all that can reasonably be required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God. I do not think that, because some one may have discovered some more efficient method of securing the goods which has not become generally known, or, because it cannot be proved, that if the skill and ingenuity

## ACT OF INSOLVENCY—ACTING—ACTIONS.

**ACT OF INSOLVENCY.**—As regards banks, it is an act which shows the bank to be insolvent, such as non-payment of its circulating notes, bills of exchange, or certificates of deposit; failure to make good the impairment of capital, or to keep good its reserve: in fact, any act which shows that the bank is unable to meet its liabilities as they mature, or to perform those duties which the law imposes for the purpose of sustaining its credit.<sup>1</sup>

**ACTING.**—When the word is used in the expression "acting as attorney," it means no more than attending, and does not satisfy a statute which requires the attorney to state that he subscribes as such attorney.<sup>2</sup>

**ACTIONS.** (See also **ABATEMENT**; **EVIDENCE**; **JUDGMENT**; **LIMITATION OF ACTIONS**; **NEGLIGENCE**; **PRACTICE**; all recognized forms of action under respective heads—**ACCOUNT RENDER**; **ASSUMPSIT**; **COVENANT**; **DEBT**; **DETINUE**; **REPLEVIN**; **TRESPASS**; **TRESPASS ON THE CASE**; **TROVER**; etc., etc.)

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|-----------------------------------|--|
| 1. <i>Definition.</i>             | 8. <i>Commencement.</i>                          |
| 2. <i>When Maintainable.</i>      | 9. <i>Consolidation.</i>                         |
| (a) <i>Motive.</i>                | (a) <i>Union of Legal and Equitable Demands.</i> |
| (b) <i>Damages.</i>               | 10. <i>Joinder.</i>                              |
| (c) <i>Proof of Same.</i>         | 11. <i>Splitting.</i>                            |
| (d) <i>Legality.</i>              | (a) <i>Same Security.</i>                        |
| (e) <i>Wrongdoer.</i>             | 12. <i>Cumulation.</i>                           |
| (f) <i>Class.</i>                 | 13. <i>Statutory Actions.</i>                    |
| 3. <i>Right Must be Complete.</i> | 14. <i>Local and Transitory.</i>                 |
| 4. <i>Consent.</i>                | 15. <i>Discontinuance.</i>                       |
| 5. <i>Nudum Pactum.</i>           | (a) <i>Termination.</i>                          |
| 6. <i>Demand.</i>                 |  |
| 7. <i>Appearance.</i>             |  |

1. **Definition.**—An action is a legal prosecution in an appropriate court by a party complainant against a party defendant to

of engineers or others were directed to the subject something more efficient might not be produced, that the carrier can be made liable."

Where it was sought to hold a railroad company liable for an accident, which occurred by reason of the breaking of a rail occasioned by extreme and intense cold, it was held that this was properly to be esteemed the act of God; and, although it was possible to conceive of rails so manufactured as to withstand any degree of cold, yet that the company could not be expected to supply such rails, and could not be held liable for a failure to do so. *McFadden v. Railroad Co.*, 44 N.Y. 478.

And so where an accident occurred through an embankment being swept away by an unexampled and extraordinary flood, it was held that the railroad company were not bound to provide an embankment sufficient to withstand such a flood. *Withers v. North Kent R. Co.*, 27 L. J. Ex. 417.

See also, to the same general effect, *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440; *Brehm v. Gt. Western R. Co.*, 34 Barb. (N. Y.) 256; *Tyner v. Railroad*, 111 Mass. 546; *Mobile, etc., R. Co. v. Ashcroft*, 48 Ala. 15; *Stokes v. Railroad*, 1 F. & F. 291; *Wyborn v. North Kent R. Co.*, 1 F. & F. 162; *Murray v. Railroad*, 27 L. J. (N. S.) 762. See generally, upon the subject, *Wharton on Contracts*, § 308; 2 *Pars. on Contracts*, § 138, and notes; *Notes to Coggs v. Bernard*, 1 Sm. L. C. (8th Am. Ed.) 422-441; *Pollock on Contracts*, (Wald's Ed. 1885), p. 366 *seq.*; *Story on Bailments*; 1 *Thompson on Negligence*, 86 *seq.*; 14 *Am. Law Rev.* 1; *Sweet's Law Dict.*; *Bouvier's Law Dict.*

1. *In re Manuf. Nat. Bank*, 1 Cent. Law Jour. 19.

2. *Everhard v. Poppleton*, 5 Q. B. 179. Where a testator left certain property in trust, and declared that if either of the trustees should decline to act, the survivor of the trustees so acting should appoint

obtain the judgment of that court in relation to some rights claimed to be secured or some remedy claimed to be given by law to the party complaining.<sup>1</sup>

Action includes suits in equity as well as proceedings at law.<sup>2</sup>

**2. When Maintainable.**—(a) A malicious motive in asserting a legal right to do a particular thing will not give a right of action.<sup>3</sup>

(b) *Damages.*—As a general rule an action will not lie for a tort unless there has been a wrongful act and actual or legal damage, but, where the injury is the result of an inevitable accident or a lawful act done in a lawful manner without negligence or in necessary self-defense, there being no legal injury, there is no tort to sustain an action.<sup>4</sup>

(c) *Proof of Same.*—An action will lie for the vindication of a right, without proof of actual damages.<sup>5</sup>

other trustees, it was held that when both the trustees wholly declined to act in the trust, they had never been trustees so acting as to entitle them to appoint other trustees. *Sharp v. Sharp*, 2 B. & Ald. 405.

1. Wait's Actions and Defenses, 10.

2. *Central Pac. R. R. Co. v. Dyer*, 1 Sawyer, 641.

3. *Mahan v. Brown*, 13 Wend. 261; *Auburn, etc., Co. v. Douglass*, 9 N. Y. 444; *Chatfield v. Wilson*, 28 Vt. 49; *Occum Co. v. Sprague Manufacturing Co.*, 34 Conn. 530; *Jenkins v. Fowler*, 24 Pa. St. 308; *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467; *Smith v. Johnson*, 76 Pa. St. 191; *Fabin v. Richard*, 8 Wis. 255; *Stevenson v. Newnham*, 13 C. B. 285; *Smith v. Bowler*, 2 Disney (Ohio), 153.

The plaintiff's ulterior motives and purposes of bringing suit cannot be inquired into. *Ramsey v. Gould*, 57 Barb. (N. Y.) 398.

See as to malice forming a consideration. *Lumley v. Gye*, 2 Ell. & Bla. 216; *Cothel v. Jones*, 11 C. B. 713.

4. *Harvey v. Dunlap, Hill & Denio*, 193; *Bennett v. Ford*, 47 Ind. 264; *Brown v. Collins*, 53 N. H. 442; *Holmes v. Mather*, L. R. 10 Ex. 261; *Scott v. Shepherd*, 3 Wes. 403.

A man is not liable to an action for the consequences of his doing a lawful act in a proper manner; nor for the consequences of enjoying his own property in the way property is usually enjoyed, unless an injury results to another from the want of proper care or skill on his own part, or unless he goes beyond the legitimate use of his own property. *Radcliffe v. Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Howe v. Young*, 16 Ind. 312; *Carhart v. Auburn Gas Light Co.*, 22 Barb. (N. Y.) 297; *Thomasson v. Agnew*, 24 Miss. 93.

Obstructions or nuisances in a street or highway causing special damages; a nuisance on one's own land injurious to the personal health or comfort of another; diversion of surface water from the land of another by excavation in one's own or the backing of water by dams, etc., upon the land of another are consequential injuries which will support an action though resulting from the use of one's own or another's property. *Wabash, etc., Canal Co. v. Spears*, 16 Ind. 441.

No action will lie for consequential damages resulting from the exercise of a legal right under legislative authority unless on the ground of negligence in the manner of its exercise. *Morris, etc., R. R. Co. v. Newark*, 10 N. J. Eq. 352.

An avoidable injury to person or reputation, whether in a corporate or private character, entitles the injured party to redress. *Detroit Daily Post Co. v. McArthur*, 16 Mich. 477; *Toff v. West Shore & Ontario Terminal Co.*, 46 N. J. L. 34.

There must be an injury to the plaintiff or a benefit to the wrongdoer to render even a wrongful act actionable. *Morgan v. Bliss*, 2 Mass. 111; *McEndre v. Piles*, 6 Litt. (Ky.) 101; *Nichols v. Valentine*, 36 Me. 322.

5. The erection of a building so that water from the roof falls upon plaintiff's ground. *Ely v. Corson*, 13 Haz. Pa. Reg. 335.

"I may daily walk through my neighbor's inclosures without any appreciable injury, but if such a plea would protect me in a persistence therein, my trespasses would in time ripen into a right. To prevent this the law redresses by action where the injury is confessedly inappreciable." *Delaware & Hudson Canal Co. v. Torrey*, 33 Pa. St. 143. Also *Thomas v. Brackney*, 17 Barb. (N. Y.) 654, *Car-*



(d) *Legality*.—An action cannot be maintained on any ground or cause which the law declares illegal,<sup>1</sup> nor can a cause of action arise from an undertaking prohibited by statute.<sup>2</sup> (See CONTRACT.)

(e) *Wrongdoer*.—The prevention of the doing an unauthorized and unlawful act does not give a good cause of action to an incipient wrongdoer who is interfered with.<sup>3</sup>

(f) *Class*.—Damages sustained alike by all individuals of a class give no foundation for an action by any individual of the class.<sup>4</sup>

**3. Right Must be Complete.**—The right of action must be complete before action brought and the subsequent occurrence of a material fact will not avail in maintaining the action.<sup>5</sup>

hart v. Auburn Gas Light Co., 22 Barb. (N. Y.) 297; Honsee v. Hammond, 39 Barb. (N. Y.) 89; O'Riley v. McCheaney, 3 Lans. (N. Y.) 278; Graver v. Scholl, 42 Pa. St. 58; Dudley v. Tilton, 14 La. Ann. 283.

For intrusion on a right of way. Williams v. Esling, 4 Pa. St. 486; Schnable v. Koehler, 28 Pa. St. 181.

1. Davidson v. Lanier, 4 Wall. 447; Rolfe v. Delmar, 7 Rob. La. 80; Stewartson v. Lothrop, 12 Gray (Mass.), 52; Howard v. Harris, 8 Allen (Mass.), 297; Pearce v. Brooks, L. R., 1 Exch. 213; Smith v. White, L. R. 1 Eq. Cas. 626; Gunler v. Lecky, 30 Ala. 591.

Every contract growing out of or connected with an illegal or immoral act is absolutely void and will not be enforced in law and equity. Courts are influenced by no tenderness for parties, but exclusively by reasons of public policy. Deans v. M'Landon, 30 Miss. 343.

No action lies for the price of fraud. Boatner v. Yarborough, 12 La. Ann. 249.

2. Peck v. Burr, 10 N. Y. 294; Hathaway v. Moran, 44 Me. 67; Lord v. Chadbourne, 42 Me. 429. A contract made in violation of a statute is void and is not rendered valid by the repeal of the statute. Robinson v. Barrows, 48 Me. 186.

So also a right of action created by a statute and which has been perfected is not impaired nor is the suit upon it affected by the repeal of the statute. Steamship Co. v. Jolliffe, 2 Wall. (U. S.) 450; Peters v. Goulden, 27 Mich. 171. Held in Wisconsin to apply only to repeal of statute giving new forms of remedy for old rights; providing new modes of prosecution for offences existing by law outside the statute repealed.

3. Where a railroad company brought a special action on the case against the defendant for preventing their constructing a branch track across a public high-

way where they were not legally authorized so to construct it, it was held that the action was not maintainable; that if the defendant wrongfully entered upon the land of another to prevent the construction of such branch railroad, he would be liable to the owner in an action of trespass therefor, but not to the railroad for merely preventing their violating the law. Bangor, etc., R. R. Co. v. Smith, 49 Me. 9.

No immunity for a wrongful act done to the injury of another's right can be claimed on the ground of public interest by any person, corporate or individual. Henderson v. Railroad Co., 17 Texas, 560.

4. Corrier v. West Side Elevated, etc., R. R., 6 Blatchf. (C. C.) 487.

The only remedy for a neglect by a corporation from which an individual suffers in common with the rest of the public is by indictment. Weightman v. Washington, 1 Black. 39.

No private action can be maintained for public wrongs. Ayers v. Sawrenge, 63 Barb. (N. Y.) 454.

5. McCullough v. Colby, 4 Bosw. (N. Y.) 603, 5 Bosw. (N. Y.) 477; Wattson v. Ghibou, 17 Abb. (N. Y.) 184; Buchanan v. Comstock, 57 Barb. (N. Y.) 582; Hare v. VanDeusen, 32 Barb. (N. Y.) 92; Oathout v. Ballard, 4 Barb. (N. Y.) 33; Smith v. Aylesworth, 40 Barb. (N. Y.) 104; Bostwick v. Mench, 4 Daly (N. Y.), 68; Church v. Frost, 3 Thomp. Cook. 318; Moore v. Maple, 25 Ill. 341; Wadley v. Jones, 55 Ga. 329; Muller v. Earle, 5 Jones & Sp. 388; Castrique v. Bernabo, 6 Q. B. 498; Wing v. Accumulative Assurance Co., 3 C. B. (N. S.) 151.

To entitle a plaintiff to bring suit for an interference with a vested right, he must have complied with the laws relating thereto. Norris v. Lapsley, 5 Cal. 47.

4. **Consent.**—Consent to an act generally bars all right of action for injuries arising therefrom.<sup>1</sup>

5. **Nudum Pactum.**—A *nudum pactum* creates no legal right, and its breach creates no right to legal redress.<sup>2</sup>

6. **Demand—When Required.**—Demand must be alleged to support an action, on a contract to be performed by delivery of property;<sup>3</sup> on a contract for payment of goods, neither time nor place of payment being specified;<sup>4</sup> on an order to deliver goods;<sup>5</sup> for the price of goods delivered on a promise to account at certain prices, or return on demand;<sup>6</sup> on a contract payable in anything other than money,<sup>7</sup> or where the undertaking is collateral.<sup>8</sup>

Where the debt is payable in personal property, to be delivered at a particular time, and the debtor fails to deliver it at such time;<sup>9</sup> where there was an entire failure of consideration upon which plaintiff paid defendant's debt and defendant became at once liable to refund;<sup>10</sup> on a promise to do a certain act or pay a sum of money, and the act has not been done;<sup>11</sup> on a promise to pay money if a stranger should fail to do a certain action;<sup>12</sup> by an

1. *Illinois Central R. Co. v. Allen*, 39 Ill. 205; *State v. Beck*, 1 Hill (S. Car.), 363; *Pillow v. Bushnell*, 5 Barb. (N. Y.) 156; *Root v. Shields*, 1 Woblv. 340, 354; *Walker v. Fitts*, 24 Pick. (Mass.) 191.

If a debtor procures the signatures of his creditors to an agreement to settle their claims for a percentage, one of them, who afterwards learns that another was induced to sign by the promise of a larger percentage, may maintain an action on the original claim without returning composition notes received by him from the debtor or their proceeds. *Cobb v. Tirrell*, 137 Mass. 143.

Where one beneficially interested in a cause from ignorance of the law surrenders his rights, he cannot hold the opposite party to a knowledge of the law and charge him for a loss occasioned by his own indiscretion; so where a constable levied on and sold property already bound by executions in the hands of the sheriff, and paid over the money to the plaintiffs in the executions in the sheriff's hands, and the plaintiffs afterwards paid the same back to the constable under the advice that his levy and sale had divested the executions in the sheriff's hands of their liens, it was held, that the plaintiffs could not afterwards charge the sheriff with negligence, although he was advised that the proceedings of the constable had divested the executions in his hands of their liens and had acted under that advice. *Harrison v. Marshall*, 6 Port. (Ala.) 65.

2. The discontinuance of a favor gives no cause of action. *Travis v. Duffan*, 2 Tex. 49.

3. *Martin v. Channin*, 7 Mo. 277; *Bradley v. Farrington*, 4 Ark. 532.

4. *Frazee v. McCord*, 1 Ind. 224. Upon a contract for payment in such goods as should suit the payee, he is bound to demand such goods specifically, and within a reasonable variety before action.

5. *Decker v. Birhap*, 1 Morr. (Iowa) 62.

6. *Bolles v. Stearns*, 11 Cush. (Mass.) 320.

7. *Wyatt v. Bailey*, 1 Morr. (Iowa) 396.

8. *January v. Duncan*, 3 McLean (C. C.), 19.

In a suit brought upon an instrument, "For value received, I promise to pay A \$500 in castings, at B & C's foundry in Augusta; said A's present account to go in part payment, the castings to be taken at 6 cts. per pound," no time being fixed, demand and refusal must be proven. *Hotchkiss v. Newton*, 10 Ga. 560.

Where a miller fraudulently drew into his boom and manufactured logs owned by other parties, who then transferred to a third party, such third party must show a demand and notice after transfer to support an action. *Root v. Bonemma*, 22 Wis. 539.

9. *Crabtree v. Messersmith*, 19 Iowa, 170.

10. *Pennington v. Clifton*, 10 Ind. 172.

11. *Lent v. Padelford*, 10 Mass. 230. No demand is necessary where both plaintiff and defendant have equal knowledge of the matter, as, for instance, an act to be done by a stranger.

12. *Dyer v. Rich*, 1 Metc. (Mass.) 180.

owner for the recovery of property from a *bona-fide* purchaser from one having no authority to sell;<sup>1</sup> when an obligation to pay is complete;<sup>2</sup> where there is a joint indebtedness and the creditor has applied the property of one debtor to the payment of the whole debt;<sup>3</sup> for property wrongfully taken from the owner;<sup>4</sup> when the party to be charged had no right to expect, and is not injured by the omission of demand;<sup>5</sup> where an account is payable in goods, the party has ceased trading and is not in a position to pay them, and there has been no unreasonable delay;<sup>6</sup> for money for goods received to be sold at certain prices or returned on demand, and the goods have been sold and money received;<sup>7</sup> for the value of wheat, to be delivered when threshed.<sup>8</sup>

*When not Required.*—A demand need not be alleged for the maintenance of a suit by a client against his attorney for money collected;<sup>9</sup> where the time for the payment of property is fixed;<sup>10</sup> on an agreement to return a note, after a reasonable time;<sup>11</sup> upon a promise to pay money, time of payment not being specified, after a reasonable time;<sup>12</sup> on a promise to pay on demand;<sup>13</sup> where it is the duty of a party, by contract or otherwise, to remit or apply money in his hands without demand.<sup>14</sup>

**7. Appearance.**—(a) *What Constitutes.*—A formal entry, plea, or motion, ascertainable by the record, constitutes an appearance.<sup>15</sup>

1. *Whitman, etc., Co. v. Tuttle*, 4 Nev. 494.

2. *Watson v. Walker*, 23 N. H. 471.

3. *Walsh v. Ostrander*, 22 Wend. (N. Y.) 213.

4. *New York, etc., Co. v. Richmond*, 6 Bosw. (N. Y.) 213.

5. *Randon v. Barton*, 4 Tex. 289.

6. *Brooks v. Jewell*, 14 Vt. 470.

7. *Wyman v. Fowler*, 3 McLean (C. C.), 467.

On a contract for brick, received from time to time in installments, paid for by a due bill for thirty days, an action for a residue undelivered must be preceded by demand and refusal. *Widner v. Walsh*, 3 Col. 548.

8. *State v. Mooney*, 65 Mo. 494.

9. *Shepherd v. Crawford*, 71 Ga. 458.

If from the nature of the case a demand would be of no avail if made, it is unnecessary to put the defendant *in mora* before bringing suit. *Rosenthal v. Baer*, 18 La. Ann. 573.

10. *Campbell v. Clark*, 1 Hempst. 67.

11. *Henley v. Bush*, 33 Ala. 636.

12. *Niemayer v. Brooks*, 44 Ill. 77.

13. *Ross v. Lafayette, etc., R. Co.*, 6 Ind. 297.

14. *Catterlin v. Somerville*, 22 Ind. 482; *Ferguson v. Dunn*, 28 Ind. 58; *Stacy v. Graham*, 14 N. Y. (4 Kern.) 492.

A specific objection to a necessary demand, made prior to bringing suit,

waives all other objections. *Bartlett v. Adams*, 43 Ind. 447.

Plaintiff inclosed his land and thereby made a partition fence, and upon calling upon defendant for one-half value, no objection was made as to the estimate, but that he was not liable; held, that there was no necessity for an estimate of the value in order to bring the suit. *Bartlett v. Adams*, 43 Ind. 477.

Where a demand that should be made by a certain day is prevented by a restraining order obtained by debtor, it may be made as soon as the order is dissolved. *Pay v. Shanks*, 56 Ind. 554.

15. *Scott v. Hull*, 14 Ind. 136.

The following steps have been held equivalent to an appearance:

Service of an order of court applied for and obtained, giving time to answer, with a notice signed "Attorney for defendant." *Ayers v. Western R. Corp.*, 48 Barb. (N. Y.) 132.

Putting in an answer. *Hayes v. Shattuck*, 21 Cal. 51; *Ins. Co. of North America v. Swineford*, 28 Wis. 257.

Or a demurrer. *Kegy v. Welden*, 10 Ind. 550; *Knight v. Low*, 15 Ind. 374; *Evans v. Iles*, 7 Ohio, 233.

Or a motion to dissolve an attachment. *Whiting v. Budd*, 5 Mo. 443; *Duncan v. Wickliffe*, 4 Metc. (Ky.) 118.

Motion for a continuance. *Shaffer v. Trimble*, 2 Greene, Iowa, 464.

**General Appearance.**—An appearance will be taken to be general unless the contrary appears.<sup>1</sup>

**Its Effect.**—Whatever operates as a general or unqualified appearance waives all defects or irregularities affecting the notice, process, or service necessary to obtain jurisdiction over the defendant.<sup>2</sup>

**Special Appearance.**—An appearance for any particular purpose,

Motion to set aside an interlocutory order. *Tallman v. McCarty*, 11 Wis. 401.

Taking part in the trial. *Scott v. Niles*, 40 Vt. 373.

Motion to mitigate damages, for a new trial and taking exceptions. *Wilson v. Fowler*, 3 Ark. 463.

Or taking an appeal. *Tree v. Big Stand Iron Co.*, 13 Ohio, 563; *Weaver v. Stone*, 2 Grant (Pa.) Cas. 422.

Appearance and offer to file answer. *Tennison v. Tennison*, 40 Mo. 110.

Appearing in supreme court and taking part in the argument of a case reserved estops defendant from denying appearance below. *Cleveland, etc., Co. v. Mara*, 26 Ohio, 185.

Written consent by attorney to continuance to a subsequent term. *Bazzo v. Wallace*, 16 Neb. 290.

**What is not an Appearance.**—Indorsing admission of service on summons. *Nat. Bank v. Rogers*, 12 Minn. 529.

Giving notice of retainer. *Wandelaar v. Coomer*, 6 Johns. (N. Y.) 328; *Vanderpoel v. Wright*, 1 Cow. (N. Y.) 209; *Mann v. Carley*, 4 Cow. (N. Y.) 148.

Giving bail. *Lauveau v. Ervin*, 12 Rich. (S. Car.) 31.

Giving bond to dissolve attachment. *Clark v. Bryan*, 16 Md. 171.

Giving attachment bond. *Coplinger v. Steamboat*, 14 Ind. 480.

Notice of motion to dissolve attachment. *Glidden v. Packard*, 28 Cal. 649.

Motion to quash. *Ferguson v. Rose*, 5 Ark. 517; *Gooch v. Jeter*, 5 Ark. 383.

Filing answer by attorney protesting to jurisdiction. *Sullivan v. Frazee*, 4 Robt. (N. Y.) 616.

Taking a deposition. *Scott v. Hull*, 14 Ind. 136; *Bentz v. Eubanks*, 32 Kans. 321.

Motion to set aside judgment, there being no personal service of process. *Lutes v. Perkins*, 6 Mo. 57.

1. *Deshler v. Foster*, 1 Morr. (Iowa) 403; *Abbott v. Semple*, 25 Ill. 107; *Flake v. Carson*, 33 Ill. 518; *Aultman v. Steinan*, 8 Neb. 109; *Collier v. Falk*, 66 Ala. 223.

2. Once having appeared, the cause

may proceed no matter what irregularity there is. *Knox v. Summers*, 3 Cranch. 496; *Legee v. Thomas*, 1 Blatchf. 11; *Suydam v. Pitcher*, 4 Cal. 280; *Payne v. Farmers' Bank*, 29 Conn. 415; *Deputy v. Betts*, 4 Han. (Del.) 352; *Miles v. Goodwin*, 35 Ill. 53; *Little v. Vance*, 14 Ind. 22; *Bell v. Pierson*, 1 Morr. (Iowa) 21; *Hall v. Biever*, 1 Morr. (Iowa) 113; *Harris v. Guin*, 18 Miss. 563; *Winchester v. Cox*, 3 Iowa, 575; *Choteau v. Rice*, 1 Minn. 192; *Lewis v. Nickols*, 26 Mo. 298; *State v. Woolery*, 39 Mo. 525; *Fox v. Reed*, 3 Grant (Pa.) 81; *Anderson v. Morris*, 12 Wis. 689; *Johnson v. Knoblauch*, 14 Minn. 16; *Johnson v. West*, 43 Ala. 689; *Humphrey v. Newhall*, 48 Ill. 116; *Carpenter v. Central Park R.*, 11 Abb. (N. Y.) Pr. N. S. 416; *Vernon v. West School District*, 38 Conn. 112; *Adams Exp. Co. v. Hill*, 43 Ind. 157; *Shuster v. Finan*, 19 Kan. 114; *Louisville, etc., R. Co. v. Nicholson*, 60 Ind. 158; *Hart v. Smith*, 17 Fla. 767; *Berry v. Conklin*, 23 Kan. 460; *Hulett v. Nugent*, 71 Mo. 131; *Lane v. Leech*, 44 Mich. 163.

Defendant's voluntary appearance is equivalent to personal service. *Christal v. Kelly*, 88 N. Y. 285.

A general appearance is not equivalent to service in time to avoid statute of limitations. *Etheridge v. Woodyly*, 83 N. Car. 11.

After appearance and plea in a case of an attachment against the property of a defendant not in reach of personal process, the case stands as if the suit were brought in the usual manner. *Toland v. Sprague*, 12 Pet. 300.

An appearance, however, does not enable a court to take cognizance of questions not submitted to its jurisdiction. *United States v. Yates*, 6 How. 605; *Payne v. Farmers' Bank*, 29 Conn. 415.

An appearance of defendant where plaintiff has two remedies waives objections to the remedy pursued. *Fisher v. Hepburn*, 48 N. Y. 41.

Appearance of a party to have his case put at the foot of the docket gives the court sufficient jurisdiction to render a personal judgment. *Crear v. Clough*, 52 Mo. 55.

such as to take advantage of defects, is not a waiver of those defects.<sup>1</sup>

**Withdrawal.**—Generally, appearance may be withdrawn by leave of court.<sup>2</sup>

**Authority.**—Usually an appearance by an attorney will be presumed to have been made with authority.<sup>3</sup>

**8. Commencement.**—Except in Connecticut and Vermont, the issuing or suing out of the writ is the commencement of the action. In those States the service is the commencement.<sup>4</sup> A suit in

1. *Campbell v. Swasey*, 12 Ind. 70; *Allen v. Lee*, 6 Wis. 478; *Nye v. Liscom*, 21 Pick. (Mass.) 263; *Ames v. Winsor*, 19 Pick. (Mass.) 207.

The filing a motion to dismiss for want of jurisdiction is a voluntary appearance, waiving defect in summons. *Handy v. Insurance Co.*, 37 Ohio, 366.

An appearance for moving to quash a writ for want of jurisdiction or insufficiency of service does not subject to the jurisdiction or waive the illegality. *Hodges v. Brett*, 4 Greene (Iowa), 345; *Milburn v. Fouts*, 4 Greene (Iowa), 346; *Ulmer v. Hiatt*, 4 Greene (Iowa), 439; *Johnson v. Buells*, 26 Ill. 66; *Weil v. Lowenthal*, 10 Iowa, 575; *Billin v. White*, 25 La. Ann. 624; *Bank of Tenn. v. Anderson*, 3 Sneed (Tenn.), 669; *Camp v. Tibbetts*, 2 E. D. Smith (N. Y.), 20; *Stetson v. Goldsmith*, 30 Ala. 602; *Morris v. Thierry*, 29 La. Ann. 362; *Covert v. Clark*, 23 Minn. 539. But see *Curtis v. Jackson*, 23 Minn. 539; *Harkness v. Hyde*, 98 U. S. 476; *Fare v. Gunter*, 82 Mo. 522; *Shaw v. Rowland*, 32 Kan. 154.

A rule of court requiring pleas and motions in abatement to be filed within two days after entry of action is not dispensed with by a special appearance. *Mitchell v. Union Life Ins. Co.*, 45 Me. 104.

An appearance to set aside an irregular judgment is not a waiver of any right. *Pomeroy v. Betts*, 31 Mo. 419.

Or in arrest of judgment. *Schell v. Le-land*, 45 Mo. 289.

Appearance merely to object, not waiver of want of jurisdiction. *Standley v. Arnou*, 13 Fla. 361.

To constitute a waiver of defects there must be an intention to appear. *Merkee v. Rochester*, 20 N. Y. Supreme Ct. 157.

A general appearance does not preclude the afterwards setting up want of jurisdiction. *Wheelock v. Lee*, 74 N. Y. 495.

This is so also when taken with a motion to dismiss writ for want of proper service. *Michels v. Stork*, 44 Mich. 22.

Petition for removal to Federal court

in which parties not served join is not an appearance, as to them, in State court. *Schwab v. Mabley*, 47 Mich. 512. See *Small v. Montgomery*, 17 Fed. Rep. 865; *Hendrickson v. Chicago*, etc., R., 22 Fed. Rep. 569.

**Non-appearance.**—A party not appearing waives nothing in regard to jurisdiction or authority of the court, or in the way of objections to the proceedings, and competency and sufficiency of plaintiff's evidence. *Clark v. Van Vracken*, 20 Barb. (N. Y.) 278.

In Pennsylvania an appearance *de bene esse* is good if held by the court that the process is sufficient. *Boland v. Mason*, 66 Pa. 138.

2. *Dana v. Adams*, 13 Ill. 691.

An appearance entered through fraud or mistake may be withdrawn. See *Michen v. McCoy*, 3 W. & S. (Pa.) 501; *United States v. Yates*, 6 How. 605.

A withdrawal leaves the case as if there had been no appearance, and does not submit to the jurisdiction. *Graham v. Spencer*, 14 Fed. Rep. 603.

3. *Martin v. Judd*, 60 Ill. 78; *Leslie v. Fisher*, 62 Ill. 118.

When sued on a record in which judgment has been entered on an attorney's appearing for the defendant, said defendant may deny authority by special plea. *Hill v. Mendenhall*, 21 Wall. 453.

A regular appearance, even without authority, confers jurisdiction. *England v. Garner*, 90 N. Car. 197.

4. *Carpenter v. Butterfield*, 3 Johns. (N. Y.) Cas. 145; *Hogan v. Cuyler*, 8 Cow. (N. Y.) 203; *Parker v. Colcord*, 2 N. H. 36; *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Reed v. Brewer, Peck*, (Tenn.) 276; *Thompson v. Bell*, 6 T. B. Mon. (Ky.) 560; *Day v. Lamb*, 7 Vt. 426; *Gates v. Bushnell*, 9 Conn. 530; *Downer v. Garland*, 21 Vt. 362; *Cox v. Cooper*, 3 Ala. 256; *Whitaker v. Turnbull*, 3 Harr. (Del.) 172; *Fearle v. Simpson*, 2 Ill. 30; *Swisher v. Swisher*, *Wright* (Ohio), 755; *Caldwell v. Heitsch*, 9 W. & S. (Pa.) 51.

To render the action "commenced" in Vermont, there must be service of the

equity is commenced when the bill is filed, not when defendant is served.<sup>1</sup>

**9. Consolidation.**—The consolidation of actions rests in the discretion of the court on motion made for that purpose.<sup>2</sup>

**Union of Legal and Equitable Demands.**—A party who claims a legal title must proceed at law, while one whose title or claim is equitable must proceed by the forms and rules of equity proceedings.<sup>3</sup>

writ sufficiently completed to call upon the defendant to answer. *Kirby v. Jackson*, 42 Vt. 552.

The filing of a summons and complaint is the commencement of an action in relation to real estate only for the purpose of operating as constructive notice to purchasers, etc., from the defendant, and for no other purpose. *Haynes v. Onderdonk*, 2 Hun (N. Y.), 619.

If the summons be sued out before the days of grace have expired, the cause of action does not exist on a note. *Collins v. Montemy*, 3 Ill. App. 182.

Commencement will be presumed when appearance made and answer filed, if record shows no issuance of writ or any objection taken. *Charlestown v. Hay*, 74 Ind. 127.

No property being attached and no service attempted, an action cannot be properly entered. *Searles v. Hardy*, 75 Me. 461.

1. *Gordon v. Tyler*, 53 Mich. 629.

2. *Worthy v. Chalk*, 10 Rich. (S. Car.) 141; *McRae v. Boast*, 3 Rand. (Va.) 481; *Scott v. Brown*, 1 Nott & M. (S. Car.) 417; *Lewis v. Daniel*, 45 Ga. 124.

A court of equity may consolidate with or without consent of complainants. *Burnham v. Dalling*, 13 N. J. L. 310. See also *Groff v. Musser*, 3 Serg. & R. (Pa.) 262; *Reid v. Dodson*, 1 Overt. (Tenn.) 396; *Clason v. Church*, Col. (N. Y.) Cas. 62; 1 Johns. (N. Y.) Cas. 29.

Several suits which might have been comprised in one writ may be consolidated on motion, on payment of costs in all suits but one, unless the defences are different. *Powell v. Gray*, 1 Ala. 77.

Several actions of ejectment comprising the same question and defence have been consolidated. *Den v. Kimble*, 10 N. J. L. 335; *Jackson v. Stiles*, 5 Cow. (N. Y.) 282.

Even when one suit has been commenced before another, unless causing prejudice or delay to plaintiff. *Dunning v. Bank*, 19 Wend. (N. Y.) 23.

Defence must be same or there must be no defence, or questions arising must be identical. *Wilkinson v. Johnson*, 4 Hill (N. Y.), 746; *Logan v. Mechanics'*

*Bank*, 13 Ga. 201; *Howard v. Chamberlain*, 64 Ga. 684.

Lands which are the subject of different actions, being situated in different counties, or parties to the one not being interested in the subject of the other, the actions cannot be consolidated. *Mayor v. Coffin*, 90 N. Y. 312.

**Promissory Notes.**—Actions on promissory notes having the same drawer, indorser, and indorsee will be allowed to consolidate. *Bank v. Cohen*, 2 Nott & M. (S. Car.) 440.

Actions on such notes drawn at different dates and payable at different times, though by same plaintiff against same person, cannot be consolidated unless the defences are the same. *Worley v. Glentworth*, 10 N. J. L. 241; *Thompson v. Shepherd*, 9 Johns. 262.

The amount of notes must not exceed jurisdiction. *Parrott v. Green*, 1 McCord (S. Car.), 53.

**Practice.**—Two suits consolidated must be conducted as if one and the same. *Castro v. Whitlock*, 15 Tex. 437.

A motion to consolidate must be made before trial. *Eleventh Ward Sav. Bank v. Hay*, 8 Daly (N. Y.), 328.

**Patents.**—Two suits for infringement of different patents in one machine may be consolidated. 24 Fed. Rep. 90.

3. *Hurt v. Hollingsworth*, 100 U. S. 100; *S. P. La Mothe Manufacturing Co. v. National Tube Works Co.*, 7 Repr. 138.

While M. was occupying lands as a homestead a creditor caused them to be sold on execution, and H. bought them and took a sheriff's deed but did not get possession. Later M. sold the lands to M. and gave him a deed and possession. Of course the title then depended on the validity of the homestead claim: if the land was exempt, the execution sale was a nullity; if it was not, then M.'s conveyance was void, for when it was made his title had been divested. To determine the question, M. brought suit to vacate the sheriff's deed as a cloud on the title, and H. answered, denying the homestead exemption, alleging his own purchase and that M. wrongfully withheld the land

**10. Joinder.**—Several causes of action may be joined in the same suit, provided they are of the same nature and arise in the same right. Actions differing in form have been allowed to be joined.

Entire rights of action arise out of one and the same contract ; several, out of different acts or contracts.<sup>1</sup>

from him, and asking judgment for possession. The circuit court, partly on a stipulation of parties, entertained both claims, heard the evidence as to the homestead claim and decided that it was invalid, and then rendered judgment dismissing M.'s suit and granting H.'s demand for possession. *Held*, that a Federal court cannot entertain two such demands in one action. The first is strictly a suit in equity seeking especial relief which only a court of chancery can grant. The second is an action at law for the recovery of real property. The two cases are entirely different in their nature and can be determined where the distinctions between equitable and legal proceedings are maintained only in separate suits. In the one case, if the allegations of the plaintiff be sustained the judgment must be declaratory and prohibitory, adjudging that the deed of the sheriff to the defendant constitutes a cloud upon his title, and enjoining the defendant from asserting any claim to the premises under it. In the other cases, if the defendant establishes his averments the judgment must be for the possession of the premises and the rent and the profits.

In the Federal courts such a blending of equitable and legal causes of action in one suit is not permissible. See *Hurt v. Hollingsworth*, 100 U. S. 100.

The statute adopting State laws of procedure for Federal courts does not adopt a State law allowing equitable defences to be set up against a demand of legal cognizance, *e.g.*, in an action on a judgment. *Montejo v. Owen*, 14 Blatchf. 324; *S. P. La Mothe Manufacturing Co. v. National Tube Works*, 7 Repr. 138.

Where one of two innocent parties must suffer from the misconduct of a third, he who placed it in the power of such third party to work the injury must suffer the loss. *Bailey v. Crim*, 8 Repr. 455; *Rawls v. Deshler*, 4 Abb. (N. Y.) App. Dec. 12.

After recovery in an ejectment suit a law proceeding is instituted for the mesne profits. On failure to recover by reason of the bar of the statute of limitations, recourse to equity will not be allowed. *Mitchell v. Mitchell*, 21 Md. 585.

Equity cannot be resorted to after plaintiffs have failed to make out a case

in an action for damages for non-performance of contract for sale of land. *Towle v. Jones*, 1 Robt. (N. Y.) 87.

Under the provisions of the N. Y. Code for the joinder of legal and equitable actions, one demanding in one suit the removal of a cloud on his title and recovery of possession must allege facts necessary to support him if sought in separate suits. *Bockes v. Lansing*, 74 N. Y. 437.

In general, claims to equitable relief, and to a judgment at law, cannot be prosecuted in the same action. *Mayo v. Madden*, 4 Cal. 27; *Harvey v. Dewitt*, 13 Gray (Mass.), 536; *Reubens v. Joel*, 13 N. Y. 488.

1. Com. Dig., "Action," G.; 1 Bac. Abr. 51-2; 2 Saund. 117; *Holland v. Bothmar*, 4 T. R. 229; *Halleck v. Powell*, 2 Caines, 217; *Union Cotton Manufactory v. Lobdell*, 13 Johns. 462.

Several items of account arising at different times need a contract, either express or implied, embracing all the items, to make an entire demand. *Secor v. Sturges*, 16 N. Y. 548.

An account for goods sold, all due, is an entire demand. *Guernsey v. Carver*, 8 Wend. (N. Y.) 492.

A creditor holding several notes against the same debtor, each of which, separately, is within a justice's jurisdiction, while the amount of all exceeds it, may sue on them separately before a justice, or, if all due and in the same right, may unite them in one suit before a court of larger jurisdiction. *Ferguson v. Cul-ton*, 8 Tex. 283.

So in Pennsylvania the court will on appeal consolidate separate suits before a justice on different promissory notes. *Boyle v. Grant*, 18 Pa. St. 162.

The law of Louisiana will not favor a number of distinct suits against the same person; nor the uniting in one suit demands against several distinct persons. *Leverich v. Adams*, 15 La. Ann. 310.

Deposits on two accounts at a bank in trust for two children give rise to separate claims on depositor's death by his children. *Ellison v. New Bedford, etc., Savings Bk.*, 130 Mass. 48.

Where there are two contracts, one express, the other implied, two separate

**11. Splitting of Actions.**—An entire claim or demand arising out of a single transaction, whether in the nature of contract or tort, cannot be divided into separate and distinct claims and the same form of action brought for each, or two suits maintained without defendant's consent.<sup>1</sup>

causes of action may be combined in one suit under the New York Code. *Hawk v. Thorn*, 54 Barb. (N. Y.) 164.

Breaches of contract requiring separate findings are independent causes of action, though arising on the same contract. *Boyce v. Christy*, 47 Mo. 70; *Brownell v. Pacific R. Co.*, 47 Mo. 239.

Claims as of an executor cannot be joined with those accruing by private right. But such as in their nature must accrue in one's own right, as for work and labor done, may be joined with those accruing in the right of testator. *Bulkley v. Andrews*, 39 Conn. 523.

A cause of action against the trustee of an insolvent savings bank to recover damages caused by his unauthorized investments cannot be joined with one on a bond given by him to assist in making up a deficiency in the assets of the bank. The N. Y. Code does not apply where the liability is by operation of law and fact. *French v. Salter*, 17 Hun (N. Y.), 546.

Two bills of goods do not constitute one demand if one may be sued on before the other becomes due. *Stickel v. Steel*, 41 Mich. 350.

Counts charging negligence in inspection of title, and deceit, may be joined in one action against the representative of a deceased attorney-at-law. *Tichenor v. Hayes*, 41 N. J. L. 193.

Where distinct and separate judgments in different amounts are asked the parties cannot unite, though against the same person. *Independent Sch. Dist. v. Same*, 50 Iowa, 322.

An action on a note against maker and indorser cannot be joined with an action on account against the indorser only. *Thorpe v. Dickey*, 51 Iowa, 676.

Nor an action for conversion of personal property and an account in same complaint. *Thompson v. St. Nicholas Bank*, 6 How. (N. Y.) Pr. 163.

Nor actions against three successive county treasurers for misinvestment. *Firth v. Roe*, 60 How. (N. Y.) Pr. 432.

A demand for rents of land with an allegation of their conversion is not a joinder of tort and contract. *Finch v. Baskerville*, 85 N. C. 205.

A note with a promise to pay interest at one time and principal at another may

be the foundation of two actions, though the principal be due when the action for interest is brought. *Dulaney v. Payne*, 101 Ill. 325; s. c., 40 Am. Rep. 205.

1. *Wagner v. Jacoby*, 26 Miss. 532; *Farrington v. Payne*, 16 Johns. (N. Y.) 432; *Herriter v. Porter*, 23 Cal. 385; *Brannenburg v. Indianapolis, etc., R. Co.*, 13 Ind. 103; *Logan v. Caffrey*, 30 Pa. St. 106; *Smith v. Jones*, 15 Johns. (N. Y.) 229; *Avery v. Fitch*, 4 Conn. 362; *Vance v. Lancaster*, 3 Hayw. (Tenn.) 130; *Colvin v. Corwin*, 15 Wend. (N. Y.) 557; *Firemen's Ins. Co. v. Cochran*, 27 Ala. 228; *Chicago R. Co. v. Nichols*, 57 Ill. 464; *State v. Shinn*, 42 N. J. L. 138; *Hennequin v. Barney*, 24 Fed. Rep. 580; *Olcott v. Hugus*, 105 Pa. St. 350; *Hoff v. Myers*, 42 Barb. (N. Y.) 270.

Where in an action upon an award in favor of two partners the defendant insisted upon a misjoinder of parties, he having bought the interest of one of the parties, and the court had given the plaintiff leave to amend by striking out the name of his partner as a plaintiff, *held*, that the defendant had agreed that the interests of his creditors should be separate, and could not complain that he was held to his contract. *Carrington v. Crocker*, 37 N. Y. 336.

An action will lie in case of partial breach, for such breach, notwithstanding the full time has not elapsed, unless the contract is indivisible; but such recovery will bar a further claim for damages of the breach sued on. *Crabtree v. Hagenbaugh*, 233.

The court may try such counts as are in its jurisdiction, though there may be other counts not in the jurisdiction setting forth different causes of action. *Diblee v. Davison*, 25 Ill. 486.

Independent sales of liquor in cask, made on different days may be sued for separately. *Cushman v. Ban*, 2 Hilt. (N. Y.) 340.

Suit brought and judgment recovered upon certain items in an account bar a subsequent suit upon other items in the same account not claimed in the first action. *Borngesser v. Harrison*, 12 Wis. 544.

The test of entirety is whether the same evidence is necessary to support all



(a) *Same Security*.—When two suits for the same cause of action are founded upon different securities, the plaintiff may

branches of a claim. *Crips v. Talvande*, 4 McCord. (S. C.) 20.

The taking by one act of several chattels of the same person will only support one action. Any articles omitted cannot be recovered. *Folsom v. Clemence*, 119 Mass. 473.

A cause of action founded on conversion of personal property may be joined with one founded on contract. The tort may be waived and the suit brought on the implied contract. *Logan v. Wallis*, 76 N. C. 416.

A party who has paid judgment and costs against him cannot after reversal recover judgment in one suit and costs in another. *Clayes v. White*, 83 Ill. 540.

An account for a bill of goods purchased in one day is to be taken as one entire transaction in the absence of evidence of a contrary intention. *Magruder v. Randolph*, 77 N. Car. 79.

The action against a decedent's executor or administrator for deceit of decedent does not merge a judgment obtained against decedent's surviving partner for the debt contracted by means of the deceit. *Morgan v. Skidmore*, 3 Abb. (N. Y.) N. Cas. 92.

Action for wrongful conversion cannot be joined with one for proceeds of same property. *Teall v. Syracuse*, 32 Hun (N. Y.), 332.

But false representations and conversion may. *Silver v. Holden*, 50 N. Y. Super. Ct. 236.

Possession of real estate and foreclosure of mortgage cannot be asked for in one action. *Butler University v. Conard*, 94 Ind. 353.

A had two horses killed at the same time on a railroad, and sued the company before a justice for the killing of one horse, and recovered judgment for \$100, the limit of the jurisdiction. *Held*, that he could not afterwards maintain an action before a justice for the other horse. *Camp v. Morgan*, 21 Ill. 255.

A party cannot bring several suits for several sums past due on a lease. If more than one payment is due, these payments should be consolidated in one suit. *Casselberry v. Forquer*, 27 Ill. 170. See *Lee v. Kearny Committee*, 42 N. J. L. 543.

Where a party has demands against another resting in account, and having brought suit on the trial withdraws from the jury some of the items, while he submits others, he cannot sustain an action to recover the items so withdrawn.

*Stevens v. Lockwood*, 13 Wend. (N. Y.) 644.

An entry on land, and felling trees and a conversion of them, are distinct causes, and when united in a complaint cannot be severed by the court, both causes failing together. *Frost v. Duncan*, 19 Barb. (N. Y.) 560.

The doctrine that when an order is drawn on a fund it amounts to an assignment thereof does not apply to an order for a part of the fund only. This gives no lien as against the drawee. He has a right to stand on the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments. *Mandeville v. Welch*, 5 Wheat. 286.

There being several different claims arising out of the same contract, payable at different times, all those due must be included in an action brought. Reformed, etc., *Church v. Brown*, 54 Barb. (N. Y.) 101.

An owner may maintain separate actions of ejectment for two lots, for which there was a contract of sale, and the payment of the whole purchase-money under one verdict is payment of the purchase-money in the other. *Roddy v. Harsh*, 62 Pa. 129.

Where the second ground of action was not within the knowledge of the plaintiff at the time of commencing the first action, the objection to a subsequent action does not apply. *Risley v. Squire*, 53 Barb. (N. Y.) 280.

A creditor may bring an action for his claims notwithstanding the pendency of an action against him by the debtor in which such claims might have been set up as a counter-claim. *Liggnot v. Redding*, 4 E. D. Smith (N. Y.), 285; *Taggart v. Rice*, 37 Vt. 47.

**Privy**.—Where an action in form *ex delicto* is brought to recover damages for an injury arising from a breach of contract, some privity between plaintiff and defendant must be shown. *Gray v. Ottolinger*, 12 Rich. (S. Car.) 101.

A submission to an issue framed by court, superseding two ejectment suits and an equity suit, is binding, and the verdict conclusive. *Long's Appeal*, 92 Pa. 171.

A party cannot maintain two inconsistent actions to enforce the same right. *Pott's Appeal*, 5 Pa. 500.

Where a person can have an adequate remedy by an order in a cause already pending in the same court, or under a

prosecute both to judgment, but he may only have one satisfaction.<sup>1</sup>

**12. Cumulation.**—It is not always necessary to enforce a statutory remedy in order to pursue a statutory right; but where a statute confers a right and declares the course necessary to enforce it, the remedy so provided must be adopted. The ordinary remedies provided by common law or general legislation cannot be pursued.<sup>2</sup>

When a statute prescribes a new remedy for an existing common-law right, the new remedy is cumulative.<sup>3</sup>

**13. Statutory Remedies.**—One who sues on a right of action given by statute must present a case within the provisions of the stat-

bill in equity already filed by him, another or separate action will not lie. *Mason v. Miles*, 63 N. Car. 564; *Whitaker v. Bond*, Phil. Eq. (N. Car.) 227.

An action on a promissory note given for work and labor done and materials furnished by the plaintiff in erecting and repairing certain buildings of the defendant cannot be maintained if it appears that the plaintiff, prior to the commencement of the suit, had instituted proceedings in another court to enforce his lien on the buildings for the same debt. *Ogden v. Bodle*, 2 Duer (N. Y.), 611.

The fact that an action for an accounting has been brought in which the defendant may be required to account for moneys received after the commencement of the action does not oblige the plaintiff to obtain such accounting; but he may make such items the subject of a new action. *Tyler v. Willis*, 35 Barb. (N. Y.) 213; 13 Abb. Pr. (N. Y.) 369.

**1. Stillwell v. Bertrand**, 22 Ark. 379.

The true test is whether satisfaction has been had; if not, both proceedings on the primary debt and collateral may be continued. *Corn Exchange Ins. Co. v. Babcock*, 8 Abb. Pr. (N. Y.) N. S. 256.

**2. The Highland Light**, Chase Dec.

150; *James v. Atlantic Delaine Co.*, 11 Bankr. Reg. 390; *St. Pancras v. Battenberg*, 2 C. B. (N. S.) 477; *Dudley v. Mayhew*, 3 N. Y. 9; *First Nat. Bank of Whitehall v. Lamb*, 57 Barb. (N. Y.) 434; *Haley v. Petty*, 42 Ark. 392; *McKinney v. Monongahela Nav. Co.*, 14 Pa. St. 65; *Ward v. Severance*, 7 Cal. 126; *Fuller v. Edings*, 11 Rich. (S. Car.) 239; *Butler v. State*, 6 Ind. 165; *Cole v. Muscatine*, 14 Iowa, 296; *Hazen v. Essex Co.*, 12 Cush. (Mass.) 475; *Camden v. Allen*, 26 N. J. L. 398; *Weller v. Wegand*, 2 Grant (Pa.), 103; *Brown v. White Deer*, 27 Pa. St. 109; *Babb v. Mackey*, 10 Wis. 371.

A statute which provides that a penalty imposed by it may be recovered by a summary proceeding upon complaint

before two or more justices does not bar the party from his remedy by action. *Collinson v. Newcastle & Darlington R. Co.*, 1 Car. & Kir. 546; *Lichfield v. Simpson*, 82 B. 65. See *Law v. Salter*, 51 N. Y. 1.

Where a statute authorized a corporation to forfeit the shares of stock of a subscriber for the non-payment of instalments due upon a stock subscription, an exercise of the right of forfeiture on the part of the corporation will bar any subsequent action for such instalments. *Small v. Herkimer Mfg. Co.*, 2 N. Y. 330; *Mills v. Stewart*, 41 N. Y. 384.

A railroad had in its construction the legal right to pass over and destroy a highway in a town, and a general statute provided for the injury done. To recover for the acts done according to law, the declaration must be specially founded on the statute. *Henniker v. Contoocook Valley R.*, 29 N. H. 146.

Where a remedy is given for only part of an injury authorized by statute, the common law may be resorted to for the residue. *Troy v. Cheshire R. Co.*, 23 N. H. 83; *Gibbes v. Beaufort*, 20 S. Car. 213.

If the remedy given by statute is not adequate, it is not presumed to be exclusive. *Johnston v. Louisville*, 11 Bush (Ky.), 527.

**3. Cox v. Robins**, 9 N. J. L. 384; *Colden v. Eldred*, 16 Johns. (N. Y.) 220; *Fryburgh Canal v. Frye*, 5 Me. 38; *Mayor, etc., of Baltimore v. Howard*, 6 Har. & J. (Md.) 483; *Booker v. M'Robert*, 1 Call. (Va.) 243; *People v. Craycroft*, 2 Cal. 243; *Selden v. D. & H. Canal Co.*, 24 Barb. (N. Y.) 362; *Adams v. Richardson*, 42 N. H. 212; *Bruce v. Hudson Canal Co.*, 19 Barb. (N. Y.) 371.

A statutory remedy, given by express or implied provision, does not take away the common-law remedy, but is cumulative. *Wells v. Steele*, 31 Ark. 219.

This rule is applicable to maritime law. *The Waverly*, 7 Biss. 465.

ute.<sup>1</sup> Any court which has jurisdiction of the matter and can obtain jurisdiction of the parties may enforce a legal liability incurred, or a personal right of action fixed either by the common or statute law.<sup>2</sup>

**14. Local and Transitory Actions.**—Laws prescribing where defendants are to be sued are never understood as including suits local in their character, unless expressly set out.<sup>3</sup> Actions founded on privity of estate are local; on privity of contract, transitory.<sup>4</sup>

1. *Whittemore v. Cutter*, 1 Gall. 429.

The construction of the statute, however, if remedial must be liberal. See also *Bowditch v. Boston*, 101 U. S. 16.

2. *Dennick v. R. Co.*, 103 U. S. 11.

The fact that the right of action is given by statute does not vary the principle. *Ex parte Van Riper*, 20 Wend. 614.

Where a statute requires a citizen to erect a fire-escape, or imposes any absolute duty, any person damaged by the non-performance may maintain an action. *Willey v. Mulledy*, 78 N. Y. 310.

3. Rev. Stat. § 5198—designating courts in which national banks may be sued—will be construed as referring to transitory actions only. Actions local in their nature may be maintained in the proper State court against a national banking association in a county or city other than where it is established. *Casey v. Adams*, 102 U. S. 66.

4. *Henwood v. Cheeseman*, 3 Serg. & Rawle (Pa.), 503.

Actions founded on contracts with respect to lands are transitory. *Livingston v. Jefferson*, 1 Brock. 203.

**What have been held Local.**—Trespass or nuisance to real estate. *Sumner v. Finnegan*, 15 Mass. 284; *Livingston v. Jefferson*, 1 Brock. 203.

Trespass *quare clausum*. *Roach v. Danson*, 2 Humph. (Tenn.) 425.

*Replevin*. *Robinson v. Mead*, 7 Mass. 353.

Covenant of seizin. *Clarkson v. Gifford*, 1 Cai. (N. Y.) 5.

Contract for conveyance of land. *Parker v. McAllister*, 14 Ind. 12.

Debt on a judgment in a court of the State. *Smith v. Clark*, 1 Ark. 63; *Barner v. Kenyon*, 2 Johns. (N. Y.) Cas. 381. Action for obstructing a way. *Crook v. Pitcher*, 61 Md. 510.

**What held Transitory.**—Actions on contracts and for personal injuries, and for injuries to personal property. *Glen v. Hodges*, 9 Johns. (N. Y.) 67; *Gardner v. Thomas*, 14 Johns. (N. Y.) 134; *Shaver v. White*, 6 Munf. (Va.) 112; *Northern, etc., R. Co. v. Scholl*, 16 Md. 331.

Trespass *quare clausum*, in Virginia. *Livingston v. Jefferson*, 1 Brock. 203.

*Replevin*, in Pennsylvania. *Powell v. Smith*, 2 Watts (Pa.), 126.

Account for rents and profits of land. *Lewis v. Martin*, 1 Day (Conn.), 263.

Debt and covenant between lessor and lessee for recovery of rent. *Henwood v. Cheeseman*, 3 Serg. & Rawle (Pa.), 503; *Lienow v. Ellis*, 6 Mass. 331; *Birney v. Haim*, 2 Litt. (Ky.) 263.

Bill for rescinding contract for land. *Lewis v. Morton*, 5 T. B. Mon. (Ky.) 3.

Assault and battery. *Watts v. Thomas*, 2 Bibb. (Ky.) 458; *Redgrave v. Jones*, 1 Har. & M. (Md.) 195.

Action against a railroad company for killing stock. *Illinois, etc., R. Co. v. Swearinger*, 33 Ill. 289.

Actions against a town to recover damages caused by defects in highways. *Titus v. Frankfort*, 15 Me. 89.

Bill in equity to enjoin trespass on realty by felling timber. *Powell v. Cheshire*, 17 Ga. 357.

An action local at common law may be brought in a court having jurisdiction by statute. *Curtis v. Attwood*, 51 Conn. 169.

The New York statute relative to locality of actions applies only to causes arising in the State. Actions to recover damages for negligence are personal and transitory, and may be brought wherever the defendant can be found. *Barney v. Bumstenbinder*, 64 Barb. (N. Y.) 212.

An original action lies in Massachusetts against the members of a joint-stock company as partners, though the statute of the State in which the company existed provided that suits against joint-stock companies should be prosecuted in the name of the president or treasurer. The action under the statute is local. *Gott v. Dinsmore*, 111 Mass. 45.

A suit to subject assets descended to the heir, to the payment of his ancestor's debts must be prosecuted in the place in which the property is situate by equitable proceedings. *Williams v. Ewing*, 31 Ark. 229.

**15. Discontinuance.**—A discontinuance does not operate to prevent a subsequent suit for the same cause of action in every case.<sup>1</sup> Plaintiff has absolute right to discontinue at common law before or after issue joined and without leave of court.<sup>2</sup>

(a) *Termination.*—A suit does not end before complete satisfaction of or discharge from the judgment.<sup>3</sup>

**ACTUAL** is something real, in opposition to constructive or speculative,—something “existing in act.”<sup>4</sup>

Transitory actions upon contracts can be brought in any county of the State where service can be had. 46 Mich. 552.

Action on a certificate entitling plaintiff to interest in certain real property and dividends, title being in defendants as trustees, is transitory. *Roche v. Marvin*, 92 N. Y. 398.

A life-insurance company may be sued in the county where the person insured resided, under an act requiring insurance companies to be sued in county where “property insured” was. *Quinn v. Fidelity Beneficial Assoc.*, 100 Pa. St. 382.

1. *Bingham v. Wilkins*, Crabbe, 50; *Holmes v. The Lodemia*, Crabbe, 434; *Gibson v. Gibson*, 20 Pa. 9; *Steelman v. Sites*, 35 Pa. St. 216; *Bloss v. Plymale*, 3 W. Va. 393.

**Arbitration.**—A submission to arbitration is a discontinuance unless there is some agreement. *Norwood v. Stephens*, 7 Coldw. (Tenn.) 1.

Where pending a suit a submission to arbitration was made, and on award a discontinuance, it was held regular, but no bar to a second action. *Cunningham v. Craig*, 53 Ill. 252.

Agreement to arbitrate made out of court operates as a discontinuance. *Eddings v. Gillespie*, 12 Heisk. (Tenn.) 548.

This is not affected by Wisconsin Code. *Noble v. Strachan*, 32 Wis. 314; *Bertschy v. McLeod*, 32 Wis. 205; *McLeod v. Bertschy*, 33 Wis. 205.

2. The right to discontinue terminates when the action is ready for judgment, though not formally entered. *Carleton v. Darcy*, 43 N. Y. Super. Ct. 373.

Discontinuance against two joint wrongdoers on a consideration paid by one is not a bar for the same cause against the other. *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628.

**Terms.**—The court may exercise its discretion as to the terms on which a discontinuance is allowed. *Wilder v. Boynton*, 63 Barb. (N. Y.) 547.

**Assent.**—Plaintiff may discontinue without assent of defendant, but cannot thereby deprive him of any rights which he

may possess. *Cunningham v. White*, 45 How. (N. Y.) Pr. 486.

**Time.**—Discontinuance cannot be obtained after verdict in favor of one defendant who has set up a separate defence and before verdict as to other defendants. *Meador v. Dollar Savings Bank*, 56 Ga. 605.

**Fraud.**—Discharge of an action obtained by fraud or misrepresentation to prejudice of plaintiff not valid. *Larabee v. Sewall*, 66 Me. 376.

3. *Walton v. Sugg*, Phil. (N. Car.) L. 98; *Capehart v. Van Campen*, 10 Minn. 158.

4. *State v. Wells*, 31 Conn. 210.

**Fraud, Actual and Constructive (distinguished).**—“Actual fraud implies deceit, artifice, trick, design, some direct active operation of the mind. Constructive fraud is indirect, and may be implied from some other act, or omission to act, which may be, in moral contemplation, entirely innocent; but which, without the explanation or actual proof of its innocence, is evidence of fraud.” *People v. Kelly*, 35 Barb. (N. Y.) 457. Fraud may be actual or constructive. Actual fraud consists in any kind of artifice by which another is deceived. Constructive fraud consists in any act of omission contrary to legal or equitable duty, trust, or confidence justly reposed which is contrary to good conscience and operates to the injury of another. *Jackson v. Jackson*, 47 Ga. 99, 109.

**Actual Possession.**—Possession means simply the owning or having a thing in one's own power; it may be actual or it may be constructive. Actual possession exists where the thing is in the immediate occupancy of the party; constructive is that which exists in contemplation of law without actual personal occupation. *Brown v. Volkening*, 64 N. Y. 76, 80. “Actual possession,” as a legal phrase, is put in opposition to the other phrase “possession in law,” or constructive possession. Actual possession is the same as *pedis possessio* or *pedis positio*; and these mean a foothold on the land, an actual entry, a possession in fact, a standing upon it, an occupation of it, as a real

demonstrative act done. It is the contrary of a possession in law, which follows in the wake of title, and is called constructive possession. *Churchill v. Underdonk*, 59 N. Y. 134, 136. See *Jackson v. Sellick*, 8 J. R. 262; *Wagoner v. Hastings*, 5 Pa. St. 300. "Actual possession" is that which is accompanied with the real and effectual enjoyment of an estate with the reception of its fruits, and is contradistinguished from imaginary or fictitious possession. *Suffol. v. Hepburn*, 1 Cal. 263. "Actual possession" as much consists of a present power and right of dominion as an actual corporal presence. *Min-turn v. Burr*, 16 Cal. 107, 109. By "actual possession" is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation—by a substantial inclosure—by cultivation, or by appropriate use, according to the particular locality and quality of the property. *Coryell v. Cain*, 16 Cal. 567, 573. "Actual possession" of land is the purpose to enjoy, united with or manifested by such visible acts, improvements, or inclosures as will give to the locator the absolute and exclusive enjoyment of it. *Staminger v. Andrews*, 4 Nev. 59, 68. There are two kinds of possession of real property known to the law—actual and constructive. It is "actual possession" when in the immediate occupancy of the party. It is actual when the owner goes upon the land to take possession, and exercises acts of ownership over it. It is actual also where one having the title is in possession of lands by his tenant, agent, or steward. *Fleming v. Maddox*, 30 Iowa, 240. In the case cited (*Churchill v. Underdonk*, 59 N. Y. 134) actual possession was interpreted to mean an actual occupation of the same; in other words, a possession in fact as contradistinguished from that constructive one which the legal title draws after it. The correctness of that construction is apparent. The word "actual" in the statute is specially significant. It is plainly used in opposition to "virtual" or "constructive," and means an open, visible occupancy. *Cleveland v. Crawford*, 7 Hun (N. Y.), 616, 619. Cf. *Orme's Case*, L. R. 8 C. P. 281; *Hadfield's Case*, *ibid.* 306. The occupation of pine land by annually making turpentine on it is such an "actual possession" as will oust a constructive possession by one claiming merely under a superior paper title. *Bynum v. Carter*, 4 Ired. N. C. 310. See *Wolf v. Ament*, 1 Grant's Cases, 150. By "actual possession," as the terms are here

used, is meant that possession which is accompanied by the real and effectual enjoyment of the property. *Davis v. Water Works*, 57 Cal. 543. The words "actual possession" have two separate and distinct meanings which should not be confounded; yet some courts have confounded them, but we trust this court will not follow such examples. "Actual possession" is used as opposed to "constructive possession," such possession as the law construes to be in a man when there is no real possession. In this sense of the words actual possession, the possession of my tenant, agent, or steward is my "actual possession"—that is to say, the possession is actual and not constructive. But actual possession has another meaning. It means a possession continued from day to day; such a possession as when it is interfered with needs a summary remedy. This is the sense in which actual possession is used in the Code. *Langworthy v. Myers*, 4 Iowa, 18, 27. Cf. *Neubrandt v. State*, 53 Wis. 89. The "actual possession" mentioned in the Maine statutes of 1853, c. 34, § 1, is a possession which is open, notorious, and adverse in its character, and does not differ from that mentioned in the R. S. of 1840, c. 45, § 23, excepting as to the time of its continuance. *Peabody v. Hewett*, 52 Me. 33, 45.

**Actual and Continued Change of Possession.**—In the statute of frauds, the words "actual and continued" are applied to the change of possession. They mean an open, public change of possession which is to continue and be manifested continually by outward and visible signs, such as render it evident that the possession of the judgment debtor has ceased. He must cease from the apparent as well as real ownership. *Topping v. Lynch*, 2 Robertson (N. Y.), 484, 488, approved *Steele v. Benham*, 84 N. Y. 634. Cf. *Camp v. Camp*, 2 Hill (N. Y.), 628; *Randall v. Parker*, 3 Sandf. (N. Y.) 73; *Grant v. Lewis*, 14 Wis. 487; *Brunswick v. McClay*, 7 Neb. 137; *Steele v. Benham*, 84 N. Y. 634; *Stevens v. Irwin*, 15 Cal. 503.

**Actual Delivery.**—"Actual delivery" consists in the giving real possession of the thing sold to the vendee or his servants, or special agents, who are identified with him in law, and represent him. *Bolin v. Huffnagle*, 1 Rawle (Pa.), 1, 19.

**Actual Notice** is such as has been proved to have been given to a party directly and personally, or such as he is presumed to have received personally, because the evidence within his knowledge was sufficient to put him upon inquiry; and actual

notice may be proved by the facts of the case from which it can be inferred. *Johnson v. Dooley*, 72 Ga. 297.

The "actual notice" required by the statute is not synonymous with actual knowledge. We think the true rule is, that notice must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would "put a prudent man upon inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase." *Brinkman v. Jones*, 44 Wis. 498, 519.

We will take leave of this point by remarking that it would, perhaps, be more accurate to say that actual notice, in the case we have been considering, is shown when the proof, positive or presumptive, authorizes the clear and satisfactory conclusion that the purchaser had knowledge of the encumbrance, or would have had it if he had not wilfully declined to search for it, and thus his conscience is affected by it. *Jordan v. Pollock*, 4 Ga. 145, 158. "Actual notice" does not require positive and certain knowledge, such as seeing the deed; but that is sufficient notice, if it be such as men usually act upon in the ordinary affairs of life. When it is shown that purchasers are affected with a knowledge of such circumstances, then the foundation is laid from which the inference of "actual notice" may be drawn. *Beattie v. Butler*, 21 Mo. 313, 323. *Cf. Curtis v. Munday*, 3 Metc. (Mass.) 405; *Vaughn v. Tracy*, 22 Mo. 415; *Masterson v. West End R. Co.*, 5 Mo. App. 64.

The Kansas Code, concerning the opening-up of judgments rendered upon service by publication, provides as one condition that the party shall "make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in and make his defence." To constitute the "actual notice" specified in the statute, it is not necessary that the defendant be fully informed as to time of commencing suit, the court in which it is commenced, the property that has been attached, the exact amount claimed, the day named for answer, or other details of the action. It is enough that he is distinctly and clearly notified that a suit has been commenced and is pending against him, and notified from such a source and within such a time that by the exercise of ordinary and reasonable care and prudence he can ascertain all details and make his defence. *Beckwith v. Douglas*, 25 Kan. 229.

**Actual Total Loss** is where the subject insured wholly perishes, or its recovery is rendered irretrievably hopeless; a constructive total loss takes place when the subject insured is not wholly destroyed, but its destruction is rendered highly probable, and its recovery, though not hopeless, yet exceedingly doubtful. *Butt v. Brewers and Malsters' Ins. Co.*, 9 Hun (N. Y.), 383.

An actual total loss is where the vessel ceases to exist in specie; becomes a "mere congeries of planks," incapable of being repaired; or where, by the peril insured against, it is placed beyond the control of the insured, and beyond his power of recovery. *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

A cargo was insured for \$2339, "only against general average and absolute total loss." The ship was wrecked and the cargo sold for salvage, after payment of which and costs there was left \$750. *Held*, that the insurers were not liable. *Gould v. Louisiana Mut. Ins. Co.*, 20 La. Ann. 259.

**Actual Cash Payment.**—The provision of a statute requiring a limited partner to contribute in "actual cash payments," is not violated by a payment in checks of third persons, it being conceded that they represented cash, and that the amount actually went into the firm business. *Hogg v. Orgill*, 34 Pa. St. 344.

*Contra*: authorizing a firm to apply for its benefit, and as part of its capital, United States bonds payable to bearer in the hands of a bailee, is not "an actual cash payment as capital" by a special partner, even though subsequently the bonds are applied for the benefit of the firm, and realize more than the necessary amount in cash. *Haggerty v. Foster*, 103 Mass. 17. *Cf. Pierce v. Bryant*, 5 Allen, 91; *Haviland v. Chase*, 39 Barb. (N. Y.) 283.

**Actual Cash Value.**—In an insurance policy the term "actual cash value" means the sum of money the insured goods would have brought for cash, at the market price, at the time when and the place where they were destroyed. *Mack v. Lancashire Ins. Co.*, 4 Fed. Rep. 59. *Cf. Wolfe v. Howard Ins. Co.*, 7 N. Y. 583.

**Actual Cost.**—It is apparent that the terms "actual cost," "real cost," and "prime cost," used in these sections, are phrases of equivalent import, and mean the true and real price paid for the goods upon a genuine *bona-fide* purchase. *United States v. Sixteen Packages*, 2 Mason, 48. *Cf. Alfonso v. U. S.*, 2 Story, 421. Under a lease between two railroads, whereby, when extra trains were required, the

lessee was to be allowed "the actual cost of running the same," it was held that the term "actual cost" meant money actually paid out. *Lexington, etc., R. Co. v. Railroad Co.*, 9 Gray (Mass.), 226.

**Actual Determination.**—A judgment of affirmance by default is not an "actual determination." *McMahon v. Rauhr*, 47 N. Y. 67. Cf. *Caughy v. Smith*, *ibid.* 244; *Frank v. Benner*, 3 Daly, 422. A *remittitur* controls the court below, and a judgment in pursuance of it cannot be said to be an "actual determination." *Wilkins v. Earle* 42 How. Pr. (N. Y.) 253.

**Actual Market Value.**—The market value of goods is the price at which the owner of them, or the producer of them, holds them for sale—the price at which they are freely offered in the market; such prices as he is willing to receive if the goods are sold in the ordinary course of trade; the price which the purchaser must pay to get the goods. That is the "actual market value." *Cases of Champagne*, 1 Ben. 241. Cf. *Quarter Casks of Sherry Wine*, 2 Ben. 249; *Six Cases of Ribbons*, 3 Ben. 536.

**Actual Military Service.**—The term service, in its restricted sense, is the exercise of military functions in the enemy's country in the time of war, or the exercise of military functions in the soldier's own State or country in case of insurrection or invasion; and in this sense the words of the statute, "actual military service," should be understood. *Van Deuzer v. Estate of Gordon*, 39 Vt. 111. A person in the naval service of the United States is not within the "actual military service." *Abrahams v. Bartlett*, 18 Iowa, 513. By the insertion of the words "actual military service," the privilege, as respects the British soldier, is confined to those who are on an expedition. *Drummond v. Parish*, 3 Curteis, 522, 542. But having marched into the enemy's country, from which he never returned, being encamped among a hostile population, and acting in conjunction with soldiers who were confronted by the rebel army, although he was in winter quarters, and not at the time of writing occupied with any present movement of the troops, but was apparently on some service detached from his own regiment, we cannot say that he was not a soldier "in actual service." *Leathers v. Greenacre*, 53 Me. 561, 573. "Actual military service" is confined to those who are on an expedition. A soldier at home on furlough cannot make a valid nuncupative will within the provision made in favor of soldiers in actual military service. *Smith's Will*, 6

*Phila.* 104. Cf. *White v. Repton*, 3 Curteis, 818; *Gould v. Safford's Estate*, 39 Vt. 498.

**Actual Occupation.**—By "actual occupant," in designating the individual against whom an action of ejectment might be brought, was intended no more than the "tenant in possession," as that term was used in the former practice. Occupant is he that has possession, one who has the actual use or possession of a thing. A soldier of the United States, claiming to be in charge, under superior officers, of real property, as property of the United States, is not the actual occupant, and an action cannot be maintained against him. *People v. Ambrecht*, 11 Abb. Pr. 97. An owner of land is not in the actual occupancy of the same, within the meaning of § 49 of the act concerning private corporations (ch. 23 Gen. Stat. p. 203), unless he is an actual resident thereon. *Hunt v. Smith*, 9 Kan. 137, 145. Cf. *Smith v. Sanger*, 3 Barb. (N. Y.) 360.

**Actual Ouster.**—By "actual ouster" is not meant a physical eviction; but a possession attended with such circumstances as to evince a claim of exclusive right and title, and a denial of the right of the other tenants to participate in the profits. *Burns v. Byrne*, 45 Iowa, 285.

**Actual Residence.**—Although a party may derive his title to different tracts of lands from different sources, yet if the tracts adjoin one another and are all in one inclosure, and there is no one but the owner residing thereon, such residence is an "actual residence" upon all the tracts. *Wharton v. Bunting*, 73 Ill. 16.

**Actually Sold.**—When are lands "actually sold" at a tax sale so as to entitle the treasurer to his fees? Clearly when the sale is completed; when he has collected from the purchaser the amount of the bid. *Miles v. Miller*, 5 Neb. 269; cf. *Fredelley v. Disereus*, 26 Ohio, 312.

**Actual Settler.**—I have before explained who may be an "actual settler" to demand a warrant—namely, one who has gone upon and occupied land with a *bona-fide* intention of an actual present residence; although he should have been compelled to abandon his settlement, by the public enemies, in the first stages of his settlement. But actual settlement intended by the ninth section (Act 3d April, 1792—3, *Smith's Laws, Penn.* 209) consists in clearing, fencing, cultivating, two acres of ground, at least, on each hundred acres, erecting a house thereon for the habitation of man, and a residence of five continued years next following his first

## ADDITION—ADDITIONAL.

**ADDITION—ADDITIONAL.**—These words denote the idea of joining or uniting one thing to another.<sup>1</sup>

settling, if he shall so long live. This kind of settling more properly deserves the name of improvements, as the different acts to be performed clearly import. This will satisfactorily explain what at first appeared to be an absurdity in that part of the proviso which declares that "if such actual settler shall be prevented from making such actual settlements." Per Washington, J., *Balfour v. Meade*, 1 Wash. C. C. Rep. (U. S.) 18, 26.

**Actual Damages.**—The "actual damages" sustained by the patentee are, according to the fourteenth section of the act of July 4, 1836 (5 U. S. Stat. at Large, 123), to be the sum fixed by the verdict. *Stephens v. Felt*, 2 Blatchf. 37.

**Actual Control, Care, or Management.**—The Texan code does not mean by these words, actual possession. A person in constructive possession of an animal upon the range—as an agent and the like—may exercise "actual control, care, or management" without even reducing the animal into actual possession, and, as we have seen, may thus constitute the owner within the meaning of the law. *Moore v. State*, 8 Tex. App. 496.

**Actually Occupied.**—A person rented a house in which he resided. He let out beds by the night. *Held*, a person who lives in a house, and merely lets out parts of it in the manner described, does not cease to be the actual occupier. *King v. Inhabitants*, 4 Ad. & Ell. 497. Cf. *King v. Inhabitants*, *ibid.* 612. A let a shed contiguous to a passage-way between the shed and A's store, and received the rent, knowing that the shed was used for gaming. *Held*, that A did not "actually occupy" the shed. *Com. v. Dean*, 1 Pick. 387.

**Actually Employed.**—Where 6 and 7 Vict. c. 73, § 12, required that an applicant for admission as an attorney, during the whole time of service under the articles shall be "actually employed" in the business of an attorney, it was held, that a period of eleven months during which the clerk had been absent, through sickness, could not be counted as service, as he had not been "actually employed" as an attorney or solicitor during the whole of the five years. *Ex parte Moses*, L. R. 9 Q. B. 1.

**Actual Seizure.**—An execution debtor was possessed of a mansion-house and grounds, and also of a farm, which, with

the exception of two outlying fields, adjoined the grounds and formed part of one block with them. The farm was in the debtor's occupation, although the accounts were kept distinct. The farmhouse was a mile distant from the mansion-house in a direct line. On the 19th of May a writ of *fi. fa.* was executed at the mansion-house by the under-sheriff, who informed persons in charge there, including the steward of the estate, that all the goods on the estate were seized; and a man was left in possession. No act of seizure was done at the farmhouse or upon the farm on that day, the under-sheriff intending what he had done to be a seizure of the whole; but on the following day a man was put in possession at the farm-house. The goods on the farm were claimed by assignees under a bill of sale made for an antecedent debt, and for the purpose of giving it a preference over the execution, and which was executed on the evening of the 19th after the seizure at the mansion-house was completed. At the time of the execution of the bill of sale, it was known to the solicitor of the assignees that the judgment creditor had threatened to seize, and that a writ of *fi. fa.* on the same judgment had been executed in another county; and it was expected by him, but not known, that a writ had been delivered to the sheriff of the county in which the goods lay. *Held*, that what was done on the 19th of May amounted to an "actual seizure" of the goods on the farm and at the farm-house. *Gladstone v. Padwick*, L. R. 6 Ex. 203.

1. Where a court orders a bond to be given "in addition to" the one originally taken, such additional bond does not supersede the original one. *Walter v. McSherry*, 21 Mo. 76. The term "additional" embraces the idea of joining or uniting one thing to another, so as thereby to form an aggregate. We add by bringing things together. "Additional security" is that which, united with or joined to the former, is deemed to make it as an aggregate sufficient as a security from the beginning. 53 Miss. 626, 645.

**Addition erected to a Building.**—An "addition erected to a former building," to constitute a building within the meaning of the mechanics' lien law (Nix. Dig. 487, § 5), must be a lateral addition. It must occupy ground without the limits of the building to which it constitutes an addition; so that the lien shall be upon



## ADDITION—ADDRESS OF LETTERS.

**ADDRESS OF LETTERS.**—By the law of negotiable instruments the mailing of a notice of dishonor, properly addressed to an indorser or drawer, will in cases where such notice may be given by mail, be deemed sufficient notification of dishonor as to such drawer or indorser.<sup>1</sup>

the building formed by the addition, and the land upon which it stands. *Updike v. Skillman*, 27 N. J. Law, 131. It is very evident that the legislature meant by the word "addition" (*Nix. Dig.* 487, § 5) to embrace something which in common parlance would not be designated as a building, or the phraseology would not have been used, that such addition should be considered a building for the purposes of the act. A piazza is an "addition" to a building within the meaning of the 5th section. *Whitenack v. Noe*, 11 N. J. Eq. 321.

**Any Addition of Building.**—Where the owner of two adjoining messuages conveys one of them, and it is agreed by him and his grantee that if the latter shall make "any addition of building" westwardly, he shall not extend it northwardly beyond a certain line, the grantee is not thereby restricted from raising his building higher, though by so doing he interrupts the access of light and air to the windows of the grantor's house. *Atkins v. Bordman*, 2 Metc. (Mass.) 457.

**All Future Erections or Additions.**—The right of a tenant to remove trade fixtures may doubtless be qualified by the covenants in the lease. But we are of opinion that the covenant to deliver up in good order "all future erections or additions" to or upon the premises is limited, in purpose and effect, to new buildings erected or old buildings added to; and cannot be extended so as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term. *Holbrook v. Chamberlin*, 116 Mass. 155, 162.

1. 2 *Dan. Neg. Instr.* (3d Ed.) § 1021; 2 *Edwards Bills & Notes* (3d Ed.), § 812; *Dobree v. Eastwood*, 3 C. & P. 250; *Stocken v. Collin*, 7 M. & W. 515; *Friend v. Wilkinson*, 9 Gratt. (Va.) 31; *Shelburne Falls Bank v. Townsley*, 102 Mass. 177; *Miller v. Hackley*, 5 Johns. (N. Y.) 375; *Knott v. Venable*, 42 Ala. 186; *Bell v. Hagerstown Bank*, 7 Gill (Md.), 216; *True v. Collins*, 3 Allen (Mass.), 438.

The full name of the party to whom the notice is to be sent, and the name of

the town or city, is a sufficient address. *Ames's Cas. Bills & Notes*; *True v. Collins*, 3 Allen (Mass.), 440.

The address must not be too general. A notice of dishonor, sent to a large city, addressed to an indorser by his surname only, is insufficient. 2 *Ames's Cas. Bills and Notes*, p. 849; *Walter v. Haynes*, Ry. & Moo. 149; *True v. Collins*, 3 Allen (Mass.), 438.

It has been said that such a notice would be insufficient, although sent to a small town. *True v. Collins*, 3 Allen (Mass.), 438.

A notice addressed to "W. E. Rose, Columbia, S. C.," held sufficient. *Benedit v. Rose*, 16 S. Car. 629.

Where the name of the indorser is a very common one—John Smith, for instance—it is doubtful if an address giving the full name would be sufficient where the notice is sent to a large city. *Story Prom. Notes* (7th Ed.), § 346.

Where there are several towns of the same name in different States, the name of the State must be added, if known. *Story Prom. Notes* (7th Ed.), § 348; *Beckwith v. Smith*, 22 Me. 125.

A notice addressed to a post-office by a name other than its official name is sufficient, if such name was one by which the post-office was commonly known. *Bank of Geneva v. Howlett*, 4 Wend. (N. Y.) 328.

"Where the party to be charged has added to his signature the name of a place, it is sufficient in addressing the notice to follow the signature and name given." 2 *Ames's Cas. Bills and Notes*, p. 849. See *Mann v. Moors*, Ry. & Moo. 249; *Burmeister v. Barron*, 17 Q. B. 828.

Where a mistake is made in the address, but the notice is nevertheless duly received, it will be sufficient. *Walter v. Haynes*, Ry. & Moo. 149. Unless the error in the address is calculated to mislead the party to be notified. *Story Promissory Notes* (7th Ed.), § 347.

If the indorser be dead at the time of dishonor, notice must be sent to his executor or administrator, if it can be ascertained on reasonable inquiry who or where he is. 2 *Dan. Neg. Instr.* (3d Ed.) § 1000; *Oriental Bank v. Blake*, 22 Pick.

## ADEQUATE—AD FILUM AQUÆ.

**ADEQUATE.**—That which is sufficient for the purpose required.<sup>1</sup>

**AD FILUM AQUÆ.**—To the thread of the stream; to the middle of the stream.<sup>2</sup> (See also *FILUM AQUÆ.*)

(Mass.) 206; *Barnes v. Reynolds*, 4 How. (Miss.) 114; *Cayuga Co. Bank v. Bennett*, 5 Hill (N. Y.), 236.

Where no legal representative had been appointed at the time of dishonor, a notice addressed to "The Legal Representatives of James M. Boyd, deceased, Lynchburg," was held sufficient. *Boyd's Adm'r v. City Savings Bank*, 15 Gratt. (Va.) 501; *Pillow v. Hardeman*, 3 Humph. (Tenn.) 538.

It seems that a notice addressed in the name of the deceased would also be sufficient. *Stewart v. Eden, Executrix*, 2 Caines R. (N. Y.) 121.

But a notice addressed to "the estate" of the deceased has been held insufficient, as that term might apply to the heir-at-law as well as to the executor or administrator. *Massachusetts Bank v. Oliver*, 10 Cush. (Mass.) 557.

Notice of dishonor may be addressed to either the residence or the place of business of the person to be notified. *Bank of Columbia v. Lawrence*, 1 Pet. (U. S.) 578. See *U. S. Bank v. Hatch*, 6 Pet. 250; *Exch. Co. v. Boyer*, 3 Rob. (La.) 307; *Adams v. Wright*, 14 Wis. 408; *Stedman v. Gooch*, 1 Esp. 3.

Where the person to be notified resides in one town and does business in another, neither of which is that where the person sending notice resides, notice may be sent by mail addressed to the person to be notified either at the town where he resides or that where he does business. *Morton v. Westcott*, 8 Cush. (Mass.) 425; *Bank of Columbia v. Lawrence*, 1 Pet. (U. S.) 578; *Van Vechten v. Pruyn*, 13 N. Y. 549.

Where the actual residence during a part of the year is different from the domicile of the person to be notified, notice may be sent addressed to such person at such place of actual residence. Thus a notice may be sent to a senator addressed to him at Washington while the senate is in session. *Chouteau v. Daniel Webster*, 6 Metc. (Mass.) 1.

1. **Adequate Cause.**—The expression "adequate cause" means such as would commonly produce a degree of anger, rage, resentment, or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. *Boylett v. State*, 2 Tex. App. 93, 100. It may be that the judge below took the

view of *Paschal's Digest*, article 2254, that there could be no "adequate cause" for passion beyond those stated in that article. If so, he was in error. Our supreme court says: "Articles 2251, 2252, 2253, and 2254, *Paschal's Digest*, are explanatory of article 2250. We do not understand that these explanations and examples are legislative restrictions, and that in no case can a homicide be reduced from murder to manslaughter unless the party can bring himself within the rules and examples given. We regard the law rather as giving instances or examples by which the mind could be rendered incapable of cool reflection. There may be other 'adequate causes' for sudden passion besides those instanced in the article." *West v. State*, 2 Tex. App. 460, 476. What amount of injury must be inflicted to produce the "adequate cause" specified in the statute cannot be fixed by any definite general rule, but must depend upon the particular circumstances of each particular case. The amount of the injury is therefore a question of fact for the determination of the jury, under proper instructions from the court. *Williams v. State*, 7 Tex. App. 396. Cf. *Janes v. State*, 10 Tex. App. 421.

**Adequate Crossings.**—But the law nowhere defines what constitutes the other "adequate crossings" which the statute authorizes, nor has it been determined, so far as we can discover, by judicial construction. Then, as an adequate crossing is to be constructed, and such crossing is not defined as matter of law, it must be determined as a question of fact. *Gray v. Burlington, etc., R. Co.*, 37 Iowa, 119.

2. *Bouvier's Law Dict.*

Alluvion, whether it affects an accretion to the shore, or whether it forms islands, alters the position of the original *filum aquæ*, and it will always be located by taking the middle of a line, drawn at right angles from bank to bank, no matter how recently the bank may be formed. *Miller v. Hepburn*, 8 Bush (Ky.), 326; *Clark v. Campau*, 19 Mich. 329; *Knight v. Wilder*, 2 Cush. (Mass.) 202; *Bay City Gas-light Co. v. Industrial Works*, 28 Mich. 182; *Stolp v. Hoyt*, 44 Ill. 220; *Deerfield v. Arms*, 17 Pick. (Mass.) 41; *Bonewits v. Wygant*, 75 Ind. 41. See also ACCRETION.

## ADHERING—ADJACENT.

**ADHERING.**—The use of this word has been confined to the expression "adhering to the king's enemies, or the enemies of the United States," in the description of the crime of treason.<sup>1</sup>

**ADJACENT.**—This word is distinguished from adjoining, inasmuch as it does not denote touching or contiguous to.<sup>2</sup>

The owner of property half a mile distant from a railway is not an "adjacent occupant or proprietor."<sup>3</sup>

1. Adhering to the king's enemies must of necessity be against the king; and, therefore, if an Englishman assist the French, being at war with us, and fight against the king of Spain, who is an ally of the king of England, this is treason, as adhering to the king's enemies against the king,—for the king's enemies are hereby strengthened and encouraged,—and so is within the express words of 25 Edw. III., of "adhering to the king's enemies." *Vaughan's Case*, 2 Salkeld, 634. Rebels, being citizens, are not enemies within the meaning of the constitution; hence a conviction for treason, in promoting a rebellion, cannot be sustained under that branch of the constitutional definition which speaks of "adhering to their enemies, giving them aid and comfort." *U. S. v. Greathouse*, 2 Abbott (U. S.), 364.

2. *Adjacent*, strictly speaking, does not mean *adjoining*; it means that it shall be in the neighborhood, or convenient, or near to. *Henderson v. Long*, 1 Cooke (Tenn.), 128. The interpretations given to the word "adjacent" by Walker are "lying close," "bordering upon something." The legislature evidently intended to restrict the grant to the owners of the lands bordering upon, or adjoining the water covering the subject of the proposed patent. *The People v. Schermerhorn*, 19 Barbour, 540, 556. The term "adjacent owner" as used in the act, to designate the persons entitled to purchase lands under water, is not limited to the owner of the land lying next to it, e.g., the owner of the land between high and low water line, but means the owner of the upland which is bounded by the river. *Mayor, etc., of New York v. Hart*, 16 Hun, 380. Under the act of 3d of April, 1832, for the opening of streets, etc., in New Orleans, which provides that a contribution to pay the expense of opening shall be assessed on the lots and premises "adjacent to" and fronting that part of the street so opened, straightened, or improved, it was held that the only lots subject to assessment were those to which a new front was given or added to by the new street. "We think," said the court, "the word *adjacent*, applied to lots, is synonymous

with the word *contiguous*. In another and more general relation, it might have a more extended meaning; but in the sense in which it is used—to wit, to discriminate as to locality from other lots—we can only give this meaning to it in a statute like this, which undertakes to divest a right of property, and is consequently subjected to strict rules of interpretation." *Re Municipality for Opening Roffignac Street*, 7 La. Ann. 76.

3. *Continental Imp. Co. v. Phelps*, 47 Mich. 299.

*Hoyt, J.*, in the case of the *U. S. v. Northern Pac. R. Co.*, 29 Alb. L. J. 24, construing the word "adjacent" in the company's charter, which grants the privilege of cutting timber from "adjacent" public lands for use in the construction of the work, held that it has a broader meaning than "adjoining," and is synonymous with "neighboring," and said: "Congress, in enacting section 2 of defendant's charter, saw fit to use the word 'adjacent,' and in determining the intent of this section we must investigate the meaning of the word 'adjacent' as there used. Sometimes it has a meaning given it which is synonymous with the word 'adjoining,' but it is as often applied in a more extended sense, as in the 'vicinity' or the 'neighborhood' of, while 'adjoining' and 'contiguous' are never used in such enlarged sense. Congress, then, having selected from several synonymous words the one having, as applied to the subject in the section in which it is used, the broadest meaning and most extended signification of the whole, must be held to have intended the broadest rather than the more restricted signification to be given to it in the interpretation of said section, and therefore to hold that this section restricted the defendant to lands adjoining or contiguous to the line of the road, would be contrary to all rules of interpretation, while if we apply the usual rules we must hold that its rights are extended by this section beyond lands adjoining or contiguous to its line of road to lands anywhere in the vicinity or neighborhood of its said line of road. Was the land in question in the neighborhood of defendant's line of road, within the meaning of

## ADJOINING.

**ADJOINING.**—Contiguous, touching, in actual contact with. Where two towns touch at the corners, they are adjoining.<sup>1</sup>

section two? The design of this question was to allow the company to take timber from public lands to build its road, and when we once concede that under this section the defendant is authorized to go beyond adjoining lands, as the use of the word 'adjacent' compels us to do, it must follow that the use of the more enlarged word was for the benefit of the Northern Pacific R. Co., and it must be so construed by the court as to effect the object of its enactment. And we are of opinion that timber land nearest to the line of the road must be held to be neighboring timber land, even although there may intervene large tracts of land not timbered. If this be so, then under the facts of these cases, as above stated, the lands from which the timber in question was cut was in the neighborhood of the line of the road where it was used, and therefore 'adjacent' thereto, within the meaning of section two of the charter of the defendant Northern Pacific R. Co. Besides, under the facts proven in these cases, the lands in question would probably come within a more restricted use of the word 'adjacent,' for the line of defendant's road runs for several hundred miles through a country almost entirely destitute of timber, and the belt upon which this timber in question was cut was the first timber land near said road reached by it in the course of its construction; therefore though this timber be more than one hundred miles from the line of defendant's road, we are of the opinion that it must under the circumstances be held to be 'adjacent thereto,' within the meaning of section two of defendant's charter."

1. Ground cannot be properly said to "adjoin" a house unless it be absolutely contiguous, without anything between them: *Rex v. Hodges*, 1 Moody & Malkin, 341. Cf. *Peverelly v. People*, 3 Parker C. C. (N.Y.) 59. These two towns in fact are "next adjoining" in no other sense than that of touching at the corners. *Holmes v. Carley*, 31 N. Y. 289. The word "adjoining," in its etymological sense, means touching or contiguous, as distinguished from lying near or adjacent. In the Matter of Ward, 52 N. Y. 395, the words "along" and "adjoining" are used as synonymous terms. This is manifest from the immediate context, and from the use of the word "along" in the same connection, without the word "adjoining." Both words as used imply contiguity, contact. *Walton v. St. Louis*, etc., R. Co., 67 Mo. 56. But appellants say

that adjoining does not mean to touch, but to be near to. We are of the opinion that the words "adjoining to the present boundaries" as used in this charter do not mean simply near to, but next to. *Irna v. Pool*, 46 Iowa, 256. The words "adjoining to or occupied with" are to be taken in connection and tend to explain each other: they mean something more than adjacent or contiguous, which they might be if there were a solid wall between, or were in another occupation. *Devoe v. Commonwealth*, 3 Metcalf (Mass.) 316, 327. The whole yard of a house of correction, though divided by a public street, against which it is suitably fenced and protected, must be regarded as adjoining or appurtenant. *Com. v. Curley*, 101 Mass. 24. Where, by agreement, a wall has been built on land dividing the property of an individual from that of a railway company, and the individual and the company are, by the same agreement, the joint owners of the land, on which the wall is built, that circumstance does not affect the individual, so as to prevent him from being considered an "adjoining" owner. *Directors v. Blackmore*, L. R. 4 Eng. & Irish App. Cas. 610. Lessees of lands separated from railroad land, by a private road, of which they had the exclusive right of user during their tenancies, held to be owners of "immediately adjoining land." *Coventry v. London*, etc., R. Co., L. R. 5 Eq. Cas. 104.

*Holmes v. Carley*, 31 N. Y. 289. The appellant owned premises separated from a street by a wall five feet high, belonging, together with the land on which it stood, to another person. The appellant had no direct access from his premises to the street, but in order to reach it had to pass for a short distance down a public footpath, or over other intervening land. Held, that the appellant was not the owner of premises "fronting, adjoining, or abutting" on the street within the meaning of s. 150 of the Public Health act, 1875, and therefore was not liable to contribute to the expenses of sewerage and paving the street under that section. *Lightbound v. Bebington Local Board*, L. R. 14 Q. B. 849.

A was the owner of three houses fronting a street called York Place, and adjoining or abutting at the rear upon a footpath at the end of a street called St. Julian St., which formed a cul-de-sac. The ground at the back of these houses was five feet above the level of St. Julian St., and the wall, which was the property

## ADJOURN—ADJOURNMENT—ADJUDGED.

**ADJOURN—ADJOURNMENT.**—These words denote a continuance from day to day.<sup>1</sup>

**ADJUDGED.**—Deemed, held, declared. Usually applied to the declaration or sentence of a court.<sup>2</sup>

of A, was about twelve feet high on the outside. There was no access from A's premises to St. Julian St. *Held*, that his premises "adjoined or abutted on" St. Julian St., and consequently that he was chargeable with his proportion of the expenses of paving, etc., that street. *Newport U. S. Authority v. Graham*, L. R. 9 Q. B. 183.

The defendants claim that "adjoining" means "near;" the prosecutors that it means, "touching," in contact with. The latter is the proper signification, and it is the more readily to be adopted in this case, because it thus restricts the grant of eminent domain, which is never to be extended by unnecessary implication. *Akers v. N. N. J. R. Co.*, 43 N. J. Law, 110.

1. An "adjournment" is a putting off until another time or place. *People v. Martin*, 5 N. Y. 26. Where the constitution of Arkansas provided that "every order or resolution in which the concurrence of both houses of the General Assembly may be necessary, except on questions of adjournment, shall be presented to the governor, and before it shall take effect be approved by him" (art. vi. § 16), it was held: "An adjournment," says Mr. Blackstone, "is no more than a continuance of the session from one day to another, as the word itself signifies." The concurrent resolution had for its sole object the continuance of the session from the ninth of March, 1881, when it would have otherwise expired, till the nineteenth of the same month. This is clearly germane to the matter of "adjournment," and the resolution did not require the approval of the governor. *Trammell v. Bradley*, 37 Ark. 374, 379.

**Adjourned Session.**—The sole question in the cause is, whether the adjournment from the 16th of May to the fourth Monday in June was a continuation of the April term, or constituted a distinct term. But an "adjourned session" is the same session with that at which the adjournment was made. *Mechanics' Bank v. Withers*, 6 Wheaton (U. S.), 106.

**Adjourned Term.**—The "adjourned term," as its name manifestly imports, is but a continuation of the previous term; and although it is continued for the trial of the causes on a particular division, it by no means follows that the power of 'the court over the business

which has been done, and the entries made, is taken away. It is the same term prolonged, and although prolonged for purposes specified in the order, and although the court, as a matter of justice to the counsel and suitors, would not take up any causes not set for trial at such "adjourned term," yet as its session or term has not finally closed, it has power over its record to make it conform to the truth, and to see that injustice is not done by allowing an erroneous judgment to stand against a party, but should, as in the case before us, *micro motu*, vacate it and set down the cause for a rehearing at the regular succeeding term. If the term has not closed and the court is still in session, it is not concluded by its previous order, but has power to rescind it, for so long as the term continues this power necessarily results. It is not like the case of a special, distinct term held after the regular term has been brought to a final close. In such case, the court would be concluded by the final adjournment. *Van Dyke v. State*, 22 Ala. 57. *Cf. Keen v. Queen*, 10 Q. B. 927.

3. Where a judgment read, "Whereupon, etc., it is considered by the court here that the said Z. P. be confined and imprisoned at hard labor in the State prison for the term of ten years," on objection that he was not by the court adjudged guilty of a misdemeanor, the court said: "Our statute does not require such language to be introduced either into the annunciation or record of the sentence. No judgment of the form contended for can anywhere be found. The word 'adjudged' is here used by the legislature, perhaps not very aptly, as synonymous with 'deemed,' which latter word is frequently found in correspondent places. They have so employed the word 'adjudged' in the act respecting lotteries, Rev. Laws 272, § 1. All lotteries shall be and are hereby adjudged to be common and public nuisances." *State v. Price*, 11 N. J. Law, 203, 217. Where a statute disqualifies as a witness any person who "shall, upon conviction, be adjudged guilty of perjury," a person is not rendered incompetent until by judgment sentence has been pronounced upon him; a verdict of guilty alone is not sufficient. In this case the court said: "The learned counsel for the plaintiff in error contends that there is no difference in meaning

## ADMINISTRATION—ADMIRALTY.

**ADMINISTRATION.**—The management and settlement of the estate of a deceased person who has left no executor.

**ADMEASUREMENT OF DOWER.** See DOWER.

**ADMINISTRATOR.** See EXECUTORS AND ADMINISTRATORS.

**ADMIRALTY.** See SHIPPING.

1. *History.*
2. *Jurisdiction of Colonial Courts.*
3. *Of U. S. Courts.*
4. *Over what Waters it extends.*
5. *Over Torts as affected by Place.*
6. *Over Internal Commerce.*
7. *Over Foreign Waters.*
8. *What Persons within.*
9. *What Vessels within.*
10. *Over Bridges, etc.*
11. *General Scope of Jurisdiction.*
12. *Contracts within Jurisdiction.*
13. *Contracts not Maritime.*
14. *Torts within Jurisdiction.*
15. *Prize Causes.*
16. *Jurisdiction Exclusive.*
17. *Maritime Lien.*
18. *Courts having Jurisdiction.*
19. *Procedure in Admiralty.*
20. *Actions in rem.*
21. *Actions in personam.*
22. *Joinder of Actions.*
23. *Pleadings.*
24. *Set-off and Recoupment.*
25. *Action Pending.*
26. *Evidence.*
27. *Trial.*
28. *Decree.*
29. *Restraint of Lower Court.*

1. **History.**—The general method of admiralty procedure conforms rather to the civil than to the common law; hence it has been supposed that the admiralty jurisprudence of England, like

between the words 'deemed' and 'adjudged' used in the penal enactments of the revised statutes, and urges that the word 'adjudged' in the section under consideration should be read as if written 'deemed.' It is, perhaps, enough to say that it, in fact, reads 'adjudged,' and that whatever difference there is between the two terms is in favor of our interpretation of the statute. Moreover, the phrase 'deemed' is not in its meaning, when used in legislative expression, so much more favorable to the plaintiff in error as to turn us from our view of the question. To 'damn' or 'condemn' is 'to deem, think, or judge any one to be guilty, to be criminal, to give judgment, or sentence, or doom of guilt; to adjudge, or declare the penalty or punishment.' (Rich. Dict. *in voce* Damn.) And 'judge not, that ye be not judged' of our New Testament is 'Nyle ye deme, that ghe be not demed' of Wicliffe." *Blaufus v. People*, 69 N. Y. 107. Where the condition of a bond was that it should be void "if the defendant pay all sums of money, damages, and cost that should be adjudged against him if the injunction should be dissolved," when the injunction was dissolved it was held, "It is clear that, within the terms of the condition of this bond, the amount of the judgment at law was not 'adjudged' against the defendant upon the dissolution of the injunction." *Corder v. Martin*, 17 Mo. 41. I think that the

"sum adjudged" means the sum in respect of which the order of adjudication is made. *In re Ricardo v. Board of Health*, 2 Hurl. & H. 256, 264.

1. **In Statute.**—*Crossman v. Crary*, 37 Iowa, 684: "The word 'administration' means, as here used [in statute declaring administration shall not be originally granted after five years], the management of the estate of a decedent, and expresses the jurisdiction assumed by the proper probate court over it. This jurisdiction is assumed by the appointment of the administrator; when that is done administration is said to have been granted. It does not refer simply to the act of appointment of the administration, although that act is included in the thought expressed for 'administration;' management of the estate is assumed by the appointment."

**Expenses of, in Statute.**—*Lester et al. v. Mathews*, 56 Ga. 655: "Plaintiff further alleges that the consent verdict, and which sets out the fees to be paid to proponent's counsel, after 'expenses of administration,' meant by the expression 'expenses of administration' the fee of plaintiff and his associates—in law, a fee to resist by the heirs-at-law the settling up of a will: and if the words do not bear that signification in law, it asserts that the parties to the consent verdict so meant. . . . We do not think such a fee embraced in the meaning of those words."

that of the ecclesiastical courts, was originally an importation from the Latinized countries of the Continent,<sup>1</sup> and the exact time of its introduction has been fixed at the reign of Edward III.<sup>2</sup>

Later writers have asserted a more ancient origin for the English courts of admiralty, making them coeval with the tribunals of the common law, and originally cognizant of all litigated matters related to the sea.<sup>3</sup> But, however ancient and originally extensive this jurisdiction was, at and for a long time before the American Revolution the English admiralty was an inferior court not of record,<sup>4</sup> having a very limited jurisdiction,<sup>5</sup> and subject to humiliating correction by writ of prohibition issuing out of the King's Bench.

**2. Jurisdiction of Colonial Courts.**—The courts of vice-admiralty which existed in all the American colonies, administered by deputies of the governor or proprietary, under royal patent, exercised without hindrance a jurisdiction as wide as any writer has ever claimed for the ancient English admiralty.<sup>6</sup>

**3. Jurisdiction of Courts of the United States.**—Article 3, § 2 of the United States Constitution confers upon the courts of the United States cognizance "of all cases of admiralty and maritime jurisdiction."

Under this grant of the organic law it is now well settled that "the jurisdiction in admiralty conferred by the Constitution on the Federal courts is that jurisdiction which had been and was being exercised in admiralty in this country prior to and at the time of the adoption of the Constitution, and not the jurisdiction of England nor that of Continental Europe."<sup>7</sup>

**4. Jurisdiction, over what Waters it Extends.**—It has never been

1. 1 Black Com. 80 *et seq.*

2. 3 Black Com. 69.

3. Benedict's Admiralty, ch. v.

4. 3 Black Com. 69.

5. See Benedict's Adm. 60, for an enumeration of the subjects of English admiralty jurisdiction, and *id.* ch. vi. for a history of the quarrel between the courts of common law and admiralty, resulting in the victory of the former and the curtailment of the jurisdiction of the latter, *tempore* James I. and Charles I.

6. "The commissions of the vice-admirals in the colonies in North America, insular and continental, contained a much larger jurisdiction than existed in England when they were granted." Waring *v.* Clarke, 5 How. p. 454.

See in Benedict's Adm. 69 the text of a commission granting Vice-Admiral Lord Cornbury jurisdiction in "all civil and maritime causes and . . . business civil and maritime whatsoever," arising in "the maritime parts whatsoever" of New York, New Jersey, and Connecticut. This is a larger power than any English judge dared to claim at that time (1701).

7. Per Billings, D. J., in *Cope v. Vallette Dry Dock*, 10 Fed. Repr. 142, citing *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1, and *Ex parte Easton*, 95 U. S. 68. This view of the admiralty jurisdiction of the United States has not obtained without much opposition. Story, J., propounded it in his celebrated judgment in *De Lovio v. Boit*, 2 Gall. (U. S.) 398 (1815); but many judges wished to assimilate the U. S. courts of admiralty to those of Great Britain. See *The Thos. Jefferson*, 10 Wheat. (U. S.) 428; *Ramsey v. Allegre*, 12 Wheat. (U. S.) 611; *Steamboat Orleans v. Phœbus*, 11 Pet. (U. S.) 175; *Peyroux v. Howard*, 7 Pet. (U. S.) 324. Judge Story's views, however, have triumphed, until the latest authority can assert that the admiralty system of the United States embraces "the water-borne commerce of the United States conducted on its internal navigable waters as well as on the high seas, and has grown to include all maritime services and contracts, and all injuries when inflicted upon such waters." Henry on Jurisdiction and Procedure, p. vi.

doubted but that admiralty has jurisdiction over the high seas,<sup>1</sup> which begin at low-water mark.<sup>2</sup>

The Federal courts early declared their jurisdiction to extend over waters within the body of a county<sup>3</sup> having any tidal movement, however slight.<sup>4</sup>

The act of 1845<sup>5</sup> purported to extend admiralty jurisdiction to certain cases arising on the "lakes and navigable waters connecting said lakes," and this statute has been held constitutional as a regulation of the powers of district courts sitting in admiralty; but if regarded as an attempt to confer a new jurisdiction, unconstitutional,—jurisdiction in all admiralty and maritime causes having been given to the U. S. courts by the Constitution itself, so that the legislature cannot lawfully diminish such jurisdiction, and naturally cannot enlarge it.<sup>6</sup>

By the case last cited, and numerous subsequent decisions, the Supreme Court of the United States has now established the doctrine that the constitutional grant extends admiralty jurisdiction not only over waters affected by the ebb and flow of the tide, but over all the navigable waters of the nation, and "wherever ships float and navigation successfully aids commerce, whether internal or external."<sup>7</sup> Canals are navigable waters within this rule.<sup>8</sup>

**5. Jurisdiction over Torts as affected by Place.**—To give admiralty jurisdiction in cases of tort, the wrong complained of must have occurred on the water; that the cause originated on the water is not enough if the damage actually occurred on shore.<sup>9</sup> But matters on land incidental to maritime occurrences are within the jurisdiction.<sup>10</sup>

**6. Jurisdiction over Internal Commerce.**—It was at one time supposed that matters arising upon voyages between ports of the

1. The *Thomas Jefferson*, 10 Wheat. (U. S.) 428.

2. *De Lovio v. Boit*, 2 Gall. (U. S.) 398; *U. S. v. Hamilton*, 1 Mass. 152. Long Island Sound is a part of the high seas. *The Martha Anne, Olc.* (U. S.) 18. So also is the mouth of a tidal river a mile and a half wide. *U. S. v. Smith*, 3 Wash. (U. S.) 78. In criminal statutes, however, the phrase is used in contradistinction to landlocked ports, bays, and harbors, which, though subject to tidal ebb and flow, are within the jurisdiction of the governments of the surrounding countries. *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 76; *U. S. v. Wilson*, 3 Blatchf. (U. S.) 435; *U. S. v. Grush*, 5 Mass. 290.

3. *Waring v. Clarke*, 5 How. (U. S.) 441.

4. *Peyroux v. Howard*, 11 Pet. (U. S.) 324.

5. 5 U. S. Stat. at Large, 726. As embodied in Rev. Stat. § 566, the portions of the act obnoxious to the decisions *infra* are omitted.

6. *The Genesee Chief*, 12 How. (U. S.) 443, overruling *The Thomas Jefferson*, 10 Wheat. (U. S.) 428; *Steamboat Orleans v. Phœbus*, 11 Pet. (U. S.) 175.

7. *The Hine v. Trevor*, 4 Wall. (U. S.) 555; *Fretz v. Bull*, 12 How. (U. S.) 466; *The Magnolia*, 20 How. (U. S.) 295; *The Moses Taylor*, 4 Wall. (U. S.) 411; *The Commerce*, 1 Black (U. S.) 574; *The Daniel Ball*, 10 Wall. (U. S.) 557.

8. *The Avon*, 1 Brown Adm. 170; *The Oler*, 2 Hughes (U. S.), 12; *Ex parte Boyer*, 109 U. S. 629.

9. *The Plymouth*, 3 Wall. (U. S.) 20; *The Maud Webster*, 8 Bend. (U. S.) 547. Thus, an injury done to one standing on a wharf by a bale of cotton falling upon him from a ship's tackle alongside cannot be redressed in admiralty. *The Mary Stewart*, 10 Fed. Repr. 137.

10. *Moxon v. The Fanny*, 2 Pet. Adm. 309.



same State were not within the Federal admiralty jurisdiction,<sup>1</sup> but the contrary is now well settled.<sup>2</sup>

**7. Jurisdiction over Foreign Waters.**—Whenever the suit itself naturally falls within the admiralty jurisdiction, that the matters complained of occurred in foreign waters is immaterial.<sup>3</sup>

**8. Jurisdiction What Persons within.**—Jurisdiction does not depend on the citizenship of the parties,<sup>4</sup> and though courts are not bound to adjudicate litigations between foreigners,<sup>5</sup> they may lawfully do so,<sup>6</sup> and are bound to finally decide a controversy under which rights have already been acquired.<sup>7</sup> Such suits are usually entertained,<sup>8</sup> but libels by foreign seamen for wages against ships of their own nationality are discouraged;<sup>9</sup> yet completion or abandonment of voyage by the vessel, and wrongful discharge or maltreatment of the sailors will always induce the court to adjudicate their claims,<sup>10</sup> unless debarred by treaty.<sup>11</sup>

**9. Jurisdiction—What Vessels within.**—All ships or vessels are *prima facie* subject to the jurisdiction of admiralty; but ships of war belonging to a foreign friendly nation are not subject to seizure by the admiralty courts of the United States,<sup>12</sup> and vessels belonging to and engaged in the service of a city government have the same immunity.<sup>13</sup>

Barges,<sup>14</sup> canal-boats,<sup>15</sup> lighters and scows,<sup>16</sup> a floating elevator,<sup>17</sup> and a wharf-boat<sup>18</sup> are all vessels for purposes of jurisdiction; a log-raft,<sup>19</sup> a floating saloon,<sup>20</sup> and a dry-dock<sup>21</sup> are not.

**10. Jurisdiction over Bridges, etc.**—Since there can be no maritime lien upon things not engaged in navigation, admiralty cannot entertain a suit to recover damages for the wrongful obstruction of navigation by a bridge;<sup>22</sup> and the converse is equally true that in

1. *Vide* the dictum of Nelson, J., in *Moore v. American Transportation Co.*, 24 How. (U. S.) 6, and *compare* N. J. Steam Navigation Co. v. Merchants' Bank, 6 How. (U. S.) 344; *Maguire v. Card*, 21 How. (U. S.) 249.

2. *The Commerce*, 1 Black (U. S.), 574; *The Belfast*, 7 Wall. (U. S.) 624; *Langley v. The Syracuse*, 6 Blatchf. (U. S.) 2; *The Elmira Shepherd*, 8 Blatchf. (U. S.) 341.

3. *The Sailor's Bride*, Bro. Adm. 68; *The Champion*, Bro. Adm. 520; *The Diana*, 1 Lush. 539; *The Courier*, 1 Lush. 541; *The Greifswald*, Swab. 430.

4. *Peyroux v. Howard*, 7 Pet. (U. S.) 324.

5. *Thomassen v. Whitwill*, 9 Bend. (U. S.) 113; *The Carolina*, 14 Fed. Repr. 424.

6. *The Sailor's Bride*, Bro. Adm. 68.

7. *Covert v. Wexford*, 3 Fed. Repr. 577.

8. *The Belgenland*, 114 U. S. 355; *The Maggie Hammond*, 9 Wall. (U. S.) 435; *The Russia*, 3 Bend. (U. S.) 471.

9. *Fry v. Cook*, 14 Fed. Repr. 424; *The Bucherdass Ambaidass*, 1 Low. (U. S.) 569. Ordinarily seamen should apply

to the consul of the ship's country for redress.

10. *The Herwine*, 3 Sawy. (U. S.) 80; *The Lilian M. Vigus*, 10 Bend. (U. S.) 385.

11. *The Elwine Kreplin*, 9 Blatchf. (U. S.) 438.

12. *Long v. The Tampico and Progreso*, 16 Fed. Repr. 491. This rule is one of general international law. *The Constitution*, L. R. 4 P. D. 39.

13. *The Fidelity*, 16 Blatchf. (U. S.) 596.

14. *The Dick Keyes*, 1 Biss. (U. S.) 408.

15. *The Kate Tremaine*, 5 Bend. (U. S.) 60.

16. *The General Cass*, 1 Bro. Adm. 337.

17. *The Alabama*, 22 Fed. Repr. 449.

18. *The Old Natchez*, 9 Fed. Repr. 476.

19. *A Raft of Cypress Logs*, 1 Flippin (U. S.), 543.

20. *The Hendrik Hudson*, 3 Bend. 419.

21. *Cope v. Vallette Dry-dock*, 10 Fed. Repr. 142.

22. *The Rock Island Bridge*, 6 Wall. (U. S.) 213.

admiralty the owners of a bridge cannot recover for injuries done their property by the negligent navigation of a passing vessel.<sup>1</sup> The same rule applies to injuries to and by wharves,<sup>2</sup> dry-docks,<sup>3</sup> buildings on piers,<sup>4</sup> and marine railways.<sup>5</sup>

**11. General Scope of Jurisdiction.**—The subjects of admiralty jurisdiction are "maritime contracts and maritime torts, including captures *jure belli*, and seizures on water for municipal and revenue forfeitures. Contracts, claims, or services purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty, and so also are torts or injuries of a civil nature committed on navigable waters."<sup>6</sup>

The test of jurisdiction in tort is locality, and what waters and places are within it has been already shown.<sup>7</sup>

As to contracts, the criterion is their nature and subject-matter; and if they refer to maritime services, transactions, or casualties, they are within admiralty jurisdiction, without regard to the place where they are made or are to be performed.<sup>8</sup>

Jurisdiction is not lost by losing possession of a thing seized;<sup>9</sup> it extends to the distribution of things sold under judicial decree,<sup>10</sup> and assets so distributed can be marshalled as in equity;<sup>11</sup> and all matters incidental to a controversy are within the jurisdiction whenever the principal point is within it.<sup>12</sup>

**12. Contracts within Jurisdiction.**—That all "contracts, claims, and services essentially maritime"<sup>13</sup> are proper subjects for admiralty has always been admitted; but the rule is often difficult of application, and a study of the decisions in which jurisdiction over particular cases has been granted or denied is the only reliance in practice.

Average contribution is maritime in its nature, and therefore enforceable in admiralty;<sup>14</sup> but a personal action by shipowners against the consignees of cargo already delivered, for their contributive share, cannot be sustained.<sup>15</sup>

1. The Neil Cochran, 1 Bro. Adm. 162.

2. The Ottawa, 1 Bro. Adm. 356; The C. Accame, 20 Fed. Repr. 642.

3. Cope v. Vallette Dry-dock, 10 Fed. Repr. 142.

4. The Plymouth, 32 Wall. (U. S.) 20.

5. The Professor Morse, 23 Fed. Repr. 803.

Where the injury complained of is done by a floating vessel, it would seem to be strictly a maritime tort, cognizable in admiralty; but the rule is well established, at least in the circuits. *Vide* The Arkansas, 17 Fed. Repr. 383, and Henry on Jurisdiction and Procedure, 69.

6. Per Clifford, J., in The Belfast, 7 Wall. (U. S.) 637.

7. The Genesee Chief, 12 How. (U. S.) 443, and §§ 4-7, *supra*.

8. Insurance Co. v. Dunham, 11 Wall. (U. S.) 1.

It is not necessary that libellant should

be seeking to enforce a maritime lien. breach of any maritime contract is enough to confer jurisdiction. Maury v. Culliford, 10 Fed. Repr. 388.

9. U. S. v. The Little Charles, 1 Brock. Marsh. (U. S.) 347.

10. Osborn v. U. S., 91 U. S. 474; Andrews v. Wall, 3 How. (U. S.) 568.

11. The Edith, 94 U. S. 518.

12. Davison v. Sealskins, 2 Paine (U. S.), 324, where goods seized and sold by pirates were recovered in admiralty, though retaken on land.

13. *Ex parte* Easton, 95 U. S. 68.

14. Dike v. The St. Joseph, 6 McLean (U. S.) 573.

15. Cutler v. Rae, 7 How. (U. S.) 729; but the circuit courts have ventured to think this case overruled by Insurance Co. v. Dunham, 11 Wall. (U. S.) 1. *Vide* Bark San Fernando v. Jackson, 12 Fed. Repr. 341.

Bounties for sea services are distributable by admiralty courts<sup>1</sup> and proceedings to limit shipowners' liability under the act of 1851 are cognizable by them.<sup>2</sup>

The following contracts have been expressly decided to be maritime in their nature: An agreement to share salvage monies,<sup>3</sup> or pay seamen's wages;<sup>4</sup> contracts for freight,<sup>5</sup> pilotage,<sup>6</sup> wharfage,<sup>7</sup> salvage,<sup>8</sup> towage,<sup>9</sup> passage,<sup>10</sup> dockage,<sup>11</sup> ransom,<sup>12</sup> lockage,<sup>13</sup> insurance,<sup>14</sup> repairs and supplies,<sup>15</sup> measuring cargo,<sup>16</sup> removing ballast,<sup>17</sup> stevedoring,<sup>18</sup> and cooerage of cargo.<sup>19</sup>

Bottomry bonds,<sup>20</sup> and charter parties,<sup>21</sup> whether under seal or not,<sup>22</sup> are to be sued on in admiralty, and money loaned on the credit of the ship may be recovered therein, whether the loan is evidenced by writing or not.<sup>23</sup> Forfeitures of vessels<sup>24</sup> and penalties<sup>25</sup> incurred by their owners are within the jurisdiction, and so also are suits to establish title to or recover possession of vessels,<sup>26</sup> and disputes between part owners as to the disposition of the common property.<sup>27</sup>

**13. Contracts not Maritime.**—It is well settled that admiralty has no jurisdiction over contracts for building vessels,<sup>28</sup> nor furnishing labor,<sup>29</sup> and materials<sup>30</sup> towards their construction, nor storing on land even such aids to navigation as sails.<sup>31</sup>

Partnership accounts, though arising out of the ocean carrying

1. *The Lucy Anne*, 3 Ware (U. S.), 253; *vide* 12 Op. Atty.-Gen. 314.

2. *Norwich Co. v. Wright*, 13 Wall. (U. S.) 104; Rev. Stat. U. S. §§ 4282-7; Sup. Ct. Rules in Adm. 54.

3. *Andrews v. Wall*, 3 How. (U. S.) 568.

4. *Sheppard v. Taylor*, 5 Pet. Adm. 675.

5. *Lands v. A Cargo of Coal*, 4 Fed. Repr. 478.

6. *Gottfried v. Miller*, 104 U. S. 521.

7. *Ex parte Easton*, 95 U. S. 68.

8. *Houseman v. The North Carolina*, 15 Pet. (U. S.) 40.

9. *The May Queen*, Sprague (U. S.), 588.

10. *The Pacific*, 1 Blatchf. (U. S.) 569.

11. *The Vidal Sala*, 12 Fed. Repr. 207.

12. *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325.

13. *The Steamboat Bob Connell*, 1 Fed. Repr. 218.

14. *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1.

15. *The General Smith*, 4 Wheat. (U. S.) 438; *The Virgin v. Vyfhuis*, 8 Pet. (U. S.) 538.

16. *Constantine v. Schooner River Queen*, 2 Fed. Repr. 731.

17. *Roberts v. Bark Windermere*, 2 Fed. Repr. 722.

18. *The Canada*, 7 Fed. Repr. 119; *The Senator*, 21 Fed. Repr. 191; *The*

*Velox*, 21 Fed. Repr. 479. There are, however, decisions the other way. *Paul v. The Ilex*, 2 Wood (U. S.), 229. Approved in *The Ole Oleson*, 20 Fed. Repr. 384, where see a review of cases turning on the question what services are maritime.

19. *Hubbard v. Roach*, 2 Fed. Repr. 393.

20. *The Draco*, 2 Sumn. (U. S.) 157.

21. *The Fifeshire*, 11 Fed. Repr. 743.

22. *Drinkwater v. The Spartan*, 1 Ware (U. S.), 145.

23. *The J. R. Hoyle*, 4 Biss. (U. S.) 234.

24. *U. S. v. The Sally*, 2 Cranch, 406.

25. *U. S. v. The Queen*, 11 Blatchf. (U. S.) 416.

26. *Ward v. Peck*, 18 How. (U. S.) 267.

27. *The Seneca*, 3 Wall. Jr. (U. S.) 385. But the limits of this power are still uncertain, and it cannot be said to extend to a sale of the vessel and distribution of the proceeds among the disputing owners. Cf. *Tunno v. The Betsina*, 5 Am. L. Reg. 406; *Lewis v. Kinney*, 5 Dill. (U. S.) 159; *Coyne v. Caples*, 8 Fed. Repr. 638.

28. *People's Ferry Co. v. Beers*, 20 How. (U. S.) 393.

29. *Bradley v. Bolles*, Abb. Adm. 569.

30. *Edwards v. Elliott*, 21 Wall. (U. S.) 532.

31. *Gilbert v. Roach*, 2 Fed. Repr. 393.

trade,<sup>1</sup> or relating to rights of part owners in their ships,<sup>2</sup> cannot be settled in admiralty, that court having no chancery powers.<sup>3</sup>

Admiralty cannot enforce mortgages or pledges of vessels, these being purely land contracts.<sup>4</sup>

The maritime character of a contract sometimes depends on the place where it is executed, for though agreements for repairs and supplies are ordinarily enforceable in admiralty,<sup>5</sup> if the repairs are made or supplies furnished at the home port of the vessel—that is, at the place where her owners, or, if more than one, her managing owner, resides,<sup>6</sup>—they are classed with contracts for construction;<sup>7</sup> and an endeavor has been made to extend the same rule to the work of unloading cargo at the home port.<sup>8</sup>

**14. Torts within Jurisdiction.**—The term “tort,” when used in reference to admiralty jurisdiction, is not “confined to wrongs or injuries committed by direct force, but includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case.”<sup>9</sup>

The test of jurisdiction has been already shown to be the place of committing the tort, whether upon navigable waters or not.<sup>10</sup>

The tort, however, to be maritime must be done by a vessel, *i.e.*, by those or some of those in charge of her, in their representative capacity as agents and servants of the owners. To call an assault by one passenger upon another a maritime tort because occurring on the deck of a ship is obviously absurd.

But when the act complained of was done by the agents of the owners, and as such agents, the jurisdiction is undoubted, and has been even held to include such apparently malicious acts as the abduction of a child by the master,<sup>11</sup> the wrongful taking of cargo not destined for the ship,<sup>12</sup> and wilful refusal to give a bill of lading for goods on board.<sup>13</sup>

It is now settled that an action for negligence resulting in death may be brought in admiralty by the persons entitled to sue under the statute prevailing at the place of the accident;<sup>14</sup> after much conflict of opinion the supreme court have now held that in the

1. *Vandewater v. Mills*, 19 How. (U. S.) 82.

2. *Kellum v. Emerson*, 2 Curt. (U. S.) 79; *The Orleans v. Phœbus*, 11 Pet. (U. S.) 175; *Grant v. Poillon*, 20 How. (U. S.) 162; *Ward v. Thompson*, 22 How. (U. S.) 330.

3. *Dean v. Bates*, 2 Wood. & M. (U. S.) 87.

4. *The John Jay*, 17 How. (U. S.) 399; *The Emily Souder*, 17 Wall. (U. S.) 666.

5. *Vide* § 12, *ante*.

6. Rev. Stat. § 4141; *St. Louis v. The Ferry Co.*, 11 Wall. (U. S.) 423; *Morgan v. Parham*, 16 Wall. (U. S.) 471. What is the home port is always a question of fact, towards the decision of which the vessel's registry and port of hail as painted on her stern are persuasive but not conclu-

sive evidence. *The Martha Washington*, 1 Cliff. (U. S.) 463; *The Mary Chilton*, 4 Fed. Repr. 847; *The Norman*, 6 Fed. Repr. 406; *The Plymouth Rock*, 13 Blatchf. (U. S.) 505.

7. *The General Smith*, 4 Wheat. (U. S.) 438.

8. *The E. A. Barnard*, 2 Fed. Repr. 712.

9. *Leathers v. Blessing*, 105 U. S. 360.

10. *Vide ante*, §§ 4, 5, and 11.

11. *Steele v. Thacher*, Ware (U. S.), 91; *The Yankee v. Gallagher*, McAll (U. S.), 467; *Tillmore v. Moore*, 4 Fed. Repr. 231.

12. *The Dauntless*, 7 Fed. Repr. 366.

13. *The Markee*, 14 Fed. Repr. 112.

14. *Steamboat Co. v. Chase*, 16 Wall. (U. S.) 522; *Sherlock v. Alling*, 93 U. S. 99.

absence of State or national legislation no such action will lie in admiralty where the negligence occurred on the high seas.<sup>1</sup>

**15. Prize Causes.**—Prize money is recoverable in admiralty,<sup>2</sup> whether the prize was taken on the high seas or in port;<sup>3</sup> and, in general, all cases of prize are within the jurisdiction conferred by constitutional grant.<sup>4</sup>

**16. Jurisdiction Exclusive.**—No State court can exercise jurisdiction *in rem* upon any maritime contract or tort, even if the right to the process *in rem* has been conferred by a State statute;<sup>5</sup> but under the judiciary acts of the United States,<sup>6</sup> which "save the right of a common-law remedy where the common law is competent to give it," any suitor may proceed either *in personam* in the admiralty, or bring an ordinary suit in any court that is open to him.<sup>7</sup> That a cause, therefore, *may* be promoted in admiralty does not prove that it *must* be brought there, unless it is desired to begin by process *in rem*.<sup>8</sup>

**17. The Maritime Lien.**—Another test of jurisdiction is the existence or absence of the maritime lien, which is a right or privilege in a vessel or cargo to be carried into effect by legal process.<sup>9</sup> It arises both out of contracts on behalf of vessel and cargo, and torts done by a vessel, which, in this regard, is treated as a sentient being, endowed with a personality capable of being called to account for injuries inflicted by it.<sup>10</sup>

Wherever a maritime lien exists, admiralty will enforce it by process *in rem*, *i. e.*, seizure of the thing upon which the lien exists, and it is the only court that can do so.<sup>11</sup>

**18. Courts having Jurisdiction.**—By Rev. Stat. U. S. § 563, exclusive original jurisdiction in admiralty is given to the various district courts of the United States, except where it shall in special cases be conferred by statute on the circuit courts.<sup>12</sup> This law

1. The Harrisburg, 119 U. S. 199, reversing 15 Fed. Repr. 610. But even in this latest decision the court have not signified their opinion of the doctrine of The E. B. Ward, Jr., 17 Fed. Repr. 456, and McDonald v. Mallory, 77 N. Y. 546, viz., that for the purposes of this jurisdiction a ship remains a portion of the soil of her home State, and therefore subject to State statutes. On this point the ruling of the court decides nothing more than that if a suit *in rem* can be maintained under a State statute for death resulting from negligence on the high seas, the State statute of limitations also applies, and unless process issues within the period prescribed by such statute the suit is barred.

2. Keane v. The Gloucester, 2 Dall. (U. S.) 36.

3. The Emulous, 1 Gall. (U. S.) 563.

4. The Prize Cases, 2 Black (U. S.), 635.

5. The Lottawanna, 21 Wall. (U. S.)

558; The Moses Taylor, 4 Wall. (U. S.) 411. But where the contract is not maritime, as for shipbuilding, the State courts may by State statute exercise what is practically jurisdiction *in rem*. Edwards v. Elliott, 21 Wall. (U. S.) 532; Scull v. Shakespear, 77 Pa. St. 297; affirmed in U. S. S. C., not reported.

6. Rev. Stat. U. S., §§ 563 and 711.

7. Leon v. Galceran, 11 Wall. (U. S.) 185; Schoonmaker v. Gilmore, 102 U. S. 118.

8. Steamboat Co. v. Chase, 16 Wall. (U. S.) 522.

9. The Nestor, 1 Sumn. (U. S.) 73; The City of Mecca, L. R. 6 P. D. 106.

10. The China, 7 Wall. (U. S.) 53. For particular cases creating maritime liens, *vide* SHIPPING.

11. Vandewater v. Mills, 19 How. (U. S.) 82.

12. U. S. R. S. § 71 gives the circuit court concurrent jurisdiction in seizures for slave-trading, and § 5308 in condem-

effectually prevents any foreign power,<sup>1</sup> or any State, or any other Federal court assuming to dispose of an admiralty suit;<sup>2</sup> but territorial courts may, by authority of the local legislature, exercise admiralty jurisdiction.<sup>3</sup>

If the amount involved, exclusive of costs, exceeds \$50, an appeal lies from the district to the circuit court;<sup>4</sup> and if, in like manner, it exceeds \$5000, to the Supreme Court of the United States.<sup>5</sup>

The time and manner of appealing to the circuit court are regulated by the rules in admiralty of the supreme court<sup>6</sup> and the various district and circuit courts.

An appeal to the supreme court, to become a *supersedeas*, must be taken within sixty days from the final decree, and at all events within two years.<sup>7</sup>

**19. Procedure in Admiralty.**—The admiralty courts of the United States, subject to the Federal statutes<sup>8</sup> and the rules prescribed from time to time by the supreme court, administer justice according to the general procedure of admiralty in all civilized countries, though more especially in accordance with the forms handed down to us by the English maritime courts.<sup>9</sup>

This procedure by libel, or petition and answer, resembles rather the civil law than any other, is administered in even a more liberal spirit than a court of equity,<sup>10</sup> and permits amendments in the discretion of the court at any time.<sup>11</sup> The great and distinguishing feature of admiralty jurisprudence is that wherever a maritime privilege or lien attaches to a vessel or cargo, or both, there by an action *in rem* such vessel or cargo is impleaded and made the defendant,<sup>12</sup> and the person opposing the libellant can only become technically the "claimant," and be permitted to take his property out of custody and contest the cause by giving a bond or stipulation which shall represent the thing defendant.<sup>13</sup>

Actions *in personam* are those in which an individual is charged personally in respect to some matter of admiralty and maritime jurisdiction.<sup>14</sup> All actions must belong to one of these two classes.

**20. Actions in Rem.**—The process by which such actions are begun commands a seizure of the *res*. Its allowance is a judicial act,<sup>15</sup> but in the United States is regulated by supreme court

nations of property used by persons in insurrection.

1. *Glass v. The Betsey*, 3 Dall. (U.S.) 6.

2. *The Hine v. Trevor*, 4 Wall. (U.S.) 555.

But an "admiralty suit" is one brought not only upon a maritime contract or tort, but under admiralty procedure; any one content with the "common-law remedy" may pursue it. Compare § 16, *supra*.

3. *Am. Ins. Co. v. Canter*, 1 Pet. (U.S.) 511.

4. U. S. Rev. Stat. § 631.

5. Acts, Sept. 24, 1789, and March 1, 1875; Supp. to Rev. Stat., vol. i. p. 136.

6. Rules 45-46.

7. U. S. Rev. Stat. §§ 1007-8; *Rodd v. Heartt*, 17 Wall. (U.S.) 354; *Rubber Co. v. Goodyear*, 6 Wall. (U.S.) 153.

8. U. S. Rev. Stat. §§ 911-913.

9. *Manro v. Almeida*, 10 Wheat. (U.S.) 473.

10. *Richmond v. New Bedford Copper Co.*, 2 Low. (U.S.) 315.

11. *The Edwin Post*, 6 Fed Repr. 206.

12. *The Moses Taylor*, 4 Wall. (U.S.) 411; *The Sabine*, 101 U.S. 384.

13. U. S. v. Ames, 99 U.S. 35.

14. *The Sabine*, *supra*.

15. *The John*, 2 Hagg. p. 317.

rules;<sup>1</sup> yet because it is the act of the law, no action will lie for false arrest of the *res*.<sup>2</sup>

No process (except *in forma pauperis* by special *allocatur*) can issue without security for costs entered, while to secure the release of the thing seized a stipulation for the value of the thing arrested is necessary, which once given represents the *res*,<sup>3</sup> and forever discharges the lien sought to be enforced.<sup>4</sup>

Any one having the right of possession may become the claimant,<sup>5</sup> whose death does not abate the suit.<sup>6</sup>

The persons signing the stipulation to release the thing seized are liable individually to the full amount of the stipulation, but no farther.<sup>7</sup> A person not signing, even the claimant, cannot be made liable,<sup>8</sup> but the liability of those who have signed can be fixed in the same suit in which the stipulation was given, and decree entered directly against them.<sup>9</sup>

**21. Actions in Personam.**—A citation or monition to appear and answer, containing a clause in the nature of a warrant of arrest or *capias*, where the State law would permit arrest,<sup>10</sup> or of attachment<sup>11</sup> against non-residents, is the appropriate method of beginning these actions.

Stipulators cannot surrender their principal like bail, but are responsible for the amount decreed.<sup>12</sup>

Attachments may issue in tort as well as contract,<sup>13</sup> and are not confined to maritime seizures.<sup>14</sup>

**22. Joinder of Actions.**—The rules of the Supreme Court permit actions *in rem* and *personam* to be joined in the same libel for wages, pilotage, and collision,<sup>15</sup> and there would not seem to be any impropriety in joining them in any case.<sup>16</sup> They are, however, generally regarded as separate and cumulative.<sup>17</sup>

Proceedings *in rem*, however, may be changed to those *in personam* by amendment.<sup>18</sup>

1. The St. Lawrence, 1 Black (U. S.), 522.

2. Thompson v. Lyle, 3 W. & S. (Pa.) 166; The Apollon, 9 Wheat. (U. S.) 362.

3. The Lucille, 19 Wall. (U. S.) 73; The Lady Pike, 96 U. S. 461.

4. The Thales, 3 Bend. (U. S.) 327; The White Squall, 4 Blatchf. (U. S.) 103.

Nor can the *res* ever be rearrested, even by other parties, for the enforcement of the same lien. Such parties should petition to become co-libellants. The Nahor, 9 Fed. Repr. 213.

5. The Prometheus, 1 Low (U. S.), 491.

6. The James A. Wright, 10 Blatchf. (U. S.) 160.

7. The Webb, 14 Wall. (U. S.) 406.

8. The Gran Para, 10 Wheat. (U. S.)

497. These rules, growing out of the doctrine that the stipulation represents the *res*, are not changed by the fact that the admiralty may be enforcing a lien given by State law, and represented by a bond

given under that law. The Edith, 94 U. S. 518.

9. The Alligator, 1 Gall. (U. S.) 145.

10. Adm. Rule, 47; The Carolina, 14 Fed. Repr. 424; The Kentucky, 4 Blatchf. (U. S.) 48.

11. Adm. Rule 2.

12. Adm. Rule 3. Holmes v. Dodge, 1 Abb. Adm. 60; Gaines v. Travis, *ibid.* 422; *In re* Loring Snow, 2 Curt. (U. S.) 485.

13. Manro v. Almeida, 10 Wheat. (U. S.) 473.

14. Miller v. The U. S., 11 Wall. (U. S.) 268; Atkins v. The Disintegrating Co., 18 Wall. (U. S.) 272.

15. Adm. Rules, 13-15.

16. Newell v. Norton, 3 Wall. (U. S.) 257.

17. The Prince Albert, 5 Ben. (U. S.) 386; The Zodiac, 5 Fed. Repr. 220; Ins. Co. v. Alexandre, 16 Fed. Repr. 279.

18. The Virgin, 8 Pet. (U. S.) 538; Chamberlain v. Ward, 21 How. (U. S.) 548.

**23. Pleadings.**—Admiralty pleadings are in general simple and untechnical.<sup>1</sup>

The libel must show the jurisdiction of the court,<sup>2</sup> and if it is filed by a part of the persons interested for the benefit of all, it must state that fact.<sup>3</sup> It need not be sworn to (though this is usually done), but the answer must be sworn to in any event.<sup>4</sup>

The claimant or respondent may both answer and demur,<sup>5</sup> and the libellant should not prolong the pleadings by a replication, but amend his libel.<sup>6</sup>

**24. Set-off and Recoupment.**—No statute especially authorizes admiralty to take cognizance of set-off, hence it is admitted only to diminish compensation, not as an independent right,<sup>7</sup> and not even then unless the court would have jurisdiction if it were presented as an original demand.<sup>8</sup>

Recoupment is, however, admitted in cases of both tort and contract, even to the extent of compelling contribution among tortfeasors.<sup>9</sup>

**25. Action pending.**—That a suit for the same cause is pending in a State or foreign court is no bar to proceedings in admiralty.<sup>10</sup>

**26. Evidence.**—The common-law rules of evidence do not apply in admiralty,<sup>11</sup> nor the statutes of States in which the courts sit;<sup>12</sup> but U. S. statutes, of course, do apply.

From the nature of the causes heard, the character of the witnesses and the place (the sea) where much documentary evidence is prepared, the rules of admiralty are lax, and must often bend to the circumstances of a peculiar case.<sup>13</sup>

**27. Trial.**—Jury trials are not a right in admiralty unless given by express statute;<sup>14</sup> ordinarily the hearing is before the judge alone.

Though the proof may differ from the allegations of the pleadings, unless the variance is so great as to be misleading the court will proceed to a decree.<sup>15</sup>

**28. Decree.**—In actions *in personam* the decree, like an ordinary judgment, is against persons and corporations properly served with process within the territorial limits of the court's jurisdiction, or against the attached property of persons not so served.<sup>16</sup>

1. Du Pont de Nemours v. Vance, 19 How. U. S. 162.

2. Boon v. The Hornet, Crabbe, (U. S.) 426.

3. Ins. Co. v. Johnson, Blatchf. & H. (U. S.) 19.

4. Coffin v. Jenkins, 3 Story, (U. S.) 108.

5. The William Penn, 3 Wash. (U. S.) 484.

6. The Sarah Anne, 2 Sumn. (U. S.) 206.

7. Willard v. Dorr, 3 Mason (U. S.), 161.

8. The James and Catherine, Bald'w, (U. S.) 544.

9. The David Faust, 1 Ben. (U. S.) 183; The North Star, 106 U. S. 17.

10. The Tubal Cain, 9 Fed. Repr. 834; The Peshawur, L. R. 8 P. D. 32.

11. The J. F. Spencer, 3 Ben. (U. S.) 337.

12. The Independence, 3 Curt. (U. S.) 360.

13. The Vivid, 4 Ben. (U. S.) 319.

14. Gillet v. Pierce, Bro. Adm. 553. The right is secured on the demand of either party in certain cases arising on the Western lakes and rivers by U. S. Rev. Stat. § 566.

15. The William Penn, 3 Wash (U. S.) 484; The Clement, 2 Curt. (U. S.) 363.

16. Boyd v. Urquhart, 1 Sprague (U. S.), 433.



## ADMIRALTY—ADOPTION OF CHILDREN.

A decree *in rem* is against the *res* itself, and binds parties, privies and strangers; for to the proceeding all the world are parties,<sup>1</sup> and such decree cannot be questioned even in the courts of a country whose ship has been condemned by a foreign tribunal.<sup>2</sup>

Decrees *in rem* are usually entered also against the stipulators for the release of the thing seized; they then become, with decrees *in personam*, liens upon the real estate of stipulators and respondents according to the law of the State where they are entered,<sup>3</sup> and are enforceable by execution, directed to the U. S. marshal, in the nature of a writ of *fieri facias*.<sup>4</sup>

**29. Restraint of Lower Courts.**—Obviously all questions of jurisdiction may be raised at the hearing of a cause and considered on appeal; but the law permits the Supreme Court of the U. S. to issue to district courts, "when proceeding as courts of admiralty and maritime jurisdiction," writs of prohibition,<sup>5</sup> for the purpose of preventing them from assuming a jurisdiction with which they are not legally vested.<sup>6</sup>

If, however, the case which the applicant for the writ alleges to be without the jurisdiction, appears to be really of a maritime nature, the writ will be refused, and the complaining party left to his remedy of appeal;<sup>7</sup> for the writ is not of right, but rests in the sound discretion of the court.<sup>8</sup>

**ADOPTION OF CHILDREN.** See BASTARDY; PARENT AND CHILD.

**1. Definition.**—The act by which a person takes the child of another into his family, and treats him as his own.<sup>9</sup>

1. *Hollingsworth v. Barbour*, 4 Pet. (U. S.) 466. The *res*, however, must have been actually seized; without it there is no jurisdiction to make the decree. *Taylor v. Carryl*, 20 How. (U. S.) 583; *Miller v. U. S.*, 11 Wall. (U. S.) 294. But once seized, jurisdiction attaches, and the decree is valid though *res* removed. *The Rio Grande*, 23 Wall. (U. S.) 458; *Ex parte Devoe Manuf. Co.*, 108 U. S. 401.

2. *The Trenton*, 2 Fed. Repr. 657; *Imrie v. Castrique*, L. R. 4 H. L. 414.

3. *Ward v. Chamberlain*, 2 Black (U. S.), 430; *Cropsey v. Crandall*, 2 Blatchf. (U. S.) 341.

4. Adm. Rule 21; *The Kentucky*, 4 Blatchf. (U. S.) 448.

5. U. S. Rev. Stat. § 688.

6. Though its use in the Federal courts is founded on statute, the writ itself is as old as the common law, and was the instrument by which the court of king's bench continually harassed and humiliated the English courts of admiralty. *Vide* High's Extraordinary Legal Remedies, and *ante*, § 1.

7. *Ex parte Gordon*, 104 U. S. 515;

*Ex parte Hagar*, 104 U. S. 520; *Ex parte Pennsylvania*, 109 U. S. 174.

8. *Ex parte Easton*, 95 U. S. 68. The effect of these decisions is to render this remedy of little value and confer upon the district and circuit judges the final decision of all jurisdictional questions in cases involving less than \$5000.

**Authorities for Admiralty.**—Standard American works are Conkling's Jurisdiction, Law, and Practice in Admiralty, 2d Ed. 2 vols. 1857; and Parson's Shipping and Admiralty, 2 vols. 1869. Books of daily necessity to the practitioner are Benedict's Admiralty, 2d Ed. 1870; Desty's Shipping and Admiralty, 1879, and Henry's Admiralty Jurisdiction and Procedure, 1885.

9. *Bouvier's Law Dict.*

Adoption was unknown to the common law, but was recognized by the civil law, and exists in many countries on the continent of Europe which derive their jurisprudence from that law. Co. Lit. 7, b. 237, b. 4; Phillimore, § 531; Mackenzie's Roman Law, 120-124; Whart. Conf. of L. § 251. It was introduced from the

In many of the States, adoption has been regulated by statute.<sup>1</sup>

**2. Descent—Status.**—The rights of descent flow from the legal

law of France or of Spain into Louisiana and Texas, but was abolished in Louisiana in 1808; see *Fuselier v. Masse*, 4 La. 423; *Vidal v. Commagère*, 13 La. Ann. 516; *Teal v. Sevier*, 26 Tex. 516. The rights of the parent by adoption are treated substantially as those of a natural parent. *Schouler Dom. Rel.* § 232.

An adoption is not revocable, unless some sufficient reason is shown therefor. *Janes v. Cleghorn*, 54 Ga. 9.

**1. Whitmore on Adoption.**

The word "child" as used in a statute relating to adoption of children means minor child. *Re Moore*, 14 R. I. 38.

It is immaterial that the name of the child does not appear in the body of the instrument, and that the person adopting signed as guardian. *Bancroft v. Bancroft*, 53 Vt. 9.

A complaint seeking to have an order of court granting the prayer of a petition for the adoption of a child, and containing the averment "that at the time of said adoption said defendant" (the adoptive child) "was eighteen years of age, and knew that said Preston Brown" (the adopting father) "was a person of unsound mind; and that so knowing, and for the purpose of becoming the heir of said Preston Brown, and securing the property of said Brown, he gave his consent to said adoption, and permitted said adoption to be made," does not show such fraud as will vitiate the order of the court. *Brown v. Brown*, 101 Ind. 340.

A widowed mother joined in executing a deed of adoption of her child. A day or two afterward, at her request, the adopter signed a paper stating that she could "have her son (the adopted child) at any time she calls for him." *Held*—(1) that under the statute, by joining in the deed she relinquished her parental rights over the child; (2) that the subsequent paper could not be construed to work a revocation of the deed; it was evidently intended to allow her only the temporary custody and society of the child. *Re Clements*, 78 Mo. 352.

Under the statute as to the adoption of infants, the consent of the parent is absolutely necessary, where such parent is not hopelessly intemperate or insane, and has not abandoned the child, even though the child be under fourteen. *Luppie v. Winans*, 37 N. J. Eq. 245.

Where articles for the adoption of a child were made by its mother to defendant, who, however, for several years

neglected to have them recorded, and meanwhile the mother married the plaintiff, and executed articles of adoption to him, which were at once recorded; while it is not decided which of the parties is in law the father by adoption of the child, nor what the child's rights of inheritance are, yet it is held, in an action by plaintiff to recover the child from the custody of defendant, that the question must be decided according to the best interests of the child, in view of all the circumstances, and not solely on the ground of legal parentage. *Fouts v. Pierce*, 64 Iowa, 71; see *Luppie v. Winans*, 37 N. J. Eq. 245.

Where natural heirs seek to set aside an order for the adoption of a child, their remedy is in equity; they must proceed promptly, and a delay of ten years will be fatal to their suit. *Brown v. Brown*, 101 Ind. 340.

Under the Mass. Pub. Sts. c. 148, § 4, notice of a petition for the adoption of a child is necessary in all cases where the written consent required by § 2 is not submitted to the court with the petition, even if a case is presented by the petition, which, if proved to exist, would authorize the judge of probate to decree the adoption without consent. *Humphrey, appellant*, 137 Mass. 84.

It is no objection to the maintenance of a petition by a husband and wife to the Probate Court, under the Mass. Pub. Sts. c. 148, for the adoption of a child, alleged to be of unknown parentage and a foundling, that the petition does not also allege that the child is not one of the class excepted in § 1. *Edds, Appellant*, 137 Mass. 346.

Where the articles of adoption were signed and acknowledged by the natural parent, but the persons intending to adopt failed to execute the instrument, and the child resided with them for eighteen months, *held*, that a legal adoption was not accomplished. *Long v. Hewitt*, 44 Iowa, 363.

An adopted child usually inherits from the adopting parent, and *vice versa*; but otherwise as to collateral kindred. *Schouler Dom. Rel.* § 232, n.

Failure to file articles of adoption until after the death of the adopting party renders the adoption incomplete, and the adopted child cannot inherit from decedent. To create rights of inheritance under the statute in regard to adoption, the statutory requirements must be strictly complied with. *Shearer v. Wea-*

status of the parties, and where the status is fixed the law supplies the rules of descent.<sup>1</sup>

ver, 56 Iowa, 578; *Tyler v. Reynolds*, 53 Iowa, 146.

1. Where a child, adopted by a husband and his wife jointly, dies, without children or their descendants, the owner of land inherited from the adopting mother, the surviving husband and adoptive father inherits such land, and it does not descend to the natural mother. *Humphries v. Davis*, 100 Ind. 274; s. c., 50 Am. Rep. 788; *Paul v. Davis*, 100 Ind. 422; *Hyatt v. Pugsley*, 33 Barb. (N. Y.) 373; *Valentine v. Wetherill*, 31 Barb. (N. Y.) 655; *Sewall v. Roberts*, 115 Mass. 262; *Hole v. Robbins*, 53 Wis. 514. *Compare Com. v. Powell*, 20 Cent. Law Jour. 343; *Reinders v. Koppelman*, 68 Mo. 482.

Where an adopted child dies intestate, unmarried, and without lawful issue, or their descendants, surviving him or her, seized of real estate or owning personal property, which may have come to such child by gift, devise, or descent from the adopting parent or parents, father or mother, such real estate or personal property shall descend to the adopting father or mother, if living, or, if dead, to the heirs-at-law of such adopting father or mother, to the entire exclusion of the natural heirs of such adopted child from any share or interest therein. *Barnhizel v. Ferrell*, 47 Ind. 335, so far as it is in conflict with this case, is overruled. *Davis v. Krug*, 95 Ind. 1.

Where a father adopted two children of his daughter, and afterwards died, leaving no will, the children so adopted inherited from him as his own children, and inherited, also, the share of their deceased mother. *Wagner v. Varner*, 50 Iowa, 532.

Real estate was devised to A. for life, with power to dispose of it by will, or, if he died intestate, to pass by intestate laws. *Held*, that his adopted child was entitled to the estate. *Johnson's App.*, 88 Pa. Stat. 346.

The Pennsylvania statute of 1872 was intended to be retrospective, but where the adopting parent died intestate in 1870 it was held that a proceeding under the act of 1872 could not divest the estate which had vested in his children at his death. *Ballard v. Ward*, 89 Pa. St. 358.

An adopted child cannot (in Pennsylvania) take under a devise to the "children" of the parent by adoption, as it is not a child by nature. *Shafer v. Eneu*, 54 Pa.

St., 304. *Compare Barnes v. Allen*, 25; Ind. 222.

An adopted child can take by descent only from the person adopting, and not from lineal or collateral kindred of the adopting parent. Such child cannot by inheritance take from a child of the adopting parent born in lawful wedlock. *Keegan v. Geraghty*, 101 Ill. 26.

The rights of inheritance acquired by an adopted child under the laws of another State where he was adopted, are subservient to the laws of the State where the property is situated. *Keegan v. Geraghty*, 101 Ill. 26.

The adoption of an heir-at-law by a husband, without the consent of his wife, and leaving no issue, will not operate to prevent his widow from inheriting as provided by statute; and at her decease her share will pass to her heirs, and not to the heirs or devisees of the adopted person. *Stanley v. Chandler*, 53 Vt. 619.

The status of any person, with the inherent capacity of succession or inheritance, is to be ascertained by the law of the domicile which creates the status, at least when the status is one which may exist under the laws of the State in which it is called in question, and when there is nothing in those laws to prevent giving full effect to the status and capacity acquired in the State of the domicile. A child adopted, with the consent of its father and the sanction of a judicial decree, in another State, where the parties are domiciled at the time, under a statute by which a child so adopted has the same rights of inheritance as legitimate offspring in the estate of the adopting father, is entitled, after the adopting father and the adopted child have removed their domicile into Massachusetts, to inherit here the real estate of such father as against his collateral heirs; although his wife has given no formal consent to the adoption, as is required under the statutes of adoption in Massachusetts. *Ross v. Ross*, 129 Mass. 243; s. c., 37 Am. Rep. 321.

An adopted child will take as a child under a residuary clause of the adopting father's will, where the specific legacy has lapsed. *Burrage v. Briggs*, 120 Mass. 103.

Under the New Hampshire statute, 1867, *held*, that the provision that the decree be made in the county where the petitioner or the child resides, implies

## ADOPTION OF CHILDREN—ADULT—ADULTERATION.

**3. Services.**—There is no difference between an adoptive and a natural child as to the right to recover for services.<sup>1</sup>

**ADULT.**—The word "adult" signifies a person who has attained the full age of twenty-one years.<sup>2</sup>

A statute to prevent the sale of liquor required that the law should be enforced upon the petition of a majority of the "adult" residents. *Held*, that adult females, as well as males, may join in the petition.<sup>3</sup>

**ADULTERATION.** (See POLICE POWER.)—At the common law it is an indictable offence to mix unwholesome ingredients in anything made and supplied for the food of man.<sup>4</sup>

Statutes forbidding the sale of impure or adulterated articles of food or of drugs exist in many of the States. These statutes are within the police power of the legislature, and constitutional.<sup>5</sup>

that the statute was intended to be limited to cases in which all the parties have their domicile in the State; and does not apply to the case of an adoption therein of a child domiciled there by persons, then and since domiciled in Massachusetts. *Foster v. Weternan*, 124 Mass. 592.

1. *Lunay v. Vantyne*, 40. Vt. 503.

2. *Schenault v. State*, 10 Tex. App. 410.

The burden of proof of the age is on the State. *George v. State*, 11 Tex. App. 95.

3. *Blackwell v. State*, 36 Ark. 178.

4. **At Common Law.**—1 *Russell on Crimes*, 169. See *Burnby v. Rollitt*, 16 M. & W. 644; *R. v. Dixon*, 3 M. & S. 11; *Goodrich v. People*, 2 Park. Cr. (N. Y.) 622; *State v. Smith*, 3 Hawk. (N. Car.) 40; *State v. Norton*, 2 Ired. L. (N. Car.) 40.

The selling unwholesome provisions, 4 Bl. Com. 162, or the giving any person unwholesome victuals, not fit for man to eat, *lucri causâ*, 2 East (P. C.), 822, is an indictable offence. Where the defendant was indicted for deceitfully providing certain French prisoners with unwholesome bread, to the injury of their health, it was objected, in arrest of judgment, that the indictment could not be sustained, for it did not appear that what was done was in breach of any contract with the public, or of any civil or moral duty; but the judges, on a reference to them, held the conviction right. *R. v. Treeves*, 2 East (P. C.), 821. The defendant was indicted for supplying the royal military asylum at Chelsea with loaves not fit for the food of man, which he well knew, etc. It appears that many of the loaves were strongly impregnated with alum (prohibited to be used by repealed statute 37 Geo. 3, c. 98, s. 21), and pieces as large as horse-beans were

found; the defence was, that it was merely used to assist the operation of the yeast, and had been carefully employed. But Lord Ellenborough said, "Whoever introduces a substance into bread, which may be injurious to the health of those who consume it, is indictable if the substance be found in the bread in that injurious form, although, if equally spread over the mass, it would have done no harm." *R. v. Dixon*, 4 Camp. 12; 3 M. & S. 11.

It is a nuisance for a common dealer in provisions to sell unwholesome food, or to mix noxious ingredients in the provisions which he sells. *R. v. Dixon*, 3 M. & S. 11. Or to cause to be publicly exposed for sale, as sound and wholesome meat, meat known not to be sound and wholesome. *R. v. Stevenson*, 3 F. & F. 106. Or knowingly to send such meat to market. *R. v. Jarvis*, 3 F. & F. 108; *R. v. Crawley*, 3 F. & F. 109.

5. **By Statute.**—*People v. Cipperly*, 101 N. Y. 634; *State v. Groves*, 2 Atl. Repr. (R. I.) 384; *State v. Smith*, 14 R. I. 100; s. c., 51 Am. Rep. 344. *Com. v. Evans*, 132 Mass. 11; *Com. v. Wentworth*, 118 Mass. 441; *Com. v. Smith*, 103 Mass. 444; *Shivers v. Newton*, 45 N. J. L. 469; *Pierce v. State*, 63 Md. 592; *Butler v. Chambers*, 30 N. W. Repr. (Minn.) 308; *State v. Addington*, 77 Mo. 117; *Phillips v. Mead*, 75 Ill. 334; *Bainbridge v. State*, 30 Ohio St. 264; *U. S. v. Bayard*, 16 Fed. Repr. 384. *Compare People v. Marx*, 99 N. Y. 377; s. c., 9 Am. & Eng. Corp. Cas. 491; *People v. Arensburg*, 7 Eastn. Repr. (N. Y.) 751.

In *People v. Marx*, 99 N. Y. 377; s. c., 9 Am. & Eng. Corp. Cas. 491 and note, the statute was held void, chiefly because it was construed to be an attempt on the part of the legislature to drive the man-

**Adulteration—Continued.**

ufactured article from the market for the benefit of another industry, and to protect those engaged in the manufacture of dairy products against the competition of cheaper substances, capable of being applied to the same uses; in other words, that the object of the statute was to prohibit one industry in order to foster another. See *People v. Arensburg*, 7 Eastn. Repr. (N. Y.) 751.

In sustaining a similar statute, the Supreme Court of Minnesota, speaking of the New York case (*supra*), said: "This assumes that the object of the legislation was for the benefit of a class, and that there were no reasonable grounds for the exercise of the police power; because, if there were such grounds, it is no objection that a legitimate industry is incidentally benefited, as the practical result of the operation of the statute. We do not think the court would be warranted in setting aside this legislation on such grounds." *Butler v. Chambers*, 30 N. W. Repr. 308.

See *State v. Addington*, 77 Mo. 117. *In re Brosnahan*, 18 Fed. Repr. 62; *Palmer v. State*, 39 Ohio St. 236; s. c., 48 Am. Rep. 429.

**Dangerous Drugs.**—A law prohibiting the sale of opium is constitutional. *State v. Ah Chew*, 16 Nev. 50; s. c., 40 Am. Rep. 488.

**Adulteration of Milk and Food Products.**—The legislature may make it a criminal offence to sell milk-and-water, and in a prosecution for so doing a certificate of analysis by a sworn milk-inspector is admissible as evidence. *Commonwealth v. Waite*, 11 Allen (Mass.), 264. It is not necessary to convict for selling adulterated milk to show knowledge of the adulteration by the seller, nor to aver that the milk was cow's milk. Nor is it a defence to show that the woman who sold it was acting as her husband's agent. *Com. v. Farren*, 9 Allen (Mass.), 489; but see *Dilley v. People*, 4 Brad. (Ill.) 52. The result of a test by a lactometer is admissible in evidence. *Com. v. Nichols*, 10 Allen (Mass.), 199; see also *Com. v. Flannely*, 15 Gray (Mass.), 195; *Thompson v. Howe*, 46 Barb. (N. Y.) 287. But tests of milk made more than a year after the violation complained of are inadmissible. *Stearns v. Ingraham*, 46 T. & C. (N. Y.) 218. But an act prohibiting the sale of adulterated milk does not embrace the offence of bringing such milk into the city. *Polinsky v. State*, 73 N. Y. 65.

The fourth section of the New Jersey act provides that in all prosecutions under this act, if the milk shall be shown

upon analysis by a member of the board of public analysis, or the chemist of the State experiment station, to contain more than 88 per cent of watery fluids, or to contain less than 12 per cent of milk solids, such milk shall be deemed, for the purposes of this act, to be adulterated.

*Held*, that this section is not intended to operate as a rule of evidence by which the act of the analyst is to be conclusive of the guilt of the defendant in selling adulterated milk, but was intended to prohibit the sale of milk under a certain standard of excellence, and this exercise of authority is within the discretion of the legislature in the exertion of the police power inherent in the State. *Shivers v. Newton*, 45 N. J. L. 469; see *State v. Smith*, 14 R. I. 100; s. c., 51 Am. Rep. 344.

Defendant kept milk in, and sold it from, a tank marked "Skimmed milk." *Held*, that evidence that the milk was so sold was a good defence to the charges in the complaint, and that the defendant could not be convicted by proof that the milk was watered. *Com. v. Tobias*, 141 Mass. 129.

The Ohio statute provides for the punishment, by fine or imprisonment, or both, of persons who knowingly sell, or offer for sale, any substance purporting to be butter or cheese, or having semblance of butter or cheese, which substance is not made wholly from pure cream or pure milk, unless each package of such substance have distinctly and durably painted, stamped, or marked thereon the name of each article used or entering into the composition of such substance. *Held*, the fact that the article sold was manufactured under letters patent issued by the U. S. constitutes no defence to an information or indictment for violating the provisions of this statute. *Palmer v. State*, 39 Ohio St. 236; s. c., 48 Am. Rep. 429. *In re Brosnahan*, 18 Fed. Repr. 62; s. c., 4 Am. Cr. R. 16.

The adulteration of confections may also be prohibited; but an indictment charging defendant with fraudulently adulterating "a certain substance intended for food—to wit, one pound of confectionery"—does not sufficiently describe the substance adulterated, and if reasonably objected to will be quashed. *Com. v. Chase*, 125 Mass. 202.

A person entered a shop and asked for green tea. He received tea, which upon analysis proved to be faced with gypsum and prussian blue. It appeared that tea imported from China as green tea, and known as such to the trade, is faced as

**ADULTERY** (when not a Matter of Divorce)—**UNLAWFUL CO-HABITATION.** See **DIVORCE**; **FORNICATION**; **INCEST.**

1. **At Common Law.**—Adultery is criminal conversation with a man's wife. The woman must be married; she must be another

above, and the tea not faced is imported from Japan and is not generally known as green tea; but this is not generally known to the public. The tea sold as above was faced in China. *Held*, that the seller was guilty of selling adulterated tea as unadulterated. *Roberts v. Egerton*, L. R. 92 B. 494.

A publican sold as a bottle of gin a liquid composed of 26 per cent alcohol, 70 per cent water, and 4 per cent sugar. Evidence was adduced that gin was sold by retailers at varying strength, from proof to 20 per cent under proof. This liquid was 44 per cent under proof, but the analyst said he should call it "gin whose alcoholic strength was exceedingly low." The seller was convicted under the Sale of Foods and Drugs act. *Held*, that the facts justified the finding that this liquid was not of the quality of gin, but that the excess of water was a fraudulent increase of the measure of the article. *Fashler v. Stevenitt*, 35 L. T. N. S. 862. See *Webb v. Knight*, 2 L. R. Q. B. 530.

**Evidence.**—A complaint, under the Massachusetts statute, alleging that the defendant sold one pint of adulterated milk—to wit, milk containing less than thirteen per cent of milk solids—is not supported by proof that he sold the milk as skimmed milk out of a tank marked as required by § 7, although the milk was watered. *Com. v. Tobias*, 141 Mass. 129.

A person may be convicted of selling adulterated milk without allegation or proof that he knew it to be adulterated. *Com. v. Evans*, 132 Mass. 11. See *Com. v. Farren*, 9 Allen (Mass.), 489; *Com. v. Waite*, 11 Allen (Mass.), 264; *Com. v. Nichols*, 10 Allen (Mass.), 199; *Com. v. Smith*, 103 Mass. 444; *State v. Smith*, 10 R. I. 258; *People v. Zeigler*, 6 Park Cr. (N. Y.) 355. Or adulterated liquors. *Com. v. Boynton*, 2 Allen (Mass.), 160. See *Barnes v. State*, 19 Com. 398. Compare *Farrell v. State*, 32 Ohio St. 456; s. c., 30 Am. Rep. 614.

A complaint under the Massachusetts statute, alleging a sale of adulterated milk, to wit, milk containing less than thirteen per cent of milk solids, is supported by proof of a sale of milk, which, by the removal of a part of the cream, has been reduced in solids below thirteen per cent. *Com. v. Tobias*, 141 Mass. 129.

In an indictment charging the defendant with having in his custody and pos-

session, with intent to sell the same, "one pint of adulterated milk, to which milk water had been added," the allegation is descriptive, and is not supported by proof that the milk in question was adulterated by adding water to pure milk. *Com. v. Luscomb*, 130 Mass. 42.

**Practice.**—At the trial of a complaint, under the Massachusetts statute, alleging, in the first count, a sale by the defendant, at a time and place named, of adulterated milk, and, in the second count, the having in his possession, at the same time and place, such milk, with intent unlawfully to sell the same, the defendant asked the judge to rule that "if the jury find, on the evidence, that there was a consummated sale, they cannot convict under the second count." The judge declined so to rule; and, after instructing the jury as to what would authorize a conviction on the first count, instructed them that "if they should further find that the defendant kept the same milk with intent to sell it, they would be authorized to return a verdict of guilty on the second count." *Held*, that the defendant had no ground of exception. *Com. v. Tobias*, 141 Mass. 129.

A complaint under the Massachusetts statute, alleging in one count that the defendant, at a time and place named, sold a certain quantity, to wit, one pint, of adulterated milk, to wit, milk containing less than thirteen per cent of milk solids; and in another count alleging that the defendant, at the same time and place, had in his possession a certain quantity, to wit, one pint, of adulterated milk, to wit, milk containing less than thirteen per cent of milk solids, with intent then and there unlawfully to sell the same, is sufficient, without further alleging that the milk was analyzed, and found, on analysis, to contain less than thirteen per cent of milk solids. *Com. v. Tobias*, 141 Mass. 129.

A complaint that the defendant, at a time and place named, had in his custody and possession a certain quantity, to wit, one pint of adulterated milk, to wit, milk then and there containing less than thirteen per cent of milk solids, with intent then and there unlawfully to sell the same, is sufficient. *Com. v. Keenan*, 139 Mass. 193.

An action to protect butter and cheese manufacturers must be brought in the

man's wife; and whoever, married or single, has illicit intercourse with her becomes guilty of adultery.<sup>1</sup>

name of the party injured and defrauded by the sale of the milk diluted with water, and not in the name of the owner of the "cheese factory" unless he has been so defrauded. *Tabor v. Herrick*, 54 Vt. 63.

The court submitted to the jury the bare question whether the defendant had sold an article known as oleomargarine, an article not made from pure unadulterated milk or cream; and charged that if he had he was guilty under the law. *Held* error; that the defendant could only be convicted of selling an article manufactured in imitation or semblance of butter, and that it was error to ignore that fact in the instructions to the jury. *People v. Arensberg*, 7 Eastern Repr. (N. Y.) 751.

Under the Pennsylvania statute which provides that in all actions for the sale of any spirituous, vinous, or malt liquors, the fact that such liquors or admixtures thereof were impure, vitiated, or adulterated shall constitute a good and sufficient defence. An instruction to the jury that if they believed "there was any impurity, vitiation, or adulteration which impaired the quality or value of any of the liquors in suit, to the least extent, the plaintiffs cannot recover for the liquors so impaired." *Held*, correct. 99 Pa. St. 61.

Action to recover damages for fraudulently adulterating milk with water. *Held*, that exemplary damages could not be allowed. *Lane v. Wilcox*, 55 Barb. (N. Y.) 615.

See, as to indictments, *Goodrich v. People*, 19 N. Y. 374; *People v. Fauerbach*, 5 Park Cr. 311; *Lammond v. Volans*, 14 Hun (N. Y.), 263; *Com. v. Boynton*, 12 Cush. (Mass.) 499; *Com. v. O'Donnell*, 1 Allen (Mass.), 593; *Com. v. McCann*, 2 Allen (Mass.), 157; *Com. v. Flannelly*, 15 Gray (Mass.), 195; *Com. v. Raymond*, 97 Mass. 567; *Hunton v. State*, 1 Head (Tenn.), 160; *State v. Jacobs*, 38 Mo. 379; *Phillips v. Mead*, 75 Ill. 334; *Bainbridge v. State*, 30 Ohio St. 264.

1. 3 Blackstone's Com. 139; *State v. Wallace*, 9 N. H. 515; *State v. Taylor*, 58 N. H., 331; *State v. Lash*, 1 Harr. (N. J.) 380; s. c., 32 Am. Dec. 397; *State v. Avery*, 7 Conn. 267; *State v. Armstrong*, 4 Minn. 335; *State v. Pearce*, 2 Blackf. Ind. 318; *State v. Searle*, 56 Vt. 516; *Com. v. Bakeman*, 131 Mass. 577; s. c., 41 Am. Repr. 248.

**Fornication** is sexual intercourse between a man, married or single, and an unmarried woman. Adultery is sexual connection between a married woman and an unmarried man, or a married man other than her own husband. *Hood v. State*, 56 Ind. 263; s. c., 26 Am. Rep. 21; *State v. Taylor*, 58 N. H. 331. *Compare Morrisset v. Commonwealth*, 6 Gratt. (Va.) 673; *Respublica v. Roberts*, 2 Dall. (Pa.) 124.

In Massachusetts it is held that the act of sexual intercourse by a married man with an unmarried woman, or by an unmarried man with a married woman, is adultery in the man without regard to the guilt of the woman. *Com. v. Bakeman*, 131 Mass. 577; s. c., 41 Am. Rep. 248. Also in Vermont under the statute. *State v. Searle*, 56 Vt. 516. In this case the court said: "The question raised is, whether criminal intercourse between a married man and a single or unmarried woman is adultery in the man. The authorities are conflicting upon this point. So far as this difference exists in reported cases, it may have grown out of a difference in statutory provisions; not in statutory definitions of adultery, as those are rarely if ever found; but in provisions that indicate the legislative view, and control the judicial and legal view." See *Com. v. Call*, 21 Pick. (Mass.) 509; s. c., 32 Am. Dec. 284; *Com. v. Bradley*, 2 Cush. (Mass.) 553. See to same effect *Weatherby v. State*, 43 Me. 258; *Hinton v. State*, 6 Ala. 864; *White v. State*, 74 Ala. 31; *State v. Wilson*, 22 Iowa, 364; *Cook v. State*, 11 Ga. 53; s. c., 56 Am. Dec. 410; *State v. Chandler*, 96 Ind. 591; *State v. Sanders*, 30 Iowa, 582; *State v. Donovan*, 61 Iowa, 278; *State v. Fellows*, 50 Wis. 65; *State v. Clark*, 54 N. H. 456; *Tucker v. State*, 35 Tex. 113; *Territory v. Whitcomb*, 1 Montana, 358; *Miner v. People*, 58 Ill. 59; *State v. Hutchinson*, 36 Me. 261; *Helfrich v. Commonwealth*, 33 Pa. St. 68; *Hull v. Hull*, 2 Strob. Eq. (S. Car.) 174.

Adultery is not an indictable offence at common law. *Anderson v. Commonwealth*, 5 Rand. (Va.) 627; s. c., 16 Am. Dec. 776; *Com. v. Isaacs*, 5 Rand. (Va.) 634; *State v. Cooper*, 16 Vt. 551; *State v. Brunson*, 2 Bail. (S. Car.) 149. *Compare State v. Wallace*, 9 N. H. 515; *State v. Avery*, 7 Conn. 267; *Hood v. State*, 56 Ind. 263; s. c., 26 Am. Repr. 21.

The offence may be committed though

By statute in some States the common-law rule has been modified so as to extend the commission of the offence to other as well as married women, and in some instances the offence has by statute been merged with that of unlawful cohabitation.<sup>1</sup>

the man was ignorant that the woman was married. *Com. v. Elwell*, 2 Metc. (Mass.) 190; s. c., 35, Am. Dec. 398.

An act of sexual intercourse between two persons, one married, the other single, will be adultery in the former but not in the latter. *Hunter v. U. S.*, 1 Pinn. (Wis.) 91; s. c., 39 Am. Dec. 277; *Com. v. Call*, 21 Pick. (Mass.) 509; s. c., 32 Am. Dec. 284; *Morrisett v. Commonwealth*, 6 Gratt. (Va.) 673; *Respublica v. Roberts*, 2 Dall. (Pa.) 124. *Compare Com. v. Elwell*, 5 Metc. (Mass.) 190; s. c., 35 Am. Dec. 398; *State v. Wallace*, 9 N. H. 515; *State v. Pearce*, 2 Blackf. (Ind.) 318; *State v. Wilson*, 22 Iowa, 364.

1. *Cohabit.*—The legal sense of the term in the statute is to live together in the same house as married persons live together, or in the manner of husband and wife. *Jones v. Commonwealth*, 80 Va. 18. There must be both lewd and lascivious intercourse, and a living together of the parties as husband and wife live together, to constitute the offence of lewd and lascivious association and cohabitation. *Jones v. Commonwealth*, 80 Va. 18. See *Com. v. Isaacs*, 5 Rand. (Va.) 635; *Searls v. People*, 13 Ill. 597; *State v. Marvin*, 12 Iowa, 499; *Wright v. State*, 5 Blackf. (Ind.) 358; *Com. v. Calef*, 10 Mass. 153; *Scott v. Commonwealth*, 77 Va. 346; *Carotti v. State*, 42 Miss. 334.

In *Searls v. People*, 13 Ill. 597, the indictment was for living in an open state of fornication, and the court said: "In order to constitute this crime, the parties must dwell together openly and notoriously upon terms as if the conjugal relation existed between them. The object of the statute was to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in the illicit intimacy which outrages public decency, having a demoralizing influence upon society. They may, indeed, live together in the same family, but if apparently chaste, regularly occupying separate apartments, a single instance of illicit intercourse would not constitute the crime of living together in an open state of fornication" . . . "From the very nature of the case, the offence must generally be proved by circumstances, and the statute provides that it 'shall be sufficiently proved by circumstances which raise the presump-

tion of cohabitation and unlawful intimacy;' but this presumption must be something more than a mere suspicion. It must amount to a reasonable belief or conviction of the judgment, not only of unlawful intimacy, but also of cohabitation." In Missouri, it is held that persons, in order to be guilty of living together in open and notorious adultery, as meant by the statute, must reside together in the face of society, as if the conjugal relation subsisted between them, and their illicit intercourse must be habitual and not occasional. *State v. Crowner*, 56 Mo. 147. While the opinion disclaims the meaning that the cohabiting and abiding must be for a great length of time, or that perhaps a short time would not do, still it holds that the parties must live together in a notorious and open manner, to the evil example of society. In Mississippi, it is held to consist "in living together in the manner of husband and wife without being lawfully married, in the open assumption of the visible forms of and rights of matrimony without the sanction of the nuptial tie, and without incurring those obligations and responsibilities which attach to the married state." *Carroti v. State*, 42 Miss. 335.

It need not be shown that the acts of the defendants were open and notorious in a prosecution under the Missouri statute which provides that "every man and woman, one or both of whom are married, and not to each other, who shall lewdly and lasciviously abide and cohabit with each other, shall, upon conviction, be adjudged guilty of a misdemeanor." It is sufficient for the State in such case to prove that the defendants lived together as man and wife and indulged in sexual intercourse habitually and in conformity to a regular custom on their part. *State v. West*, 84 Mo. 440.

In *Com. v. Calef*, 10 Mass. 153, the prosecution was founded on a statute which provided that "if any man and woman, either or both of them being then married, shall lewdly and lasciviously associate and cohabit together, they shall be punished," etc. In construing this statute the court said: "By cohabiting must be understood a dwelling or living together, not a transient and single unlawful interview."

In *Scott v. Commonwealth*, 77 Va.



**Living in Adultery.**—To constitute unlawful cohabitation, the living together must be open and notorious, as if the relation of husband and wife existed, and the illicit intercourse habitual.<sup>1</sup>

344, the evidence of unlawful cohabitation was conclusive, and the conviction was accordingly sustained. "It was proven," said Judge Fauntleroy, in delivering the opinion of the court, "that the defendant, Scott, admitted that the woman Retta Jackson was his wife; that they lived together; that he (Scott) admitted that Jackson's daughter was his child; that he carried her mail to her from the post-office, and that he familiarly associated with her, and was reported to live with her as man and wife."

Sexual intercourse between persons not married, though living in the same house, is not sufficient, alone, to constitute the offence of cohabiting together as husband and wife without being married. *Taylor v. State*, 36 Ark. 84; s. c., 4 Am. Cr. R. 30.

In order to establish the offence defined by Mississippi statute, it must be shown that the parties, whether dwelling together or not, habitually indulge in sexual intercourse. It is not necessary that the parties shall dwell together or publicly avow the relationship existing between them. It is sufficient to show that relationship which, whether avowed or concealed, if publicly known would characterize the woman as mistress of the man. It is habitual concubinage or lying together which constitutes the cohabitation meant by the statute. *Granberry v. State*, 61 Miss. 440.

Evidence that defendant and R. lived as man and wife for many years, and that she bore him children, if not admissible as proof of marriage in a trial on a charge of adultery, is admissible as tending to identify the parties named in the certificate. *People v. Stockwell Pac. Repr. (Cal.)* 1.

To sustain an indictment under the Virginia statute the evidence must establish that the parties, not being married, lewdly and lasciviously associated and cohabited—that is, lived together in the same house as man and wife live together. *Jones v. Commonwealth*, 80 Va. 18. The indictment may be either joint or separate. *Scott v. Commonwealth*, 77 Va. 344.

1. *Miner v. People*, 58 Ill. 59. See *State v. Marvin*, 12 Iowa, 499; *Brevaldo v. State*, 21 Fla. 789; *Sullivan v. State*, 36 Ark. 64; *Wright v. State*, 5 Blackf. (Ind.) 280; *State v. Gartrell*, 14 Ind. 280; *Clouser v. Clapper*, 59 Ind. 548; *Hall v. State*, 53 Ala. 463. *People v. Gates*, 46

Cal. 53; *State v. Crouner*, 56 Mo. 147; *Richardson v. State*, 37 Tex. 346, 34 Tex. 142; *Carotti v. State*, 42 Miss. 334.

The statutory crime cannot be proved by a single act, or even by a number of acts, of illicit intercourse. *Miner v. People*, 58 Ill. 59; *Granberry v. State*, 61 Miss. 440; *Richardson v. State*, 37 Tex. 346; *State v. Crouner*, 56 Mo. 147; *Clouser v. Clapper*, 59 Ind. 548; *Carotti v. State*, 42 Miss. 334.

Where a cohabitation, using the words in the usual sense, is shown, one or more acts of sexual intercourse clearly proven, or circumstances from which such intercourse would necessarily be inferred, as sleeping together, would uphold a verdict of guilty. But in the absence of evidence of such cohabitation, it is not sufficient to prove occasional acts of sexual intercourse. H. was a pupil of G. and testified that on five or six occasions during a scholastic term of three months she remained at the schoolroom after the other pupils had been dismissed, at which times and place, but at no other, G. had sexual intercourse with her. *Held*, that this did not constitute the offence defined by the statute. *Granberry v. State*, 61 Miss. 440.

To constitute the offence of lewd and lascivious cohabitation, within the meaning of the statute it must be shown that the parties lived together openly and notoriously, as though the marriage relation existed between them; occasional acts of incontinence are not sufficient. *Pruner v. Commonwealth*, 10 Va. L. J. 520.

In *State v. Marvin*, 12 Iowa, 499, the indictment charged, in the language of the statute, that the defendants did lewdly and lasciviously associate and cohabit together. The evidence showed that they lived together in the same house in the relation of master and servant, and that on two occasions the defendant M. was seen getting out of bed with the female defendant. The jury returned a verdict of guilty, upon which judgment was entered for the State, but on appeal the judgment was reversed. "The defendants," said the appellate court, "were not living together as husband and wife. Secret acts of intercourse would not make them liable. The burden of the offence is the open, lewd, lascivious conduct of the parties living together as man and wife. It is the

It is the act of living together, and not the knowledge or intent, that constitutes the offence.<sup>1</sup> Religious or social usages are no defence,<sup>2</sup> nor an invalid divorce.<sup>3</sup>

**Solicitation.**—By the common law it is an indictable offence to solicit one to commit adultery.<sup>4</sup>

**Consent of Woman not essential.**—To constitute the crime of adultery as against the man, the consent of the woman to the carnal intercourse is not necessary.<sup>5</sup>

publicity and disgrace, the demoralizing and debasing influence, that the law is designed to prevent."

In *Searls v. The People*, 13 Ill. 597, which was a prosecution for living together in adultery, the trial court instructed the jury that "in order to constitute this offence, even one act of sexual intercourse need not be proved by positive testimony, but the offence is sufficiently proved by any circumstances which raise the presumption of unlawful intimacy and sexual and adulterous intercourse." In reversing the judgment the Supreme Court said: "In order to constitute this crime the parties must dwell together openly and notoriously upon terms as if the conjugal relation existed between them. In other words, they must cohabit together."

Where the offence is committed one night each week for seven months, it is within the statute. *Collins v. State*, 14 Ala. 608. See *Swancoat v. State*, 4 Tex. App. 105; *Parks v. State*, 4 Tex. App. 134.

Where the parties lived together for several months in the same room, the offence is established. *Richardson v. State*, 37 Tex. 346.

If it exists but a single day, with the intent to continue the cohabitation, the offence is complete. *Hall v. State*, 53 Ala. 463.

See, generally, *Collins v. State*, 14 Ala. 608; *Smith v. State*, 39 Ala. 554; *Hall v. State*, 53 Ala. 465; *McLelana v. State*, 25 Ga. 477; *State v. Gartrell*, 14 Ind. 280; *Gaylor v. McHenry*, 15 Ind. 383; *Wright v. State*, 5 Blackf. (Ind.) 358; s. c., 35 Am. Dec. 126; *Swancoat v. State*, 4 Tex. App. 105; *Parks v. State*, 4 Tex. App. 134; *Morrill v. State*, 5 Tex. App. 447; *Searles v. People*, 13 Ill. 597; *Miner v. People*, 58 Ill. 60; *Baker v. U. S.*, 1 Pinn. (Wis.) 641.

1. The criminal offence of adultery is not excused by the absence of a guilty intent, unless a guilty knowledge is part of the statutory definition; nor is it excused by the subsequent intermarriage of the parties. *Fox v. State*, 3 Tex. App. 329; s. c., 30 Am. Rep. 144; *State v.*

*Goodenow*, 65 Me. 30; *Com. v. Elwell*, 2 Metc. (Mass.) 190; s. c., 35 Am. Dec. 398.

Under statutes the distinction has been taken that where the guilty knowledge is part of the definition of the offence, it must be averred, but not otherwise. *Whar. Cr. L.* § 297; *State v. Stimson*, 4 Zab. (N. J.) 478.

2. *Cannon v. U. S.*, 116 U. S. 55; *Seagar v. Sligerland*, 2 Caines (N. Y.), 219; *Hollis v. Wells*, 3 Pa. L. J. 169; *Holmes v. Johnson*, 42 Pa. St. 159. See *Berckmans v. Berckmans*, 16 N. J. Eq. 122, 17 N. J. Eq. 453; *Inskeep v. Inskeep*, 5 Iowa, 204.

3. Defendant procured a divorce and married again. The divorce was vacated for fraud and want of jurisdiction. *Held*, that he was guilty of adultery. *State v. Whitcomb*, 52 Iowa, 85; *State v. Goodenow*, 65 Me. 30; *Com. v. Elwell*, 2 Metc. (Mass.) 190. See *Com. v. Putnam*, 1 Pick. (Mass.) 136; *Putnam v. Putnam*, 8 Pick. (Mass.) 433; *Com. v. Thompson*, 6 Allen (Mass.), 591; *State v. Weatherby*, 43 Me. 258.

4. *Whar. Crim. L.* § 2666; *State v. Avery*, 7 Conn. 267.

It is held not to be indictable in Pennsylvania. *Smith v. Commonwealth*, 54 Pa. St. 209.

5. The man may be alone convicted, although at the time the act was committed the woman was in such a state of stupefaction as to be incapable of consent. *Com. v. Bakeman*, 131 Mass. 577; s. c., 141 Am. Rep. 248.

The court instructed the jury as follows: "To constitute the crime of adultery as against the man, the consent of the woman to the carnal intercourse is not indispensable, but the offence may, as against him, exist, though the connection was effected by force and against her will." *Held*, no error. *State v. Donovan*, 61 Iowa, 278; s. c., 4 Am. Cr. R. 25; *State v. Sanders*, 30 Iowa, 582.

An action lies for criminal conversation, although the intercourse was had by violence. *Egbert v. Greenwalt*, 44 Mich. 245; s. c., 38 Am. Rep. 260. See *State v. Tarr*, 28 Iowa, 397.

Insanity on the part of the woman is

**Evidence.**—A husband or wife may testify against each other.<sup>1</sup> An actual marriage must be proved.<sup>2</sup> Evidence is admissible of improper familiarity and adultery between the parties, both before and after the commission of the offence charged, although it proves other and distinct offences.<sup>3</sup> The pecu-

a valid defence to an indictment for adultery. *Matchin v. Matchin*, 6 Pa. St. 332. See *State v. Donovan*, 61 Iowa, 278; s. c., 4 Am. Cr. R. 25; *State v. Sanders*, 30 Iowa, 582; *People v. Barnes*, 9 Pac. Repr. (Idaho) 532; *State v. Ellis*, 74 Mo. 385; s. c., 41 Am. Rep. 321; *Mercer v. State*, 17 Tex. App. 452; *Alonzo v. State*, 15 Tex. App. 378; *Com. v. Goodhue*, 2 Metc. (Mass.) 193; *People v. Rouse*, 2 Mich. 209; *Wright v. State*, 4 Humph. (Tenn.) 196; *Stephen v. State*, 11 Ga. 225; *Burk v. State*, 2 Harr. & J. (Md.) 426. Compare *Noble v. State*, 22 Ohio St. 541.

1. *Roland v. State*, 9 Tex. App. 277; s. c., 35 Am. Rep. 743; *State v. Bennett*, 31 Iowa, 25; *State v. Bridgman*, 49 Vt. 202; s. c., 24 Am. Rep. 124; *State v. Marvin*, 35 N. H. 28; *Parsons v. People*, 21 Mich. 509. Compare *State v. Welch*, 26 Me. 30; *Mills v. U. S.*, 1 Pinn. (Wis.) 73.

Where a wife testifies before the grand jury to her husband's adultery, supposing that she is obliged to do so, but not intending to prefer charges of adultery against him, this is not a complaint by her against her husband. *State v. Donovan*, 61 Iowa, 278; s. c., 4 Am. Cr. R. 25.

Husband and wife are incompetent to disprove sexual intercourse between themselves in order to raise a presumption that the wife's child is illegitimate. *Egbert v. Greenwalt*, 44 Mich. 245, s. c., 38 Am. Rep. 260. See **BASTARDY**.

Under an indictment against two persons for living together in adultery, the husband of the woman is not a competent witness for the man, when both are on trial together under the plea of not guilty. *Birge v. State*, 78 Ala. 435.

2. *Hutchins v. Kimmell*, 31 Mich. 126; s. c., 18 Am. Rep. 161; *People v. Bennett*, 39 Mich. 208; see *Miner v. People*, 58 Ill. 50; *Com. v. Norcross*, 9 Mass. 492; *Com. v. Littlejohn*, 15 Mass. 163; *People v. Humphrey*, 7 Johns. (N. Y.) 314; *Fenton v. Reed*, 4 Johns. (N. Y.) 52; s. c., 4 Am. Dec. 244; *State v. Roswell*, 6 Conn. 446; *Kibby v. Rucker*, 1 A. K. Marsh (Ky.), 391; *Wood v. State*, 48 Ga. 192; *Buchanan v. State*, 55 Ala. 154. Compare *Forney v. Hallacher*, 8 Serg. & R. (Pa.) 159; s. c., 11 Am. Dec. 590.

Where the accused was married to a woman under the legal age, her consent to the marriage on arriving at the age of

consent, and before the act of adultery, must be proved. *People v. Bennett*, 39 Mich. 208. The marriage may be proved by general repute. *Com. v. Holt*, 121 Mass. 61.

The evidence of persons who witnessed the marriage is competent to prove the marriage. *State v. Clark*, 54 N. H. 456; *Com. v. Norcross*, 9 Mass. 492; *Com. v. Littlejohn*, 15 Mass. 163. It may be proved by the admission of one of the parties. *State v. Medbury*, 8 R. I. 543. See *Cameron v. State*, 14 Ala. 546; s. c., 48 Am. Dec. 111; *Cayford's Case*, 7 Greenl. (Me.) 57; *Cook v. State*, 11 Ga. 53; s. c., 56 Am. Dec. 410. Compare *Mills v. U. S.*, 1 Pinn. (Wis.) 73; *State v. Timmens*, 4 Minn. 325; *State v. Rood*, 12 Vt. 396.

**Proof of Marriage—Marriage Certificate.**—A statute providing for the punishment of adultery, and making a recorded certificate of marriage proof of marriage for the purpose of the act, does not exclude other proof of the marriage. Where, in a trial of *J. W. S.* for adultery, the record of a marriage certificate introduced in evidence shows a marriage of *J. S.* to *Rebecca Gibson*, the testimony of a witness that he was present when defendant was married to *Rachel Gibson*, in the year when, at the place where, and by the person by whom, the record shows the marriage was performed, is admissible as tending to identify the parties named in the certificate. *People v. Stokes*, 12 Pac. Repr. (Cal.) 1.

3. *State v. Bridgman*, 49 Vt. 202; s. c., 24 Am. Rep. 124. See *Thayer v. Davis*, 38 Vt. 163; *State v. Potter*, 52 Vt. 33; *State v. Marvin*, 35 N. H. 28; *State v. Wallace*, 9 N. H. 515; *State v. Williams*, 76 Me. 480; *State v. Witham*, 72 Me. 531; *Gardner v. Madeira*, 2 Yeates (Pa.) 466; *Thayer v. Thayer*, 101 Mass. 111; *Com. v. Nichols*, 114 Mass. 285; s. c., 19 Am. Rep. 346; *Com. v. Merriam*, 14 Pick. (Mass.) 518; *Com. v. Morris*, 1 Cush. (Mass.) 391; *Com. v. Lahey*, 14 Gray (Mass.), 91; *State v. Kemp*, 87 N. Car. 538; *State v. Pippin*, 88 N. Car. 646; *State v. Butner*, 76 N. Car. 118; *Cole v. State*, 6 Baxt. (Tenn.) 239; *Richardson v. State*, 37 Tex. 346; *Alsabrooks v. State*, 52 Ala. 24; *Lawson v. State*, 20 Ala. 65; s. c., 56 Am. Dec. 182; *State v. Way*, 5 Neb. 283; *People v. Jenness*, 5

niary circumstances of the parties at the time of the commission of the offence may be proved in an action for criminal

Mich. 305; *Searls v. People*, 13 Ill. 599; *Lovell v. State*, 12 Ind. 18. Compare *State v. Donovan*, 61 Iowa, 278; s. c., 4 Am. Cr. R. 25; *State v. Crowley*, 13 Ala. 172; *State v. Jolly*, 3 Dev. & B. (N. Car.) 110; s. c., 32 Am. Dec. 656; *State v. Bates*, 10 Conn. 372.

Upon an indictment for living in an open state of adultery on a certain day and on divers other days and times since said date to the day of the finding of the indictment, evidence of acts anterior to such time are admissible in evidence as tending to illustrate or explain similar acts within the period alleged in the indictment, or to corroborate testimony of such latter acts, but not to convict of a substantive offence committed anterior to such period. Where there has been a conviction upon such an indictment, and there is no evidence of a living in an open state of adultery within the limited period, but there is proof of such a living about a year prior to the first day of such period, a new trial should be granted, the introduction of such evidence having been properly excepted to. *Brevaldo v. State*, 21 Fla. 789.

Acts of adultery are held admissible, whether occurring before or after the act charged, for the purpose of showing an adulterous disposition. *Thayer v. Thayer*, 101 Mass. 111.

In *Gardner v. Maderia*, 2 Yeat. (Pa.) 446, an action of *crim. con.*, where the injury was stated to have been committed within certain days, it was held that proof of improper freedoms must be first had within the limited time. It is laid down that though time was no more a material part of the complaint than of a contract, yet that where a trespass is alleged to have been committed within certain days it would be a surprise on the defendant not to confine the proof to the times laid (citing *Buller v. Pri.* 86), but that, after laying a reasonable ground to infer an improper connection between the parties within the limited period, the court will be more liberal afterwards in receiving other evidence of indecent conduct at different times tending to show the criminal views and acts of the parties. There has been no reasonable ground laid down to infer a living in an open state of adultery from evidence as to the period named in this indictment.

In *People v. Jenness*, 5 Mich. 322, after arguing in favor of the admissibility of evidence of a prior act of adultery as tending to prove the one relied on, it

is said: "If offered as proof of substantive offences on which a conviction might be had in the case, it should of course be excluded; but as it was not offered for this purpose and could not be allowed to have such effect, we can see no objection to its reception."

Under Michigan statute, a prosecution must be instituted within a year after the offence, evidence of acts are inadmissible if they occurred more than a year before the commission of the adultery, unless they are shown to belong to a continuous series of improprieties. *People v. Davis*, 52 Mich. 569. So acts committed two years before are too remote to be put in evidence. But acts within a short time before and very soon after the act complained of may be shown if establishing a continuous intimacy. *People v. Hendrickson*, 53 Mich. 525.

In a prosecution for adultery, acts prior and also subsequent to the act charged in the indictment, when indicating a continuousness of illicit intercourse, are admissible in evidence for the purpose of showing the relation and mutual disposition of the parties. *State v. Witham*, 72 Me. 531.

In fornication and adultery, evidence of acts anterior to the two years preceding the indictment is competent to be considered by the jury in connection with evidence of other acts of a like nature within the two years. *State v. Pippin*, 88 N. Car. 646; *State v. Kemp*, 87 N. Car. 538.

Evidence as to acts and instances of intercourse prior to the time limited by statute is admissible in connection with other evidence, as tending to show that the defendant was guilty of acts of intercourse admitted to have occurred within the time covered by the indictment. *State v. Potter*, 52 Vt. 33.

Evidence having been adduced tending to show an adulterous intercourse between the parties during the period covered by the indictment, proof of acts or conduct prior to that time may be received, without regard to the sufficiency of the other evidence to authorize a conviction. *Cross v. State*, 78 Ala. 430.

Where, contrary to the rule of law, in a prosecution for adultery, evidence was admitted of an adulterous act subsequent to the one charged in the indictment, the error was cured by the district attorney's withdrawing from the jury the evidence of such subsequent act. *State v. Donovan*, 61 Iowa, 278; s. c., 4 Am. Cr. R. 25.

conversation.<sup>1</sup> The plaintiff's connection with other women at any time after marriage and before trial may be proved in mitigation of damages.<sup>2</sup> Evidence is competent to show the reputation for chastity of the woman.<sup>3</sup>

The sex of the parties, if present in court, may be inferred by the jury from their dress and general appearance.<sup>4</sup> Evidence of the *particeps criminis* is admissible.<sup>5</sup> It is competent to prove that the woman was delivered of a child about nine months after offence charged.<sup>6</sup> An averment in an indictment that the action was commenced by the wife of the defendant is not presumptive of its truth; it must be proved.<sup>7</sup> The court has discretionary power to grant a bill of particulars.<sup>8</sup> A prosecution for adultery should be discontinued where the only person competent to make complaint asks leave to withdraw it.<sup>9</sup>

### ADVANCEMENTS. See LEGACIES; WILLS.

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|---|--|
| 1. <i>Definition.</i>   | 5. <i>When Value of Advancement is to be computed—Interest.</i>                  |
| 2. <i>Of What an Advancement may Consist.</i>                   | 6. <i>Changes of Gifts to Advancements, and vice versa—Change of Debts, etc.</i> |
| 3. <i>Presumption as to Advancements.</i>                       | 7. <i>Miscellaneous.</i>   |
| 4. <i>English and American Statutes and their Construction.</i> |  |

1. **Definition.**—An advancement is an irrevocable gift by a parent to a child, in anticipation of such a child's future share of the parent's estate.<sup>10</sup> Advancements are governed by the statutes of distribution.<sup>11</sup>

**Proof of Former Conviction.**—The record of a former conviction is not admissible as evidence without the indictment on which it was founded, so that the court may see that the offence was committed with the same person; and if the indictment is not produced, the court cannot consider the former conviction for any purpose. *Cross v. State*, 78 Ala. 430.

1. *Peters v. Lake*, 66 Ill. 206; s. c., 16 Am. Rep. 593.

Direct proof of adultery, that is, evidence of eye-witnesses, is not required, for such is the nature of the offence, and the secret and clandestine manner in which it is committed, that such proof is in most cases unattainable; yet where it is sought to be inferred from circumstances, they must lead to the conclusion of guilt by fair and necessary inference. *Kremelberg v. Kremelberg*, 52 Md. 553.

2. *Shattuck v. Hammond*, 46 Vt. 466; s. c., 14 Am. Rep. 631; *Smith v. Masten*, 15 Wend. (N. Y.) 270.

3. *Com. v. Gray*, 129 Mass. 474; s. c., 37 Am. Rep. 378; *Blackman v. State*, 36 Ala. 295.

4. *White v. State*, 74 Ala. 31.

5. *State v. Colby*, 51 Vt. 291; *State v. Crowley*, 13 Ala. 172.

A man and woman cannot be jointly convicted of a single act of adultery, upon the admission by one of a single act of adultery, committed at one time, and an admission by the other of a different act of adultery, committed at a different time. *Com. v. Cobb*, 14 Gray (Mass), 57.

6. *Com. v. O'Connor*, 107 Mass. 219.

7. *State v. Henke*, 58 Iowa, 457.

Where a wife, in response to a subpoena, testifies before the grand jury to her husband's adultery, supposing that she is obliged to do so, but not intending to prefer charges of adultery against him, this is not a complaint by her against her husband. *State v. Donovan*, 61 Iowa, 278; s. c., 4 Am. Cr. R. 25.

8. *Tilton v. Beecher*, 59 N. Y. 176; s. c., 17 Am. Rep. 337; *People v. Davis*, 52 Mich. 569.

9. *People v. Dalrymple*, 55 Mich. 519.

10. *Yundt's App.*, 13 Pa. St. 575.

11. The section of the English statute on this subject is derived, as regards goods and chattels, from the ancient custom of London, of the province of York, and of Scotland; and as regards lands descending in coparcenary, from the common law of hotchpot. 2 Bl. Com. 517.

2. Of what an Advancement may consist.—Money expended in the maintenance of a son is not an advancement, nor in binding him apprentice, nor in his education, nor for his travels.<sup>1</sup> Such expenditures are not *prima facie* an advancement, but the presumption may be rebutted, as when it is shown that a considerable sum is advanced as a premium for instruction, and not merely as a compensation for maintenance.<sup>2</sup> Gifts of inconsiderable sums of purse money and other trivial presents (such as a gold watch or wedding clothes) are not advancements.<sup>3</sup> Presents for the purpose of pleasure or amusement are not advancements, *aliter* in case of gifts for the purpose of making profit.<sup>4</sup> An advancement may consist of an annuity, and its value is to be computed at the date of the grant.<sup>5</sup> A contingent portion may be an advancement; clearly so, if the contingency has happened; also even while contingent, if it can be valued.<sup>6</sup> The contingency must be so limited as necessarily to arise within a reasonable time.

A life-insurance policy taken out in the name of a child may be an advancement.<sup>7</sup>

The purchase of an office or benefice in England has been held advancement.<sup>8</sup>

Neither a restriction upon alienation, nor the reservation of a life estate, nor the reservation of a right to revoke the gift, indicates an intention that the gift shall be other than an advancement.<sup>9</sup> The provision must be complete in the father's lifetime, and so cannot be made by will. But it does not have to take place in enjoyment in his lifetime.<sup>10</sup>

The doctrine of advancements is said to be derived from the *collatio bonorum* of the imperial law (Dig. 37.6. 1); hence the equalizing of advancements is sometimes called their *collation*, especially in Louisiana, where this branch of the law forms the subject of minute regulation. See Rev. Civ. Code of La. of 1875, art. 1227-1288; *Destrehan v. Destrehan*, 16 Martin (La.), 557.

1. *Cooper v. Wray*, 3 Strobb. Eq. (S. Car.) 185; *Riddle's Est.*, 19 Pa. St. 431; *Miller's App.*, 40 Pa. St. 57; *Bowles v. Winchester*, 13 Bush (Ky.), 1; *Bruce v. Griscom*, 9 Hun (N. Y.), 280; 70 N. Y. 612; *Bradsher v. Cannady*, 76 N. Car. 445.

2. *Roper, Husb. and Wife*, 13.

3. 3 P. Wms. 317, note to *Pusey v. Desbouverie*; *Elliott v. Collier*, 1 Ves. Sr. 16, 3 Atk. 528; *Mitchell*, 8 Ala. 414; *Fennell v. Henry*, 70 Ala. 484; *Sanford v. Sandford*, 61 Barb. (N. Y.) 293, 5 Lans. 486; *Meadows v. Meadows*, 11 Ired. (N. Car.) 148; *King's Est.*, 6 Whar. (Pa.) 370.

4. See *Ison v. Ison*, 5 Rich. Eq. (S. Car.) 15; *Shiver v. Brock*, 2 Jones Eq. (N. Car.) 137; *M'Caw v. Blewit*, 2 McCord Ch. (S. Car.) 90.

5. *Kircudbright v. Kircudbright*, 3 Ves. 51; *Boyd v. Boyd*, L. R. 4 Eq. Cas. 305.

6. 2 P. Wms. 442, 449; *Knight v. Oliver*, 12 Gratt. (Va.) 33.

7. *Rickenbacker v. Zimmerman*, 10 S. Car. 110.

It was held in this case that under the South Carolina statute, requiring the value of advancements to be computed at the death of the intestate, the value of the advancement was to be computed by getting the value of such a policy at the death of the intestate with the expectation of life of the intestate when the policy was taken out, and that the premiums paid were to be added on without interest. The premiums were compared to money spent in improving real estate which has been given as an advancement.

8. *Henderson v. Rose*, 3 P. Wms. 317, note to *Pusey v. Desbouverie*; *Norton v. Norton*, 3 P. Wms. 317, note; *Kircudbright v. Kircudbright*, 8 Ves. 63.

9. *Graves v. Spedden*, 46 Md. 527; *Hughey v. Eichelberger*, 11 S. Car. 36.

10. *Edwards v. Freeman*, 2 P. Wms. 440; *Twisden v. Twisden*, 9 Ves. 425, 462; *Nettleton v. Nettleton*, 17 Conn. 542.

**3. Presumptions as to Advancements.**—Between a loan, gift, and advancement, where the amount is substantial, the presumption is in favor of an advancement.<sup>1</sup> Especially is this the case when the child is starting out in life,<sup>2</sup> and living apart from the parent after marriage.<sup>3</sup> It has been held that a conveyance of land may be shown by parol to have been extended as an advancement.<sup>4</sup> If a father purchase land in the name of his son, no resulting trust arises, but there is a presumption of an advancement.<sup>5</sup> And so in case of a voluntary conveyance by a parent to a child.<sup>6</sup> There is no need of an express agreement by the child that the gift is an advancement.<sup>7</sup>

So, also, it is finally decided in England that the youngest son receiving lands under the custom of Borough-English does not have to bring them into hotchpot.

1. *Mitchell v. Mitchell*, 8 Ala. 414; *Clements v. Hood*, 57 Ala. 459; *Butler v. Ins. Co.*, 14 Ala. 777; *Hatch v. Straight*, 3 Conn. 31; *Brown v. Burke*, 22 Ga. 574; *Holliday v. Wingfield*, 59 Ga. 206; *Grattan v. Grattan*, 18 Ill. 167; *Bay v. Cook*, 31 Ill. 336; *Selleck v. Selleck*, 107 Ill. 389; *Stanley v. Brannon*, 6 Blackf. (Ind.) 193; *Hodgson v. Macy*, 8 Ind. 121; *Dillman v. Cox*, 23 Ind. 440; *Hayden v. Burch*, 9 Gill (Md.), 79; *Parks v. Parks*, 19 Md. 323; *Graves v. Spedden*, 46 Md. 527; *Wilson v. Beauchamp*, 50 Miss. 24; *Gordon v. Barkslew*, 6 N. J. Eq. 94; *Melvin v. Bullard*, 82 N. Car. 33; *Hollister v. Attmore*, 5 Jones Eq. (N. Car.) 373; *Tremper v. Barton*, 18 Ohio, 418; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Sampson v. Sampson*, 4 S. & R. (Pa.) 333; *Dutch's App.*, 57 Pa. St. 461; *Weaver's App.*, 63 Pa. St. 309; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9; *Johnson v. Patterson*, 13 Lea (Tenn.), 626; *Rains v. Hays*, 6 Lea (Tenn.), 303; *Watkins v. Young*, 31 Gratt. (Va.) 84; *Astreen v. Flanagan*, 3 Edw. Ch. (N. Y.) 279.

2. *Hollister v. Attmore*, 5 Jones Eq. (N. Car.) 373.

3. *Holliday v. Wingfield*, 59 Ga. 206.

4. *Kingsbury's App.*, 44 Pa. St. 460; *Rockhill v. Spraggs*, 9 Ind. 30, 68 Am. Dec. 607.

5. *Hummel v. Hummel*, 80 Pa. St. 420; *Dutch's App.*, 57 Pa. St. 461; *Phillips v. Gregg*, 10 Watts (Pa.) 158; *James v. James*, 43 Ark. 301; *Robinson v. Robinson*, 45 Ark. 481; *Wormley v. Wormley*, 98 Ill. 544; *Maxwell v. Maxwell*, 109 Ill. 588; *Dille v. Webb*, 61 Ind. 85; *Higdon v. Higdon*, 57 Miss. 264. If the father pays any considerable portion of the price, there is an advancement *pro tanto*. *Sweet v. Northrup*, 12 N. Y. Weekly Dig. 377.

6. *Ray v. Loper*, 65 Mo. 470; *Harper v. Harper*, 92 N. Car. 300. But where a

consideration is recited in a deed in the usual form, the presumption is against an advancement. *Miller's App.*, 107 Pa. St. 221. But notwithstanding such recital, the presumption is in favor of an advancement when a parent conveys to a child without actually receiving any consideration. *Sanford v. Sanford*, 61 Barb. 293, 5 Lans. 486. But mere inadequacy of consideration will not make the sale an advancement. *Merriman v. Laceyfield*, 4 Heisk. 209. A consideration of natural love and affection raises a presumption of an advancement. *Lott v. Kaiser*, 61 Tex. 665. A conveyance from a parent to his son is not an advancement if made in consideration of services rendered by the son, for which the parent was under moral obligation to pay. *Murrel v. Murrel*, 2 Strob. Eq. (S. Car.) 148, 49 Am. Dec. 664.

7. *Nesmith v. Dinsmore*, 17 N. H. 515. *Treadwell v. Cordis*, 5 Gray (Mass.), 341. Where a debt is paid by the father for the son, it will be presumed to be an advancement. *Johnson v. Hoyle*, 3 Head (Tenn.), 56. Money paid to a third party for the son's benefit may be an advancement. *Johnson v. Evans*, 8 Gill (Md.), 155, 50 Am. Dec. 669. *Held*, in *Holliday v. Wingfield*, 59 Ga. 206, that under the Code of Georgia it is not necessary that the child accept the provision as an advancement, if intended by the parent as such. The statutes in Massachusetts, Maine, and Vermont require as evidence of an advancement that there shall be a declaration to that effect in the gift or grant of the parent or a charge to that effect by the intestate, or an acknowledgment in writing by the child. See Gen. Stat. Mass. c. 91, § 8. *Hartwell v. Rice*, 1 Gray (Mass.), 587; *Bigelow v. Poole*, 10 Gray (Mass.), 104; *Barton v. Rice*, 22 Pick. (Mass.) 508; *Ashley's App.* 4 Pick. (Mass.) 24; *Osgood v. Breed*, 17 Mass. 358; *Bullard v. Bullard*, 5 Pick. (Mass.) 527; *Bulkeley v. Noble*, 2 Pick. (Mass.) 340; *Porter v. Porter*, 51 Me. 376; *Brown v. Brown*, 16

An agreement that an advance shall bar any further claim by the heir is valid.<sup>1</sup> If a deed of gift declares that the gift is not to be accounted for in the distribution of the estate, it is not an advancement, although expressly declared to be such in the same instrument.<sup>2</sup>

If an account is stated and interest charged, the presumption is in favor of a debt.<sup>3</sup> If a parent receives such evidence of indebtedness as a bond or promissory note, or if he becomes surety for the child, the presumption is in favor of a debt.<sup>4</sup>

*A fortiori*, a loan to a son-in-law cannot be treated as an advancement to the daughter.<sup>5</sup> But it has been held that an advancement to a son-in-law may be an advancement to the daughter.<sup>6</sup>

Vt. 197; *Adams v. Adams*, 22 Vt. 50; *Weatherhead v. Field*, 26 Vt. 665. And in these States it has been held that no subsequent parol declarations will control the original intentions of the party as represented by charges on books or entries upon memoranda, etc. See *Hatch v. Straight*, 3 Conn. 31; *Partridge v. Havens*, 10 Paige (N. Y.), 618; *Johnson v. Belden*, 20 Conn. 322; *Osgood v. Breed*, 17 Mass. 359; *Barton v. Rice*, 22 Pick. (Mass.) 508; *Brown v. Brown*, 16 Vt. 205. For proof of advancement required in Rhode Island, see *Law v. Smith*, 2 R. I. 244; *Sayles v. Baker*, 5 R. I. 457; *Mowrey v. Smith*, 5 R. I. 255. In some States it has been held that the declarations of the donor before and after and at the time of the transaction, and the admissions of the donee, are admissible in evidence to show the intention. *Mitchell v. Mitchell*, 8 Ala. 414; *Autrey v. Autrey*, 1 Ala. Sel. Cas. 542; *Butler v. Ins. Co.*, 14 Ala. 777; *Merrill v. Rhodes*, 37 Ala. 449; *Smith v. Smith*, 21 Ala. 761; *Fennell v. Henry*, 70 Ala. 484; *Phillips v. Chappel*, 16 Ga. 16; *Dillman v. Cox*, 23 Ind. 440; *Woolery v. Woolery*, 29 Ind. 249; *Middleton v. Middleton*, 31 Iowa, 151; *Cecil v. Cecil*, 20 Md. 153; *Graves v. Spedden*, 46 Md. 527; *King's Est.*, 6 Whart. (Pa.) 370; *Christy's App.*, 1 Grant (Pa.), 369; *Lawson's App.*, 23 Pa. St. 85; *Kingsbury's App.*, 44 Pa. St. 460; *Morris v. Morris*, 9 Heisk. (Tenn.) 814; *Watkins v. Young*, 31 Gratt. (Va.) 84. But it has also been held that such declarations made to third persons are not of themselves sufficient to establish the fact of advancements. *Homiller's Est.*, 17 W. N. C. (Pa.) 238; *Ray v. Loper*, 65 Mo. 470; *Weatherwax v. Woodin*, 20 Hun (N. Y.), 518. And so it has been held that advancements cannot be established by mere evidence in books without proof *aliunde*. *Marsh v. Brown*, 18 Hun (N. Y.), 319; *Benjamin v. Dimmick*, 4 Redf. (N. Y.) 7.

1. *Kershaw v. Kershaw*, 102 Ill. 307; *Galbraith v. McLain*, 84 Ill. 379; *Nicholson v. Caress*, 59 Ind. 39. But see *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85.

2. *James v. James*, 76 N. Car. 331.

3. *Levering v. Rittenhouse*, 4 Whar. (Pa.) 130; *Harris's App.*, 2 Grant (Pa.), 304. But this presumption may be rebutted.

4. *Grey v. Grey*, 22 Ala. 233; *Fennell v. Henry*, 70 Ala. 484; *West v. Bolton*, 23 Ga. 531; *Batton v. Allen*, 5 N. J. Eq. 99; *High's App.*, 21 Pa. St. 283; *Roland v. Schrack*, 29 Pa. St. 125; *Miller's App.*, 31 Pa. St. 337; *Morr's App.*, 80 Pa. St. 427; *Jones's Est.*, 29 Pitts. L. J. (Pa.) 89; *Bruce v. Griscom* (9 Hun, 280), 70 N. Y. 612; *Vaden v. Hance*, 1 Head (Tenn.), 300; *House v. Woodard*, 5 Coldw. (Tenn.) 196. But this presumption may be rebutted. *Cutliff v. Boyd*, 72 Ga. 302; *Peabody v. Peabody*, 59 Ind. 556; *Harris v. Harris*, 69 Ind. 181; *Bragg v. Stanford*, 82 Ind. 234; *Dilley v. Love*, 61 Md. 603. The child may show that the statement was given to the father, not with the view that repayment might be demanded, but as a memorandum. *Johnson v. Ghost*, 11 Neb. 414. But it has been held that verbal declarations of the parent that money for which he held a bond or note against a child was intended as an advancement are insufficient to establish it. *Merkel's App.*, 89 Pa. St. 340. An existing indebtedness of the parent to the child raises a presumption of an intention to pay the debt rather than to advance the child. *Haglar v. McCombs*, 66 N. Car. 345.

5. *Seagrist's App.*, 10 Pa. St. 424; *Wheelan's App.*, 70 Pa. St. 410.

6. *Dilley v. Love*, 60 Md. 603; *Stewart v. Pattison*, 8 Gill (Md.), 46; *Bridgers v. Hutchins*, 11 Ired. (N. Car.) 68; *Wilson v. Wilson*, 18 Ala. 176; *Lindsay v. Platt*, 9 Fla. 150. It was held in *Stayner v. Bower*, 42 Ohio St. 314, that where a



And a gift to a son-in-law soon after marriage is presumed to be an advancement.<sup>1</sup>

**4. Statutes and their Construction.**—The doctrine of advancements is now founded wholly upon statute,<sup>2</sup> and has been decided to apply only to the case of actual intestacy of the parent.<sup>3</sup> The American statutes in this connection generally use the word "intestate."<sup>4</sup>

Independently of the statutes, a will may direct that debts or gifts shall be taken as advancements and may direct what value is to be put on the advancements.<sup>5</sup> But it is not sufficient to prevent a liability to account that the intestate merely believed that he had advanced his distributees equally, if in fact he had not done so.<sup>6</sup> Where a testator directs that advances charged against children shall be deducted from their shares, an advance which is

son-in-law receives money and property as advancements for his wife, he holds the same for his wife; and upon the death of the father, when the amount of her distributive share is ascertained, she has a right to compel her husband to account for and pay to her such money and property, and she may demand and collect her share in full of the administrator. And in such case when she elects to sue the administrator and compels him to pay her the distributive share in full, including the amount of such advancements, the administrator by operation of law is subrogated to the rights and remedies of the wife against the husband.

Where land was conveyed to a son-in-law and afterwards sold on execution against him, it was held that the wife may defend in ejectment by showing that it was an advancement, and that such proof is not forbidden by the Pennsylvania Statute of Frauds of 1856. *Myers v. Leas*, 101 Pa. St. 172.

1. *Rogers v. Mayer*, 59 Miss. 524. It has been said that a conveyance of land to a son-in-law is not an advancement in the absence of evidence that it was so intended. *Rains v. Hays*, 6 Lea (Tenn.), 303. See *Towles v. Roundtree*, 10 Fla. 299; *Barber v. Taylor*, 9 Dana (Ky.), 84; *Baker v. Leathers*, 3 Ind. 558.

2. *Marshall v. Rench*, 3 Del. Ch. 239.

3. Even though there is a surplus undisposed of by will. *Walton v. Walton*, 14 Ves. 324; *Huggins v. Huggins*, 71 Ga. 66; *Marshall v. Rench*, 3 Del. Ch. 239; *Turner's App.*, 48 Mich. 369, 52 Mich. 398; *De Caumont v. Bogert*, 36 Hun (N. Y.), 382; *Clark v. Kingsley*, 37 Hun (N. Y.), 246; *Brown v. Brown*, 2 Ired. Eq. (N. Car.) 309; *Richmond v. Vanhook*, 3 Ired. Eq. (N. Car.) 581; *Jerkins v. Mitchell*, 4 Jones Eq. (N. Car.) 207; *Newell's Will*, 1 Browne (Pa.), 311; *Snelgrove v. Snel-*

*grove*, 4 Desaus. (S. Car.) 274; *Newman v. Wilbourne*, 1 Hill Ch. (S. Car.) 10; *Wilson v. Miller*, 1 Pat. & H. (Va.) 353; *Allen v. Allen*, 13 S. Car. 512. Compare *Pearce v. Gleaves*, 10 Yerg. (Tenn.) 359.

4. In the Revised Statutes of N. Y., in speaking of advancements in relation to the distribution of personal estates, the word "deceased" is substituted for "intestate;" whereas in relation to the descent of real estate, the word "intestate" is retained. Rev. Stat. (1882) 2213, 2305; *Hawley v. James*, 5 Paige (N. Y.), 450. In *Thompson v. Carmichael*, 3 Sand. Ch. (N. Y.) 120, *held*, in reference to realty, that bringing into hotchpot is not required unless there is a total intestacy. The provision of the Kentucky statute on this subject applies where there has been a partial disposition of the estate by will. *Bowles v. Winchester*, 13 Bush (Ky.), 1. Under the New Jersey statute it has been *held* that advancements in money can have no effect upon a son's share of real estate descended. *Havens v. Thompson*, 23 N. J. Eq. 321.

5. *Bacon v. Gassett*, 13 Allen (Mass.), 334; *Hall v. Davis*, 3 Pick. (Mass.) 450; *Hawley v. James*, 5 Paige (N. Y.), 450; *Manning v. Manning*, 12 Rich. Eq. (S. Car.) 410; *Brewton v. Brewton*, 30 Ga. 416; *Nolan v. Bolton*, 25 Ga. 352; *Lawrence v. Lindsay*, 7 Hun (N. Y.), 641; *Eisner v. Koehler*, 1 Demarest (N. Y.), 277. See *McClintock's App.*, 58 N. H. 152. Where a will provided that advancements were to be deducted, and a subsequent codicil revoked the devise to one son and gave his share to the daughter-in-law, wife of said son, it was held that she took it charged with the advancements to the son. *Buchler v. Fairlamb*, 100 Pa. St. 385.

6. *Andrews v. Halliday*, 63 Ga. 263.

not so charged is not to be deducted.<sup>1</sup> Evidence is admissible that the charges are false or excessive, or that the sum charged was repaid before the testator's death.<sup>2</sup>

In England where primogeniture exists, the statute provides that no child of the intestate except his heir-at-law who shall have any estate in land by the settlement of the intestate, or who shall be advanced by the intestate in his lifetime by pecuniary portion equal to the distributive shares of the other children, shall participate with them in the surplus; but if the estate so given to such child by way of advancement be no equivalent to their shares, then that such part of the surplus as will make it so shall be allotted to him or her. In the United States advancements do not in general need a separate consideration in the case of real estate.

Under the English statute the doctrine of advancements is held to apply to fathers only.<sup>3</sup> In this country it doubtless applies to mothers also.<sup>4</sup>

Of course the doctrine does not apply to a wife.<sup>5</sup> Nor are children to bring advancements into hotchpot for the benefit of the widow.<sup>6</sup>

The English statute and most of the American statutes use the term child.<sup>7</sup> Where grandchildren take *per capita* their shares

1. Sayre v. Sayre, 32 N. J. Eq. 61. Where certain sums were charged on the debit side of the books, and other entries were made on the credit side so as to balance the debits, and there was evidence to show that the intention was to cancel the charges, it was held that the entries might have that effect. Lawrence v. Lawrence, 4 Redf. (N. Y.) 278.

2. Hoak v. Hoak, 5 Watts (Pa.), 80; Musselman's Est., 5 Watts (Pa.), 9.

3. Holt v. Frederick, 2 P. Wms. 356, 2 Eq. Cas. Abr. 446. See Bennet v. Bennet, Law Rep. 10 Chan. Div. 474.

4. Murphy v. Nathans, 46 Pa. St. 508; Daves v. Haywood, 1 Jones Eq. (N. Car.) 253; Kintz v. Friday, 4 Demarest (N. Y.), 540.

5. Greiner's App., 103 Pa. St. 89.

6. Miller's Est., 2 Brewst. (Pa.) 355; Murray's Est., 2 Pears. (Pa.) 473; Jackson v. Jackson, 28 Miss. 674, 64 Am. Dec. 114; Ward v. Lant, Prec. in Ch. 182; Gibbons v. Count, 4 Ves. 850; Kircudbright v. Kircudbright, 8 Ves. 51; Porter v. Collins, 7 Conn. 1; Logan v. Logan, 13 Ala. 653; Andrews v. Hall, 15 Ala. 85; May v. May, 15 Ala. 177; Beavors v. Winn, 9 Ga. 189; Wright v. Wright, Dudley (Ga.), 251. This is expressly provided by statute in some States; e.g., see Gen. Stat. of Mass., c. 94, § 17. In Davis v. Duke, 1 Taylor (N. Car.), 213, it was held under the North

Carolina statute of 1784 that advancements are to be brought into hotchpot for the benefit of the widow. See also Credle v. Credle, Busbee, 225. While in Tennessee the contrary was held under the same statute. Brunson v. Brunson, 1 Meigs, 630.

7. Illegitimate children are covered by the provision. Page v. Page, 8 N. H. 202. The statutes of Massachusetts, Maine, Vermont, and Kentucky have been held to apply equally to grandchildren. See Dilley v. Love, 61 Md. 603. It is declared in New York that every estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust with a right of selection, shall be deemed an advancement. Beebe v. Estabrook, 79 N. Y. 246; N. Y. Rev. Stat. (1882), 2213, 2305. In Ohio the provision applies when children or their descendants have thus been advanced. Stat. of Ohio (1884), § 4169 *et seq.* The New Jersey statute uses the word issue. Stat. of N. J. (Revision of 1877) 297. The Code of North Carolina says children. Code (1883), vol. 1, § 1483. In Vermont the provision applies to children or other lineal descendants. Rev. Laws of Vt. (1880) § 2246 *et seq.* It has sometimes been said that children as well as issue may stand in a collective sense for grandchildren, when the justice or reason of the case requires it. Wyth

are not subject to advancements to their parents.<sup>1</sup> *Aliter*, where they take *per stirpes*, as they then represent their parents and can take only the parents' shares.<sup>2</sup>

5. **When Value of Advancement is to be computed—Interest.**—The value is in all cases to be computed at the date when the advancement comes into possession and enjoyment, and interest is not to be charged.<sup>3</sup> When it is not convenient to make distribution at the expiration of a year from the decedent's death, advancements are to be charged with interest from that time.<sup>4</sup> The fact that the advancement subsequently becomes worthless does not relieve the child from accounting for its value at the time it came into enjoyment.<sup>5</sup>

*v. Blackman*, 1 Ves. Sn. 196; *Royle v. Hamilton*, 4 Ves. 437; *Dickinson v. Lee*, 4 Watts (Pa.), 82.

1. *Skinner v. Wynne*, 2 Jones Eq. (N. Car.) 41; *Person's App.*, 74 Pa. St. 121; *Brown v. Taylor*, 62 Ind. 295.

2. *Proud v. Turner*, 2 P. Wms. 560; *McRae v. McRae*, 3 Bradf. Sur. (N. Y.) 199; *McLure v. Steele*, 14 Rich Eq. (S. Car.) 105; *Nelson v. Bush*, 9 Dana (Ky.), 194; *Hughes' App.*, 57 Pa. St. 179; *Eshleman's App.*, 74 Pa. St. 42; *Storey's App.*, 83 Pa. St. 89. See *Daves v. Haywood*, 1 Jones Eq. (N. Car.) 253. This is expressly provided by statute in some States; e.g., see Gen. Stat. of Mass. c. 91, § 10. A grandchild is bound by an agreement of his father, the son of the intestate, accepting a provision in full of the share of the estate. *Simpson v. Simpson*, 114 Ill. 603.

3. *Oyster v. Oyster*, 1 S. & R. (Pa.) 422; *Manning v. Thruston*, 59 Md. 218; *Moale v. Cutting*, 59 Md. 510; *Pigg v. Carroll*, 89 Ill. 205; *Stephenson v. Martin*, 11 Bush (Ky.), 485; *Ray v. Loper*, 65 Mo. 470; 53 Am. Dec. 496; *Rickenbacker v. Zimmerman*, 10 S. Car. 110; *Jackson v. Jackson*, 28 Miss. 674, 64 Am. Dec. 114; *Kyle v. Conrad*, 25 W. Va. 760; *Marsh v. Gilbert*, 2 Redf. (N. Y.) 465; *Puryear v. Cabell*, 24 Gratt. (Va.) 260; *Keys v. Keys*, 11 Heisk. (Tenn.) 425; *Williams v. Stonestreet*, 3 Rand. (Va.) 559. See *Fickes v. Wiseman*, 2 Watts (Pa.), 314. "The apparent inequality created by the length of time which the advancement is held and enjoyed before the other legatees receive their share constitutes no ground for charging the advanced legatee with interest. It is an inequality which always exists where advancements are made at different times by the parent among a family of children." *Black v. Whitall*, 9 N. J. Eq. 572, 59 Am. Dec. 423; *Hosmer v. Sturges*, 31 Ohio St. 657. It is fair that the child

should have the increase in value, as he runs the risk of any deterioration in value. *Kean v. Welsh*, 1 Gratt. (Va.) 406; *Knight v. Yarborough*, 4 Rand. (Va.) 569; *Nelson v. Wyans*, 21 Mo. 347. Where a father made an advancement of money to his son, took from him a promissory note, and then directed by will that the advancement should be deducted from that child's share, it was held that the principal only, and not the interest, should be deducted. *Krebs v. Krebs*, 35 Ala. 293; *Hutchinson's App.*, 47 Pa. St. 84; *Green v. Howell*, 6 W. & S. (Pa.) 203. See *Grim's App.*, 105 Pa. St. 375. The Code of Alabama requires advancements to be estimated at the value, if any, specified in the conveyance; and in other cases at their value when made. See *Turner v. Kelly*, 67 Ala. 173. The statute of South Carolina requires the value of the advancement to be computed at what it is worth at the death of the intestate, relation being had to its situation at the time of the gift. *Rickenbacker v. Zimmerman*, 10 S. Car. 110.

4. *Ford's Est.*, 2 W. N. C. (Pa.) 113; *Thompson's Est.*, 8 W. N. C. (Pa.) 16; *Sharp's Est.*, 37 Legal Int. (Pa.) 234; *Yundt's App.*, 13 Pa. St. 575. It has been held in some cases that interest is to be charged on advancements from the death of the intestate. *Ex parte Glenn*, 20 S. Car. 64; *Johnson v. Patterson*, 13 Lea (Tenn.), 626; *Williams v. Williams*, 15 Lea (Tenn.), 438; *Kyle v. Conrad*, 25 W. Va. 760.

5. So held in the case of slaves emancipated by the war, in *Fennell v. Henry*, 70 Ala. 484. But slaves in such case are not to be accounted for under the South Carolina statute, which requires that the value of advancements shall be computed at the death of the intestate. *Hughes v. Eichelberger*, 11 S. Car. 36; *Wilson v. Kelly*, 21 S. Car. 535. *Ex parte Glenn*

6. **Changes of Gifts to Advancements, and vice versa—Changes of Debts, etc.**—As before stated, the donor may change a debt or a gift into an advancement by will.<sup>1</sup> But the donor cannot change an advancement into a debt or trust.<sup>2</sup> The *ex parte* declarations of the parent of an intention to treat an existing debt as an advancement, not communicated to the child nor agreed to by him, nor accompanied by an act sufficient to obliterate the obligation as a debt, cannot change the debt into a gift by way of advancement.<sup>3</sup> But this rule does not exclude written entries of advancements.<sup>4</sup> The donor may change an advancement into an absolute gift, but an entry to have that effect must be explicit.<sup>5</sup> By mutual agreement the parties may resettle the terms of an advancement, so as to change it into a gift for life or into an absolute gift.<sup>6</sup>

7. **Miscellaneous.**—The advancement is no part of the intestate's estate,<sup>7</sup> and the donee does not relinquish his title by bringing it into hotchpot. He does not have to refund any part, though it exceeds his share.<sup>8</sup> The donor divests himself of all property in the advancement.<sup>9</sup>

20 S. Car. 64. And it has been held in that State that the use of the slaves cannot be charged as an advancement, since after they have been given their use belongs exclusively to the donee. *Wilson v. Kelly*, 21 S. Car. 535. Where a life estate in slaves was given, only the reasonable value of the life estate could be treated as an advancement, not the use and profits of their labor. *Cawthorn v. Coppedge*, 1 Swan (Tenn.), 487.

1. *Green v. Howell*, 6 W. & S. (Pa.) 203; *Whitman's App.* 2 Grant (Pa.), 323; *Mitchell v. Mitchell*, 8 Ala. 414. But this cannot be done by subsequent acts and declarations merely. *Lawson's App.* 23 Pa. St. 85; *Dugan v. Gittings*, 3 Gill (Md.), 138; *Bradsher v. Cannady*, 76 N. Car. 445.

2. *Haverstock v. Sarbach*, 1 W. & S. (Pa.) 390; *Miller's App.* 31 Pa. St. 337; *Sherwood v. Smith*, 23 Conn. 516; *Arnold v. Barron*, 2 Pat. & H. (Va.) 1; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9; *Thompson's App.* 42 Pa. St. 345; *Cleaver v. Kirk*, 3 Metc. (Ky.) 270.

3. *Yundt's App.* 13 Pa. St. 575; *Porter v. Allen*, 3 Pa. St. 390; *Haverstock v. Sarbach*, 1 W. & S. (Pa.) 390; *Levering v. Rittenhouse*, 4 Whar. (Pa.) 137; *Deweese's Est.*, 3 Bréwst. (Pa.) 314; *Oller v. Bonebrake*, 65 Pa. St. 338; *Harley v. Harley*, 57 Md. 340.

4. *Hengst's Est.*, 6 Watts (Pa.), 86. A paper signed by the intestate is sufficient to change a debt into an advancement. *Kirby's App.* 16 W. N. C. (Pa.) 71.

5. *Clark v. Warner*, 6 Conn. 356; *Lee v. Boak*, 11 Gratt. (Va.) 182.

6. *Harper v. Parks*, 63 Ga. 705; *Wallace v. Owen*, 71 Ga. 544. But where a

father, worth about \$12,000, gave to his son personal property worth about \$100, and afterwards representing to the latter that such personal property was intended as an advancement, induced the son to sign a note as evidence of such advancement, *held*, in a suit on the note, that it was executed without valid consideration. *Harris v. Harris*, 69 Ind. 181.

7. *Black v. Whitall*, 9 N. J. Eq. 572.

8. *Eckler v. Galbraith*, 12 Bush (Ky.), 71; *Gordon v. Barkelew*, 6 N. J. Eq. 94; *Phillips v. McLaughlin*, 26 Miss. 592; *Jackson v. Jackson*, 28 Miss. 64; *Am. Dec.* 114; *Chase v. Lockerman*, 11 Gill. & J. (Md.) 185, 35 Am. Dec. 277. By refusing to bring an advancement into hotchpot the child gives up all further interest in the estate. *Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726; *Taylor v. Reese*, 4 Ala. 121.

A widow, who under her husband's will held lands and slaves, which were to be divided equally between her and her children, but with a power to advance to the children the property, at such times and in such kinds of property as her judgment might dictate, advanced to two of the children some slaves and more than their aliquot share of land, intending to give them a balance still due from the slave property. *Held*, that the unexpected circumstance of the destruction of the slave property by the war did not entitle the children not advanced to a redistribution of the land, or an account of the slave property which went into the hands of the children advanced. *Kelly v. McCallum*, 83 N. Car. 563.

9. *Crosby v. Covington*, 24 Miss. 619.

## ADVANCEMENTS—ADVANCES.

Advancements must be voluntary on the part of the donor.<sup>1</sup>

Lapse of time cannot be set up against liability for an advancement.<sup>2</sup>

A power given to a wife to divide property given to her for life among the children does not authorize her to make advancements to some of them and not to others.<sup>3</sup>

**ADVANCES.**—Moneys paid before, or in advance of, the proper time of payment; furnishing on credit.<sup>4</sup>

*Fellows v. Little*, 46 N. H. 27; *Clark v. Willson*, 27 Md. 693; *Luqueer's Est.*, 1 Tuck. (N. Y.) 236. *Yancy v. Yancy*, 5 Heisk. 353.

An instrument making an advancement cannot be of a testamentary nature, as the title passes at once. *Holliday v. White*, 33 Tex. 460.

If subsequently to the advancement the father takes possession of the property and uses it, he becomes his son's debtor, and the statute of limitations runs against the claim for the use of the property. *Persoll v. Scott*, 64 Ga. 767.

1. See *Rains v. Hays*, 6 Lea (Tenn.), 303.

R. mortgaged certain real estate, the equity of redemption in which was afterwards set off, on an execution against him, to a creditor who conveyed the same to R.'s wife, and she afterwards died intestate. After her death R. remained in possession, and some time after was required to pay, and did pay, the mortgage debt. On a bill for foreclosure of the mortgage brought by R.'s executors against his children, who were also the children and heirs-at-law of R.'s wife, *held*, that the payment of the mortgage debt was not an advancement to the children. *Hart v. Chase*, 46 Conn. 207.

2. *Hughes' App.*, 57 Pa. St. 179.

3. *Farmer v. Farmer*, 93 Ind. 435. But see *Wimberly v. Bailey*, 58 Tex. 222, and *Weir v. Smith*, 62 Tex. 1.

But where property was devised to widow for life, and at her death what remained was to be divided equally among the children, and the widow and children agreed that what she gave to each should be charged in the final division, it was held the advancements should be accounted for according to the agreement. *Foltz v. Wert*, 103 Ind. 404.

**Authorities for Advancement.**—*Kent's Commentaries*, vol. 4, \*418 *et seq.*; *Williams on Executors*, 6th Am. Ed. 1605 *et seq.*; *Comstock on Executors* (1832), chapter on Distribution, 327 *et seq.*; *Hood on Executors* (1847), chapter on Distribution, 192 *et seq.*; *Lomax on Executors* (1841), 212 *et seq.*; *Toller on Executors* (1829), 3d Am. Ed. \*376 *et seq.*; *McClellan's Executor's Guide* (1873), 119 *et seq.*

4. The term "advances" does not, even in ordinary cases, include money. Its ordinary use indicates moneys paid before, or in advance of, the proper time of payment. If it be deemed equivalent to advancement, and then to imply the advancing the son or daughter in life by promoting his or her pecuniary interest, that meaning may well apply to the large bequests given on marriage, or on the child attaining full age, but not to the moneys expended for his support. *Vail v. Vail*, 10 Barb. (N. Y.) 69, 73.

The word "advances" when taken in its strict legal sense does not mean gifts—advancements—and does mean a sort of loan; and when taken in its ordinary and usual sense includes both loans and gifts—loans more readily, perhaps, than gifts. *Nolan v. Bolton*, 25 Ga. 352.

"Advancement" and "advancements" are the terms used in the law dictionaries, and in the New York statutes, to designate money or property given by a father to his children, as a portion of his estate, and to be taken into account in the final partition or distribution thereof. "Advances" is not the appropriate term for money or property thus furnished. The latter phrase, in legal parlance, has a different and far broader signification. It may characterize a loan or a gift, or money advanced, to be repaid conditionally. "Lent and advanced" was the language of the old common count, in *assumpsit*, for money loaned or advanced, to be repaid. *Chase v. Ewing*, 51 Barb. (N. Y.) 597, 612.

It was rightly ruled that the word "advances," as used in one clause of the will, was not restricted to "advancements." *Barker v. Comins*, 110 Mass. 477, 488. *Cf. County of Ormsby v. State*, 6 Nev. 283.

**Advance.**—To "advance" is to "supply beforehand;" "to loan before the work is done or the goods made." *Powder Co. v. Burkhardt*, 7 Otto, 110, 117.

The word "advance" implies an act which, by anticipation puts money or money's worth into the hands of the party, who would otherwise not receive it. *Cooper v. Cooper*, L. R. 8 Ch. App. 813, 824.

**ADVERSE POSSESSION.** See also DEDICATION; EJECTMENT; PRESCRIPTION.

1. *Definition.*
2. *Adverse User.*
3. *Intent.*
4. *Essentials.*
5. *Possession must be Hostile herein of—*
  6. *Executory Contract.*
  7. *Tenant in Common.*
  8. *Ouster.*
  9. *Conveyance by Co-tenant.*
  10. *Life Estate.*
  11. *Landlord and Tenant.*
  12. *Trusts.*
  13. *Agent.*
  14. *Mortgagor and Mortgagee.*
  15. *Pendente Lite Purchaser.*
  16. *Vendor and Vendee.*
  17. *Boundaries and Fences.*
  18. *Husband and Wife.*
  19. *Permissive Entry.*
20. *Possession must be Actual herein of—*
  21. *What Constitutes Possession.*
  22. *Cultivation.*
  23. *Inclosures.*
  24. *Taxes.*
25. *Possession must be Visible, Notorious, and Exclusive herein of—*
  26. *Notice.*
  27. *Possession must be Continuous herein of—*
    28. *Tacking.*
    29. *Interruption.*
    30. *Offer to purchase Superior Title.*
    31. *Purchase by Adverse Holder.*
    32. *May not hold adversely to All.*
    33. *Color of Title herein of—*
      34. *Good Faith.*
      35. *Parol Agreement.*
      36. *Gift.*
      37. *Under Mistake.*
      38. *Lost Deed.*
      39. *Invalid Conveyance or Title.*
      40. *Interference of Titles.*
      41. *Conflicting Titles.*
      42. *Extent of Possession.*
      43. *Fraud.*
    44. *Without Color of Title.*
    45. *Improvements.*
    46. *Abandonment.*
    47. *Mines.*
    48. *Water.*
    49. *Easement.*
    50. *Right of Way.*
    51. *Highways.*
    52. *Public Lands.*
    53. *State Lands.*
    54. *Municipal Corporations.*
    55. *Effect of Adverse Possession.*
    56. *Evidence.*

1. **Definition.**—Adverse possession is a possession inconsistent with the right of the true owner; in other words, where a person possesses property in a manner in which he is not entitled to possess it, and without anything to show that he possesses it otherwise than as owner,—that is, with the intention of excluding all persons from it, including the rightful owner,—he is in adverse possession of it. Thus, if A is in possession of a field of B's, he is in adverse possession of it; unless there is something to show that his possession is consistent with a recognition of B's title.<sup>1</sup>

1. Sweet's Law Dict.; Ward v. Carttar, L. R. 1 Eq. 29; Magee v. Magee, 37 Miss. 152; Alexander v. Polk, 39 Miss. 755; Dixon v. Cook, 49 Miss. 226; French v. Pearce, 8 Conn. 441.

What constitutes adverse possession is for the court; the facts which support the claim, for the jury. Kinsell v. Daggett, 11 Me. 309; Schwartz v. Kuhn, 10 Me. 274; Atherton v. Johnson, 1 N. H. 34; Webb v. Richardson, 42 Vt. 465; Hall v. Dewey, 10 Vt. 593; Gayetty v. Bethune, 14 Mass. 49; Cummings v. Wyman, 10

Mass. 464; Poinard v. Smith, 6 Pick. (Mass.) 172; Gross v. Welwood, 90 N. Y. 638; Madison Am. Church v. Oliver St. Church, 73 N. Y. 82; Trim v. Marsh, 54 N. Y. 599; s. c., 13 Am. Rep. 623; Jackson v. Joy, 9 Johns. (N. Y.) 102; Jackson v. Stephens, 13 Johns. (N. Y.) 496; Jackson v. Wheat, 18 Johns. (N. Y.) 40; Den v. Sinnickson, 9 N. J. L. 149; Hopkins v. Robinson, 3 Watts (Pa.), 205; Bell v. Hurlley, 4 W. & S. (Pa.) 132; Wallace v. Duffield, 2 S. & R. (Pa.) 527; Mushawer v. Patten, 10 S. & R. (Pa.)

**2. What is Adverse User.**—An adverse user is such a use of the property as the owner himself would make, asking no permission,

334; *Overfield v. Christie*, 7 S. & R. (Pa.) 172; *Read v. Goodyear*, 1 S. & R. (Pa.) 350; *Hatch v. Smith*, 4 Pa. St. 109; *Workman v. Guthrie*, 29 Pa. St. 495; *Hoopes v. Garver*, 15 Pa. St. 517; *Baker v. Swan*, 32 Md. 355; *Bolling v. Petersburg*, 3 Rand. (Va.) 536; *Rogers v. Madden*, 2 Bailey (S. Car.), 321; *Harrington v. Wilkins*, 2 McC. (S. Car.) 289; *Dubois v. Marshall*, 3 Dana (Ky.), 336; *Bracken v. Martin*, 3 Yerg. (Tenn.) 55; *Beverly v. Burke*, 9 Ga. 440; s. c., 54 Am. Dec. 351; *Iler v. Routh*, 3 Miss. 276; *Grafton v. Grafton*, 16 Miss. 77; *Magee v. Magee*, 37 Miss. 490; *Holliday v. Cromwell*, 37 Tex. 437; *McNair v. Funt*, 5 Mo. 300; *Macklot v. Dubreuil*, 9 Mo. 473; s. c., 43 Am. Dec. 550; *Boogher v. Neece*, 75 Mo. 384; *Washburn v. Cutter*, 17 Minn. 361; *McPherson v. Featherston*, 37 Wis. 632; *Shackelford v. Bailey*, 35 Ill. 387; *Woodward v. Blanchard*, 16 Ill. 424; *Wriggins v. Holley*, 11 Ind. 2; *McCluny v. Ross*, 5 Wheat. (U. S.) 116. Compare *Saterfield v. Randall*, 44 Ga. 576.

"When we look to the elements of an adversary possession, in reference to conflicting claims and the statutory prescriptive bar, we find that it consists of an exclusive, actual, continued possession, under a colorable claim of title." *Taylor v. Burnside*, 1 Gratt. (Va.) 165.

To establish an adverse possession the claim must be unequivocal. *Sturges v. Parkhurst*, 50 N. Y. Super. Ct. 306.

Instructions which leave it to the jury to determine what constitutes adverse possession or color of title are properly refused. *Boogher v. Neece*, 75 Mo. 384.

The plaintiff brought a suit to recover possession of certain land, of which he claimed to have been dispossessed by the defendant about three years before. After his ouster the plaintiff executed a deed of the premises to B, but by reason of the adverse possession of the defendant no title passed. The deed was given and received for the sole purpose of enabling B to dispossess the defendant. Soon after this the defendant brought an action of trespass against B for taking and carrying away a quantity of hay, which B justified on the ground that it was hay cut on the land in question, the title to which was in him. The court, however, rendered judgment for the present defendant. The latter, in the present suit, offered in evidence that judgment as an estoppel upon the present plaintiff. *Held*, that the title to the demanded premises

was not in issue in that suit. The court below found, as to the plaintiff's title, that the only use to which the strip of land had been subjected was the occasional trimming and cutting of its trees and brush and the annual cutting and removal of the grass, seaweed, and sedge growing on it, and the landing, repairing, and storing of the fishing and other boats of the plaintiff and of those under whom he claimed title; and that the plaintiff and those under whom he claimed had been in the adverse and uninterrupted use and possession of the premises for the purposes aforesaid, more than fifteen years before the ouster by the defendant. The court having rendered judgment for the plaintiff, it was held, on the defendant's appeal, that this court could not, as matter of law, say that such possession and use were not such as to practically exclude the owner, and therefore could not say that the conclusion of the court below was legally erroneous. *Carver v. Staples*, 51 Conn. 21.

Adverse possession cannot arise until there is some one to dispute the right claimed. *Marble v. Price*, 54 Mich. 466.

Title by adverse possession is not affected by a repeal of the statute granting it. *Knox v. Cleveland*, 13 Wis. 245; see *Shriver v. Shriver*, 86 N. Y. 575.

Where land is held adversely, the true owner cannot as against the party in possession convey a title by deed delivered off the premises. *Sohier v. Coffin*, 101 Mass. 179.

Mere denials of the right, complaints, remonstrances, or prohibitions of user, unaccompanied by any act which in law would amount to a disturbance and be actionable as such, will not prevent the acquisition of a right by prescription. *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605.

When both parties claim title by possession under color of title, the origin of each being an act of trespass, the one being a trespass on the constructive possession and the other a trespass on the actual possession under the later title, the same rule of law as to the title passing by adverse possession applies to each. *Farran v. Heinrich*, 86 Mo. 521.

No title can be acquired by adverse possession of land which was dedicated to public use before the possession began. *Hoadley v. San Francisco*, 50 Cal. 265.

and disregarding all other claims to it so far as they conflict with this use.<sup>1</sup>

**3. Intent.**—An adverse possession depends upon the intention with which it was taken or held.<sup>2</sup>

The claim of a mere easement, or other right in land less than the entire fee, does not confer any adverse right to the fee simple, and that to have this effect, under the statute of limitations, the claim must be of the entire title, exclusive of the title of any other person. *N. O. & S. R. Co. v. Jones*, 68 Ala. 48, 55. *Dothard v. Denson*, 75 Ala. 483.

Under a plea of not guilty in ejectment, evidence to prove an adverse possession is admissible, and a special plea of the statute of limitation should not be allowed. *Wade v. Doyle*, 17 Fla. 522; *Weiskoph v. Dibble*, 18 Fla. 24.

The fact that ejectment was brought within the time is no defence to the plea of the statute. The two actions are not for the same cause. *Whitfield v. Hill*, 5 Jones Eq. 316; *Isler v. Dewey*, 84 N. Car. 345.

In a proceeding by an administrator for leave to sell land to pay debts, the court, exercising but a mere statutory authority, has no jurisdiction to settle and determine conflicting titles to the land, or to remove clouds upon title. If the paramount owner of the land is made a defendant, it would doubtless be his duty to assert his rights to the same in his answer, not for the purpose of forming an issue to be tried in that proceeding, but for the purpose of giving notice of his rights, and thus prevent an estoppel *in pais*. *Harding v. Le Moyne*, 114 Ill. 65.

**Breach of Peace.**—A person who has, or thinks he has, a title to land which is in the actual possession of another cannot lawfully take possession without the consent of the holder, even though he commit no breach of the peace. *Morris v. Robinson*, S. C. Ala. Dec. Term, 1885-1886; *Turnley v. Hanna*, 67 Ala. 101; *Mason v. Hawes*, 52 Conn. 12; s. c., 52 Amer. Rep. 552.

Adverse possession must be peaceable, without force and violence; but it will not be broken by every trespass or claim by another inconsistent with a recognition of such adverse holding. *Duren v. Sinclair*, 22 S. Car. 361.

1. *Blanchard v. Moulton*, 63 Me. 434.

2. *Waltmeyer v. Baughman*, 63 Md. 200; *Beatty v. Mason*, 30 Md. 409; *Core v. Faupel*, 24 W. Va. 238; *Bartholomew v. Edwards*, 1 Houst. (Del.) 217; *Davis v. Bowmar*, 55 Miss. 671; *Magee v. Magee*,

37 Miss. 152; *Brown v. Cockrell*, 30 Ala. 45; *Howard v. Reedy*, 29 Ga. 154; *Carroll v. Gillion*, 33 Ga. 539; *St. Louis University v. McCune*, 28 Mo. 481; *Betts v. Brown*, 3 Mo. App. 20; *Musick v. Barney*, 49 Mo. 458; *Skinner v. Crawford*, 54 Iowa, 119; *Jones v. Hockman*, 12 Iowa, 108; *Grube v. Wells*, 34 Iowa, 148; *McNamara v. Seaton*, 92 Ill. 498; *Jackson v. Berner*, 48 Ill. 203; *Humphries v. Hoffman*, 35 Ohio St. 395; *Green v. Harman*, 4 Dev. (N. Car.) 158; *Cleveland v. Flogg*, 4 Cush. (Mass.) 76; *Allen v. Holton*, 20 Pick. (Mass.) 458; *Church v. Burghart*, 8 Pick. (Mass.) 328; *Cook v. Babcock*, 11 Cush. (Mass.) 210; *Brown v. Gay*, 3 Me. 126; *Putnam School v. Fisher*, 38 Me. 324; *Worcester v. Lord*, 56 Me. 265; *Dow v. McKenney*, 64 Me. 138; *Grant v. Fowler*, 39 N. H. 101; *Hodges v. Eddy*, 41 Vt. 488; *Morse v. Churchill*, 41 Vt. 649; *Jackson v. Thomas*, 16 Johns. (N. Y.) 293; *Jackson v. Wheat*, 18 Johns. (N. Y.) 44; *Russell v. Davis*, 38 Conn. 562; *McGee v. Morgan*, 1 A. K. Marsh (Ky.), 62; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Larwell v. Stevens*, 2 McCrary (U. S.), 311; *Jackson v. Porter*, 1 Paine (U. S.), 457. Compare *Campau v. Dubois*, 39 Mich. 274.

The intention must be manifest. *Culver v. Rhodes*, 86 N. Y. 348; *Marcy v. Marcy*, 6 Metc. (Mass.) 360; *Hart v. Gregg*, 10 Watts (Pa.), 185; *Prescott v. Nevers*, 4 Mason (U. S.), 330. But it need not be expressed, it may be inferred from manner of occupancy. *Conyers v. Kenan*, 4 Ga. 308; s. c., 48 Am. Dec. 226.

The possession may be adverse, although deceit may have been used, to deceive the rightful owner. *Strange v. Durham*, 1 Brev. (S. Car.) 83.

The declarations of the adverse holder that he wished to find the true owner, and to purchase the property of him, will not save the statute. *Patterson v. Reigle*, 4 Pa. St. 201.

The possession of a mere trespasser, entering and holding without claim of right, is not adverse to the rightful owner, and does not ripen into a title by lapse of time, nor invalidate a conveyance by the owner to another person. *Bernstein v. Humes*, 78 Ala. 134; *Clark v. Courtney*, 5 Pet. (U. S.) 320.

**Unintentional Encroachment.**—Where



4. **Essentials.**—To constitute a possession such as will bar the title of the legal owner, five elements must coexist. It must be (1) hostile or adverse; (2) actual; (3) visible, notorious, and exclusive; (4) continuous, and (5) under a claim or color of title.<sup>1</sup>

5. **Hostile or Adverse.**—The element of hostility to the title of the true owner is an indispensable ingredient of adverse possession. The hostile possession must be continuous and notorious. It cannot be made out from inference, as the presumption is in favor of the true owner.<sup>2</sup>

the owner of a city lot undertakes to erect a building upon his own ground, but by inadvertence and ignorance of the true line of his lot places a portion of the wall four inches over the dividing line and upon the adjoining lot, but with no intention then or afterward to claim any portion of such adjoining lot as his own, and the adjoining lot-owner had no knowledge of such encroachment, the possession thus taken will not be adverse. *Winn v. Abeles*, 35 Kan. 85.

1. *Hawk v. Senseman*, 6 S. & R. (Pa.) 21; *Parich v. Spooner*, 57 Vt. 583; *Cook v. Babcock*, 11 Cush. (Mass.) 209; *Taylor v. Burnside*, 1 Gratt. (Va.) 165; *Creekmur v. Creekmur*, 75 Va. 430; *Core v. Faupel*, 24 W. Va. 238; *Dietrick v. Noel*, 42 Ohio St. 18; s. c., 51 Am. Rep. 788; *Flaherty v. McCormick*, 113 Ill. 538; *Washburn v. Cutter*, 17 Minn. 361; *Dot-hard v. Denson*, 75 Ala. 541; *Davis v. Bowmar*, 55 Miss. 671; *Ringo v. Woodruff*, 43 Ark. 469; *Bracken v. Jones*, 63 Tex. 184; *Unger v. Mooney*, 63 Cal. 586.

Terms "open," "notorious," "adverse," and "exclusive," when applied to the manner in which land is held, indicate a claim of right. The terms constitute a definition of disseisin, and will be so construed unless explained by other evidence. *School Dist. v. Benson*, 31 Me. 381; s. c., 52 Am. Dec. 618.

2. *Jones v. Porter*, 3 P. & W. (Pa.) 132; *Hawk v. Senseman*, 6 S. & R. (Pa.) 21; *Rung v. Shoneberger*, 2 Watts (Pa.) 23; s. c., 26 Am. Dec. 95; *Putnam School v. Fisher*, 38 Me. 324; *Lund v. Parker*, 3 N. H. 49; *Grant v. Fowler*, 39 N. H. 101; *Hodges v. Eddy*, 38 Vt. 344; *Morse v. Churchill*, 41 Vt. 649; *Soule v. Barlow*, 49 Vt. 329; *Newhall v. Wheeler*, 7 Mass. 189; *Coburn v. Hollis*, 3 Metc. (Mass.) 125; *Slater v. Rawson*, 6 Metc. (Mass.) 439; *Cook v. Babcock*, 11 Cush. (Mass.) 209; *Church v. Burghart*, 8 Pick. (Mass.) 328; *Russell v. Davis*, 38 Conn. 562; *Smith v. Burtis*, 6 Johns. (N. Y.) 218; *Jackson v. Wheat*, 18 Johns. (N. Y.) 40; *Creekmur v. Creekmur*, 75 Va. 430; *Clark v. McClure*,

10 Gratt. (Va.) 305; *Core v. Faupel*, 24 W. Va. 238; *Hudson v. Putney*, 14 W. Va. 561; *Beatty v. Mason*, 30 Md. 409; *O'Daniel v. Bakers' Union*, 4 Houst. (Del.) 488; *Snoddy v. Kreutch*, 3 Head (Tenn.) 304; *McGee v. Morgan*, 1 A. K. Marsh (Ky.), 62; *Herbert v. Haurick*, 16 Ala. 581; *Potts v. Coleman*, 67 Ala. 221; *Carroll v. Gillion*, 33 Ga. 539; *Gordon v. Sizer*, 39 Miss. 805; *Magee v. Magee*, 37 Miss. 152; *Ringo v. Woodruff*, 43 Ark. 469; *Musick v. Barney*, 49 Mo. 458; *Wall v. Shindler*, 47 Mo. 282; *Satterwhite v. Rosser*, 61 Tex. 166; *Cracken v. Jones*, 63 Tex. 184; *Wiggins v. Holly*, 11 Ind. 2; *Jackson v. Berner*, 48 Ill. 203; *De Long v. Mulcher*, 47 Iowa, 445; *Grube v. Wells*, 34 Iowa, 150; *Jones v. Hockman*, 12 Iowa, 108; *Sparrow v. Hoey*, 44 Mich. 63; *Yelverton v. Steele*, 40 Mich. 538; *Washburn v. Cutter*, 17 Minn. 361; *Unger v. Mooney*, 63 Cal. 586; s. c., 49 Am. Rep. 100; *Pepper v. O'Dowd*, 39 Wis. 548.

Mere verbal objections on the part of the true owner will not stop the running of the statute. *Kimball v. Ladd*, 42 Vt. 747.

One holding the legal title to lands, although not actually occupying, will be considered as constructively in possession thereof, unless they are in the actual hostile occupancy of another under a claim of title. *Bliss v. Johnson*, 94 N. Y. 235.

Adverse possession has in it nothing of stealthiness, nor is it elastic or flexible; there must be publicity, continuity, and good faith in its assertion, leaving no room for doubt by the person against whom it is asserted that his title is disputed, and a hostile title asserted. *Potts v. Coleman*, 67 Ala. 221. *Compare Strange v. Durham*, 1 Brev. (S. Car.) 83.

There must be not only an actual occupation, but also a claim of title hostile to that of the true owner. *Held*, accordingly, that it was error to instruct the jury to the effect that land was adversely possessed where protected by a substantial enclosure, or where it has

Possession will not be adverse if it be held under, or subservient to, a higher title, nor if it be consistent with the interest or estate of the claimant; for instance, where the possession of one is the possession of the other, or where the estate of one in possession and that of the claimant form different parts of one and the same estate. The mere entry and possession of one tenant in common, or joint tenant, or coparcener will not be adverse to the co-tenant, because the possession of one is the possession of the other. To constitute adverse possession in such cases, there must be an ouster, an entry and possession hostile to the title of the owner of the legal title. Nor will the possession of a tenant for years or tenant for life be adverse to the reversioner or heir in remainder. Thus:

6. *Executory Contract*.—When a purchaser of lands, under an executory contract, is let into possession, not having paid the purchase-money, and not having received a conveyance, he holds in subordination to the title of the vendor; and he cannot defeat a suit in equity by the vendor to charge the lands with the payment of the purchase-money, by interposing the lapse of time as a defence, without showing that his possession was open and notorious, asserted as hostile to the right and title of the vendor, and continued long enough to bar a recovery at law under the statute.<sup>1</sup>

been usually cultivated or improved; the definition, omitting the element of hostility, which is an indispensable constituent of adverse possession. *Thompson v. Felton*, 54 Cal. 547.

It should appear that the possession had been actual, continued, visible, notorious, distinct, and hostile. And where the circuit judge was requested so to instruct the jury, and refused, but instructed them only that the possession must be actual, continued, and visible, *held* to be error. *Sparrow v. Hovey*, 44 Mich. 63.

The occupant's declarations during the occupancy are evidence to show that the holding was not adverse. *Calhoun v. Cook*, 9 Pa. St. 226.

1. *Walker v. Crawford*, 70 Ala. 567; *Potts v. Coleman*, 67 Ala. 221; *Beard v. Ryan*, 78 Ala. 37; *Taylor v. Dugger*, 66 Ala. 445; *Ormond v. Martin*, 37 Ala. 598; *McQueen v. Ivey*, 36 Ala. 308; *Dothard v. Denson*, 72 Ala. 541; *Moring v. Ables*, 62 Miss. 263; *Benson v. Stewart*, 30 Miss. 49; *McClanahan v. Barrow*, 27 Miss. 664; *Gladney v. Barton*, 51 Miss. 216; *Adair v. Adair*, 78 Mo. 630; *Adams v. Cowherd*, 30 Mo. 458; *Strickland v. Summerville*, 55 Mo. 165; *Estes v. Long*, 71 Mo. 605; *Pullen v. Canfield*, 67 Mo. 50; *Doe v. Jefferson*, 5 Del. 477; *Clark v. McClure*, 10 Gratt. (Va.) 305; *Nowlin v. Reynolds*, 25 Gratt. (Va.) 137; *Hudson v. Putney*, 14 W. Va. 561; *Core v. Faupel*, 24 W. Va. 238; *Williams v. Cash*, 27

Ga. 507; *Stamper v. Griffin*, 12 Ga. 457; *Jackson v. Foster*, 12 Johns. (N. Y.) 490; *Knox v. Hook*, 12 Mass. 329; *Brown v. King*, 5 Metc. (Mass.) 173; *Catino v. Decker*, 38 Conn. 262; *Adams v. Fullam*, 43 Vt. 592; 47 Vt. 558; *Re Public Parks Depart.* 73 N. Y. 560; *Den v. Kip*, 2 Dutch. (N. J.) 351; *Harris v. Richey*, 56 Pa. St. 395; *McCracken v. Roberts*, 19 Pa. St. 390; *Woods v. Dill*, 11 Ohio, 455; *Dunlap v. Dougherty*, 20 Ill. 397; *Rigor v. Frye*, 62 Ill. 507; *Clouse v. Elliott*, 71 Ind. 302; *Blackwell v. Ryan*, 21 S. Car. 112; *Gilleson v. Railroad Co.*, 7 S. Car. 173; *Furlong v. Garrett*, 44 Wis. 111; *Coldcleugh v. Johnson*, 34 Ark. 312; *Turner v. Thomas*, 13 Bush (Ky.), 518; *Higginbotham v. Fishback*, 1 A. K. Marsh (Ky.), 506; *Gassom v. Donaldson*, 18 B. Man. (Ky.), 230; *Kilburn v. Ritchie*, 2 Cal. 145; *Farrish v. Coon*, 40 Cal. 33; *Osterman v. Baldwin*, 6 Wall. (U. S.) 116; *Hermans v. Schmaltz*, 7 Fed. Repr. 566; s. c., 10 Biss. (U. S.) 323; see *Adams v. Fullam*, 47 Vt. 558.

Neither can the widow of such vendee after his death. *Blackwell v. Ryan*, 21 S. Car. 112.

A sold land belonging to his wife to B, giving only a title bond. B entered in possession. The wife died 30 years after such entry. *Held*, that A's estate by courtesy was barred by the possession of B and his successors. *Stokely v. Slayden*, 8 Baxt. (Tenn.) 307.

The vendee, though not strictly a ten-

Where, however, the vendee has executed his part of the agree-

ant of the vendor, and though the technical relation of landlord and tenant is not created, is estopped from denying the title of the vendor, upon principle and reasoning like that which estops the tenant from disputing the title of the landlord; and the estoppel applies to whoever may acquire possession from the vendee. *Potts v. Coleman*, 67 Ala. 221; *Jackson v. Harder*, 4 Johns. (N. Y.) 202; *Jackson v. Bard*, 4 Johns. (N. Y.) 230; *Jackson v. Walker*, 7 Cow. (N. Y.) 643; *Jackson v. Spear*, 7 Wend. (N. Y.) 403.

One buys land with borrowed money, taking the title in the name of the lender, and goes into possession under an agreement with the lender that the title is to be conveyed to him whenever he repays the loan, his possession will not become adverse as against the lender until he has made an open and explicit disavowal of the lender's title and assertion of title in himself, and such disavowal and assertion have been brought home to the lender. *Estes v. Long*, 71 Mo. 605.

The possession of a purchaser of land by title bond, who goes into possession and holds for himself, is not the possession of his vendor, who has color of title, so as to perfect the latter's title, under the 1st section of the act of 1819, in seven years, against an otherwise superior title in another. If the purchaser in such case be for some purposes regarded as the tenant at will of his vendor, yet he is not the tenant in fact, and his possession is not that of his vendor, in the sense of the statute. *Ellege v. Cook*, 5 Lea (Tenn.), 622.

The possession of the purchaser of land, under an executory contract, is not adverse to his vendor, although he has paid all the purchase-money and used and occupied the land for his own exclusive benefit. The contract, being executory and made in contemplation of a conveyance by deed, recognizes the legal title as outstanding, and his possession will be treated as in subordination thereto and not as adverse. *Williams v. Snidow*, 4 Leigh (Va.), 14; *Gay v. Moffitt*, 2 Bibb (Ky.), 506; *Nowlin v. Reynolds*, 25 Gratt. (Va.) 137.

A case of sale on credit, purchase-money not paid, and no title conveyed to the purchaser. Under an execution against the purchaser, the sheriff levied on and sold the lands to M, who received a sheriff's deed, and went into possession, and held under claim of right, for more than ten years. *Held*, that M ac-

quired no title by his purchase; but, going into possession under claim of right, he was an adverse holder, and the statute of limitations had perfected a bar in his favor. *Miller v. The State*, 38 Ala. 600. See, also, *Smilie v. Biffle*, 2 Penn. St. 52; *Steele v. Johnson*, 4 Allen (Mass.), 425; *Clark v. Gilbert*, 39 Conn. 94; *Northrop v. Wright*, 7 Hill (N. Y.), 476; *Beverly v. McBride*, 9 Ga. 440; *McCall v. Neely*, 3 Watts, 69; *Woodward v. Blanchard*, 16 Ill. 424; *Angell on Lim.* (6th Ed.) §§ 406 *et seq.*

Possession by virtue of an executory contract with one who himself claims under a like contract from the patentee is not adverse to that of the patentee until the latter repudiates his contract by selling to other parties, in which case possession under the executory contract will be adverse to that of the second vendee. *Pearson v. Boyd*, 62 Tex. 541; *Roosevelt v. Davis*, 49 Tex. 463; *Keys v. Mason*, 44 Tex. 144.

One who holds under an executory contract cannot make his possession adverse by taking a lease from another party. *Pratt v. Canfield*, 67 Mo. 50.

A bond for title will give color of title. *Elliott v. Mitchell*, 47 Tex. 445; *Scarborough v. Arrant*, 25 Tex. 131; *Miller v. Alexander*, 8 Tex. 36; *Spitler v. Scofield*, 43 Iowa. 571.

A tax certificate is evidence of the purchase of the land, after the expiration of the time for redemption, and upon notice to the owner the purchaser is entitled to a deed. This deed may be sufficient for color, even if too defective to convey title. *McKeighan v. Hopkins*, 14 Neb. 361; *Bride v. Watt*, 23 Ill. 507.

Twenty years' actual possession of a lot under contract of purchase is a bar to ejectment as to any part of the land within the inclosure. *Schneider v. Botsch*, 90 Ill. 577; *Hubbard v. Stearns*, 86 Ill. 35.

**Sub-purchaser.**—When a purchaser of land, under an executory contract, is let into possession, not having paid the purchase-money nor received a conveyance, his possession becomes adverse when he pays the purchase-money, and not before; but if he sells and conveys to a third person, who pays the stipulated price, and is placed in possession, the possession of such sub-purchaser is adverse to the original vendor, and will ripen into a title under the statute of limitations, although the first purchaser never paid the purchase-money, and never acquired any title. *Beard v.*

ment by payment of the purchase-money, his possession is from that time adverse to the vendor.<sup>1</sup>

Ryan, 78 Ala. 37; Walker v. Crawford, 70 Ala. 567; State v. Conner, 69 Ala. 212. See James v. Patterson, 62 Ga. 527.

T sold to D a tract of land, and gave bond for title. D, being unable to make his payment, sold to A, who agreed to pay T, and to extend to D for a certain time the right to repurchase. A being involved, the title was conveyed to W, to be held by him during D's right to repurchase. D failed to repurchase, and W then delivered the deed to A, whose heirs held adversely about twenty years, and then brought suit to have the legal title, outstanding in the heirs of W, surrendered and conveyed to them. *Held*, that the claim of the heirs of A had ripened into a good, legal title by lapse of time, and that they were entitled to relief. Gladney v. Barton, 51 Miss. 216.

The possession of land by the holder of a bond for titles, with some of the purchase-money unpaid, is permissive, and the same does not become adverse to the maker of the bond though the holder has conveyed the premises by deed to an innocent purchaser from himself, yielded possession to such purchaser, and afterwards resumed and held it under a reconveyance by deed from his own vendee. A second vendee by deed from the holder of the bond cannot, in a contest with the maker of the bond, tack to his own possession any part of that of the holder of the bond, the same not being adverse; nor can he tack to his own the possession of the first vendee by deed, because the two adverse possessions having been separated by an intervening permissive possession, the continuity of adverse holding was interrupted. *Rutherford v. Hobbs*, 63 Ga. 243.

A, having contracted to purchase lands of B, paid part of the purchase-money, but titles were never made. A gave the bond to his son, C, who went into possession. *Held*, that his possession was adverse, both as to A and B. *Hunter v. Parsons*, 2 Bailey (S. Car.), 59.

1. *Moring v. Ables*, 62 Miss. 263; *Niles v. Davis*, 60 Miss. 750; *Brown v. King*, 5 Metc. (Mass.) 173; *Bryan v. Atwater*, 5 Day (Conn.), 181; *Catline v. Decker*, 38 Conn. 262; *Potts v. Coleman*, 67 Ala. 221; *Tillman v. Spann*, 68 Ala. 102; *Taylor v. Dugger*, 66 Ala. 445. Compare *Core v. Faupel*, 24 W. Va. 238.

A vendor of land received the purchase-money, gave his vendee a bond for title, and died in possession without ever having done an act inconsistent with his

vendee's title. His administrators sold the land as part of his estate. Upon a bill filed by the first vendee, more than ten years after the transaction for, specific performance, and to annul the deed made by the administrators, it was ruled that the original vendor held the naked legal title in trust for the vendee; that the purchaser at administrator's sale stood in the same situation, and the statute was no bar. *Harris v. King*, 16 Ark. 122.

The possession of a purchaser under an executory contract is not adverse to his vendor, although he has paid all the purchase-money and used and occupied the land for his exclusive benefit. His contract, being executory and made in contemplation of a further conveyance of the legal title, recognizes the title in his vendor, and his holding will be regarded as in subordination thereto and not adverse. *Core v. Faupel*, 24 W. Va. 238.

Where sale is made unconditionally and the purchase-money paid, under an agreement that a deed shall be executed, the possession of the vendee becomes at once adverse. *Ridgeway v. Holliday*, 59 Mo. 444.

In ejectment by N. against M. it appeared that B.'s original possession had come down regularly to M.; that B. purchased the land from C., taking C.'s bond for title and giving three notes, which C. sold to J. and which B. paid at maturity, taking from J. a deed with the usual warranty of title; that B. took actual possession of the land before wholly paying the notes; that J. was a *bona-fide* holder for value, not knowing that the true title was in N., under whom C. held by bond for title only, with the purchase-money not fully paid; and that notice of C.'s want of title never reached B. until he had become bound to pay J. *Held*, that the possession on which M.'s prescriptive title rested had its commencement under circumstances consistent with good faith in the possession. *Newton v. Mayo*, 62 Ga. 11.

In 1845 N. sold a tract of land to his son C., who was then 17 years old, received the entire purchase-money, executed a deed or title bond thereto, which was lost or mislaid, and never entered of record, and delivered it to C. and put him in possession of the land, who immediately erected a dwelling-house thereon, and put up other buildings. Soon after this sale was made to C., N. conveyed this land and other property to

Where one enters under an executory contract he may set up as a defence the statutory limitation as against persons other than his vendor.<sup>1</sup>

7. *Tenants in Common*.—The possession of one tenant in common, though exclusive, being consistent with the right of his co-tenant, does not amount to a disseisin of the co-tenant; and an ouster, or some act which the law deems equivalent to an ouster, is necessary to constitute a disseisin of his co-tenant by a tenant in common.

Thus, where one tenant in common occupies the common property notoriously as the sole owner, using it exclusively, improving it, and taking to his own use the rents and profits, or otherwise exercising over it such acts of ownership as manifest unequivocally an intention to ignore and repudiate any right in his co-tenants, such occupation or acts and claim of sole ownership will amount to a disseisin of his co-tenants, and his possession will be regarded as adverse from the time they have knowledge of such acts or occupation and claim of exclusive ownership.<sup>2</sup>

S. to secure certain debts; and in 1869 the trustee sold the land under the trust-deed to R., who brought ejectment against C. to recover the land. On the trial, after R. had introduced the deeds, C. proved the above facts, and then proved that he had been in actual adverse possession since 1845. *Held*, that C.'s title was complete. *Nowlin v. Reynolds*, 25 Gratt. (Va.) 137.

**Presumption of Payment from Lapse of Time**.—A presumption of the payment of the purchase-money from mere lapse of time, in favor of a purchaser in possession under an executory contract, does not arise until after the expiration of twenty years from the commencement of his possession. *Taylor v. Dugger*, 66 Ala. 444.

1. *Elliott v. Mitchell*, 47 Tex. 445.

2. *Clymer v. Dawkins*, 3 How. (U. S.) 674; *McClung v. Ross*, 5 Wheat. (U. S.) 116; *Union, etc., M. Co. v. Taylor*, 100 U. S. 37; *Caperton v. Gregory*, 11 Gratt. (Va.) 505; *Terrill v. Murray*, 4 Yerg. (Tenn.) 104; *Lodge v. Patterson*, 3 Watts (Pa.), 74; *Long v. Mast*, 11 Pa. St. 189; *Bennet v. Bullock*, 35 Pa. St. 364; *Dikeman v. Parrish*, 6 Pa. St. 225; s. c., 47 Am. Dec. 455; *Peck v. Ward*, 18 Pa. St. 506; *Covey v. Porter*, 22 W. Va. 121; *Bogges v. Meredith*, 16 W. Va. 1; *Rust v. Rust*, 17 W. Va. 901; *Van Bibber v. Frazier*, 17 Md. 436; *Roberts v. Smith*, 21 S. Car. 455; *Teal v. Terrell*, 58 Tex. 257; *Peeler v. Guilkey*, 27 Tex. 355; *Squires v. Clark*, 17 Kans. 84; *Warfield v. Lindell*, 30 Mo. 272, 38 Mo. 561; *Lapeyre v. Paul*, 47 Mo. 590; *McQuiddy v. Ware*, 67 Mo. 74; *Campbell v. Laclede*

*Gas. Co.*, 84 Mo. 352; *Campau v. Campau*, 44 Mich. 31; *Abercrombie v. Baldwin*, 15 Ala. 371; *Neely v. Neely*, 79 N. Car. 478; *Linker v. Benson*, 67 N. Car. 150; *Foulke v. Bond*, 41 N. J. L. 527; *Manchester v. Doddridge*, 3 Ind. 360; *Stevens v. Wait*, 112 Ill. 544; *Ball v. Palmer*, 81 Ill. 370; *Winter v. Haines*, 84 Ill. 585; *Busch v. Huston*, 75 Ill. 344; *Young v. Heffner*, 36 Ohio St. 232; *Knowles v. Brown*, 28 N. W. Repr. (Iowa), 409; *Burns v. Byrne*, 45 Iowa, 285; *Challefoux v. Ducharme*, 8 Wis. 287; *Abernathie v. Mining Co.*, 16 Nev. 260; *Bath v. Valdez*, 11 Pac. Repr. (Cal.) 724; *Tully v. Tully*, 9 Pac. Repr. (Cal.) 841; *Unger v. Mooney*, 63 Cal. 586; *Colman v. Clements*, 23 Cal. 245; *Holley v. Hawley*, 39 Vt. 534; *Bellis v. Bellis*, 122 Mass. 414; *Hall v. Stevens*, 9 Metc. (Mass.) 418; *Catino v. Decker*, 38 Conn. 362; *Jackson v. Smith*, 13 Johns. (N. Y.) 406; *Kathan v. Rockwell*, 16 Hun (N. Y.), 90; *Millard v. McMullin*, 68 N. Y. 352; *Woolsey v. Morss*, 19 Hun (N. Y.), 273; *Culver v. Rhodes*, 86 N. Y. 348.

A grandchild cannot, after the lapse of more than twenty years from the attainment of his majority, bring a suit for partition of land against other grandchildren who have been in undisputed and adverse possession since the death of the common ancestor, for more than that length of time. *Johnson v. Filson*, 8 N. E. Repr. Ill. 318.

Where a conveyance is made by a party in the exclusive possession, under a deed which purports to convey the whole property, and the grantee goes in to the open and notorious possession of

8. *Ouster*.—Ouster is a question of fact which it is the province of the jury to determine, and the facts and circumstances which go to establish the ouster ought, under proper instructions from the court, to be submitted to the jury.<sup>1</sup>

To effect an ouster of the co-tenant there must be an actual, continued, visible, notorious, distinct, and hostile possession. It must be such that knowledge of its existence is brought home to the co-tenant.<sup>2</sup>

the whole, neither grantor nor grantee having notice of a co-tenancy, their possession, if for the statutory period, will create a good title by adverse possession in the grantee. A party who is in possession of land under a deed will not be estopped from asserting title, by adverse possession, by the action of the probate court in decreeing to the heirs of a former owner an undivided one-half of the property. Had he appeared in the probate proceedings, and set up his adverse title, the probate court would have had no authority to hear and determine the question raised. *Bath v. Valdez*, 11 Pac. Repr. (Cal.) 724.

*Partition*.—The doctrine that partition will not lie when the defendant is in adverse possession of the premises, does not apply when the plaintiff's title is an equitable one only. *Dameron v. Jamerson*, 71 Mo. 97.

*Fraud*.—If one of the tenants in common has been guilty of fraud, the statute will not run against the other tenants. *Austin v. Barrett*, 44 Iowa, 488.

1. *Johnson v. Gorham*, 38 Conn. 513; *Cummings v. Wyman*, 10 Mass. 465; *Taylor v. Hill*, 10 Leigh (Va.) 457; *Purcell v. Wilson*, 4 Gratt. (Va.) 16; *Harmon v. James*, 7 Sm. & M. (Miss.) 111; *Blackmore v. Gregg*, 2 W. & S. (Pa.) 182; *Carpentier v. Mendenhall*, 28 Cal. 484; *Clark v. Crego*, 47 Barb. (N. Y.) 599; *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *Washburn v. Cutter*, 17 Minn. 361; *Highstone v. Burdette*, 54 Mich. 329; *Broadstreet v. Huntington*, 5 Pet. (U. S.) 402; *Ewing v. Burnet*, 11 Pet. (U. S.) 41. And the burden of proof rests upon the party alleging it. *Newell v. Woodruff*, 30 Conn. 492; *Van Bibber v. Frazier*, 17 Md. 436.

2. *Culver v. Rhodes*, 87 N. Y. 348; *Zeller v. Eckert*, 4 How. (U. S.) 295; *Barr v. Gratz*, 4 Wheat. (U. S.) 213; *McClung v. Ross*, 5 Wheat. (U. S.) 124; *Challefoux v. Ducharme*, 8 Wis. 287; *Long v. Mast*, 11 Pa. St. 189; *Bennet v. Bullock*, 35 Pa. St. 364; *Hall v. Stevens*, 9 Metc. (Mass.) 418; *Warfield v. Lindell*, 38 Mo. 581.

After there is an ouster, the excluded

party must regain possession before he can bring suit for partition. *Florence v. Hopkins*, 46 N. Y. 182.

It is sufficient if his acts are of such a nature as by their own import to impart information and give notice to the co-tenants that an adverse possession and an actual exclusive ownership are intended to be asserted against them. *Campbell v. Laclede Gas Co.*, 84 Mo. 352.

*What is*.—The acts needful to create an ouster must be an actual and exclusive possession of the whole premises, claiming the whole. *Florence v. Hopkins*, *supra*, 46 N. Y. 182; *Culver v. Rhodes*, 87 N. Y. 348.

An exclusive possession, exclusive receipt of rents and profits, and exclusive claim of title. *Grim v. Dyar*, 3 Duer, 354; a public claim of the entire title, a notorious act, an open claim of exclusive right. *Smith v. Burtiss*, 9 Johns. (N. Y.) 174; *Culver v. Rhodes*, 87 N. Y. 348.

*Evidence* must make the intention to hold adversely manifest, and palpably display such intention. *Marcy v. Marcy*, 6 Metc. (Mass.) 360; *Prescott v. Nevers*, 4 Mason (U. S.), 330; *Hart v. Gregg*, 10 Watts (Pa.), 185; *Culver v. Rhodes*, 87 N. Y. 348.

The evidence to sustain an ouster by a co-tenant must be stronger than that to sustain ordinary adverse possession. *Barret v. Coburn*, 3 Metc. (Ky.) 513; *Forward v. Deetz*, 32 Pa. St. 72; *Bailey v. Trammell*, 27 Tex. 328.

In ejectment between grantees of tenants in common defendant claimed title by adverse possession, and asserted that his entry under a warranty deed was an ouster of the co-tenants. There was evidence to show, however, that he only bargained for an undivided interest, and there was nothing to show that the co-tenants knew of his possession or claim of title. *Held*, for the jury to determine whether he entered claiming title to the whole, and intending to oust his co-tenants. *Highstone v. Burdette*, 54 Mich. 329.

If the hostile character of the possession is so openly manifested that his

9. *Conveyance by a Co-tenant.*—Where one co-tenant assumes to convey the entire land, and does convey by metes and bounds, his deed will give color of title; and if possession is taken thereunder,

observation as a man reasonably careful of his interests would be sufficient to discover it, he will be deemed to have notice. Thus, where one of two tenants in common conveys to a third person by deed purporting to convey the whole land, and the deed is recorded by the grantee, who enters under it, such entry is hostile in its nature, and the mere fact of possession by a stranger is enough to put him on inquiry, and charge him with notice. So, the making of valuable improvements, paying the taxes upon the land, and receiving the rents and profits without accounting or offering to account, are circumstances indicating an adverse holding, and their effect upon the co-tenant is the same as if notice were directly communicated to him. The means of knowledge being furnished by the open and notorious character of the possession, he is charged with actual notice. *Unger v. Mooney*, 63 Cal. 586; s. c., 49 Am. Rep. 100. See *Culver v. Rhodes*, 86 N. Y. 348; *Clark v. Crego*, 47 Barb. (N. Y.) 599; *Grim v. Dyar*, 3 Duer (N. Y.) 354.

The plaintiff, being one-half owner of a grist-mill, conveyed his interest to the defendants' grantors, who then owned the other half, and in his deed bounded the premises by the north line of the grist-mill building. Afterwards the defendants, without permission of the plaintiff, enlarged the flume across the common land, and in so doing built a thick wall of solid masonry and increased the width of the waterway thereon; and it was found by a referee that this appropriation of the common land by the defendants amounted to an ouster of the plaintiff. *Held*, that the defendants were not liable to the plaintiff in an action of trespass *quare clausum*, it appearing that the plaintiff had a subsequent right to take water from the flume. *Johnson v. Conant*, 3 N. Eng. Repr. (N. H.) 163.

Defendant took a deed from one of several heirs for his undivided interest in a large quantity of land, whereupon he took possession of and improved eighty acres of it, rented it for a number of years, and collected the rents and paid the taxes, and afterwards moved upon it, and occupied it continuously as a homestead, and exercised all ordinary acts of ownership, up to the beginning of this suit—more than twenty years subsequent to the date of his deed; the co-

heirs of his grantor never in the meantime making any claim to any interest in the eighty acres, though two of them lived near the land. In this action, brought by plaintiff (who had obtained quit-claim deeds from some of the heirs) to quiet the title in him to an undivided interest in the land, defendant testified that he bought and paid for the whole eighty, and that he supposed that he had acquired it by his deed; and his testimony was not disputed, but was strongly corroborated by all the facts, except the deed itself. *Held*, that defendant had held possession of the land under a claim of sole ownership from the date of his deed; that his alleged co-tenants must be presumed to have had knowledge of his claim, and that he had a good title by adverse possession as against the plaintiff. *Laraway v. Larue*, 63 Iowa, 407; see *Foulke v. Bond*, 41 N. J. L. 527. Compare *Moore v. Antill*, 53 Iowa, 612; *Kathan v. Rockwell*, 16 Hun (N. Y.), 90.

Payment of taxes and occasional use of the land will not constitute ouster. *McQuiddy v. Ware*, 67 Mo. 74.

In 1820 R. conveyed to A. an undivided half of the premises. In 1836 W. conveyed the other undivided half to school trustees, who built a school-house, and occupied it until 1873. The district conveyed the premises to B., he being told after the sale, but before the execution of the deed, that the district had title to but one half of the premises. He had also knowledge of A.'s claim. *Held*, that the possession of the district was not adverse to A. *Kathan v. Rockwell*, 16 Hun (N. Y.), 90.

A father moved away, leaving his son in possession of the farm, who always asserted his title, saying his father gave it to him. *Held*, that his possession was adverse to the other heirs of his father. *Jackson v. Whitbeck*, 6 Cow. (N. Y.) 632.

Where one of several heirs bought the interest of one of his co-heirs in a tract of land, and after such purchase paid the taxes, took timber from the land, and also used it as a pasture, *held*, that the acts were consistent with his interest as a tenant in common therein, and did not constitute ouster of his co-tenants. *McQuiddy v. Ware*, 67 Mo. 74.

One tenant in common of a tract of land bordering upon the sea inclosed a portion by a bank wall, and placed upon

the purchaser claiming title to the whole premises, it will amount to an actual ouster and disseisin of the other tenants, and such

a part of it a fish-house, not fastened to the soil, and susceptible of easy removal, and a pump. He afterwards let the fish-house, receiving rent therefor, paid taxes on the house, but not, *eo nomine*, on the land. The other tenants in common used the fish-house as they found it convenient to do so. The pump was used as a common convenience by the neighborhood; and the land thus inclosed was used as a place of common resort for smoking and conversation, and as a place where all might draw up their boats. *Held*, that such use and occupation, even if continued for twenty-nine years, would not amount to an ouster of the co-tenants. *Ingalls v. Newhall*, 139 Mass. 268.

A brother and his married sister being the owners of land in coparcenary, the latter in 1837, by a paper purporting to be a deed signed and acknowledged by her, but without privy examination or joinder therein by her husband, conveyed to the former her interest in said land, he being at the time in the possession thereof and so continuing thereafter until his death, in 1859, when his devisees succeeded him and continued in possession up to 1881, at which time the heirs of the sister brought suit for partition of the land, the sister having remained under coverture until a short time before her death, which occurred in 1879; the brother and his devisees during the whole period from 1837 to 1859 having occupied the land notoriously as sole owners, using it exclusively, taking the entire rents and profits, making costly improvements thereon, and otherwise exercising over it such acts of ownership as manifested an unequivocal intention to repudiate any right or claim of the sister in the land. *Held*, notwithstanding said deed was void as a conveyance or contract of sale, it was sufficient *prima facie* to give notice of an intention to hold adversely; and the subsequent possession of the brother and his devisees, under the circumstances, operated as a bar to the right of his sister, although she continued under coverture the whole time; and the plaintiff's bill was properly dismissed. *Cooley v. Porter*, 22 W. Va. 121.

If the possession of a tenant in common is adverse to his co-tenant, it will not lose its hostile character by the former tendering a quit-claim deed to the latter, and requesting him to sign it, there being no offer to purchase, nor any acknowledgment of the tenancy. *Un-*

*ger v. Mooney*, 63 Cal. 586; s. c., 49 Am. Rep. 100.

Taking of a deed by one tenant in common from a third person, and spreading it on the record, will have no effect as the equivalent of an ouster, unless accompanied and followed by a hostile claim of which the co-tenant had knowledge, and by acts of possession, not only inconsistent with, but exclusive of, the right of such co-tenant. *Holley v. Hawley*, 39 Vt. 532. See *Culver v. Rhodes*, 87 N. Y. 348.

A sole and uninterrupted possession and taking of profits by one tenant in common, with the knowledge of the other, continued for a long series of years, without any perception of profits or demand for them by the co-tenant, if unexplained or controlled by any evidence tending to show a reason for such neglect or omission, will be evidence of an ouster. *Lefavor v. Homan*, 3 Allen (Mass.), 354; *Ewer v. Lovell*, 9 Gray (Mass.) 276.

To make a possession of tenant in common adverse as against the other, it is not necessary that notice should be given of the adverse intent; but the intent must be manifested by outward acts of an unequivocal kind. *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Lodge v. Patterson*, 3 Watts (Pa.), 74; *Owen v. Morton*, 24 Cal. 373; *Weisinger v. Murphy*, 2 Head (Tenn.) 674; *Culler v. Motzer*, 13 S. & R. (Pa.) 356; s. c., 15 Am. Dec. 604; *Abernathie v. Consolidated Va. M. Co.*, 16 Nev. 260; *Bradstreet v. Huntington*, 5 Pet. (U. S.) 402.

Witnessing a will of one co-tenant devising all the land, by another co-tenant, and hearing it read, *held* an ouster. *Miller v. Miller*, 60 Pa. St. 16; see *Coker v. Ferguson*, 70 Ala. 284.

An exclusive appropriation of a part of the land to his own use by the erection of a permanent structure would be evidence of an ouster of his co-tenant. *Bennett v. Clemence*, 6 Allen (Mass.), 10.

Where one of the tenants took possession of the land, and improved for a long period of time, *held* that he held adversely. *Campeau v. Dubois*, 39 Mich. 274; *Lapeyre v. Paul*, 47 Mo. 586.

The mere possession of the common premises by one co-tenant, and appropriation of the rents thereof, is not sufficient to make out a case of adverse possession against a co-tenant. There must be outward acts of exclusive ownership of an unequivocal character. *Todd v.*



possession is adverse, and, if continued for a sufficient length of time, will bar the right of the other co-tenants to recover.<sup>1</sup>

Todd, 7 N. E. Repr. (Ill.) 583; Busch v. Huston, 75 Ill. 343; Lapeyre v. Paul, 47 Mo. 586; Whiting v. Dewey, 15 Pick. (Mass.) 428; Parker v. Prop'rs, 3 Metc. (Mass.) 91; Susquehanna, etc., R. Co. v. Quick, 61 Pa. St. 328.

1. Unger v. Mooney, 63 Cal. 586; Packard v. Moss, 8 Pac. Repr. (Cal.) 818; Abernathie v. Consolidated Va. M. Co., 16 Nev. 260; Long v. Stapp, 49 Mo. 508; Warfield v. Lindell, 30 Mo. 282; s. c., 38 Mo. 578; Lapeyre v. Paul, 47 Mo. 590; Goewey v. Urig, 15 Ill. 242; Hinkley v. Green, 52 Ill. 230; Kinney v. Slatery, 51 Iowa, 353; Nelson v. Davis, 35 Ind. 474. Sands v. Davis, 40 Mich. 14; Campau v. Dubois, 39 Mich. 274; Thomas v. Pickering, 13 Me. 337; Higbee v. Rice, 5 Mass. 352; s. c., 4 Am. Dec. 63; Marcy v. Marcy, 6 Metc. (Mass.) 360; Rickard v. Rickard, 13 Pick. (Mass.) 251; Bigelow v. Jones, 10 Pick. (Mass.) 161; Parker v. Prop'rs, etc., 3 Metc. (Mass.) 91; s. c., 37 Am. Dec. 121; Kittredge v. Prop'rs, etc., 17 Pick. (Mass.) 246; Hodges v. Eddy, 38 Vt. 327; Forest v. Jackson, 56 N. H. 357; Clark v. Vaughan, 3 Conn. 191; Clapp v. Bromagham, 9 Cow. (N. Y.) 530; Bogardus v. Trinity Church, 4 Paige (N. Y.), 178; Jackson v. Smith, 13 Johns. (N. Y.) 406; Foulke v. Bond, 41 N. J. L. 527; Culler v. Motzer, 13 S. & R. (Pa.) 356; s. c., 15 Am. Dec. 604; Lodge v. Patterson, 3 Watts (Pa.), 74; Mehaffy v. Dobbs, 9 Watts (Pa.), 363; Law v. Patterson, 1 W. & S. (Pa.) 184, 191; Frederick v. Gray, 10 S. & R. (Pa.) 182; Dikeman v. Parrish, 6 Pa. St. 210; s. c., 47 Am. Dec. 455; Caperton v. Gregory, 11 Gratt. (Va.) 508; Black v. Lindsay, Busb. (N. Car.) 467; Covington v. Stewart, 77 N. Car. 148; Thomas v. Garvan, 4 Dev. (N. Car.) 223; Cloud v. Webb, 4 Dev. (N. Car.) 290; Gray v. Bates, 3 Strobb. (S. Car.) 498; Hart v. Bostwick, 14 Fla. 162; Horne v. Howell, 46 Ga. 9; Cain v. Furlow, 47 Ga. 674; Abercrombie v. Baldwin, 15 Ala. 363; Alexander v. Kennedy, 19 Tex. 488; Gill v. Fautleroy, 9 B. Mon. (Ky.) 177; Weisinger v. Murphy, 2 Head (Tenn.), 674; Ashley v. Rector, 20 Ark. 359; Hovenden v. Lord Annesley, 2 Schoales & L. 628; Doe v. Prosser, Cowp. 217; Townsend & Pastor's Case, 4 Leon. 52; Reed v. Taylor, 5 Barn. & Adol. 575.

Proof of a verbal sale of the interest of one of the heirs to an estate to another of the heirs, followed by 20 years' adverse possession in such other heir, *held*

to create a sufficient title in the latter. Hyne v. Osborne, 28 N. W. Mich. 821.

In ejectment between grantees of tenants in common, defendant claimed title by adverse possession, and asserted that his entry under a warranty deed was an ouster of the co-tenants. There was evidence to show, however, that he only bargained for an undivided interest, and there was nothing to show that the co-tenants knew of his possession or claim of title. *Held*, for the jury to determine whether he entered claiming title to the whole, and intending to oust his co-tenants. *Highstone v. Burdette*, 54 Mich. 329.

Complainants and those under whom they claimed had had fifty years' open, notorious, and continuous possession of lands, under duly recorded deeds purporting to convey the entire estate therein. *Held*, that their title was valid, as against one claiming under the former owner of an undivided interest. *Watson v. Jeffrey*, 39 N. J. Eq. 62. See *Lapeyre v. Paul*, 47 Mo. 586; *Sydnor v. Palmer*, 29 Wis. 226.

If there be parol exchange of lands for purposes of mutual tenancy, the presumption is that the possession is not adverse, but permissive; but in such case, if the proof show a hostile claim of title by either of the occupants, possession for ten years under such claim may mature into a good title. *Alexander v. Wheeler*, 69 Ala. 332.

Where one of several tenants in common conveys land, excepting and reserving the interest of his co-tenants, and the grantee takes possession of the whole under an agreement with the grantor to pay the taxes for and on behalf of the co-tenants, such possession, without a subsequent ouster or disseisin, cannot be regarded as adverse to them, and the purchaser cannot invoke the limitation law to defeat the assertion of their rights. *Grand Tower, etc., Co. v. Gill*, 111 Ill. 541.

An owner of land conveyed the same to his five children. One of the grantees afterwards reconveyed to the original grantor, but by deed purporting to convey, not the undivided one-fifth interest which he held, but the entire tract. It was considered, however, that the legal effect of the reconveyance was, under the circumstances, the same as if it had purporting to convey only the interest which the grantor therein held—an undivided one-fifth part. So the original grantor,

10. *Life Estate*.—The possession of land by a tenant for life cannot be adverse to the remainder-man; and if he sells and conveys to a third person, by words purporting to pass the absolute property, the possession of the purchaser is not, and cannot be during the continuance of the life estate, adverse to the remainder-man.<sup>1</sup>

having thus acquired an undivided one-fifth interest in the land, became a tenant in common with the other four owners to whom he had previously conveyed, and his possession in that relation was not adverse to them. *Stevens v. Wait*, 112 Ill. 544.

1. *Pickett v. Pope*, 74 Ala. 122, 65 Ala. 487; *Keith v. Keith*, 80 Mo. 125; *Sutton v. Casseleggi*, 77 Mo. 397; *Dewey v. McLain*, 7 Kan. 126; s. c., 12 Am. Rep. 418; *Hanson v. Johnson*, 62 Md. 25; s. c., 50 Am. Rep. 199; *Bedell v. Shaw*, 59 N. Y. 49; *Sands v. Hughes*, 53 N. Y. 294; *Devye v. Schaefer*, 55 N. Y. 446; *Christie v. Gage*, 71 N. Y. 189; *Pinckney v. Burrage*, 31 N. J. L. 21; *Poor v. Larrabee*, 58 Me. 543; *Gernet v. Lynn*, 31 Pa. St. 94; *Henley v. Wilson*, 77 N. Car. 216; *McCarry v. King*, 30 Humph. (Tenn.) 267; s. c., 39 Am. Dec. 165; *Turman v. White*, 14 B. Mon. (Ky.) 560; *Simmons v. McKay*, 5 Bush (Ky.) 31; *Jones v. Freed*, 42 Ark. 357; *Nicholson v. Caress*, 59 Ind. 39; *Carpenter v. Denoon*, 29 Ohio St. 379.

Possession under a sheriff's deed purporting to convey the interest which the judgment debtor had on a certain day is not adverse to the debtor's wife; and no length of such possession is a bar to her claim of dower. *Cowan v. Lindsay*, 30 Wis. 586.

A widow to whom dower is assigned comes in under the heir to whom her possession can never become adverse. *Molloy v. Bruden*, 86 N. Car. 251; *Musham v. Musham*, 87 Ill. 80. Nor can the possession of her tenant under a lease she had no authority to make. *Melvin v. Waddell*, 75 N. Car. 361. Nor the grantee under her deed. *Culver v. Rhodes*, 86 N. Y. 348. But where a widow remained in occupation of her deceased husband's residence for a long number of years, claiming ownership, it was held that her possession was adverse to the heirs. *Hogan v. Kurtz*, 94 U. S. 773. But her declaration that the husband had devised the land to her, prevented her possession becoming adverse. *Breidegam v. Hoffmaster*, 61 Pa. St. 223.

Adverse possession is held as against one's grantor by one who has taken a warranty deed of the premises in reliance on the record title and in ignorance of

any life-lease outstanding in the grantor. *Case v. Green*, 53 Mich. 615.

Where a deed conveyed a life estate, and the grantee remained in possession thirty years or more, the heirs of the grantor setting up no claim to the reversion, held, that the occupancy for so long a period becomes in itself an independent source of title. *Osborne v. Anderson*, 89 N. Car. 261.

The appellee B. had possession and paid taxes for above 20 years, under a quitclaim deed. His grantor had an estate *pour autre vie*, and the appellant and another are the reversioners. The will under which the appellee's grantor acquired his title was never recorded, nor, so far as the proof shows, brought to the notice of appellee. Held, under these circumstances, his possession has been adverse to the reversioners, and the bar of the statute is complete. *Saford v. Stubbs*, 7 N. East. Repr. (Ill.) 653.

Possession does not begin to be adverse as against a person entitled after the determination of a prior estate, during the continuance of that estate. *Fleming v. Burnham*, 100 N. Y. 1.

Although the remainder-man may have acquired the right to enter, during the continuance of the life estate, his neglect to do so, will not set the statute in motion, as he is not bound to do so until the life estate is determined. *Stevens v. Winship*, 1 Pick. (Mass.) 318; s. c., 11 Am. Dec. 178.

Where a husband conveys in fee land of the wife in which he has courtesy, the statute will not run against the vendee of the wife until the husband's death. *Jones v. Freed*, 42 Ark. 357.

A husband of a life tenant may, after her death make a deed which will give color of title. *Forest v. Jackson*, 56 N. H. 357.

During the life of the tenant, the possession of his grantee is not adverse, and a conveyance then made by the remainder-man will be valid. *Christie v. Gage*, 71 N. Y. 187; *Hanson v. Johnson*, 62 Md. 25; s. c., 50 Am. Rep. 199.

Where such conveyance has been made, one who enters upon the land may hold adversely against the grantee. *Talcott v. Draper*, 61 Ill. 56.

Where one of several remainder-men who was living with the tenant for life

The estate of the life tenant may be acquired adversely, and held during the continuance of the life estate.<sup>1</sup>

But after the life estate falls in, the possession will be adverse as to the reversioner.<sup>2</sup>

**11. Landlord and Tenant.**—When the relation of landlord and tenant has been created, the possession of the tenant is consistent with the title of the landlord, and the mere non-demand and non-payment of rent are not sufficient to bar the landlord's title, whatever effect they may have, if long continued, upon his right to recover the rent; and not only is the tenant precluded from relying on his possession to bar his landlord, but also all persons who come in under or derive possession from the tenant in any manner, however remotely. In such cases, possession is presumed to be in accordance with the title, and this presumption will hold until some notorious and unequivocal act of exclusion shall have occurred.<sup>3</sup>

upon the land, accepted a deed of a portion thereof without warranty and for a nominal consideration, and thereafter occupied, claiming to hold the premises conveyed adversely under the deed, but there was no apparent change of possession or occupation, and no notice of a hostile claim given to the co-tenants, *held*, that the giving and receiving of the deed was not in itself an act hostile to the rights of the co-tenants, but that both the deed and the possession under it were consistent therewith, as the grantor could convey the life estate, so that it gave no notice or intimation of a hostile claim; and that, therefore, there was no adverse possession, such as would defeat an action for partition. *Culver v. Rhodes*, 86 N. Y. 348.

1. *Moore v. Luce*, 29 Pa. St. 260.

2. *Christie v. Gage*, 71 N. Y. 189; *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390; *Hall v. Vandergrift*, 3 Binn. (Pa.) 374; *Cheseldine v. Brewer*, 4 H. & McH. (Md.) 487; *Bradstreet v. Huntington*, 5 Pet. (U. S.) 402; *Henderson v. Griffin*, 5 Pet. (U. S.) 151.

3. *Campbell v. Shipley*, 41 Md. 81, and cases cited; *Whiting v. Edmunds*, 94 N. Y. 309; *Sands v. Hughes*, 53 N. Y. 287; *Cattino v. Decker*, 38 Conn. 362; *Abbey, etc.*, *Assoc. v. Willard*, 48 Cal. 614; *Vanduyne v. Hepner*, 45 Ind. 589; *Dothard v. Denson*, 72 Ala. 541; *Wells v. Sheerer*, 78 Ala. 142.

A tenant cannot by buying in a title adverse to his landlord's relieve himself of the obligations of his tenancy; and if he does so and repudiates the tenancy the landlord can dispossess him. *Morse v. Byam*, 55 Mich. 594.

A tenant cannot by a disclaimer, or by mere words denying his landlord's title

and asserting one of his own, work a forfeiture of his tenancy, or set running an adverse possession. The possession of the tenant and of his grantees and assigns is that of the landlord, and not hostile or adverse, and this is so as to a grantee who has taken a deed of the fee in ignorance of the fact that his grantor stood in the relation of tenant, the latter denying any such relation. The possession of the tenant, thus in subordination to the title of the landlord, continues, not only during the term, but is presumed to remain unchanged until twenty years after the termination thereof and notwithstanding any claim of the tenant or his successors to a hostile title. *Whiting v. Edmunds*, 94 N. Y. 309.

T. being in adverse possession of land, and having the same inclosed, leased it to O. Afterward the land was patented as part of a Mexican grant; and O. (without the knowledge of T.) attorned to M., the grantor of the defendants, and the owner of the land under the patent; M. having no knowledge of O.'s being in possession as tenant for T., and being informed by O., upon inquiry, that he was in possession for himself. Subsequently, and more than five years after the issue of the patent, O. surrendered possession to T., who was shortly afterward ejected by the defendants. In an action to recover the possession by T. (claiming to have acquired the title by an adverse possession for over five years subsequent to the patent), *held*, the possession of O. was sufficient to put all persons upon inquiry as to the capacity in which he held; but M., having made the inquiry without success, was not affected with notice of his relationship to T.

Therefore, after the attornment of O.

To initiate an adverse holding, the tenant must surrender the

to M. (the latter having no notice, either actual or constructive, that the former held otherwise than for himself), the possession of T. through O., his tenant, was not adverse, in a legal sense, to the title of M. and his successors. *Thompson v. Felton*, 54 Cal. 547.

A was the tenant of B, who claimed title. C, who was the legal owner of the tenancy, finding A upon the land, also leased it to him. *Held*, that the continued possession of A did not keep alive B's claim. *Thompson v. Pioche*, 44 Cal. 508. See *Turpin v. Saunders*, 32 Gratt. (Va.) 27.

A superior title is not diverted as to the part not actually occupied by the lessee. *Scott v. Elkins*, 83 N. Car. 424. See *Schuylkill Co. v. McCreary*, 58 Pa. St. 504; *Goodwin v. Sawyer*, 33 Me. 541; *Finley v. Cook*, 54 Barb. (N. Y.) 9.

When a landlord places a tenant on a tract of land claimed by him, and designates by metes and bounds the subdivision of the tract as the portion which the tenant is to occupy, the possession of the tenant, on a question of limitation, can inure to the landlord's benefit only to the extent of the designated metes and bounds set forth in the lease. If the possession be that of one owning an undivided interest in the whole tract, it inures to the benefit of the tenants in common owning the other undivided interests, so long as the tract remains undivided. *Read v. Allen*, 63 Tex. 154.

In 1782, J. E. H. leased to J. H. a lot of ground, now fronting about 160 feet on Howard street in Baltimore city, for ninety-nine years, with the usual covenant of perpetual renewal, reserving a yearly rent, equivalent to about \$43, of the present currency. In 1828, J. E. H.'s executors, under a power in his will, sold and conveyed the reversion in this lot to a person, who, in 1832, conveyed the same to L. S. L. S., in 1832, accepted a surrender from E. L. of his leasehold interest in a part of the lot, about 122 feet of its frontage; and on the same day, by two leases, leased for ninety-nine years, renewable forever, sixty feet of the same to S. and S., and sixty-two feet and six inches of the same to E. L., reserving in each lease a yearly rent of \$300. L. S. never deposed of her reversion in the residue of the lot, consisting of a frontage of about forty-six feet. In 1864, G. M. E. purchased from the then owners of the leasehold interests, their lot, fronting twenty-two feet on Howard street, a part

of the residue of the forty-six feet. The deed by which this interest was conveyed to G. M. E. recited that the grantors acquired their title under an assignment from a person named, in 1857, subject to a yearly rent of \$88, and they assigned to G. M. E., subject to the same rent; and it was assumed that G. M. E. derived his title from J. H., the original lessee of J. E. H., through *mesne* assignments and subleases. To a bill filed by G. M. E. to obtain a decree requiring C. F. M., who held the legal title under L. S.'s will, and the *cestuis qui trust* under that will to convey to G. M. E. the naked fee held by them in the twenty-two feet, or to execute to him a new lease thereof for ninety-nine years, renewable forever, subject to a mere nominal rent, the defendants demurred; the demurrer was sustained and, on G. M. E.'s appeal, it was *held* that the rent reserved under the lease from J. E. H. to J. H. (the reversion of which L. S. acquired in 1832) was a rent service, and not a rent charge, and that it was apportionable; so that by the surrender of the 122 feet from E. L. to L. S., the original rent reserved in the lease of 1782 was not extinguished, but was apportionable to the residue of the forty-six feet, whereof the reversion was owned by L. S. and by those claiming under her will, and that this proportionate part remained fastened upon the forty-six feet. That even if it were admitted that no part of the original rent had ever, in the memory of any one now living, been paid by any owner of the leasehold interest in the lot of twenty-two feet, and that that lot had always been treated as discharged and relieved from the payment of any portion of the original rent, nevertheless, the law upon these facts alone would raise no presumption of some act of the parties in interest relieving the lot of twenty-two feet from payment of any part of the original rent, or its extinguishment *quoad* that lot, and it being conceded that the relation of landlord and tenant once existed between the parties, under the lease of 1782, after the conveyances of 1832. *Ehrman v. Mayer*, 57 Md. 612.

A purchased a house of B, who claimed no title in the land and thenceforth occupied the premises without any payment or claim of rent. *Held*, that A did not take possession as B's tenant. *Furlong v. Garrett*, 44 Wis. 111.

The continuance of possession by holding over after the termination of the lease is not adverse. *Learned v. Tallmadge*,

possession to the landlord, or do something equivalent to that, and bring home to him knowledge of the adverse claim.<sup>1</sup>

26 Barb. (N. Y.) 444. *Day v. Cochran*, 24 Miss. 261.

In an action of ejectment, it appeared that the premises in question were, in 1824, in the possession of a tenant who held under a lease from W., dated in 1823, and running for twenty years. In order to get possession, R. T., who had or claimed a title under a deed from B., employed I. to purchase the lease, which he did with the money of R. T., taking an assignment, however, in his own name. By collusion with I., and without the knowledge of the landlord, R. T. entered into possession, asserting title under the deed from B. The lease, however, was found in his possession, and he made several efforts to buy the W. title. Plaintiff claimed under deeds from the heirs of W. to C., executed in 1858 and 1859. The premises were then in the possession of grantees of G. F. T., who entered under a deed in 1846. It was admitted by defendants that R. T. "and the grantees under him have been in possession . . . and that defendant is now in possession under that (R. T.'s) claim of title." The trial court refused to submit to the jury the question as to the character of R. T.'s entry into possession, and nonsuited plaintiff. *Held* error; that if R. T., when he entered in 1824, became the tenant of W., his possession and that of his grantees remained the possession of his landlord not only until the end of the term, but presumably for twenty years thereafter, *i.e.*, until 1863, and so there was no adverse possession at the time of the conveyance to C., making his deed void for champerty; and that, therefore, the question as to the character of R. T.'s possession should have been submitted to the jury. *Whiting v. Edmunds*, 94 N. Y. 309.

**Tenant cannot interrupt Continuous Possession.**—An admission of title, or payment of rent by a tenant, without knowledge of his landlord, will not break the continuity of the adverse possession. *Haynes v. Boardman*, 119 Mass. 414. *Compare Thompson v. Pioche*, 44 Cal. 508.

**Sub-tenant.**—A sub-tenant cannot hold adversely to the landlord in any manner different from the tenant. *Campbell v. Shipley*, 41 Md. 81; *Tompkins v. Snow*, 63 Barb. (N. Y.) 525.

**Assessment Lease.**—An adverse possession will originate to a sub-tenant under an assessment lease, as the general principles as regards landlord and tenant do

not apply. *Sands v. Hughes*, 53 N. Y. 287.

A tenant may acquire title by purchase at an assessment sale. *Hilton v. Bender*, 4 Thomp. & C. (N. Y.) 270.

**Tenant by Sufferance.**—Where one is in possession of land as a tenant by sufferance, his possession will not be adverse to the landlord. *Creigh v. Henson*, 10 Gratt. (Va.) 231.

Notice to quit will render the possession of a tenant-at-will adverse. *Austin v. Wilson*, 46 Iowa, 362.

1. *Whiting v. Edmunds*, 94 N. Y. 309; *Jackson v. Stiles*, 1 Cow. (N. Y.) 575; *Thayer v. Society of U. B.*, 20 Pa. St. 62; *Boyer v. Smith*, 3 Watts (Pa.), 449; *Towne v. Butterfield*, 97 Mass. 105; *Reed v. Shepley*, 6 Vt. 602; *Holley v. Hawley*, 39 Vt. 534; *Moshier v. Reding*, 12 Me. 478; *Avery v. Baum*, Wright (Ohio), 576; *Tilghman v. Little*, 13 Ill. 241; *Wild v. Serpell*, 10 Gratt. (Va.) 400; *Lunsford v. Turner*, 5 J. J. Marsh (Ky.), 104; *Estes v. Long*, 71 Mo. 605.

A tenant may deny the title of his landlord after the expiration of his lease. *Catlin v. Decker*, 38 Conn. 362.

It must be made plain that the real owner has been given a cause of action, and if the possession commenced in subordination to his right, there should be evidence of distinct renunciation of it before he is put in position to lose anything by not bringing suit. If one goes into possession under him, he is entitled to assume that his rights are continuously admitted until the contrary is brought to his knowledge. *Willison v. Watkins*, 3 Pet. (U. S.) 43; *Farrow v. Edmundson*, 4 B. Mon. (Ky.) 606; *Sherman v. Transportation Co.*, 31 Vt. 162; *Campeau v. Lafferty*, 50 Mich. 114.

Although a party may enter into possession in privity with the true owner, he may, without first surrendering the premises, dis sever such relation, and claim by adverse title. *Creekmur v. Creekmur*, 75 Va. 430.

The hostile claim operates a forfeiture of the lease, at the election of the landlord.

Knowledge of such adverse holding must be brought home to the landlord, or notice of collateral facts from which such knowledge will be inferred. *Wells v. Sheerer*, 78 Ala. 142.

The purchase of a tax title to the land by the tenant renders his possession adverse to the landlord. *Weichselbaum v. Curlett*, 20 Kan. 709.

12. *Trusts*.—Where the trust is express, the possession of the trustee is that of the *cestui que trust*, and adverse possession cannot exist until the trustee has done some open and unequivocal act denying the right of the *cestui que trust*.<sup>1</sup>

1. Norris's App., 71 Pa. St. 106; Janes v. Throckmorton, 57 Cal. 368; Catlino v. Decker, 38 Conn. 362; Whiteside v. Jackson, 1 Wend. (N. Y.) 418; Decouche v. Savetier, 3 Johns. Ch. (N. Y.) 190; s. c., 8 Am. Dec. 478; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 125; s. c., 11 Am. Dec. 417; Weaver v. Leiman, 52 Md. 708; Gordon v. Small, 53 Md. 550; Butler v. Lawson, 72 Mo. 227; Carter v. Feland, 17 Mo. 383; Goodwin v. Goodwin, 69 Mo. 617; McCarthy v. McCarthy, 74 Ala. 516; Williams v. First Pres. Soc., 1 Ohio St. 478; Miller v. Bingham, 1 Ired. Eq. (N. Car.) 423; s. c., 36 Am. Dec. 58; Edwards v. University, 1 D. & B. Eq. (N. Car.) 325; s. c., 30 Am. Dec. 170; Thompson v. Thompson, 1 Jones (N. Car.), 434; Taylor v. Dawson, 3 Jones Eq. (N. Car.) 86; Hamilton v. Taylor, 1 Litt. Sel. Cas. (Ky.) 444; Shelby v. Shelby, Cooke (Tenn.), 179; s. c., 5 Am. Dec. 686; Marr v. Gilliam, 1 Coldw. (Tenn.) 489; McCammon v. Pettit, 3 Sneed (Tenn.), 242; Milner v. Hyland, 77 Ind. 458; Lewis v. Hawkins, 23 Wall. (U. S.) 119; Seymour v. Treer, 8 Wall. (U. S.) 202; Prevost v. Gratz, 6 Wheat. (U. S.) 481.

As between trustee and *cestui que trust*, in the case of an express trust, the statute of limitations does not begin to run until the trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the knowledge of the *cestui que trust*. Perry on Trusts, §§ 863, 864; Janes v. Throckmorton, 57 Cal. 368; Hearst v. Pujol, 44 Cal. 235; Oliver v. Piatt, 3 How. (U. S.) 333; Elmendorf v. Taylor, 10 Wheat. (U. S.) 152; Hill v. Bailey, 8 Mo. App. 85; s. c., 76 Mo. 454; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129; Chick v. Rollins, 44 Me. 104; Roberts v. Littlefield, 48 Me. 61.

An express trust, as distinguished from a trust implied by law, is created by the direct and positive act of a party, manifested by some instrument of writing; and when the legal title to property is conveyed to one person, to be held by him for the benefit of another, an express trust is created, without regard to the particular words or form of the conveyance. 1 Perry on Trusts, § 82; McCarthy v. McCarthy, 74 Ala. 546; Cresswell v. Jones, 68 Ala. 420.

Where a trustee purchases property with trust funds, though in his own name, his possession will be deemed the possession of the beneficiaries until he does some unequivocal act denying their right. Butler v. Lawson, 72 Mo. 227.

Where a wife furnishes money to her husband with which to purchase land for her, and he makes the purchase, but takes the title in his own name without the knowledge or consent of his wife, he becomes a trustee for her, and the statute of limitations does not commence to run against her until her husband disavows his trust. Milner v. Hyland, 77 Ind. 458.

R. conveyed land to the defendant, who, at the same time, covenanted in writing that he would sell enough of the land to pay off the incumbrances thereon, and account with S. and M.—children of R.—for one fifth of the moneys remaining on hand from sales of the land, after paying the incumbrances; and also that he would sell all the lands within three years, or at his option convey to S. and M. one fifth of all the lands remaining on hand after paying the said debts and expenses. Afterwards, a mortgage upon a portion of the land having been foreclosed, and the land sold and conveyed by the sheriff, the defendant obtained a conveyance from the purchaser. The interests and rights of S. and M. under the covenant having afterwards become vested, by proper mesne conveyances, in J., were after his death sold by his administrator, under an order of the probate court, as personal property. Held, in an action by the heirs of J., that the defendant took the land in trust for S. and M. to the extent of the rights reserved to them in the covenant; and to that extent they had an equitable interest in the land; that the deed and covenant did not work an equitable conversion of the land into personal property; and that the sale of this interest by the administrator as personal property was therefore void; that the title obtained by the defendant from the purchaser at the foreclosure sale inured to the benefit of his *cestuis que trust* to the extent of their rights under the covenant; that the action was properly brought by the heirs of J.; and that, in view of the fact that the record failed to show any notice of the *cestuis que trust* of an adverse holding by the trustee, the defence

But this principle does not apply to cases of constructive trusts, where, by the wrongful act of one party, the other may charge him in equity as his trustee. The rule in respect to this class of trusts is, that if one, knowing he could avail himself of the benefit of such trust, lies by for the statutory period, his claim will thereby be barred. But the statute will not run against one innocently ignorant of his rights, nor against one incompetent to enforce them,<sup>1</sup>

of the statute of limitations could not be maintained. *Janes v. Throckmorton*, 57 Cal. 368.

A deed to a tract of land granted in 1765 to the town of N. declared that the premises were conveyed to the inhabitants of said town "for a parsonage and the use and support of ministers of the gospel." Since 1800 the town had used the premises otherwise, and applied the income and profits therefrom to municipal purposes. *Held*, that there had been such a distinct repudiation and disavowal of the trust, and such an adverse holding of the premises, without application to have trust executed as to make a complete legal and equitable title in the town. *Congregational Soc. v. Pewington*, 53 N. H. 595.

At the trial of a writ of entry, dated in 1883, it appeared that the demanded premises were conveyed by A., in 1829, to the ancestor of the demandant; that in 1837 A. conveyed the same premises to the inhabitants of a school district. "their successors and assigns forever," by a deed which contained, after a description of the premises, the words, "said lot of land to be used, occupied, and improved by said inhabitants as a school-house lot, and for no other purpose;" that from 1837 to 1882 the school district had the exclusive use of the premises for school purposes, and had taken exclusive care of it; and that in 1882 the school district conveyed the premises to the tenant, the school-house was removed, and the premises ceased to be used for school purposes. *Held*, that the demandant's ancestor was disseised in 1837; that the deed to the school district was in form a deed in fee; and that the statute of limitations was a bar to the action. *Barker v. Barrows*, 138 Mass. 578; s. c., 9 Am. & Eng. Corp. Cas. 208.

An administrator of an estate, having no power or control over the land of his intestate, and not being required to pay the taxes thereon, may rightfully become the purchaser of the same, as against the heirs, at a sale for the taxes thereon, and set up his deed as color of title. *Stark v. Brown*, 101 Ill. 395.

A trustee cannot retain possession of

lands held by him in trust after repudiating his trust, and claim adversely, until his claim ripens into a title under the statute of limitations. *Schlessinger v. Mallard*, 11 Pac. Rep. (Cal.) 728.

**Secret Trust.**—Where a party in 1868 took a conveyance of land in his own name for the purpose of defeating a creditor of the grantor, and with a secret trust for the use of the grantor, and afterwards died intestate, action to vacate this deed instituted in 1882, by a subsequent creditor, who had obtained his judgment in 1880, and who alleged and proved his ignorance of the fraud until within six years preceding the commencement of this action, was not barred by the statute of limitations. And the defendants having gone into possession, claiming the land as heirs of their ancestor, they were bound by the secret trust attached to their ancestor's deed, and could not now assert a claim to have held by adverse possession. *McSween v. McCown*, 23 S. Car. 342.

Where a debtor executed a deed to lands for the purpose of placing the title beyond the reach of his creditors, and of creating a secret trust for his own benefit, he continuing in fact the real owner, and enjoying the use, products, and profits of the estate, and the grantee never having been in possession of, and never having exercised or claimed any dominion or ownership over, the lands conveyed, the grantee is not, under such deed, clothed with any ownership or asserted right which will uphold a claim of adverse possession against a creditor of the grantor seeking to subject the lands conveyed by the deed to the payment of his debt. *Jones v. Wilson*, 69 Ala. 400. See *Elwell v. Hinckley*, 138 Mass. 225. Compare *Estes v. Long*, 71 Mo. 605.

1. 2 Washb. Real Prop. (4th Ed.) 493; *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 120; s. c., 11 Am. Dec. 417; *Phalen v. Clark*, 19 Conn. 421; *Weaver v. Leiman*, 52 Md. 708; *Kennedy v. Kennedy*, 25 Kan. 151; *Peters v. Jones*, 35 Iowa, 512; *Murdock v. Hughes*, 7 S. & M. (Miss.) 219; *Clark v. Snodgrass*, 66 Ala. 233; *Starke v. Starke*, 3 Rich. (S. Car.)

like an infant; and the same principle applies in the case of resulting trusts.<sup>1</sup>

The rule that the statute of limitations does not bar a trust estate holds only between *cestui que trust* and the trustee, not as between *cestui que trust* and the trustee on the one side, and strangers on the other. Therefore, where the *cestui que trust* and

438; *Boone v. Chiles*, 10 Pet. (U. S.) 177, 223; *Willison v. Watkins*, 3 Pet. (U. S.) 43; *Sherwood v. Sutton*, 5 Mason (U. S.), 1.

In case of a constructive trust, the statute will commence to run from the period at which the *cestui que trust* could have indicated his right by action or otherwise.

But the trustee must bring himself clearly within the position of a continued and consistent adverse claimant, and the *cestui que trust* must have no reasonable excuse for failing to prosecute his claim within the proper time. *McKin v. Williams*, 48 Tex. 89; *Grumbles v. Grumbles*, 17 Tex. 472; *Hunter v. Hubbard*, 26 Tex. 537; *Anderson v. Stewart*, 15 Tex. 285; *Carlisle v. Hart*, 27 Tex. 350; *Cole v. Noble*, 63 Tex. 432.

Where a party conveys land as a security for a loan, and after his death his widow pays the debt and takes a deed for the land to herself, she will hold the title as a trustee for the heirs of her husband. The owner of land conveyed the same to secure a loan of money, and after his death his widow paid the debt and took a conveyance to herself; and inventoried the land as that of her husband, and she and the only heir occupied the same as a homestead, she having a dower and homestead right in the premises. It was held that the widow's possession was not adverse as against the heir, and that laches is not imputable in such a case. *Hunter v. Dennis*, 112 Ill. 568.

Two persons purchased a tract of land, each to have a certain portion thereof, and one of them took a deed for all, giving back a mortgage to the vendor to secure the price, which mortgage was afterward discharged by the money of both the purchasers, so that a resulting trust was created against the one taking the deed. The other took possession of his part, and made lasting and valuable improvements on the same, and continued in the undisputed possession for more than twenty years, during which time he paid his share of the taxes, and for some years leased his part to his co-purchaser, in whose name the title rested, who paid rent. It was

held, on bill filed by the one so occupying his land to compel the other to convey to him, that the statute of limitations was no bar to the equitable relief sought. *McNamara et al. v. Garrity*, 106 Ill. 384.

There was a sale of land by bond for title in 1853. In 1855 the vendee sold and conveyed to a stranger, who entered and held possession until his death, in 1866, and after his death his widow and children continued to occupy the premises. In 1871, a bill was filed to enforce the vendor's lien for the purchase money due upon the sale in 1853. The defence was seven years' possession under the statute. The court held that the vendee, or a purchaser from him, stood in the relation of a trustee to the vendor for the unpaid purchase money, against whom the statute does not run. *Lewis v. Hawkins*, 23 Wall. (U. S.) 119; *Swartwout v. Burr*, 1 Barb. (N. Y.) 499; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 402. See EXECUTORY CONTRACT, *ante*, p. 229.

In an action to enforce a trust, it appeared from the findings of fact, supported by sufficient evidence, that the defendant from 1866 to 1869, inclusive, took conveyances of real estate in his own name, without the consent of the parties whose money paid the consideration. As the action was not commenced till 1876, and no exceptions shown to take the case out of the statute, the court correctly found, as a conclusion of law, that the plaintiff's cause of action was barred by the statute of limitations. *Main v. Payne*, 17 Kan. 608; *Kennedy v. Kennedy*, 25 Kan. 151.

1. *Strimpfler v. Roberts*, 18 Pa. St. 283; s. c., 57 Am. Dec. 606; *Cummings v. Stovall*, 6 Lea (Tenn.), 679; *Brawner v. Staup*, 21 Md. 337.

Where children had a resulting trust in land bought by their father with their mothers' money, *held*, that the statute did not begin to run until their father's death. *Groves v. Groves*, 57 Miss. 658.

The widow of a decedent entered into a contract in writing with the heirs, by which, in consideration of the surrender by her of her year's support, exempt property and dower, the heirs agreed to convey to her one third in value of the lands of the estate, and a specific allot-



his trustee are both out of possession for the time limited, the party in possession has a good bar against them both.<sup>1</sup>

*Adverse Holding by Purchaser from Trustee.*—A purchaser of lands at a sale made by a trustee under a deed of trust, taking possession of his purchase, becomes an adverse holder as against persons who claim an equity in the lands under a prior verbal contract with the grantor who executed the deed of trust, although the purchaser had notice thereof.<sup>2</sup>

13. *Agent.*—When a person enters into the possession of land as the agent of another, his possession, or that of others claiming under him, cannot become adverse to his principal, until there has been an open disclaimer of the title under which he entered, and the assertion of a hostile title, brought home to his principal, or to those claiming under him.<sup>3</sup>

ment of land was afterwards made to her by parol, of which she took possession, and then married, had a child, and died; the heirs in the mean time, pending the coverture, conveyed the land to the husband, who held under the deed, and, after the death of the wife, sold and conveyed the land to a third person for value, who continued in possession for over ten years, when the heirs of the wife filed this bill for a specific execution of the original contract and for a recovery of the land. *Held*, that the right of action was barred by the statute of limitations. *Cummings v. Stovall*, 6 Lea (Tenn.), 679.

1. *Herndon v. Pratt*, 6 Jones Eq. (N. Car.) 327; *Fleming v. Gilmer*, 35 Ala. 62; *Bryan v. Weems*, 29 Ala. 423; *Mason v. Mason*, 33 Ga. 345; *Worthy v. Johnson*, 10 Ga. 358; *Smilie v. Biffie*, 2 Pa. St. 52; *Crook v. Glenn*, 30 Md. 55; *Long v. Cason*, 4 Rich. (S. Car.) 60; *Pledger v. Easterling*, 4 Rich. (S. Car.) 101; *Henson v. Kinard*, 3 Strob. Eq. (S. Car.) 371; *Watkins v. Specht*, 7 Coldw. (Tenn.) 585; *Williams v. Otey*, 8 Humph. (Tenn.) 563; s. c., 47 Am. Dec. 632; *Coleman v. Walker*, 3 Metc. (Ky.) 65; s. c., 77 Am. Dec. 164; *Wooldridge v. Planters' Bank*, 1 Sneed (Tenn.), 297; *Meeks v. Vassault*, 3 Sawy. (U.S.) 206; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152.

In 1852 L. conveyed certain leasehold property to S., and in 1854 applied for the benefit of the insolvent laws, returning in his schedule no property. S. was appointed his trustee, and he obtained his final discharge in due course in 1854. After this, in 1857, S. re-conveyed the property to L. by a deed which was withheld from record until June, 1860. In March, 1860, before this deed was recorded, S. sold and conveyed the property to W., who thereupon entered into possession, and, as is alleged, re-

ceived the rents and profits thereof, until 1868. In 1861, more than a year after the conveyance to W., L., for the consideration of one dime, conveyed all his estate in the property to his son, the present complainant, who was then an infant, under the age of twenty-one years.

*Held*, where there is a trustee competent to sue and protect the trust estate, limitations run in favor of a stranger to the trust, notwithstanding the *cestui que trust* may be an infant. A party intruding upon an infant's estate becomes constructively his guardian or trustee, but against such a trust limitations run; and to avoid the bar, the bill for account must be filed within three years after the infant arrives at age. *Weaver v. Leiman*, 52 Md. 708. See *Wooldridge v. Planters' Bank*, 1 Sneed (Tenn.), 297; *Williams v. Otey*, 8 Humph. (Tenn.) 563; s. c., 47 Am. Dec. 632; *Goss v. Singleton*, 2 Head (Tenn.), 67; *Parker v. Hall*, 2 Head (Tenn.), 641; *Pendergast v. Foley*, 8 Ga. 1; *Worthy v. Johnson*, 10 Ga. 358; *Long v. Cason*, 4 Rich. Eq. (S. Car.) 60; *Molton v. Henderson*, 2 Ala. 426.

If a trustee estops himself from suing by a sale of the property, thus uniting with the purchaser in a breach of trust, the wrong is to the beneficiaries, not to him. He cannot sue; and the beneficiaries, if under disability, are not affected by the statute. *Parker v. Hall*, 2 Head (Tenn.), 641.

2. *Clark v. Snodgrass*, 66 Ala. 233.

3. *Baucum v. George*, 65 Ala. 259; *Fountain Coal Co. v. Phelps*, 95 Ind. 271; *Whiting v. Taylor*, 8 Dana (Ky.), 403.

The acts of an agent constituting a disseisin will work to the benefit of his principal. *Atkinson v. Patterson*, 46 Vt. 750.

A, entitled as tenant in tail to an estate,

**14. Mortgagor and Mortgagee.**—Possession of the mortgagor, or his privies, including his grantees with notice, will not be adverse, nor bar an action by the mortgagee for foreclosure, or for possession of the land, unless there has been an open and explicit disavowal and disclaimer of holding under the mortgagee's title, and assertion of title in the holder brought home to the mortgagee. The mere taking possession by the vendee of the mortgagor, and continued occupancy by him and his vendees for the period of the statutory bar; their open control and improvement of the land, and payment of taxes thereon as their own absolute property, with the intention of holding it against all comers, will not bar the action.<sup>1</sup>

held the same as an agent for B for twenty years. *Held*, that B had acquired title by adverse possession. *Williams v. Pott*, L. R. 12 Eq. 149.

A deed signed by one as "agent" will not constitute color of title. *Simmons v. Lane*, 25 Ga. 178.

**Fraud.**—A, acting as assumed agent for B, made a deed in his own name, with no mention of the principal. *Held*, that the deed was not color of title. *Payne v. Blackshear*, 52 Ga. 637.

**Attorney and Client.**—Where an attorney makes a purchase of land through an agent, from his client, which land is the subject-matter of the attorneyship, and at the time of the conveyance the attorney does not use his influence over his client to his prejudice, and the agent acts *bona fide*, and the client is paid a full and fair price for the land, and upon the execution of the conveyance delivers possession thereof to the grantee, who thereupon transfers the deed and premises to the attorney, and thereafter the attorney compromises and settles an outstanding title to the land, and in the written compromise signs his own name and the name of his former client thereto, under a power of attorney which he had received from his client prior to his own purchase of the premises, and at said time informs the holder of the outstanding title that his client has parted with all of his title, and that he, the attorney, is the owner thereof, and thereafter the land is in the possession of the attorney, his tenants and grantees for more than fifteen years, during which time the attorney, his tenants, grantees, and heirs have paid the taxes thereon, and made lasting and valuable improvements costing many thousands of dollars, and the client during all the fifteen years makes no claim to the premises, or to any part of the proceeds arising therefrom, and charges no fraud or trust upon his attorney, and thereafter

sells and conveys all his right and interest to the premises to a subsequent grantee, and the court below finds substantially that the attorney was acting for himself in obtaining the conveyance, and in making the compromise of the outstanding title, and during all the time subsequent thereto was claiming ownership to the land in his own interest, and as adverse to the original owner, and not as his trustee, *held*, that these facts are sufficient to sustain the findings; and the statute of limitations fully protects the defendants who have been in possession of the premises by themselves or through their grantors for more than fifteen years prior to the commencement of the suit to recover the same. *Yeamans v. James*, 27 Kan. 195.

1. *Ringo v. Woodruff*, 43 Ark. 469; *Lewis v. Hawkins*, 23 Wall (U. S.) 110; *Butler v. Douglass*, 1 McCrary (U. S.), 630; *Higginson v. Mein*, 4 Cranch (U. S.), 414; *Hughes v. Edwards*, 9 Wheat. (U. S.) 490; *Whittington v. Flint*, 43 Ark. 504; s. c., 51 Am. Rep. 572; *Elsberry v. Boykin*, 65 Ala. 336; *Hodgdon v. Heidman*, 66 Iowa, 645; *Crawford v. Taylor*, 42 Iowa, 260; *Green v. Turner*, 38 Iowa, 112; *Gower v. Winchester*, 33 Iowa, 302; *Jamison v. Perry*, 38 Iowa, 14; *Maxwell v. Hartman*, 50 Wis. 660; *Crook v. Glenn*, 30 Md. 55; *Koons v. Steele*, 19 Pa. St. 203; *Parker v. Banks*, 79 N. Car. 480; *Jones v. Williams*, 5 A. & E. 291; *Palmer v. Eyre*, 17 A. & E. N. S. 366; *Pugh v. Heath*, L. R. 7 App. Cas. 235; s. c., 35 Eng. Rep. (Moaks' Ed.) 172.

**Mortgage.**—A mortgage of land in the actual adverse possession of one claiming to hold adversely to the mortgagor, is void as to the claimant; thus, in an action of ejectment between a mortgagee and such claimant, the court instructed the jury that if the defendant's possession was "actual, visible, open, notorious, and hostile, under a claim of ownership," the mortgage was void as to him.

Where the mortgagee obtains possession of the premises, after condition broken, and no payment has been made on account of

*Held*, correct. *Canfield v. Hard*, 58 Vt. 217.

**When it Becomes Adverse.**—To convert the possession into an adverse holding, there must be a renunciation or disclaimer of the mortgagee's right, and such renunciation or disclaimer must be traced to his knowledge. *State v. Conner*, 69 Ala. 212. See *Jamison v. Percy*, 38 Iowa, 14; *Haskell v. Bailey*, 22 Conn. 573.

Twenty years' possession of the premises by a mortgagee under his mortgage, pursuant to the statute, bars the mortgagor's equity of redemption, and the extinguishment of the mortgagor's equity effected by this statute, unlike the extinguishment effected by mere judicial action, is not subject to be waived by an incautious admission of the mortgagee. *Chapin v. Wright*, 5 Atl. Repr. (N. J.) 574.

To constitute adverse possession against a mortgagee it is not sufficient that the mortgagor or those holding under him, occupy, use, improve, and pay taxes on the premises, as their own absolute property, but the possession must be in open denial of the mortgagee's title, and accompanied with such acts or declarations of the holders as are sufficient to put the mortgagee on notice that they claim and hold in hostility to his rights, and adversely to him. Until then the possession is consistent with his rights and not adverse, and the statute does not begin to run. *Ringo v. Woodruff*, 43 Ark. 469.

A condition broken will render the possession adverse. *Green v. Mizule*, 54 Miss. 220.

**After Foreclosure Sale.**—Where a mortgagor or his grantee remains in possession after the title to an undivided interest therein has passed by a foreclosure sale to a purchaser thereof, his possession is presumed amicable and in subordination to the title of the purchaser until the contrary appears. The parties so jointly owning the land become tenants in common, the possession of one being deemed the possession of both; and the statute of limitations does not begin to run against such purchaser until an ouster or the assertion of some hostile claim by the tenant in possession, denoting an intention to hold adversely to his cotenant. *Lowry v. Tillyen*, 31 Minn. 500.

The relation which a purchaser, upon a valid foreclosure sale, sustains to a mortgagor or his grantee remaining in

possession is, that the possession is in accordance with, and in subordination to, the title of such purchaser, and is under him with his acquiescence, unless the contrary appear, or until an intention to claim the premises adversely is made manifest. *Avery v. Judd*, 21 Wis. 262; *Seeley v. Manning*, 37 Wis. 574; *Maxwell v. Hartmann*, 50 Wis. 660; *Cook v. Travis*, 20 N. Y. 400; *Lowry v. Tillyen*, 31 Minn. 500.

Where there has been a foreclosure, and a deed acquired by the mortgagee, though the proceedings were void, yet the deed will give color of title. *Mason v. Ayers*, 73 Ill. 121.

Twenty years' possession under a mortgage is presumptive evidence of foreclosure. *Randall v. Bradley*, 65 Me. 43.

Possession by the mortgagee after foreclosure, but no order of sale issued pursuant to an arrangement with the mortgagor by which the mortgagee was to apply the rents to a satisfaction of the mortgage, is not adverse. *Frink v. Le Roy*, 49 Cal. 317. See *Knowlton v. Walker*, 13 Wis. 264.

In 1866 L. mortgaged a tract of land to R. In August, 1869, R., without having foreclosed his mortgage, conveyed the land to L.'s wife. L. died in 1874, and in May, 1879, Mrs. L. borrowed money from T., and, to secure the repayment thereof, gave a deed of trust upon this land. In the "fall of 1879" she died. Default was made in the payment of the debt and the land was sold under the deed of trust and bought by T. In February, 1880, T. brought an action of ejectment against the children of Mrs. L., to recover the land, they having received possession from their mother, who had been in possession of the same jointly with her husband up to the time of his death, and had sole possession thereof afterwards during her lifetime. The defendants resisted the suit on the ground that Mrs. L., being only the assignee of R.'s mortgage, T. could not acquire the legal title through her. *Held*, that as Mrs. L. was in possession of the land more than ten years between the execution of R.'s deed and her death, she acquired a title by limitation, as a mortgagee in possession after condition broken. The joint possession of herself and husband, after the execution of R.'s deed and before L.'s death, must be referred to her who had the paper title, rather than to him who had, in form at

principal or interest, he will acquire a title by adverse possession.<sup>1</sup>

**15. *Pendente Lite Purchaser.***—The statute of limitations does not run in favor of a *pendente lite* purchaser. Such purchaser in possession of land so purchased will not be regarded as holding it adverse to the parties to the suit during the litigation.<sup>2</sup>

**16. *Vendor and Vendee.***—Where the purchaser is in possession under a complete legal title, such as a deed purporting to convey the land, he will be considered as holding adversely to all the world, including his vendor, from whom his title and possession are derived. The entry or the holding in such case imparts no recognition of a subsisting title in another, by whose permission and in subordination to whose continuing title the purchaser entered or holds.<sup>3</sup>

A grantee who has entered under a conveyance from his grantor may lose his title by an adverse possession of such grantor, and the grantor may thus claim to hold adversely to the grantee.<sup>4</sup>

least, conveyed it away. *Little v. Teague*, 60 Miss. 115.

1. *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; *Slee v. Manhattan Co.*, 1 Paige (N. Y.), 48; *Howland v. Shurtleff*, 2 Metc. (Mass.) 26; *Phillips v. Sinclair*, 20 Me. 269; *Robinson v. Fife*, 3 Ohio St. 551; *Hoffman v. Harrington*, 33 Mich. 392; *Knowlton v. Walker*, 13 Wis. 264; *Crawford v. Taylor*, 42 Iowa, 260; *Montgomery v. Chadwick*, 7 Iowa, 114; *Hall v. Denckla*, 28 Ark. 506; *Gunn v. Brantley*, 21 Ala. 633; *Slicer v. Bank*, 16 How. (U. S.) 571.

2. Land is sold at a judicial sale, the sale confirmed and a conveyance made to the purchaser and he takes possession, the litigation continues, and after the purchaser has been in the actual possession of the land under such conveyance for more than ten years, the decrees ordering and confirming the sale are reversed and declared void, and the sale set aside for the want of jurisdiction in the court to order the sale; during all this time the taxes on the land are paid by the purchaser, and the same is not charged for taxes to the owner and he pays no taxes on it. *Held*, the possession of such purchaser under such void sale is not adverse to the owner. The payment of the taxes by such purchaser inures to the benefit of the owner, and the State can have no claim against the owner for taxes on the land, and his title cannot become forfeited for not also paying taxes on the land. *Lynch v. Andrews*, 25 W. Va. 751.

3. *Society, etc., v. Clarke*, 4 Pet. (U. S.) 480; *Bradstreet v. Huntington*, 5 Pet. (U. S.) 402; *Core v. Faupel*, 24 W. Va. 238.

4. *Sherman v. Kane*, 86 N. Y. 57; *Cramer v. Benton*, 4 Lans. (N. Y.) 291; *Traip v. Traip*, 57 Me. 268; *Tilton v. Emery*, 17 N. H. 536; *Stearns v. Hendersass*, 9 Cush. (Mass.) 497; s. c. 57 Am. Dec. 65; *Burkman v. Jones*, 44 Wis. 498; *Dorlan v. Magilton*, 47 Cal. 485; *Garabaldi v. Shattuck*, 11 Pac. Repr. (Cal.) 778; *Smith v. Montes*, 11 Tex. 24.

When there is a disclaimer by the grantor of the title of the grantee subsequent to the delivery of the grant, an adverse possession may be acquired and it is not necessary that such possession should be hostile in its inception. *Jackson v. Brink*, 5 Cow. (N. Y.) 483; *Milard v. McMullin*, 468 N. Y. 345; *Sherman v. Kane*, 86 N. Y. 57; *Butler v. Phelps*, 17 Wend. (N. Y.) 642; *Stiles v. Jackson*, 1 Wend. (N. Y.) 103; *Catline v. Decker*, 38 Conn. 262; *Hoyt v. Jones*, 31 Wis. 389; *Burkman v. Jones*, 44 Wis. 498; *Chalfin v. Malone*, 9 B. Mon. (Ky.) 596.

The mere continued possession of the vendor of lands is not adverse to his vendee. *Ronan v. Meyer*, 84 Ind. 390; *Jeffersonville, etc., R. Co. v. Oyler*, 82 Ind. 394; *Record v. Kelcham*, 76 Ind. 482; *Jackson v. Burton*, 1 Wend. (N. Y.) 341; *Marston v. Butler*, 3 Wend. (N. Y.) 149; *Beach v. Catlin*, 4 Day (Conn.), 284; s. c., 4 Am. Dec. 221; *Olwine v. Holman*, 23 Pa. St. 279; *Higginson v. Mein*, 4 Cranch, 415; *Harris v. King*, 16 Ark. 122. Compare *Burkman v. Jones*, 44 Wis. 498, *Furlong v. Garrett*, 44 Wis. 111.

In *Burbans v. Van Zandt*, 7 Barb. (N. Y.) 91, the court said: "By the execution and delivery of a deed of land the entire legal interest in the premises becomes vested in the grantee, and if the grantor continues in possession after-

17. *Boundaries and Fences*.—If one by mistake inclose the land of another and claim it as his own, his actual possession will work a disseisin;<sup>1</sup> but if, ignorant of the boundary line, he makes a mis-

wards, his possession is not that of owner, but of a tenant of the grantee. He will be regarded as holding the premises in subserviency to his grantee, and nothing short of an explicit disclaimer of such relation, and a notorious assertion of right in himself, will be sufficient to change the character of his possession and render it adverse to the grantee. But from the time the grantor explicitly disclaims holding under the grantee, and openly asserts his title to the premises, in hostility to the title claimed under his own previous deed, his possession becomes adverse, even though he knew his title to be bad, and from that moment the statute of limitations will begin to run." See *Hoyt v. Jones*, 31 Wis. R. 389; *Butler v. Phelps*, 17 Wend. (N. Y.) 642; *Stiles v. Jackson*, 1 Wend. (N. Y.) 103; *Cramer v. Benton*, 4 Lans. (N. Y.) 291; *Chalfin v. Malone*, 9 B. Mon. (Ky.) 596; *Creekmur v. Creekmur*, 75 Va. 430.

A grantor with warranty may, subsequent to the delivery of his grant, originate an adverse possession, and is not estopped from asserting the same by the covenant of warranty. *Sherman v. Kane*, 86 N. Y. 57.

Where possession is originally taken and held under the true owner, a clear, positive, and continued disclaimer and disavowal of that title, and the assertion of an adverse one, must be brought home to the true owner before any foundation can be laid for the operation of the statute of limitations. *Creekmur v. Creekmur*, 75 Va. 430.

When a person who has conveyed property by a warranty deed subsequently acquires an interest in the same property by a tax title, and conveys his subsequently-acquired title in a portion of the property to third parties, who reside thereon for more than ten years, their title cannot be attacked. *Reilly v. Blasher*, 28 N. W. Repr. (Mich.) 151.

The owner of land, while in its occupancy as a homestead, conveyed the same in fee, reserving in the deed, however, his homestead right. It was held, the continued possession of the premises by the grantor, after his conveyance, was not adverse to his grantee, because such possession was consistent with the deed. *Stevens v. Wait*, 112 Ill. 544.

A cloud upon title cannot be created by the owner of the title and exist by his grant. And rights that may accrue to

him from the grantor's continued occupancy after deeding the property are not to be enforced in equity if the bill does not aver such possession as by lapse of time or otherwise would legally extinguish defendant's claim. *Bresler v. Pitts*, 58 Mich. 347.

1. *Grim v. Murphy*, 110 Ill. 271; *Schneider v. Botsh*, 90 Ill. 577; *Brown v. Anderson*, 90 Ind. 94; *Bunce v. Bidwell*, 43 Mich. 542; *Sherman v. Kane*, 86 N. Y. 57; *Crary v. Goodman*, 22 N. Y. 170; *Swettenham v. Leary*, 18 Hun (N. Y.), 284; *Seymour v. Carli*, 31 Minn. 81; *Burdick v. Heivly*, 23 Iowa, 511; *Tracy v. Newton*, 55 Iowa, 210; *Meyer v. Weigman*, 45 Iowa, 579; *Hunter v. Chrisman*, 6 B. Mon. (Ky.) 463; *Soule v. Barlow*, 49 Vt. 329; *Burnell v. Malony*, 39 Vt. 579; *Enfield v. Day*, 7 N. H. 457; *Abbott v. Abbott*, 51 Me. 584; *Hitchings v. Morrison*, 72 Me. 331; *Ricker v. Hibbard*, 73 Me. 105; *Alexander v. Wheeler*, 69 Ala. 332; *Cole v. Parker*, 70 Mo. 372; *Walbrunn v. Ballen*, 68 Mo. 164; *Hamilton v. West*, 63 Mo. 93; *Tam v. Kellogg*, 49 Mo. 118; *Houx v. Batteen*, 68 Mo. 84; *Chance v. Branch*, 58 Tex. 490; *Pouthmand v. McLaughlin*, 24 N. J. Eq. 181; *Mode v. Long*, 64 N. Car. 433.

Where defendant showed privity of estate between him and a long line of grantors to lot No. 17 in a ward of a city, and buildings thereon obtruding some feet over on lot 18 adjoining 17, continuity of possession for more than twenty years may be proven by parol between him and his grantors—his predecessors in the actual possession of the building thus extending over part of 18. Actual possession of such strip of 18 for twenty years by the said buildings extending thereon without written title thereto, is good prescriptive title against all the world, except the State and persons not *sui juris*, unless such possession originated in fraud; and honest mistake of the true line is not fraud. The fact that the buildings stood so long over what may now be claimed to be the true line is a conclusive presumption that the plaintiff's claim is not good, but that the old buildings mark the true line; especially against a purchaser who bought after twenty years' occupancy, and one of whose grantors had knowledge of the buildings years before. *Shiels v. Roberts*, 64 Ga. 370.

A leased two adjoining lots owned sep-

take in laying his fence, making no claim, however, to the land to the fence, but only to the true line as it may be subsequently ascertained, his possession is not adverse.<sup>1</sup> If two adjacent owners agree upon and establish a dividing line between their premises, and actually claim and occupy the land on each side of that line for the statutory period, such possession will be adverse and will confer a title by prescription.<sup>2</sup>

arately by B and C. A built a dividing fence, but not on the true division line. He afterwards purchased the lot of B. *Held*, that he could hold adversely the portion of C's lot enclosed with the fence. *Betts v. Brown*, 3 Mo. App. 20. See *McNamara v. Seaton*, 82 Ill. 498.

To constitute an adverse possession as against the true owner, where a party under a mistake as to the boundaries of his deed claims land not embraced therein, there must be an actual possession and improvement of the land which lies outside of his boundaries. *Simpson v. Cresswell*, 18 Fla. 29.

J., owning a lot of land on the south side of G street, with a frontage of one hundred and twenty-six feet, conveyed a piece thereof with a frontage of sixty feet to the defendant, the latter supposing that by the terms of his deed his lot extended to a certain fence which would give him a frontage of sixty-six feet. Soon after the delivery of his deed, the defendant entered, occupied, and cultivated the lot to the fence for more than twenty consecutive years. *Held*, that if the defendant claimed title to the fence during his entire occupation, his title ripened into an absolute title by disseisin, although he was mistaken as to the true bound. *Hitchins v. Morrison*, 72 Me. 331.

1. *Huckshorn v. Hartwig*, 81 Mo. 648; *Walbrunn v. Ballen*, 68 Mo. 164; *Cole v. Parker*, 70 Mo. 372; *Acton v. Dooley*, 74 Mo. 63; *Houx v. Batteen*, 68 Mo. 84; *Hamilton v. West*, 63 Mo. 93; *St. Louis University v. McCune*, 28 Mo. 481; *Tam v. Kellogg*, 49 Mo. 118; *Shinner v. Crawford*, 54 Iowa, 119; *Grube v. Wells*, 34 Iowa, 148; *Grim v. Murphy*, 110 Ill. 271; *Irvin v. Adler*, 44 Cal. 559; *Brown v. Cockerill*, 33 Ala. 38; *Alexander v. Wheeler*, 69 Ala. 332; s. c., 78 Ala. 167; *Howard v. Reedy*, 29 Ga. 152; *Reley v. Griffin*, 16 Ga. 141; s. c., 60 Am. Dec. 726; *Hitchings v. Morrison*, 72 Me. 331; *Abbott v. Abbott*, 51 Me. 584; *Worcester v. Lord*, 56 Me. 265; *Dow v. McKenney*, 64 Me. 138; *Bicker v. Hibbard*, 73 Me. 105; *Lincoln v. Edgcomb*, 31 Me. 345; *Comegys v. Carley*, 3 Watts (Pa.), 280; *Enfield v. Day*, 7 N. H. 457; *Robinson v. Kinne*, 70 N. Y. 147.

Where the owner of a city lot undertakes to erect a building upon his own ground, but, by inadvertence and ignorance of the true line of his lot, places a portion of the wall four inches over the dividing line and upon the adjoining lot, but with no intention then or afterwards to claim any portion of such adjoining lot as his own, and the adjoining lot-owner had no knowledge of such encroachment, the possession thus taken will not be adverse. *Winn v. Abeles*, 10 Pac. Repr. (Kans.) 443.

There must be an entry. Thus, where there was a stone wall separating the lands of adjoining owners, A and B, the fence being upon the land of A, B held possession of his land up to the wall, and believed the centre of the wall to be the dividing line, but with no knowledge of a similar claim on the part of A, and no other possession of the ground covered by the wall, *held*, that there was not sufficient adverse possession to vest in B a title to the centre of the wall. *Huntington v. Whaley*, 29 Conn. 391.

If A and B, adjoining owners, by mistake agree upon a line, with no intent to claim beyond the true line, they will not hold adversely to each other. *Houx v. Batteen*, 68 Mo. 84; *Devyn v. Schaefer*, 54 N. Y. 446; *Irvine v. Adler*, 43 Cal. 550; *White v. Hopeman*, 43 Mich. 267; s. c., 38 Am. Rep. 178.

2. *Brown v. Leete*, 6 Sawy. (U. S.) 332; *Sherman v. Kane*, 87 N. Y. 57; *Robinson v. Phillips*, 1 T. H. (N. Y.) 151, 56 N. Y. 634; *Donahue v. Thompson*, 60 Wis. 500; *Tobey v. Secor*, 60 Wis. 310; *Bader v. Zeise*, 44 Wis. 96; *Barlett v. Secor*, 56 Wis. 520; *Tracy v. Newton*, 57 Iowa, 210; *Heinrichs v. Terrell*, 65 Iowa, 25; *Skinner v. Crawford*, 54 Iowa, 130; *Hiatt v. Kirkpatrick*, 48 Iowa, 78; *Darst v. Enlow*, 3 Westn. Repr. (Ill.) 480; *Bitter v. Seathoff*, 98 Ill. 266; *Cutter v. Callison*, 72 Ill. 113; *Hubbard v. Stearns*, 86 Ill. 35; *White v. Hopeman*, 43 Mich. 267; s. c., 38 Am. Rep. 178; *Knowlton v. Smith*, 36 Mo. 507; *Walbrunn v. Ballen*, 68 Mo. 164; *Cole v. Parker*, 70 Mo. 372; *Hamilton v. West*, 63 Mo. 93; *Houx v. Batteen*, 68 Mo. 84; *Mayer v. Rafferty*, 1 Head (Tenn.), 60; *Brown v. Cockerell*,

Where a grantor has designated his boundaries by the lines of the surrounding surveys, his grantee may claim to those boundaries.<sup>1</sup>

**18. Husband and Wife.**—Adverse possession cannot exist as between husband and wife while the marital relation continues.<sup>2</sup>

33 Ala. 38; *Irvin v. Adler*, 44 Cal. 559; *Grimm v. Curley*, 43 Cal. 251. *Watt v. Ganahl*, 34 Ga. 290; *Howard v. Reedy*, 29 Ga. 152; *Shiels v. Roberts*, 64 Ga. 370; *Burrell v. Burrell*, 11 Mass. 296; *Boston, etc., R. Co. v. Sparhawk*, 5 Metc. (Mass.) 469; *Smith v. McKay*, 30 Ohio St. 409; *Bohove v. Richmond*, 25 Ohio St. 115; *Yetzer v. Thoman*, 17 Ohio St. 130; *Adams v. Rockwell*, 16 Wend. (N. Y.) 285; *McCormick v. Barnum*, 10 Wend. (N. Y.) 105; *Dibble v. Rogers*, 13 Wend. (N. Y.) 536; *Robinson v. Phillips*, 1 Thomp. & C. (N. Y.) 151; *Hodges v. Eddy*, 38 Vt. 345; *Davis v. Judge*, 46 Vt. 655; *Faught v. Holway*, 50 Me. 24.

In *Jones v. Smith*, 64 N. Y. 180, where it appeared that the adjoining owners for more than fifty years had occupied each on his own side up to an old fence, which fence had been put up and maintained as a division fence for more than twenty years by an agreement, each owner keeping up one-half, it was held that this was sufficient evidence of a practical location, and an acquiescence in the fence as a boundary line, and of a possession of more than twenty years, in pursuance of such location, to require the submission of that question to the jury.

Where the division line between two adjoining estates is indefinite or unascertained, the owners may effectually agree upon the true boundary, and the line thus ascertained will control their deeds. A jury may infer a practical location of a disputed boundary line by agreement, from long acquiescence, less than the period necessary to constitute adverse possession, and from acts and declarations of the parties. *Turner v. Baker*, 64 Mo. 218; s. c., 27 Am. Rep. 226, and note. See *Hayes v. Livingston*, 34 Mich. 384; s. c., 22 Am. Rep. 533; *Baldwin v. Brown*, 16 N. Y. 363.

Adjoining owners orally agreed that one of them should keep up a division fence, but should keep it entirely within his own bounds. After twenty years the fence was moved to the boundary and ejectment was brought for the strip of land cut off by its removal. *Held*, that the action would not lie. As the oral agreement was void and the owner of the strip might have withdrawn from it, the strip was never held adversely to the owner, whose title was recognized in the

agreement and always afterward. *White v. Hapeman*, 43 Mich. 267; s. c., 38 Am. Rep. 178; *Hagey v. Detweiler*, 35 Pa. St. 409.

An error was made in running a division line between two farms. The parties respectively occupied up to the erroneous line for more than twenty years. Afterwards the correct line was run. *Held*, (1) that if the parties occupied up to the erroneous line, supposing it to be the true boundary, and relying upon it, such line could not be disturbed afterwards, and a mere oral agreement to run a new line could not disturb the title thus fixed. But (2) if the parties did not rely upon the first survey, but expected to settle the line by another when convenient to make it, the mere possession for twenty years, according to the erroneous line, would not give title; (3) the question of the nature of the possession, and of the claims of the respective parties, is one of fact for the jury exclusively. *Bunce v. Bidwell*, 43 Mich. 542. See *Yutzer v. Thoman*, 17 Ohio St. 130.

Where owners of adjoining lots open an alley, lying one half on each lot, and build barns and fences thereon, and acquiesce in deeds describing the alley, etc., it constitutes an adverse possession under a claim of right, and by user for twenty years they each acquire an easement in the premises of the other which neither one can lawfully disturb, and an injunction forbidding the obstruction of such alley by one of the adjoining owners against the other will be granted. *Nicholls v. Wentworth*, 100 N. Y. 455.

Where a line or corner is, in fact, certain, and an erroneous line or corner is, by mistake, made, the acts of the parties in making such mistake, and the fencing by both parties, in accordance with such mistake do not operate in the nature of an estoppel *in pais* to forfeit the estate. What subsequent acquiescence, after the mistake is discovered, or what gross neglect afterward to assert a right to correct it, amounting to fraud, will conclude the owner, is another question. *McAfferty v. Conover*, 7 Ohio St. 99; *Bobo v. Richmond*, 25 Ohio St. 115.

1. *Hughes v. Pickering*, 14 Pa. St. 297.

2. *First Nat. Bank v. Guerra*, 61 Cal. 169; *Maudlin v. Cox*, 7 Pac. Repr. (Cal.) 804; *Bell v. —*, 37 Ala. 536; *Veal*

19. *Permissive Entry*.—Where the entry is permissive the statute will not begin to run against the legal owner until an adverse holding is declared and notice of such change is brought to the knowledge of the holder of the legal title.<sup>1</sup>

*v. Robinson*, 70 Ga. 809; *Hendricks v. Rasson*, 53 Mich. 575. See *Clark v. Gilbert*, 39 Conn. 94.

If the land of a wife is sold by her husband, the possession is not adverse while the marriage exists. *Stephens v. McCormick*, 5 Bush (Ky.), 181.

A husband's marital possession cannot be adverse to the wife's grantee. *Vandevoort v. Gould*, 36 N. Y. 639.

In 1861, the defendant, C. Guerra, a married woman, filed a declaration of homestead upon a tract of land then inclosed and occupied by herself and husband, but which formed part of a large tract owned by her husband and others as tenants in common; and from that date occupied the land with her husband, claiming it as a homestead, until his death, in 1878, and afterwards by herself until the beginning of this action. After the declaration of homestead, her husband and his co-tenants mortgaged the larger tract to one C., and the mortgage having been foreclosed, C. became the purchaser of the mortgaged premises and received his deed. Subsequently, in January, 1873, the interests of C. in the homestead premises by proper mesne conveyances, became again vested in the husband of G. and another of the original co-tenants, and was by them subsequently mortgaged, and under judgment of foreclosure sold and conveyed to the plaintiffs. In an action to quiet title, to which G. was made a party, the court below found that the homestead premises had been held adversely by her from the date of the filing of the homestead. *Held*, the declaration of homestead filed by G. was invalid because the premises were then held by tenancy in common. The finding as to adverse possession cannot avail her. It was by virtue of her marital relations with her husband that she filed a declaration and has continued to claim the premises as a homestead. There is no pretence that her husband claimed adversely to any one, and she could not claim adversely to him or those holding under him so long as he remained as the head of the family, which he did until his death. *First Nat. Bank v. Guerra*, 61 Cal. 109.

Where the husband rents land from the owner, and moves upon it with his family, in subordination to the owner's title, the wife cannot during coverture,

claim the premises adversely to the owner so as to set the statute of limitations in motion. *Frink v. Alsip*, 49 Cal. 103.

1. *Allen v. Allen*, 58 Wis. 202; *Roebke v. Andrews*, 26 Wis. 311; *Woodward v. McReynolds*, 2 Pin. (Wis.) 268; *Bartlett v. Secor*, 56 Wis. 520; *Plimpton v. Converse*, 44 Vt. 158; *Morrill v. Titcomb*, 8 Allen (Mass.), 100; *Sherman v. Kane*, 86 N. Y. 57; *Babcock v. Utter*, 1 Keyes (N. Y.); 397; *Kathan v. Rockwell*, 16 Hun (N. Y.), 90; *Chance v. Branch*, 58 Tex. 490; *Pease v. Lawson*, 33 Mo. 35; *Davis v. Bowmar*, 55 Miss. 671; *Rothschild v. Hatch*, 54 Miss. 554; *Adams v. Guice*, 30 Miss. 396; *Hays v. Morrison*, 30 Ga. 971; *Cooper v. McBride*, 4 Houst. (Del.) 461; *Kincheloe v. Tracowell*, 11 Gratt. (Va.) 587; *Newlin v. Reynolds*, 25 Gratt. (Va.) 137; *Thomas v. Jones*, 28 Gratt. (Va.) 383; *Hudson v. Putney*, 14 W. Va. 561; *Core v. Faupel*, 24 W. Va. 238; *Dean v. Brown*, 23 Md. 11; *Alexander v. Wheeler*, 69 Ala. 332; *Collins v. Johnson*, 57 Ala. 304; *Davenport v. Lebringer*, 52 Iowa, 365; *Grube v. Wells*, 34 Iowa, 148; *Calvin v. McCune*, 39 Iowa, 502; *Law v. Smith*, 4 Ind. 56; *Smith v. Stevens*, 82 Ill. 554; *Perkins v. Nugent*, 45 Mich. 156; *Harvey v. Tyler*, 2 Wall. (U. S.) 328. Compare *Heiskell v. Cobb*, 11 Heisk. (Tenn.) 638; *Ford v. Holmes*, 61 Ga. 419.

When there is a gradual subsidence of the water in a millpond because of the want of repair of the dam, and the owner of a pasture contiguous to the pond turns his cattle in, and they wander from the pasture over the bottom of the old pond, such possession of the land made dry by the water receding as the dam lowered would indicate that it was not adverse, but permissive. *Eddy v. St. Mars*, 53 Vt. 462; s. c., 38 Am. Rep. 695.

Lands of the United States were entered by a father in the name of his son, and in 1849 the patent thereof was issued to the son, who was then five years of age. Before the issuance of the patent the father took possession of the land, and occupied it continuously, improving it and paying the taxes until his death, in 1878. The son lived with his father until some years after he became of age. The father recognized his son's title for years after he took possession of the land, and never asserted a hostile ti-



**20. Possession must be Actual.**—It must be actual as contrasted with constructive possession. There must be, therefore, in all cases an entry in order that an ouster may be effected and an adverse possession begun. It must be a going upon the land with a palpable

title in himself until a few months before his death. These facts being conclusively shown in an action of ejectment brought by the son against one to whom the father, by will dated in 1877 had devised the land, it is held that the court properly directed a verdict for the plaintiff without submitting the question of adverse possession to the jury. *Allen v. Allen*, 58 Wis. 202.

The equitable owner of a tract of land caused the holder of a certificate of purchase of the same to assign it to the son of the former, in 1851, not for the purpose, however, of passing the title, which fact the son knew before he became of age, which was in 1867; and he also knew that the father claimed to be the owner of the land, and paid all the taxes from 1851 to 1882 (more than thirty years), which claim the son recognized repeatedly, and when he rented part of the land of his father, paid him rents therefor, and received pay for all improvements he put on the same while tenant, and stated to the purchaser from his father that he had no objection to his purchasing of his father. The son, in 1882, filed his bill to set aside the sale made by his father, asserting title in himself. It was held that the laches of the son in asserting his rights, if any, was a bar to the relief sought. *Whipple v. Whipple*, 109 Ill. 418.

In 1826 P. conveyed to his brother E. a tract of land for a nominal consideration, and a few days thereafter E. conveyed the same tract to J., a son of P., then eight or ten years old, living with his father on the said land, for a like consideration. When J. arrived at the age of eighteen he was put to the trade of a cabinetmaker by his father; and when he arrived at maturity, between 1840 and 1843, married, and afterwards lived separate from his father. P., the father, resided on the land at the time of the conveyance to E., continued to reside on it, claiming it as his, and exercising complete and notorious dominion over it (once in 1843 against the protest of J., who was denied this right and ordered off the land), until the death of P., in 1873. In 1853 P. conveyed to his son J. another tract of land, with which J. said he was satisfied, and that he no longer claimed the first-named tract. J. lived and died on the tract last conveyed to him. On the death of P., in 1873, he devised to his son P., Jr., a son by his sec-

ond marriage, the first-named tract. In an action of ejectment, brought after the death of P. and J. by the heirs of J. against P., Jr., to recover said first-conveyed tract, *held*, P., and those claiming under him, having held continual, adversary, and notorious possession of the land under claim of title, with the knowledge and acquiescence of J., for a period beyond the statutory bar, the heirs of J. cannot now recover it from P., Jr., the devisee of P. *Creekmur v. Creekmur*, 75 Va. 431.

Two minor children, while their father was at sea, their mother, who had built with her own money a house upon land owned by the father, having died, left the premises, which they had previously occupied with their mother, and went to live with their uncle, who was executor of her will and called himself their guardian. Their father visited them about a year afterwards, and paid money from time to time for their support, and corresponded with them often, but, after his first visit, went to a foreign country and lived there. The uncle, while the children were living with him and their father was away, let the premises at will only, and without specifying his authority. He credited the children with the rent in his private-account book, and charged them with the cost of their support; and also accounted with their father, so far as required. The mother left a will, by which she gave the house to the children; and the uncle insured it for their benefit. They afterwards gave notice to quit to the tenant of the house, and occupied it themselves. *Held*, on a writ of entry by the father against the children, brought more than twenty years after their mother's death, that there was no evidence that they had acquired a title by adverse possession. *Silva v. Wimpenny*, 136 Mass. 253.

If A is entitled to a conveyance of land, and, by an agreement between A and B, in order to defraud A's creditors, the land is conveyed to B, a title to the land by adverse possession of more than twenty years may be acquired by A against B, although A is without means to pay his debts during such possession, if B knows that A is holding the land adversely and under a claim of right during his possession. *Elwell v. Hinckley* 138 Mass. 225.

intention to claim it as his own by the person entering. To bar the legal title an entry on the land is indispensable. And the intrusion on the land must be accompanied by a claim of right and not the assertion of an outstanding title pre-existing to the land. The principle of the prescriptive bar is to treat him, who has had the absolute dominion and enjoyment of the land, for a given number of years, as the true owner, against all proofs to the contrary. It is this absolute dominion and enjoyment which constitute actual possession, and there can be none other. The possession may be held under color of title, or as an intruder without any color of title.<sup>1</sup> (See Definition of ACTUAL, *ante*, p. 183.)

Where one who is in possession of land is present at its sale by another, and makes no claim to it, such possession continued after the sale will be deemed to be subordinate and friendly to the purchaser, and cannot be changed into an adverse holding so as to permit the running of the bar of the statute of limitations, until a knowledge of its adverse character is brought home to the purchaser, and the burden of showing such change and knowledge is on the party so claiming adverse possession. *Wilkinson v. Thompson*, 82 Mo. 317.

L. claimed a right of way over H.'s land by virtue of adverse user for over twenty years. H.'s defence was that he had given a license to the grantor of the complainant a long while ago, when he and the grantor had a conversation in which the grantor had said "that he would not want to use the said way much, but only once in a while." *Held*, that such a statement could not be construed to show a license. A formal asking and granting is necessary. *Leonard v. Hart*, 2 Atl. Repr. (N. J.) 136.

In 1856 D. purchased a half-section of land, upon which were cabins, outhouses, a dwelling, and one hundred acres of which were cleared. The deed was made to D., and immediately afterward J., the son of D., recently married, entered upon and took possession of the land. He held it until 1869, when D., in consideration of love and affection, deeded to him the home place, containing a section, to which he moved; but he continued to exercise complete control over the half-section from which he had moved. An action of ejectment was brought in 1879 to recover of J. the half-section referred to. The plaintiffs claimed as the residuary devisees of D., who died in 1871; J. claimed under a parol gift made at the time of his entry, and an alleged adverse possession of over twenty years. There was no direct proof as to the terms of his entry, whether under a parol gift or mere

license from D. to occupy the land and use and enjoy the rents and profits. Until 1867 it was assessed to, and the taxes were paid by, D.; but at this time he sent a message to J., saying that he was tired of paying taxes on land and have other people get the profits, and desired him to pay on this. After that J. paid the taxes. Both J. and D. spoke at times of the land as J.'s, and in 1862 D. spoke to a witness of having given the land to J. In D.'s family it was spoken of as J.'s land. J. used and occupied it as his own, made the necessary improvements and repairs, and received the rents and profits. D., in listing his own lands, included this, and at times spoke of it as his land. When, in 1869, he made the deed of his home place to J. he was asked if he did not intend to include this land, he replied, "I do not." D. gave to each of his other children a half-section of land. In 1869 J. promised a grandson of D. to get him to deed the grandson this land, and said that D. had intended to do it anyway. *Held*, upon the facts above stated, that J. entered the land originally under a mere license from D. to use and occupy it and enjoy its rents and profits, and that J. is not shown in any subsequent acts during D.'s lifetime to have asserted any claim to the land hostile to D.'s title. *Dean v. Tucker*, 58 Miss. 487.

1. *Miller v. Shaw*, 7 S. & R. (Pa.) 129; *Altamas v. Campbell*, 9 Watts (Pa.), 28; s. c., 34 Am. Dec. 494; *Bradford v. Guthrie*, 4 Brews. (Pa.) 351; *Soule v. Barlow*, 49 Vt. 329; *Jewett v. Hussey*, 70 Me. 433; *Cook v. Babcock*, 11 Cush. (Mass.) 209; *Huntington v. Whaley*, 29 Conn. 391; *Ogden v. Jennings*, 66 Barb. (N. Y.) 301; 62 N. Y. 526; *Bear Valley Coal Co. v. Dewart*, 95 Pa. St. 72; *Morrison v. Hammond*, 27 Md. 604; *Beatty v. Mason*, 30 Md. 409; *Creekmur v. Creekmur*, 75 Va. 430; *Core v. Faupel*, 24 W. Va. 238; *Parker v. Banks*, 79 N. Car. 480; *Malloy v. Bowden*, 86 N. Car. 251; *Pegues v. Warley*, 14 S. Car. 180;

No particular act or series of acts are necessary to be done on the land, in order that the possession may be actual. Any visible or notorious acts, which clearly evidence the intention to claim ownership and possession, will be sufficient to establish the claim of adverse possession.<sup>1</sup>

Huntington v. Allen, 44 Miss. 654; Denham v. Holeman, 26 Ga. 182; s. c., 71 Am. Dec. 193; Eagle, etc., Co. v. Bank, 55 Ga. 44; Satterwhite v. Rosser, 61 Tex. 166; Bracken v. Jones, 63 Tex. 184; Bowman v. Lee, 48 Mo. 335; Fugate v. Pierce, 49 Mo. 441; Bradley v. West, 60 Mo. 33; Ringo v. Woodruff, 43 Ark. 469; Horbach v. Miller, 4 Neb. 31; Booth v. Small, 25 Iowa, 177; Ambrose v. Raly, 58 Ill. 506; Yelverton v. Steele, 40 Mich. 538; Sparrow v. Hovey, 44 Mich. 63; Peterson v. McCullough, 50 Ind. 35; Washburne v. Cutter, 17 Minn. 361; Pepper v. O'Dowd, 39 Wis. 548; Unger v. Mooney, 63 Cal. 586; s. c., 49 Am. Rep. 100; Holzapple v. Phillibaum, 4 Wash. (U. S.) 356.

"The books require color of title, by deed or other documental semblance of right in the defendant, only when the defence is founded on a constructive adverse possession. But neither a deed nor any equivalent muniment is necessary; where the possession is indicated by actual occupation, and any other evidence of an adverse claim exists." Per Cowen, J., in Humbert v. Trinity Church, 24 Wend. (N. Y.) 604.

A mere squatter on land cannot avail himself of his occupancy unless he has denied, or impugned, the title of the real owner. Sackett v. McDonnell, 8 Biss. (U. S.) 394; Nowlin v. Reynolds, 25 Gratt. (Va.) 137; Rannels v. Rannels, 52 Mo. 108.

A prior possession, to be effective as against a mere squatter or intruder in actual possession, must be an actual, un-abandoned possession. The payment of taxes, surveying and mapping the lands, and executing a mortgage covering them, do not constitute such possession. Simpson v. Creswell, 18 Fla. 29.

A was in possession under color of title. He sold a part of the land, including the improvements, to B. *Held*, that A's possession was actual as to the part improved and inclosed, and constructive as to the limits defined by his color of title. That the sale to B extended B's possession no further than the limits of his deed, and that A having parted with actual possession, lost thereby his constructive possession of the part unsold. Cunningham v. Fraudtzen, 26 Tex. 34. See Chandler v. Rushing, 38 Tex. 591.

A took color of title for several lots. He occupied one and paid taxes, and exercised ownership over the others. *Held*, that his possession was confined to the lot actually occupied, and not to the lots unoccupied and unimproved. Wilson v. McEwan, 7 Oregon, 87.

The statute does not run against the owner of unoccupied lands until some one assumes to take adverse possession; and this rule applies as well to an assignee in bankruptcy, who under the Revised Statutes, § 5057, must bring suit within two years as to the original owner. Gray v. Jones, 14 Fed. Repr. 83.

Evidence is admissible, to establish occupation, that the person under whom defendants claim performed work upon the land during his lifetime. Lick v. Diaz, 44 Cal. 479.

Much depends on the situation of the property and the use to which it is applied. Mooney v. Coolidge, 30 Ark. 655; Dorr v. School Dist., 40 Ark. 237. See Bowen v. Guild, 130 Mass. 121.

After actual entry, the claim must be limited to limits made at the time. "It cannot be enlarged without making a new entry. Pepper v. O'Dowd, 39 Wis. 538.

**Secret Trust.**—If A is entitled to a conveyance of land, and, by an agreement between A and B, in order to defraud A's creditors, the land is conveyed to B, a title to the land by adverse possession of more than twenty years may be acquired by A against B, although A is without means to pay his debts during such possession, if B knows that A is holding the land adversely and under a claim of right during his possession. Elwell v. Hinckley, 138 Mass. 225. See Jones v. Wilson, 69 Ala. 400; Williams v. Higgins, 69 Ala. 517. Compare Estes v. Long, 71 Mo. 605.

1. Tiedeman on Real Prop. § 697; Faught v. Holway, 50 Me. 24; Bailey v. Carleton, 12 N. H. 9; s. c., 37 Am. Dec. 190; Blood v. Wood, 1 Metc. (Mass.) 528; Bates v. Norcross, 14 Pick. (Mass.) 224. See 17 Pick, 14; s. c., 28 Am. Dec. 271; La Frombois v. Jackson, 8 Cow. (N. Y.) 589; s. c., 18 Am. Dec. 463; Longworthy v. Myers, 4 Iowa, 18; Ford v. Wilson, 35 Miss. 504; s. c., 72 Am. Dec. 137; Royall v. Lisle, 15 Ga. 545; s. c., 60 Am. Dec. 712; Ellicott v. Pearl, 10 Pet. (U.

**21. What constitutes Possession.**—What is actual possession depends largely upon the nature of the land and uses to which it would naturally be put. The usual and decisive modes and acts of actual possession are occupation, residence, cultivation, inclosure, and improvement suitable to the character of the land.<sup>1</sup>

S.) 412; *Ewing v. Burnett*, 11 Pet. (U. S.) 41.

"So much depends on the situation and nature of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases." *Ewing v. Burnett*, 11 Pet. (U. S.) 41. See *Bowen v. Guild*, 130 Mass. 123; *Mooney v. Coolidge*, 30 Ark. 65; *Dorr v. School Dist.*, 40 Ark. 243.

If the land is not susceptible of any permanent improvement, actual occupancy, cultivation or residence may not be necessary in order to constitute adverse possession. *Washburne v. Cutter*, 17 Minn. 361; *Leeper v. Baker*, 68 Mo. 407; *Royal v. Lisle*, 15 Ga. 545; s. c., 60 Am. Dec. 712.

The same rule will not apply equally to towns, cultivated lands, and wild lands. *Draper v. Shoot*, 25 Mo. 197; s. c., 60 Am. Dec. 462; *Leeper v. Baker*, 68 Mo. 407; *Brumagin v. Bradshaw*, 39 Cal. 631.

1. *Martin v. Judd*, 81 Ill. 488; *Smith v. Jackson*, 76 Ill. 254; *Clement v. Perry*, 34 Iowa, 567; *Hunton v. Nichols*, 55 Tex. 217; *Read v. Allen*, 63 Tex. 154; *Mooney v. Coolidge*, 30 Ark. 655; *Door v. School Dist.*, 40 Ark. 243; *Leeper v. Baker*, 68 Mo. 407; *Draper v. Shoot*, 25 Mo. 197; s. c., 60 Am. Dec. 462; *McMullin v. Erwin*, 58 Ga. 427; *Bell v. Denson*, 56 Ala. 444; *Humphries v. Huffman*, 33 Ohio St. 403; *Taylor v. Burnside*, 1 Gratt. (Va.) 165; *Core v. Faupel*, 24 W. Va. 238; *Schuylikill Co. v. McCreary*, 58 Pa. St. 304; *Jackson v. Warford*, 7 Wend. (N. Y.) 62; *Erwin v. Olmsted*, 7 Cow. (N. Y.) 229; *Finlay v. Cook*, 54 Barb. (N. Y.) 9; *Bowen v. Guild*, 130 Mass. 121; *Poignard v. Smith*, 6 Pick. (Mass.) 172; *Cutter v. Cambridge*, 6 Allen (Mass.), 20; *Bennett v. Clemence*, 6 Allen Mass.), 18; *Bates v. Norcross*, 14 Pick. (Mass.) 224. See 17 Pick. 14; s. c., 28 Am. Dec. 271; *Goodwin v. Sawyer*, 33 Me. 541; *Brumagin v. Bradshaw*, 39 Cal. 24; *Ewing v. Burnett*, 11 Pet. (U. S.) 41.

What constitutes an actual possession must be governed by the facts of each case. *Leeper v. Baker*, 68 Mo. 405; *Turner v. Hall*, 60 Mo. 275. See *Ford v. Wilson*, 35 Miss. 505.

A fence, building, or other improve-

ment is not essential to constitute an adverse possession. Acts of ownership under a claim of right, visible, are sufficient to authorize the court to find such possession. *Leeper v. Baker*, 68 Mo. 400. See *Bell v. Denson*, 56 Ala. 448.

In *Davis v. Bowmar*, 55 Miss. 671, the court said: "It is certain that appellant took possession, under some sort of right in himself, of a wilderness, felled the forest, cleared the jungle, erected fences and buildings, made the place his home, cultivated it, protected it by levees, had it assessed as his own, paid taxes on it, and enjoyed exclusive possession and control of it as his own from 1836 to 1863; and in the uncertainty, if any, from the imperfect knowledge we have, as to how the possession began, appellant is entitled to the benefit of the just presumption that he was holding as owner from having acted so long and from the beginning as owners do, and so inconsistently with the idea of title in any other than himself." *Alexander v. Polk*, 39 Miss. 737; *Hollister v. Young*, 42 Vt. 407; *Johnson v. Gorham*, 38 Conn. 522; *French v. Pearce*, 8 Conn. 439; s. c., 21 Am. Dec. 680; *Smith v. Roberts*, 62 Ala. 83; *Overfield v. Christie*, 7 S. & R. (Pa.) 173; *Paine v. Skinner*, 8 Ohio, 159; *Allen v. Allen*, 58 Wis. 205; *Sedg. & W. Trial of Title to Land*, § 758; *Angell on Lim.* §§ 390, 391, 392, and cases cited in the notes.

Occupation of the land is to be regulated by its character. If it is wild land incapable of improvement to fit it for residence, the possession and use must be such as from its nature it is susceptible of. *Clancey v. Houdlette*, 39 Me. 451; *West v. Lanier*, 9 Humph. (Tenn.) 762; *Bell v. Denson*, 56 Ala. 444.

A. was the grantor of a right to maintain a dam which would raise the water in a certain stream four inches above a designated rock. In 1843 he constructed a dam which was maintained at the same height continuously until 1880, when suit was brought to recover damages for backing up the water. The court charged the jury: "In considering the question as to whether the defendant acquired a right by prescription, you will inquire whether at any time since 1843 there has been twenty-one years at a stretch that the owners of the mill

The possession need not be personal, it may be by agent or tenant (q. v.), or one under a contract of purchase. (See COLOR OF TITLE; VISIBLE, NOTORIOUS, AND EXCLUSIVE POSSESSION, *post.*)

swelled the water up higher than what is shown by the four inches above the stone. . . . If you come to consider that part of the case you will inquire, Where is the testimony of the witnesses to show that for twenty-one years, at any time since 1843, there was a use of this water so as to swell it back over the four inches? If you do not find such evidence you will say that under no consideration is the title by prescription established." *Held*, that this was error. The depth of water in such a basin is necessarily inconstant and variable. If the defendant, or those under whom he claims for a period of twenty-one years before suit brought, under a claim of right, openly, continuously, and uninterruptedly maintained his dam of the same height, whilst the owner of the lands farther up the stream was under no disability to resist the use, the law would presume a grant of the right to maintain it. *Gerhman v. Erdman*, 105 Pa. St. 371.

The leasehold interest in a lot of ground was conveyed by W. to B. Shortly afterwards W. entered upon the property, and he with his family continued in possession for over twenty years, paying the taxes and ground rent, and allowing members of his family to spend their money in erecting buildings and improving the property. In an action of ejectment brought by persons claiming through W., it was held that these were facts clearly indicating a claim of title to the property by W., and that his possession was maintained under such claim, and not under a contract with or permission from B. That such possession must be regarded as adverse and conclusive against B. and those claiming under him. *Waltemeyer v. Baughman*, 63 Md. 200.

Where lands were open and unclosed, but it appeared that defendant and those under whom he claimed had for more than ten years claimed and exercised the exclusive right to cut timber and grass therefrom, and had at various times sold the right to cut grass to others, *held*, that such possession was effectual as actual inclosure of the land. *Torey v. Bigelow*, 56 Iowa, 381. See *Clement v. Perry*, 34 Iowa, 564.

Surveying the land and paying the taxes will not constitute actual occupancy. *Thompson v. Burhans*, 61 N. Y. 70.

A person having color of title to land,

during a period exceeding ten years, paid taxes on it and went upon it and cut and carried off firewood and rails. *Held*, that this was not such visible, notorious, and continuous possession as would give him title under the statute. *Pike v. Robertson*, 79 Mo. 615.

In *Mooney v. Cooledge*, 30 Ark. 655 the court said: "It is not the particular use made of the land, or whether built upon and used as a residence, or cleared and cultivated as a farm, but the exclusive use and adverse possession may be proven as well by other acts and declarations, which show a visible, open, and exclusive possession and use of the land." See *Kerr v. Hitt*, 75 Ill. 51; *Clement v. Perry*, 34 Iowa, 567.

If there is continuous dominion manifested by continuous acts of ownership, it is sufficient. *Coleman v. Billings*, 89 Ill. 183. *Leeper v. Baker*, 68 Mo. 400. Compare *Martin v. Judd*, 81 Ill. 488; *Sloan v. Martin*, 33 Tex. 417.

**Possession by Agent.**—It is not necessary to prove actual occupancy by the defendant himself; it may be by himself, or by tenants holding under him. *Elliott v. Dycke*, 78 Ala. 150.

Land was in the possession of the widow (as tenant in dower) and the infant heir of one who died seized thereof. A brother of the deceased obtained a quitclaim deed of the land from another brother and a sister, but took no steps to obtain possession thereunder. Afterwards he obtained from the widow a quitclaim deed reciting that he and his brother and sister were the heirs of the deceased (apparently upon the theory of the illegitimacy of the child), and entered and continued in possession under such latter deed. After attaining majority the heir brought ejectment and the defendant answered claiming title by adverse possession under color of the quitclaim deed from his brother and sister. *Held*, not having entered under such deed, the defendant could not base thereon his claim of title by adverse possession. By the quitclaim deed from the widow the defendant obtained only her dower right, and became a tenant in common with the heir. The recitals in the deed by the mother do not affect the right of the heir. Having by his answer set up title in himself to the entire estate, based wholly upon adverse posses-

But neither actual occupation, cultivation, nor residence is necessary to constitute actual adverse possession, when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim,<sup>1</sup> unless the statute prescribes the manner of occupancy.

sion, the defendant cannot, to shield his possession, claim to hold as tenant in common with the plaintiff. *Watts v. Owens*, 62 Wis. 512.

**Flowing Land with Water.**—At the trial of a writ of entry, brought in 1880, to recover a parcel of flats, there was evidence that the flats were originally flowed by tide water, and were in a cove, across the mouth of which, as early as 1645, a dam had been built to obtain power for running a tide-mill; that, in 1803, a corporation, authorized by its charter to operate a canal, and to hold mill-seats on waters connected with its canal, took a deed of the demanded premises; and entered its canal upon the mill-pond, and had a floating tow-path projecting into the pond, which, in 1829, was removed, and a solid tow-path was built; that, from 1829 to 1851, the pond was used for canal and mill purposes, and was flowed or emptied at convenience; that canal-boats and timber were kept in the pond by the corporation, and no person other than the corporation exercised any control over the pond; that, in 1839, the corporation executed a lease of the mill for fifteen years, with liberty to use soil from the bottom of the pond to repair the dam; that the canal was discontinued in 1851, after which the pond was used for mill purposes and to store timber; that, in 1844, the corporation conveyed the mill and pond, subject to the lease, and subject to the right of the corporation to use the pond for canal purposes and to store timber therein; that material was used at different times from the bottom of the pond to repair the dam; that access from the sea was cut off by the dam, and access from the upland was cut off by the canal and tow-path; and that the mill was abandoned in 1872. *Held*, that this evidence would warrant a finding that a title to the soil under the pond had been acquired by adverse possession. *Eastern R. v. Allen*, 135 Mass. 13. Compare *Clarke v. Wagner*, 74 N. Car. 791.

**Husband and Wife.**—Possession by the wife, where the husband has been

continuously absent from the State will not be sufficient. *Morrell v. Ingle*, 23 Kan. 32.

**Fences.**—A fence or inclosure is not an essential element of an adverse possession, and permitting a fence to become dilapidated, or even destroyed, during the interval between periods when necessary to protect the crops does not, of itself, constitute an abandonment, nor interrupt the continuity of the possession. *Hughes v. Anderson*, S. C. Ala. Dec. Term, 1885-86. The court said: "A fence or inclosure is not an essential element of adverse possession, but is only one of the many acts indicative of possession and claim of ownership. It is often very important, it is true, to mark with precision the limits or boundaries of a possession, especially when the occupant is without color of title, which would answer this purpose. In a section of the country, for example, where fence laws have been abolished, the absence of an inclosure would weigh but little, where a river constitutes a boundary line. The reason is that it would then be no index of an intention to abandon. It has often been decided in this country that the possession of an occupant may be adverse without either inclosure or improvements. *Bell v. Benson*, 56 Ala. 444; *Ellicott v. Pearl*, 10 Pet. (U. S.) 441; *Leeper v. Baker*, 68 Mo. 400; *Angell on Lim.* ¶ 400; *Real Property Trials* (Malone), § 277-278. And color of title is sometimes said to be a substitute for a substantial and permanent fence around the premises claimed. *Trial of Titles to Land* (Sedg. & Wait), § 707; *Watson v. Mancill*, 76 Ala. 600." See *McCreery v. Everding*, 44 Cal. 246. Compare *Pullen v. Hopkins*, 1 Lea (Tenn.), 741.

**Burying-ground.**—A family burying-ground will constitute actual possession as to the part occupied by the graves. *Mooney v. Cooledge*, 30 Ark. 655.

1. *Ford v. Wilson*, 35 Miss. 490; s. c., 72 Am. Dec. 137; *Moss v. Scott*, 2 Dana (Ky.), 275; *Royall v. Lisle*, 15 Ga. 545; s. c., 60 Am. Dec. 712; *Dorr v. School*

*Occasional Use not sufficient.*—The possession must, to be actual, be continuous. An occasional or sporadic use of the land, such as occasionally cutting grass or firewood, or the erection of temporary structures, will not be sufficient to establish an adverse possession.<sup>1</sup>

Dist., 40 Ark. 237; *Draper v. Shoot*, 25 Mo. 197; s. c., 69 Am. Dec. 462; *Sleeper v. Baker*, 68 Mo. 400; *Merchants' Bank v. Clavin*, 60 Mo. 559; *Coleman v. Billings*, 89 Ill. 183; *Clement v. Perry*, 34 Iowa, 567; *Brumagin v. Bradshaw*, 39 Cal. 24; *Robinson v. Sweet*, 3 Me. 315; *Ewing v. Burnett*, 11 Pet. (U. S.) 41; *Ellcott v. Pearl*, 10 Pet. (U. S.) 412.

1. *Trustees v. Kirk*, 68 N. Y. 459; *Wheeler v. Winn*, 53 Pa. St. 122.

Occasional trespass, even though the trespasser avows an intention to make an adverse claim, will not constitute possession. *Ewing v. Alcorn*, 40 Pa. St. 492; *Washabough v. Entriiken*, 34 Pa. St. 74; s. c., 36 Pa. St. 513; *Miller v. L. I. R. Co.*, 71 N. Y. 380.

Mere fugitive, disconnected trespasses, such as cutting trees, stripping bark, surveys, etc., however long continued, will not constitute such a possession as will ripen into a title. *Rivers v. Thompson*, 46 Ala. 633; *Cornelius v. Giberson*, 1 Dutch. (N. J.) 33; *Parker v. Parker*, 1 Allen (Mass.), 245; *Congdon v. Morgan*, 14 S. Car. 587; *White v. Reid*, 2 N. & McC. (S. Car.) 534; *McBeth v. Donnelly*, Dud. (S. Car.) 177; *Slize v. Derrick*, 2 Rich. (S. Car.) 627; *Williams v. Wallace*, 78 N. Car. 354; *Long v. Young*, 28 Ga. 130; *Rifener v. Bowman*, 53 Pa. St. 313; *Beaupland v. McKeen*, 28 Pa. St. 124; s. c., 70 Am. Dec. 115; *Sorber v. Willing*, 10 Watts (Pa.), 141; *Pasley v. English*, 5 Gratt. (Va.) 141; *Anderson v. Harvey*, 10 Gratt. (Va.) 386; *Austin v. Holt*, 32 Wis. 478; *Washburn v. Cutter*, 17 Minn. 361; *Miller v. Long Island R. Co.*, 71 N. Y. 380; *Pullen v. Hopkins*, 1 Lea (Tenn.), 741. Compare *Clement v. Perry*, 34 Iowa, 564.

The mere entry from year to year for the purpose of cutting grass is not an act manifesting a purpose of taking possession as owner. *Roberts v. Baumgarten*, 51 N. Y. Super Ct. 482; *Wheeler v. Spinola*, 54 N. Y. 377.

Occupying a sugar place, from year to year, only for the purpose of making sugar, which place is separated from the home farm by intervening lands owned by others, is not actual or continuous possession. *Wilson v. Blake*, 53 Vt. 305.

Merely using a way, open to, and occupied by, the public for the purpose of getting water for cattle and the family,

has no tendency to prove that the use is adverse, but permissible. Such occupancy or use, with the public, raises the presumption that it is not adverse; which the defendant must meet and overcome by evidence. *O'Neil v. Blodgett*, 53 Vt. 213.

Repeated cutting of timber on outlands will not give title by adverse possession. *Townsend v. Reeves*, 44 N. J. L. 525; nor entirely clearing the land if the timber is allowed to grow again. *Parker v. Parker*, 1 Allen (Mass.), 245.

Merely tearing down part of a fence and walking across the land does not establish sufficient possession. *Greene v. Dwyer*, 33 Minn. 403; nor does slightly extending a line fence. *Carroll v. Gil- lion*, 33 Ga. 539.

The building of a sidewalk on a street adjoining land over which there is such an easement, and maintaining the same, cannot be regarded as an adverse possession of such land. *Kuecken v. Voltz*, 110 Ill. 264.

One who was accustomed to have a wood pile upon a vacant lot for thirty years, and had buried potatoes upon it for six years, acquired no title to the lot by such a possession. *Miller v. Downing*, 54 N. Y. 631.

Where all that the defendant had done was to dig sand on and from the land from time to time, and sell the same, his entries thereon for that purpose were but successive acts of trespass against the true owner, if he was not owner himself. *Parker v. Wallis*, 60 Md. 15; s. c., 45 Am. Rep. 703.

Where a party has color of title to woodland, and uses the land for the purpose of obtaining wood for fuel, or fencing for a farm in the neighborhood, under a claim of ownership, held to constitute possession. *Scott v. Delany*, 87 Ill. 148. See *Clement v. Perry*, 34 Iowa, 564.

Going upon wild land, digging, and hunting for a corner and boundary lines, driving cattle on the land, and employing a man to break in the following spring, are not such going into possession as will set the statute of limitations in operation so as to create a title by virtue of adverse possession. *Brown v. Rose*, 55 Iowa, 734.

The use of the water of a stream during

22. *Cultivation* is evidence of actual possession. It is not necessary that the degree of cultivation should be other than usual,<sup>1</sup> but it must be continuous, and not merely an occasional or negligent effort.<sup>2</sup>

23. *Inclosures*.—An actual, visible, and exclusive appropriation of land is constituted by the fencing and continued use of it, without an actual residing on it.<sup>3</sup> The inclosure must be of a substantial nature, not a mere temporary structure. Its character will, however, to some extent, be governed by the nature of the lands inclosed.<sup>4</sup>

a period of abundance is not an adverse use on which a prescription can be founded. *Anaheim Water Co. v. Semi-tropic Water Co.*, 64 Cal. 185.

An annual entry to cut timber, feed cattle, hunt or fish, with cultivation of a truck patch in summer, as incidental to other pursuits, will not constitute possession. *Wheeler v. Winn*, 53 Pa. St. 122. See *Pullen v. Hopkins*, 1 Lea (Tenn.), 741.

Cutting a small quantity of timber on two occasions, at an interval of one year between the two, when the land is shown to be good for grazing and farming purposes, and suitable for a homestead, "is not an act so distinct, notorious, and continuous" as will invalidate a conveyance by the owner of the legal title. *Childress v. Calloway*, 76 Ala. 130.

A co-tenant cannot acquire adverse title by paying taxes, and partial occupation. *McQuiddy v. Ware*, 67 Mo. 74.

Erection of cow-pen, ranging of cattle, and occasionally felling trees, will not constitute adverse possession. *Royall v. Lisle*, 15 Ga. 545; s. c., 60 Am. Dec. 712.

1. *Copeland v. Murphy*, 2 Coldw. (Tenn.) 64.

See *Beaupland v. McKean*, 28 Pa. St. 124; s. c., 70 Am. Dec. 115; *Pope v. Hanmer*, 8 Hun (N. Y.), 265; aff. 74 N. Y. 240.

If it is not necessary to inclose the land in order to cultivate, the possession will extend to the portion actually cultivated. *Barnes v. Sabron*, 10 Nev. 217. See *Ege v. Medlar*, 82 Pa. St. 86.

If the party relies upon cultivation and improvement, he must show both; reaping alone is not cultivation; nor is the keeping-up of a fence already made, mowing the grass, and cutting brush, an improvement within the N. Y. statute. *Doolittle v. Tice*, 41 Barb. (N. Y.) 181.

It is only necessary that the land should be used in the ordinary way. *Booth v. Small*, 25 Iowa, 177.

2. Going upon wild land, digging, and

hunting for a corner and boundary lines, driving cattle on the land, and employing a man to break in the following spring, are not such acts of actual possession as will create a title by adverse possession. *Brown v. Rose*, 55 Iowa, 734. See *Morris v. Callahan*, 105 Mass. 129; *Wheeler v. Winn*, 53 Pa. St. 122; *Overton v. Davisson*, 1 Gratt. (Va.) 211.

3. *Cantagrel v. Von Lupin*, 58 Tex. 570; *Morrison v. Kelly*, 22 Ill. 610. See *Coleman v. Billings*, 89 Ill. 189; *Schneider v. Botsch*, 90 Ill. 577; *Bristol v. Carroll Co.*, 95 Ill. 84; *Mooney v. Coolidge*, 30 Ark. 655; *Clark v. Potter*, 32 Ohio St. 49.

*Swettenham v. Leary*, 18 Hun (N. Y.), 284; *Pouthmand v. McLaughlin*, 24 N. J. Eq. 181. Compare *Martin v. Gudd*, 81 Ill. 488; *Sloan v. Martin*, 33 Tex. 418; *Humphries v. Huffman*, 33 Ohio St. 395.

"The party who enters without color of title, and who relies on adverse possession only as a defence against a legal title, must show a substantial inclosure, an actual occupancy, a *pedis possessio*, which is definite, positive, and notorious, to countervail such legal title." *Humphries v. Huffman*, 33 Ohio St. 403. See *Jackson v. Shoemaker*, 2 Johns. (N. Y.) 234; *Doe v. Campbell*, 10 Johns. (N. Y.) 477; *Jackson v. Woodruff*, 1 Cowen (N. Y.), 276; s. c., 13 Am. Dec. 525; *Bristol v. Carroll Co.*, 95 Ill. 93.

In *Clark v. Potter*, 32 Ohio St. 49, the court said: "A continued residence on the land is not necessary if it has been inclosed and used in such manner as to give publicity to the possession."

4. *Smith v. Hosmer*, 7 N. H. 436; s. c., 28 Am. Dec. 354; *Hale v. Glidden*, 10 N. H. 397; *Stevens v. Hollister*, 18 Vt. 294; s. c., 46 Am. Dec. 154; *Kennebec Purchase v. Springer*, 4 Mass. 416; s. c., 3 Am. Dec. 227; *Coburn v. Hollis*, 3 Metc. (Mass.) 125; *Slater v. Jepherson*, 6 Cush. (Mass.) 129; *Bates v. Norcross*, 14 Pick. (Mass.) 224. See 17 Pick. 14,



In some of the States the statute requires that the land claimed must be protected by a substantial inclosure,<sup>1</sup> the entire tract

s. c., 28 Am. Dec. 271; *Parker v. Parker*, 1 Allen (Mass.), 245; *Stevens v. Taft*, 11 Gray (Mass.), 35; *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230; *Smith v. Burtis*, 6 Johns. (N. Y.) 197; s. c., 5 Am. Dec. 218; *Lane v. Gould*, 10 Barb. (N. Y.) 254; *O'Hara v. Richardson*, 46 Pa. St. 391; *Slice v. Derrick*, 2 Rich. (S. Car.) 627; *Smith v. Mitchel*, 1 A. K. Marsh (Ky.), 207; *Hutton v. Schumaker*, 21 Cal. 453; *Borel v. Rollins*, 30 Cal. 408.

The inclosure need not be by an artificial fence. *Baker v. Van Volkenburg*, 29 Barb. (N. Y.) 319. See *Teed v. Halstead*, 5 Cow. (N. Y.) 216.

It appeared that fences on the sides of defendant's premises, extending across the strip in question to or near low-water mark, had been maintained by him and his grantors for more than twenty years, those portions across the beach being taken away in winter to prevent their being carried away by the ice and tides; there was no fence along the cliff, the land on that side being open to the sea. *Held*, that the evidence was sufficient to authorize the submission to the jury of the question as to whether there was a substantial inclosure within the meaning of the statute. *Trustees v. Kirk*, 84 N. Y. 215; s. c., 38 Am. Rep. 505. In this case the court said: "The requirement that the premises shall be protected by a substantial inclosure, if construed to require a continuous, uninterrupted inclosure for twenty years, would in many cases make it impossible to acquire title by adverse possession founded upon that provision. Upon such a construction, if fences were carried away by floods or destroyed by fire, or taken down in the winter for the accommodation of travel, the adverse possession would cease, although they were restored as soon as circumstances permitted. It is well understood that the bottom-lands on some parts of the Mohawk River are annually overflowed, and fences are removed to prevent them from being carried away by the flood. It cannot, we think, be claimed that the temporary removal of fences for this purpose defeats an adverse possession under the provision of the statute in respect to inclosure. In this case the land was left uninclosed on the side toward the sea. The sea was a natural barrier, as much so as a mountain or a river or a ledge of rocks; and the sea, with the lateral fences when maintained, constituted, we think,

a substantial inclosure within the meaning of the statute. The removal of the fences during the winter was to protect them from being swept away by the ice and tides. If they had not been removed, but had been left to be carried away each winter by the sea, the defendant could, we think, have replaced them in the spring, and would not have lost his right under the statute. By the voluntary removal of the fences he simply anticipated the action of the elements; and having restored them when the danger was passed, and maintained them during the season when the use of the beach for taking sea-weed was practicable, the purposes of notice, upon which the statute proceeds, were met." See *St. Louis v. Gorman*, 29 Mo. 593; *Brumagin v. Bradshaw*, 39 Cal. 24.

A plot of woodland was fenced on two sides, one of the other sides being an unfenced highway, and the fourth indicated only by marked trees. *Held*, not such occupancy as constituted adverse possession. *Pope v. Haumer*, 8 Hun (N. Y.), 265; 74 N. Y. 24.

A fence on three sides will not be sufficient. *Morrison v. Chapin*, 97 Mass. 72. Compare *Kerr v. Hitt*, 75 Ill. 51.

The fences must be substantial, a mere brush fence, or one made by felled trees lapping upon one another is not sufficient. *Hale v. Gliddon*, 10 N. H. 397; *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 229; *Coburn v. Hollis*, 3 Metc. (Mass.) 125; *Parker v. Schoonmaker*, 1 Allen (Mass.), 245; *Slater v. Jepherson*, 6 Cush. (Mass.) 129.

The fences must be erected by the party claiming adversely. *Doolittle v. Tice*, 41 Barb. (N. Y.) 181.

The inclosure must be for the purpose of marking the boundaries. *Soule v. Barlow*, 48 Vt. 132.

The fence of an adjoining owner, if on the boundary line, may be sufficient. *Doolittle v. Tice*, 41 Barb. (N. Y.) 181.

An extensive inclosure, which includes tracts also held adversely, also lands which there is no intention to claim, is not an adverse holding of a specific tract within such general inclosure. *Walsh v. Hill*, 41 Cal. 571; *Smith's L. C.* 717 *et seq.*

1. *Pope v. Haumer*, 8 Hun (N. Y.), 265; 74 N. Y. 246. *Soule v. Barlow*, 49 Vt. 329; *Walsh v. Hill*, 41 Cal. 571; *Russell v. Davis*, 38 Conn. 562.

In *Jackson v. Schoonmaker*, 2 Johns.

claimed must be inclosed.<sup>1</sup> Even where the statute does not require the erection of a fence, its construction with intent to claim title is sufficient evidence of disseisin;<sup>2</sup> but the mere fact of building a fence, if there is no intention to claim adversely connected with the erection of the fence, will not constitute evidence of possession or occupation.<sup>3</sup>

**24. Taxes.**—A stranger will not acquire title merely by payment of taxes on unoccupied land without actual possession; possession is indispensable.<sup>4</sup> (See COLOR OF TITLE, *infra*.)

**25. Possession must be Visible, Notorious, and Exclusive.**—These constitute qualities which chiefly distinguish a disseisin from a trespass, and they unite to give rise to two modes in which a disseisin

(N. Y.), 229, it was held that a possession fence, which was made by trees felled and lapping one upon another, did not constitute a sufficient adverse possession to toll the right of entry of the true owner. The court said there must be a real and substantial inclosure, an actual occupancy, a *possessio pedis*, which is definite, positive, and notorious, to constitute an adverse possession, when that is the only defence, and is to countervail a legal title. The object of the statute defining the acts essential to constitute an adverse possession is, that the real owner may, by unequivocal acts of the disseisor, have notice of the hostile claim and be thereby called upon to assert his legal title. In this case there was no actual inclosure by fences of the land in question. But this is not indispensable in every case. In *Jackson v. Halstead*, 5 Cow. (N. Y.) 216, title to land fronting on the Delaware river was claimed by adverse possession. Fences had been erected, extending to a point about a rod from the river, leaving some of the disputed ground uninclosed. But it was proved that the fence at this place was as near the river as the wash of the floods and the make of the ground would permit. This was held to be a sufficient inclosure. Woodworth, J., said that it would be too strict to require the fence to be placed on the very margin of the river, where it would be liable to be swept away by the rise of water, and not within the reason of the rule defining what shall constitute an adverse possession. The learned judge further said that a river or mountain, or a ledge of rocks, on one side, forming a natural barrier, the other sides being inclosed, would, with claim of title, constitute an adverse possession. (See *Becker v. Van Valkenburgh*, 29 Barb. (N. Y.) 319. See *Pope v. Haumer*, 74 N. Y. 240.

1. *Armstrong v. Risteau*, 5 Md. 256;

s. c., 59 Am. Dec. 115. See *St. Louis v. Gorman*, 29 Mo. 593; *Trustees v. Kirk*, 84 N. Y. 215; s. c., 38 Am. Rep. 505; *Dennet v. Crocker*, 8 Me. 239; *Morrison v. Chapin*, 97 Mass. 72.

2. *Cantagrel v. Von Lupin*, 58 Tex. 570; *Hank v. Senseman*, 6 S. & R. (Pa.) 21; *Munshower v. Patton*, 10 S. & R. (Pa.) 334; s. c., 13 Am. Dec. 678.

The adverse possession must have been actual by fences, inclosures or buildings, where the land is capable of such possession, and where it is not, such fact must be averred in pleading. Such acts as cutting timber, grazing cattle, erecting hog-pens, are illusory and insufficient. *Hicks v. Fredericks*, 9 Lea (Tenn.), 491; *Pullen v. Hopkins*, 1 Lea (Tenn.), 741; *Cass v. Richardson*, 2 Coldw. (Tenn.) 28.

Some cases hold that no inclosure is necessary; but that open, unequivocal acts of ownership are sufficient. *Bright v. Stevens*, 1 Houst. (Del.) 240; *Brooks v. Bruyn*, 24 Ill. 392; *Langworthy v. Myers*, 4 Iowa, 18; *Booth v. Small*, 25 Iowa, 117.

3. *Soule v. Barlow*, 49 Vt. 529; *Allen v. Holton*, 20 Pick. (Mass.) 458; *Russell v. Davis*, 38 Conn. 362; *Carroll v. Gillion*, 33 Ga. 539.

4. *Bear Valley Coal Co. v. Dewart*, 95 Pa. St. 72; *Sorber v. Willing*, 10 Watts (Pa.), 141; *Miller v. Long Island R. Co.*, 71 N. Y. 380; *Hurlbut v. Bradford*, 110 Ill. 397; *Paine v. Hutchins*, 49 Vt. 314; *Mallóy v. Bowden*, 86 N. Car. 251; *Fullen v. Hopkins*, 1 Lea (Tenn.), 741.

The person paying the taxes must in some way be interested in or connected with the claim and color of title. A payment by a stranger to the claim and color of title does not answer the requirements of the statute. *Hurlbut v. Bradford*, 109 Ill. 397.

Payment of taxes is not occupancy. It only shows claim of title. *Paine v. Hutchins*, 49 Vt. 314.

may be effected. (1) Where the entry is not under a written title or paper, but merely under a claim of right or ownership, the ouster extends no further than the inclosure of the disseisor. (2) But if one enters under a color of title, by deed or other written document, and occupies and improves the land, he acquires, in law, actual possession to the extent of the boundaries contained in the writing, and this though the title conveyed to him is good for nothing. To give that effect to his possession of a part of the land, the possession must be exclusive, for if the true owner is in actual possession of any part of the land the disseisor will be confined to his inclosure or actual possession, and he will not be considered as in possession to the boundaries of his deed or writing. In any case, however, the possession, to effect an ouster of the owner, must in its nature possess such notoriety that the owner may be presumed to have notice of it, and of its extent. It must, in fact, be open, visible, notorious, and exclusive.<sup>1</sup>

1. *Atherton v. Johnson*, 2 N. H. 34; *Stevens v. Hollister*, 18 Vt. 294; s. c., 46 Am. Dec. 154; *Soule v. Barlow*, 49 Vt. 329; *Russell v. Maloney*, 39 Vt. 583. *Proprietors v. Call*, 1 Mass. 483; *Pray v. Pierce*, 7 Mass. 381; s. c., 5 Am. Dec. 59; *Cook v. Babcock*, 11 Cush. (Mass.) 210; *Thomas v. Marshfield*, 13 Pick. (Mass.) 250; *Samuel v. Barrowscale*, 104 Mass. 207; *French v. Pearce*, 8 Conn. 439; s. c., 21 Am. Dec. 680; *School Dist. v. Lynch*, 33 Conn. 330; *Clark v. Gilbert*, 39 Conn. 97; *Tracy v. Norwich, etc.*, R. Co., 39 Conn. 382; *Smith v. Burtis*, 6 Johns. (N. Y.) 197; s. c., 5 Am. Dec. 218; *Doe v. Campbell*, 10 Johns. (N. Y.) 477; *Cahill v. Palmer*, 45 N. Y. 484; *Saxton v. Hunt*, 20 N. J. L. 487; *Hawk v. Senseman*, 6 S. & R. (Pa.) 21; *Calhoun v. Cook*, 9 Pa. St. 226; *Stevens v. Leach*, 19 Pa. St. 265; *Bartholomew v. Edwards*, 1 Houst. (Del.) 17; *Malloy v. Bowden*, 86 N. Car. 251; *Crispin v. Hannavan*, 50 Mo. 536; *Tamm v. Kellogg*, 49 Mo. 118; *Kellogg v. Mulen*, 39 Mo. 174; *Key v. Jennings*, 66 Mo. 356; *Ekey v. Inge*, 87 Mo. 493; *Fugate v. Pierce*, 49 Mo. 447; *Wall v. Shindler*, 47 Mo. 282; *Bowman v. Lee*, 48 Mo. 335; *Pike v. Robertson*, 79 Mo. 615; *Beatty v. Mason*, 30 Md. 409; *Armstrong v. Risteau*, 5 Md. 256; s. c., 59 Am. Dec. 115; *Creekmur v. Creekmur*, 75 Va. 430; *Turpin v. Saunders*, 32 Gratt. (Va.) 27; *Core v. Faupel*, 24 W. Va. 238; *Yelverton v. Steele*, 40 Mich. 538; *Humphries v. Huffman*, 33 Ohio St. 395; *Peterson v. McCullough*, 50 Ind. 35; *Horbach v. Miller*, 4 Neb. 31; *Turney v. Chamberlain*, 15 Ill. 271; *Booth v. Small*, 25 Iowa, 177; *De Long v. Mulcher*, 47 Iowa, 445; *Edgerton v. Bird*, 6 Wis. 527; s. c., 70

Am. Dec. 473; *Pepper v. O'Dowd*, 39 Wis. 538; *Furlong v. Garrett*, 44 Wis. 111; *Washburne v. Cutter*, 17 Minn. 361; *Carroll v. Gillion*, 33 Ga. 539; *Denham v. Holean*, 26 Ga. 182; s. c., 71 Am. Dec. 193; *Virgin v. Land*, 32 Ga. 572; *Whittington v. Wright*, 9 Ga. 23; *Royall v. Lisle*, 15 Ga. 545; s. c., 60 Am. Dec. 712; *Alexander v. Polk*, 39 Miss. 737; *Wilson v. Williams*, 52 Miss. 488; *Dixon v. Cook*, 47 Miss. 220; *Benje v. Creagh*, 21 Ala. 151; *Brown v. Cockerell*, 33 Ala. 47; *Ringo v. Woodruff*, 43 Ark. 469; *Satterwhite v. Rosser*, 61 Tex. 166; *Gillespie v. Jones*, 26 Tex. 343; *Ward v. Drouhett*, 44 Tex. 370; *Bracken v. Jones*, 63 Tex. 184; *Thompson v. Pioche*, 44 Cal. 508; *Unger v. Mooney*, 63 Cal. 586; 49 Am. Rep. 100; *Armstrong v. Morrill*, 14 Wall. (U. S.) 120.

"So long as the possessor declares that he holds in subordination to the better title, the possession will be regarded as held by consent; nor will a continued possession after such declarations avail to mature a title under the statute of limitations, until the party has changed the character of his possession either by express declarations or by the exercise of acts of ownership inconsistent with a subordinate character." *Angell on Lim.* § 354.

Two distinct and independent seisions of the same land cannot exist at the same time. *Putnam Free School v. Fisher*, 34 Me. 172.

The claim of title which must enter into and is the characteristic of an adverse possession, has in it no element of stealthiness, nor is it elastic or flexible. *Potts v. Coleman*, 67 Ala. 221; *Thompson v. Pioche*, 44 Cal. 508.

What is an adverse and exclusive possession, and what is an interruption of such possession, depend very much upon the character of the land, and the purposes to which it is adapted and for which it is used. The adverse possession of an outlying lot of small value, remote from the dwellings of people, suitable for pasturing or for the growth of wood, or for some other purpose of husbandry, is to be proved by evidence very different from that which establishes the exclusive occupation of a residence or a shop or storehouse within the limits of a thickly settled business population. The rule of law is the same in both cases; but the evidence necessary to prove the fact is very different. In either case the question is, Has the adverse possession, considering the nature, situation, and uses of the land, been exclusive and continuous?<sup>1</sup>

"The statute was not made to serve the purpose of artifice and trick." *Sailor v. Hertzogg*, 2 Pa. St. 185; *Bracken v. Jones*, 63 Tex. 184.

So where a party held homestead property under recorded leases from plaintiff's husband, which leases had not expired, or, if they had expired, had done so within a year, cannot acquire such a right as will set the statute of limitations in motion from a secret deed by said husband, which deed was unrecorded, and of which plaintiff had no notice; an entry under such a deed not being sufficiently open to give the owner notice of the hostile claim and possession. *Maudlin v. Cox*, 7 Pac. Repr. (Cal.) 804.

It is the visible and adverse possession with an intent to possess that constitutes its adverse character, and not the remote motives or purposes of the occupant. *Humphries v. Huffman*, 33 Ohio St. 395; *French v. Pearce*, 8 Conn. 430; s. c., 21 Am. Dec. 680.

1. *Bowen v. Guild*, 130 Mass. 121; *Humphries v. Huffman*, 33 Ohio St. 395; *Bell v. Denson*, 56 Ala. 449; *Brumagim v. Bradshaw*, 39 Cal. 24; *Mooney v. Cooledge*, 30 Ark. 655; *Dorr v. School Dist.*, 40 Ark. 243; *Draper v. Shoot*, 25 Mo. 197; s. c., 69 Am. Dec. 462; *Leeper v. Baker*, 68 Mo. 407; *Clement v. Perry*, 34 Iowa, 567; *Ewing v. Burnet*, 11 Pet. (U. S.) 41.

The jury may take into consideration the nature of the land. *Turner v. Hall*, 60 Mo. 271.

As regards wild lands it is not enough to pay the taxes, and occasionally look at and show them to others as one's own. *Brown v. Rose*, 48 Iowa, 231.

Neither actual possession, cultivation, nor residence is necessary to constitute adverse possession where the property is

appropriated to the use for which it was designed and the only use of which it is susceptible. *Dorr v. School Dist.*, 40 Ark. 237.

Purchasers made entry upon the land under their deed, marked out their claim by survey and stakes, and upon the portion in litigation built a wharf on which to land lightwood, etc., and erected a boat-shed, and used both wharf and shed. *Held*, to be such acts of possession under color of title as would ripen into title by possession. *Congdon v. Morgan*, 14 S. Car. 587.

Surveying a part of the land and paying some taxes do not constitute possession. *Thompson v. Burhaus*, 61 N. Y. 52. See *Beatty v. Mason*, 30 Md. 409; *Oatman v. Fowler*, 45 Ala. 482.

The cutting of timber on uninclosed wild lands, without anything to define the extent of the alleged claim, is not alone such evidence of ownership as to amount to possession adverse to the true owner. It could not, therefore, operate as a disseisin against him, nor aid in any manner in supplementing the time necessary to bar the rights of the holder of the legal title. *Childress v. Calloway*, 76 Ala. 128; *Clements v. Hays*, 76 Ala. 280; *Burks v. Mitchell*, 78 Ala. 61; *Parker v. Parker*, 1 Allen (Mass.), 245; *Hale v. Glidden*, 10 N. H. 397.

The open and exclusive use of real property, for the purpose to which it is ordinarily fit or adapted, accompanied with a claim of ownership by the occupant, constitutes adverse possession, and the erection of a fence or other artificial boundary, to indicate the limits of such possession, is not essential thereto. *Zeilin v. Rogers*, 21 Fed. Repr. 103.

Where a person under color of title enlarged a boarding house, built docks, cut

**26. Notice.**—The adverse character of the possession must be manifested to the owner. The owner must be notified, in some way, that the possession is hostile to his claim, or the statute does not operate on his right.<sup>1</sup>

the hay, and paid taxes, *held*, that these acts were sufficiently open and notorious to constitute with him claim of being exclusive owner, a foundation of adverse title. *Foulke v. Bond*, 41 N. J. L. 527.

Where a party erects upon a city lot, to which he claims title, a substantial and permanent brick building, which he claims to own throughout its entire extent, the circumstances attending his act amount to such a claim of title to the land upon which the building is erected, at least to the centre of the walls, as may, by lapse of time, ripen into a title. *Crapo v. Cameron*, 61 Iowa, 447.

As against the true owner, a plaintiff in ejectment, claiming title founded upon a written instrument and a judgment or decree of a court, to be deemed in adverse possession, must have usually cultivated or improved it, or have protected it by a substantial inclosure, or, if not inclosed, have used it for the supply of fuel, or of fencing timber for the purposes of husbandry, or for the ordinary use of the occupant. *Simpson v. Creswell*, 18 Fla. 29.

1. *Unger v. Mooney*, 63 Cal. 586; s. c., 49 Am. Rep. 100; *Miller v. Myles*, 46 Cal. 539; *Thompson v. Pioche*, 44 Cal. 508; *Soule v. Barlow*, 49 Vt. 329; *Wing v. Hall*, 47 Vt. 182; *Proprietors v. Call*, 1 Mass. 483; *Pray v. Pierce*, 7 Mass. 381; s. c., 5 Am. Dec. 59; *Cook v. Babcock*, 11 Cush. (Mass.) 210; *Samuel v. Borrow-scale*, 104 Mass. 207; *Clark v. Gilbert*, 39 Conn. 97; *School Dist. v. Lynch*, 33 Conn. 334; *Trustees v. Kirk*, 84 N. Y. 215; s. c., 38 Am. Rep. 505; *Culver v. Rhodes*, 87 N. Y. 354; *Foulke v. Bond*, 41 N. J. L. 527; *Abell v. Harris*, 11 G. & J. (Md.) 371; *Turpin v. Saunders*, 32 Gratt. (Va.) 27; *Moore v. Thompson*, 69 N. Car. 121; *Virgin v. Lard*, 32 Ga. 572; *Dixon v. Cook*, 47 Miss. 220; *Wilson v. Williams*, 52 Miss. 488; *Herbert v. Haurick*, 16 Ala. 581; *Nat. M. Co. v. Powers*, 3 Mont. 344; *Wilson v. Henry*, 35 Wis. 241; *Lynde v. Williams*, 68 Mo. 370; *Crispin v. Hannavan*, 50 Mo. 536; *Scruggs v. Scruggs*, 43 Mo. 142; *Kay v. Jennings*, 66 Mo. 356; *Musick v. Barney*, 49 Mo. 458; *Fulgate v. Pierce*, 49 Mo. 447; *Ringo v. Woodruff*, 43 Ark. 469; *Purtis v. Hill*, 3 Tex. 278; *Campau v. Dubois*, 39 Mich. 274.

The hostile occupation may be so no-

torious that the legal owner will be presumed to have notice of it. *Wilson v. Williams*, 52 Miss. 488; *Alexander v. Polk*, 39 Miss. 737; *Samuel v. Barrow-scale*, 104 Mass. 207; *Virgin v. Land*, 32 Ga. 572; *Royall v. Lisle*, 15 Ga. 545; s. c., 60 Am. Dec. 712; *Herbert v. Haurick*, 16 Ala. 581; *Key v. Jennings*, 66 Mo. 356; *Musick v. Barney*, 49 Mo. 458; *Scruggs v. Scruggs*, 43 Mo. 142; *Fulgate v. Pierce*, 49 Mo. 441; *Moore v. Thompson*, 69 N. Car. 120.

The actual possession of land with the exercise of the usual acts of ownership and dominion over it, operate in law as constructive notice to all the world of the claim of title under which the possessor holds. *Talbert v. Singleton*, 42 Cal. 395.

Whether open occupancy operates notice to the other party that such occupancy is hostile; depends on the nature and circumstances of such occupancy. *Plimpton v. Converse*, 42 Vt. 712; s. c., 44 Vt. 158; *Wing v. Hall*, 47 Vt. 182.

Where the party who sets up limitation entered under a recorded deed, which on its face discloses a conflict and assumes to convey title to the land occupied, the true owner, whose land is thus held adversely, is notified of the adverse claim. *Bracken v. Jones*, 63 Tex. 184.

If the hostile character of the possession is so openly manifested that his observation as a man reasonably careful of his interests would be sufficient to discover it, he will be deemed to have notice. Thus, where one of two tenants in common conveys to a third person by deed purporting to convey the whole land, and the deed is recorded by the grantee, who enters under it, such entry is hostile in its nature, and the mere fact of possession by a stranger is enough to put him on inquiry, and charge him with notice. So, the making of valuable improvements, paying the taxes upon the land, and receiving the rents and profits without accounting or offering to account, are circumstances indicating an adverse holding, and their effect upon the co-tenant is the same as if notice were directly communicated to him. The means of knowledge being furnished by the open and notorious character of the possession, he is chargeable with actual notice. *Unger v. Mooney*, 63 Cal. 586.

When one takes a conveyance of land,

### 27. Possession must be Continuous.—The possession must, for all

in the actual, open, notorious, and hostile possession of another claiming to hold adversely to the grantor, he takes it with notice of all the rights of the possessor that he would have learned if he had duly and fully inquired of the person in possession. It is not enough to inquire of the grantor; the rule is inflexible that such inquiry must be made of the person holding adversely to the grantor. *Canfield v. Hard*, 58 Vt. 217; s. c., 49 Am. Rep. 100.

The mere fact of signing a deed as an attesting witness does not of itself operate as an admission that the witness does not assert an adverse claim to the land conveyed, since he is not required or presumed to know the contents of the instrument when he attests it; but, if it be shown that he did in fact know the contents, the jury may consider it as such admission. *Coker v. Ferguson*, 70 Ala. 284. See *Miller v. Miller*, 60 Pa. St. 16.

Premises adjacent to a railroad were conveyed to plaintiff, "subject to any right of way said railroad may own over the same." The railroad company had previously become entitled to thirty-five feet in width from the centre line of its track as right of way, but there was nothing of record showing the extent of such easement. The railroad was in operation at the time, and a fence had been constructed on one side near the track. *Held*, that the plaintiff being affected with notice of the acquisition of an easement over the premises by the railroad company, could not acquire title to any portion of the right of way by adverse possession. *Slocumb v. Chicago, etc., R. Co.*, 57 Iowa, 675.

Building a shed, quarrying rock, erecting a lime-kiln, cutting wood, etc., are calculated to give notice. *Moore v. Thompson*, 69 N. Car. 120.

While the true owner is chargeable with knowledge of the boundaries of his land, he cannot be affected with notice that an adjoining proprietor has encroached by his fence a few feet over the line for the purpose of acquiring 640 acres of his land under the statute. *Bracken v. Jones*, 63 Tex. 184.

The owner of land is chargeable with notice of its locality and boundaries, and the meaning and locality of every settlement made upon it by another without his authority. One holding the superior title cannot set up his ignorance of the claim of right under which his land is occupied by an adverse claimant, in person

or by agent, to defeat limitation. *Brownson v. Scanlan*, 59 Tex. 222.

To make the possession of one tenant in common adverse as against the others, it is not necessary that notice should be given of the adverse intent; but the intent must be manifested by outward acts of an unequivocal kind. *Abernathie v. Consolidated M. Co.*, 16 Nev. 260.

Posting a notice declaring intention to hold the property is insufficient. *Lynde v. Williams*, 68 Mo. 360.

The use by a railroad company of its roadbed by running trains, etc., is notice. *Jeffersonville, etc., R. Co. v. Oyler*, 60 Ind. 383.

One in possession under a deed conveying a designated portion of a survey by specific metes and bounds cannot invoke for his protection the statute against the owner of an undivided interest in the same survey, under an older deed from the common vendor, the second purchaser having notice of the former deed. *Saunders v. Silvey*, 55 Tex. 46.

Possession under a deed duly recorded is constructive notice. *Forest v. Jackson*, 56 N. H. 357.

It is not sufficient that some former deed in his chain of title has been so recorded. *Wimberly v. Bayley*, 58 Tex. 222. See *Cook v. Dennis*, 61 Tex. 246.

Possession of part of one lot embraced in the same deed with other lots will not be extended by construction to the other lots, unless the deed be on record, so as to work a title by prescription; and constructive possession of the unoccupied lots will not begin to run until the date of the record. *Tritt v. Roberts*, 64 Ga. 156. See *Grimes v. Ragland*, 28 Ga. 123; *Wiley v. Warmoch*, 30 Ga. 701; *Schultz v. Lindell*, 30 Mo. 310; *Thompson v. Burhans*, 61 N. Y. 52.

Possession under title bond is sufficient to charge a purchaser from the obligor with notice of the obligee's color of title. *Spitler v. Scofield*, 43 Iowa, 571.

Possession of so much ground (not adversely held by another), upon either side of the track, as was reasonably necessary for the convenient use and maintenance of the railway, in the customary mode, was constructive notice, to a subsequent purchaser, of the actual equitable title of the railway. *Day v. N. Y. & C. R. Co.*, 20 Am. & Eng. R. R. Cas. 359; s. c., 41 Ohio St. 392.

Actual notice of the assertion of a superior title is fatal to the occupant's claim for improvements, and the filing of a bill against him, by the person claim-

the time fixed by the statute, be continuously and consistently adverse.<sup>1</sup>

ing such superior title, is the most solemn and authoritative form of notice. *Gordon v. Tweedy*, 74 Ala. 232.

In *Pike v. Robertson*, 79 Mo. 615, the court said: "If the owner visit his land the indications of adverse possession and claim should be so patent that he could not be deceived. In this case, if the owner should have visited this land he might have seen wood cut and rails split and hauled off, pretty good indications of trespass; but he would have seen no habitation, no inclosures, no fields—nothing indeed to advise him that an adverse claim was set up—that some one was disputing his title." *Musick v. Barney*, 49 Mo. 458.

A claimed sixty acres of wild land under color of title. He placed the land in care of a neighbor, who cultivated the part cleared, about three-quarters of an acre, and cut timber from the rest of the land. *Held*, that he had such a possession as gave notice of A's claim of title to one who took a mortgage from the holder of the legal title. *Wickes v. Lake*, 25 Wis. 71.

In a wall forming one side of a house belonging to A was a stone with an inscription stating the wall to be the property of B, and that the ground eighteen feet south from the stone was given to the public for a street. B had asserted no claim of title for at least thirty years. *Held*, that the fee of the street remained in B, and that A had not gained a title to the wall by adverse possession. The inscription on the stone was sufficient to prevent such adverse possession arising. *Phillipson v. Gibson*, L. R. 6 Ch. 428.

1. See p. 258; n. 1. *Bracken v. Jones*, 63 Tex. 184; *Satterwhite v. Rosser*, 61 Tex. 166; *Bank v. Hedges*, 38 Tex. 614; *Horbach v. Miller*, 4 Neb. 31; *Messer v. Reginniter*, 32 Iowa, 312; *Sparrow v. Hovey*, 44 Mich. 63; *Yelverton v. Steele*, 40 Mich. 538; *Cent. Pac. R. Co. v. Shackelford*, 63 Cal. 261; *Unger v. Mooney*, 63 Cal. 586; s. c., 49 Am. Rep. 100; *San Francisco v. Fulde*, 37 Cal. 353; *Steeple v. Downing*, 60 Ind. 478; *Thompson v. McLaughlin*, 66 Ill. 407; *Harrison v. Cachelin*, 35 Mo. 77; *Wall v. Shindler*, 47 Mo. 282; *Lynde v. Williams*, 68 Mo. 365; *Bowman v. Lee*, 48 Mo. 335; *Fugate v. Pierce*, 49 Mo. 441; *Bradley v. West*, 60 Mo. 33; *Sharp v. Johnson*, 22 Ark. 79; *Ringo v. Woodruff*, 43 Ark. 469; *Williams v. Wallace*, 78 N. Car. 354; *Malloy v. Bruden*, 86 N. Car. 251;

*Andrews v. Mulford*, 1 Hayw. (N. Car.) 320; *Park v. Cochran*, 1 Hayw. (N. Car.) 180; *Taylor v. Burnside*, 1 Gratt. (Va.) 165; *Creekmur v. Creekmur*, 75 Va. 430; *Core v. Faupel*, 24 W. Va. 238; *Ringgold v. Malott*, 1 H. & J. (Md.) 316; *Hall v. Gittings*, 2 H. & J. (Md.) 112; *Bell v. Denson*, 56 Ala. 444; *Beard v. Ryan*, 78 Ala. 37; *Riggs v. Fuller*, 54 Ala. 141; *Laramore v. Minish*, 43 Ga. 282; *Joiner v. Borders*, 32 Ga. 239; *Morrison v. Hayes*, 19 Ga. 294; *Tegarden v. Carpenter*, 36 Miss. 404; *Nixon v. Porter*, 38 Miss. 401; *Wickliffe v. Ensor*, 9 B. Mon. (Ky.) 253; *Morse v. Williams*, 62 Me. 445; *Soule v. Barlow*, 49 Vt. 329; *Melvin v. Proprietors*, 5 Metc. (Mass.) 5; s. c., 28 Am. Dec. 384; *Smith v. Chapin*, 31 Conn. 531; *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230; *Bliss v. Johnson*, 94 N. Y. 235; *Wheeler v. Spinola*, 54 N. Y. 377; *Johnston v. Irwin*, 3 S. & R. (Pa.) 291; *Moore v. Collishaw*, 10 Pa. St. 224; *Rogers v. Benlow*, 10 S. & R. (Pa.) 303; *Hoey v. Furman*, 1 Pa. St. 296; *Groft v. Weakland*, 34 Pa. St. 308; *Christy v. Alford*, 17 How. (U. S.) 601; *Armstrong v. Morrell*, 14 Wall. (U. S.) 120; *Read v. Allen*, 63 Tex. 154; *McMullin v. Erwin*, 58 Ga. 427.

The absence of the defendant, or the absence of any vendor under whom he claims, from the State, has no effect to prevent the running of the statute in his favor. It is the possession of the land by himself or tenants, not his personal presence, which avails him. *Hunter v. Nichols*, 55 Tex. 217.

An abandonment of the premises, although the intent to shortly return may exist, will stop the running of the statute. *Susquehanna, etc., R. Co. v. Quick*, 68 Pa. St. 189. See INTERRUPTION OF POSSESSION, *post*, p. 271.

The possession cannot be changed from one part of a tract to another without breaking the continuity. *Grieff v. Schwenderman*, 27 Mo. 412.

When the possession is once established, it will be presumed, in the absence of evidence to the contrary, to have continued. *Marston v. Rowe*, 43 Ala. 271.

Where acts of ownership consisted in the payment of taxes on the land and the employment of agents in respect to it, in the absence of actual possession on the part of the alleged owner, *held*, error to permit the jury to consider such acts in passing upon the question of continuous possession required to perfect a colorable title under a deed. Here the

Though the possession be continuous, if it is held for a portion of the time in recognized subordination to the true owner, and for another time in repudiation of his claim to the land, the two

jury should have been instructed that no such continuous possession was shown by the plaintiff. *Ruffin v. Overby*, 88 N. Car. 369.

A vendor of land by removing from the State cannot stop the running of the statute of limitations in favor of his vendee. *Zoll v. Carnahan*, 83 Mo. 35. But some authorities hold that the limitation does not apply to a proceeding *in rem*, but only to actions *in personam*. *Anderson v. Baxter*, 4 Oregon, 105; *Eubanks v. Leveridge*, 4 Sawy. (U. S.) 274. Compare *Whalley v. Eldridge*, 24 Minn. 358; *Emory v. Keighan*, 94 Ill. 543.

**Computation of Time.**—Only the time which elapsed before the commencement of the suit can be considered. *Beard v. Ryan*, 78 Ala. 37.

In computing time to ascertain whether an action is barred by limitations, the day on which the right of action accrued must be included, and the day of issuing the summons excluded. *Shinn v. Tucker*, 33 Ark. 421. See *Gray v. Givens*, 26 Mo. 291; *Ely v. Wynne*, 22 Gratt. 224.

The time must be definitely stated, evidence that it began "in the summer" of the year that the statute began to run and ended on some indefinite day in the year when the statutory period terminated, is not sufficient. *Grosholtz v. Newman*, 21 Wall. (U. S.) 481.

When the title of a party in possession of lands has become fixed and absolute by reason of the statute of limitations, it is not affected by a subsequent statute extending the time of limitation. *Shriver v. Shriver*, 86 N. Y. 575.

The ten years' possession need not be the ten years next before the date of the action of ejectment. *Allen v. Mansfield*, 82 Mo. 688; *Unger v. Mooney*, 63 Cal. 586; s. c., 49 Am. Rep. 100.

A tax deed will run from date of sale. *Shawler v. Johnson*, 52 Iowa, 473. See *Clark v. Thompson*, 37 Iowa, 536; *Hintrager v. Hennessy*, 46 Iowa, 600; *Barratt v. Love*, 48 Iowa, 103.

A widow has no estate in the land until her dower is assigned, but a mere right of occupancy. Her possession is not hostile to the heir's title, and she has nothing that she can convey to a stranger to the title, and is not to be estimated in computing time. *Padgett v. Norman*, 44 Ark. 490. See *Carnall v. Wilson*, 21 Ark. 62; s. c., 76 Am. Dec. 351; *Burks v. Osborn*, 9 B. Mon. (Ky.)

579; *Halsey v. Dodd*, 1 Halst. (N. J.) 367; *Weaver v. Crenshaw*, 6 Ala. 873; 18 lb. 810.

In the case of a mortgage the time will begin to run from the time of condition broken. *Green v. Mizule*, 54 Miss. 220.

Where an execution and sale were completed by the incoming sheriff, the time will begin to run from the date of the deed. *Walls v. Smith*, 19 Ga. 8.

A person enters upon land under a deed describing the land and claiming it under such deed, and which land, at the date of his deed and entry thereon, does not appear to have been granted by the commonwealth, but subsequently thereto the said land is granted to another person. *Held*, that from the time the grant issued to such other person the statute of limitations commenced to run in favor of the person who had thus entered upon the land; and if he continues in the actual possession, after the date of said grant, long enough to bar an entry under said statute, he will acquire a valid title to said land. *Adams v. Alkire*, 20 W. Va. 480.

In a suit for the recovery of land, after the issuance of the patent, the statute cannot be held to have commenced running prior to the date of the patent. *Manley v. Howlett*, 55 Cal. 94; *O'Connor v. Fogle*, 63 Cal. 9.

**Title in the United States.**—A party entered into possession of a tract of land under color of title, and so remained in possession thereof for more than ten years after the title to the tract had been conveyed to a railroad company by the United States. *Held*, that to enable him to invoke the protection of the statute of limitations, it was wholly immaterial whether his title originated before or after the title passed from the United States. *Tremaine v. Weatherby*, 58 Iowa, 615.

Possession for the period named in a State statute is no bar until the legal title passes out of the United States. *Gibson v. Choteau*, 13 Wall. (U. S.) 92; *Dunn v. Miller*, 75 Mo. 260.

Upon a plea of the statute of limitations, the only evidence given of possession during the first year of the statutory period was that the defendant's grantor went once upon the land, set up two stakes at what he was told were corners, tried to ascertain the boundaries, and af-



periods of time cannot be united to constitute the period of limitation; and if under color of title, then an actual possession and occupation of a part of the parcel claimed, and a constructive pos-

terward paid the taxes for the year. *Held*, that this did not amount to possession, and the plea was not sustained. *Bradstreet v. Kinsella*, 76 Mo. 63.

If A recover possession of land by execution on a judgment in ejectment against B, *semble* that the judgment does not relate to the time of action brought, so as to give A, during the intervening time, an adverse possession as against C, an independent claimant. *Turner v. Baker*, 64 Mo. 218.

If a levy was made on land within four years of its sale by the defendant in *fa.*, but the sale did not take place until after the expiration of the four years, the proof accounting reasonably for the delay, then the possession can only be counted in favor of the purchaser up to date of levy. *Cox v. Prater*, 67 Ga. 588.

Where the grantee sued and recovered the purchase money by reason of an alleged want of title in the grantor, *held*, an abandonment of all rights claimed or acquired by the grantee and a claim of title must commence from the date of receipt of such purchase money. *Davenport v. Sebring*, 52 Iowa, 364.

Where land was sold in 1854 upon an execution against the husband alone, the right of the wife to enter into possession of the land did not vest until the death of her husband, and an action may be brought within twenty years from that time. *Wright v. Tichenor*, 104 Ind. 185.

In 1854 certain land belonging to C. was levied upon and sold to satisfy a judgment against him alone. In 1856 his wife executed a deed, in which he did not join, to one claiming under the sheriff's sale. In 1864 C. died, his wife surviving. Action by the latter, in 1884, against a remote grantee to recover one third of the land. *Held*, that while her deed was void, it was sufficient to convey color of title. Also, that the plaintiff's cause of action to avoid the deed which gave color of title accrued when her grantee took possession under the deed in 1856, as there was then an adverse possession of all the land. Also, that the defendant and his grantors having been in possession more than twenty years under color of title conferred by the plaintiff's deed, the action is barred by the statute of limitations, the plaintiff's disability of coverture not postponing the time when the statute began to run. *Wright v. Klegla*, 104 Ind. 223.

A held under contract of purchase of B. A abandoned the land, but subsequently, under a lease from C, without having rescinded his contract with B, the land meanwhile remaining unoccupied. *Held*, that A's re-entry related back and continued his original possession. *Pratt v. Canneld*, 67 Mo. 50.

In 1783 a lease was granted for ninety-nine years, and there was enjoyment under the lease until 1876, when an action was brought for possession, on the ground that the lease was void under 13 Eliz. c. 10. Demurrer that the claim was barred by the statute of limitations. *Held*, that the lease was voidable, not void; and that, consequently, the statute did not begin to run till the action was brought. *Governors of Magdalen Hospital v. Knotts*, 5 Ch. D. 175.

Where a co-tenant, pending an action for partition, conveys his undivided interest to one who is not and does not become a party to the partition proceedings, the statute of limitations does not commence to run against the right of such grantee to possession after the determination of such partition suit until he has made a demand to be let into possession of the land allotted to his grantor, and such demand has been refused. *Martin v. Walker*, 9 Pac. Repr. (Cal.) 185.

To establish adverse possession of land under claim of title founded upon a written instrument, the vendee in possession under a parol contract for the sale of the land may avail himself of the former possession and title deeds of his vendor. *Meade v. Gilfoyle*, 64 Wis. 18.

Where the trespass is permanent in its character and the damage is complete on the occurrence of the original act of trespass, the statute begins to run from that time. Even in case of a continuing nuisance or trespass, where every such continuance is regarded as affording a new cause of action, the action must be brought before the defendant has acquired a prescriptive right to commit the trespass or to maintain the nuisance by the lapse of such a period as bars plaintiff's entry upon the land. *James v. City of Kansas*, 83 Mo. 567.

The point of time, from which the bar of the statute, prohibiting the institution of an action for the recovery of lands sold for the non-payment of taxes after the expiration of five years from the date

session of the residue, must continue uninterruptedly for the whole period prescribed.<sup>1</sup> (See also ACTUAL POSSESSION, *infra*.)

28. *Tacking*.—In the case of successive holders of land, after a disseisin committed by one of them, the seisin thereby acquired by him will not enure to the benefit of the others who come into possession after him, unless there is a privity of estate between them and him, by purchase or descent. But if there is privity of estate between them, then their connected possessions can be tacked together to make a continuity of disseisin.<sup>2</sup> To create

of sale, is to be computed, is the date of the execution of the deed by the judge of probate, that being the final, consummating act of sale. *Pugh v. Youngblood*, 69 Ala. 296.

A resumption of the adverse holding, after an interruption by the true owner, will run from the date of the resumption. *Steeple v. Downing*, 60 Ind. 478.

Where a deed giving color of title misdescribes the land and a new deed is substituted, the statute will run from date of last deed. *Weaver v. Wilson*, 48 Ill. 125.

1. Tyler on Eject. 911.

2. *Bryan v. East St. Louis*, 12 Ill. App. 390; *Kilbourne v. Lockman*, 8 Iowa, 380; *Brant v. Ogden*, 1 Johns. (N. Y.) 156; *Jackson v. Thomas*, 16 Johns. (N. Y.) 293; *Ward v. Bartholomew*, 6 Pick. (Mass.) 410; *Wade v. Lindsey*, 6 Metc. (Mass.) 407; *Melvin v. Proprietors*, 5 Metc. (Mass.) 5; s. c., 28 Am. Dec. 384; *Overfield v. Christie*, 7 S. & R. (Pa.) 173; *McCoy v. Trustees*, 5 S. & R. (Pa.) 254; *Mercer v. Watson*, 1 Watts (Pa.), 330; *Parker v. Southwick*, 6 Watts (Pa.), 377; *Hunt v. Dewling*, 8 Watts (Pa.), 403; *Moore v. Small*, 9 Pa. St. 194; *Scheetz v. Fitzwater*, 5 Pa. St. 126; *Schraik v. Zubler*, 34 Pa. St. 38; *Winslow v. Newell*, 19 Vt. 164; *Day v. Wilder*, 47 Vt. 584; *Satterwhite v. Rosser*, 61 Tex. 166; *Brownson v. Scanlan*, 59 Tex. 222; *Wheeler v. Moody*, 9 Tex. 372; *Shaw v. Nicholay*, 30 Mo. 99; *St. Louis v. Gorman*, 29 Mo. 593; s. c., 77 Am. Dec. 586; *Chouquette v. Barada*, 23 Mo. 331; *Furlong v. Garrett*, 44 Wis. 111; *McNeeley v. Langdan*, 22 Ohio St. 32; *McEntire v. Brown*, 28 Ind. 347; *Doe v. Brown*, 4 Ind. 143; *Adams v. Tiernan*, 5 Dana (Ky.), 394; *Hanson v. Johnson*, 62 Md. 25; s. c., 50 Am. Rep. 199; *Chilton v. Wilson*, 9 Humph. (Tenn.) 399; *Hays v. Morrison*, 30 Ga. 971; *Benson v. Stewart*, 30 Miss. 49; *Riggs v. Fuller*, 54 Ala. 141; *San Francisco v. Fulde*, 37 Cal. 349; *Shuffleton v. Nelson*, 2 Sawy. (U. S.) 540; *Lea v. Polk County*, 21 How. (U. S.) 403; *Dosewell v. De La Levina*, 20 How. (U. S.) 29.

*Tacking*.—One who relies on title by prescription and seeks to tack to his own the possession of prior holders to make out the prescription, must show that their possession was *bona-fide*. *Hammond v. Crosby*, 68 Ga. 767; *Baker v. Hale*, 6 Baxt. (Tenn.) 46.

The possession of lands by a vendor is subordinate, and not adverse, to the rights of his vendee, and the statute of limitations does not run during its continuance, so that the time thereof can be added to the time during which a subsequent purchaser from the vendor may hold, so as to make a sufficient period to bar the rights of the first purchaser. *Jeffersonville, etc., R. Co. v. Oyler*, 82 Ind. 394.

Action was brought against A for the possession of land held adversely by him for less than ten years, but before trial he died. The plaintiffs in such action, having matured title by possession made their entry upon the land, and, subsequently, were ousted by the heirs-at-law of A. Held, that such heirs could not claim that their possession thus acquired was a continuation of A's possession cast upon them by descent. *Congdon v. Morgan*, 14 S. Car. 587.

Defendant in ejectment cannot tack the possession of a grantor, whose possession originated in fraud of the true owner, to his own possession in order to complete the term of years necessary to give him title by prescription, though he himself be an innocent purchaser from such fraudulent grantor. *Farrow v. Bullock*, 63 Ga. 360.

When a vendor conveys by deed lands particularly designated, or described by numbers, metes and bounds, the purchaser acquires title, or color of title, only to the lands within the designated numbers and boundaries; and if he claims adverse possession, under color of title, of adjoining lands outside of those numbers and boundaries, because his vendor was in possession thereof at the time his conveyance was executed, he must show that the possession thereof was delivered to him, as a part of the

such privity, there must have existed, as between the different disseisors, in regard to the estate of which a title by disseisin is

lands sold and conveyed; otherwise, he cannot tack his vendor's prior possession to his own subsequent possession, for the purpose of making out a title under the statute of limitations. *Humes v. Bernstein*, 72 Ala. 546.

It is indispensable to maintain the plea of limitation that the deed under which he who sets up that defence claims should have been duly registered; the registration of some deed or deeds in the chain of title will not meet the requirements of the statute. While this is true, one who entered under a deed to himself, duly recorded, may tack his own possession to that of his vendor, who also entered and held under a deed duly registered. *Cook v. Dennis*, 61 Tex. 246. See *Wimberly v. Bailey*, 58 Tex. 222.

A long acquiescence of adverse parties in the possession of land by another will warrant the court in assuming the existence and loss of record-links in making up his title, the lapse of time varying with the conditions under which the records were kept and the casualties to which they were exposed. *Yount v. Miller*, 91 N. Car. 331.

Where the purchaser of a lot, upon receiving a deed therefor, erects a building thereon and enters into possession, and afterwards sells and conveys the premises, a number of transfers being thereafter made, and the building at times being vacant, but no interruption by an adverse claim to the title of the occupant, *held*, that the possession was continuous, and after the expiration of ten years the occupant possessed the fee. *Stettinische v. Lamb*, 26 N. W. Repr. (Neb.) 374.

A *feme covert* died in December, 1854, leaving a will, which was admitted to probate, but was not executed in due form to pass real estate, because the consent of her husband in writing was not annexed thereto, and also because it was not executed sixty days before her death. By said will she devised a farm to her husband for life, with remainder in fee to her nephew. Under it her husband, on the 1st of January, 1855, entered into possession of the property, claiming title as tenant for life, and so continued in possession until the 5th of February, 1868, when he united with the nephew in a sale and conveyance to J., who thereupon entered upon said property, and continued in possession up to the 11th of April, 1882, when the heirs-at-law of the testatrix brought ejectment against him. *Held*.

that the claim of title and possession of the husband, as tenant for life under the will, being hostile to the title of the heirs-at-law, was as against them adverse and exclusive. That the purchaser from the husband and nephew having immediately taken and held possession under the conveyance to him, his possession was added or tacked to the possession of the husband, making a continuous adverse possession of more than twenty years, which was a flat bar to the right of the plaintiffs as heirs-at-law. *Hanson v. Johnson*, 62 Md. 25; s. c., 50 Am. Rep. 199.

Possession under color of title may be transferred, and the possession of subsequent holders united, as to the land actually occupied, but not as to other land of which the first holder had color of title, but of which there was no conveyance to subsequent holders. *Cooper v. Ord*, 60 Mo. 420.

Where the purchasers were joint tenants and one died, and under order of court the property was sold and purchased by the survivor, who paid his bid in full but took no deed, *held*, that the survivor did not hold under a different legal title or by a disconnected right, and that the time of his possession might be added to the time of the joint possession. *Congdon v. Morgan*, 14 S. Car. 587.

Even a link in a chain of title subsequent to patent which is not void, but voidable, will constitute a link in the chain of "title" within the meaning of the statute; and this even though such voidable deed had its origin in a transaction between the grantor and grantee, which was fraudulent as to an estate represented by the grantor. *League v. Rogan*, 59 Tex. 427; *Pearson v. Burdett*, 26 Tex. 172.

A party cannot connect his possession previous to obtaining a deed with his subsequent possession under a deed. *Barnes v. Vickers*, 59 Tenn. 370.

If the actual owner leases to a tenant, in ignorance of a prior lease to the same tenant from one who claims title, the continued possession of the tenant will not keep alive the first landlord's adverse claim. *Thompson v. Pioche*, 44 Cal. 508.

Where a tract of land is held under color of title, a part constructively and a part actually, a grantee of the part actually held does not succeed to the claim to the part constructively held. *Chandler v. Rushing*, 38 Tex. 591.

The possession of a deviser, devisee

claimed, some such relation as that of ancestor and heir, grantor and grantee, or deviser and devisee.<sup>1</sup>

**29. Interruption.**—Upon every discontinuance of the possession of the wrong-doer, the possession of the rightful owner is, by operation of law, restored, and nothing short of an actual adverse and continuous possession for the statutory period can destroy his right or vest title in the wrong-doer.<sup>2</sup>

for life, and remainder-man, is of sufficient privity to be tacked to make out a continuous possession. *Haynes v. Boardman*, 119 Mass. 414.

One cannot avail himself of the previous possession of another under whom he does not claim in order to establish a title of land by adverse possession. *Bailey v. March*, 3 N. H. 275; *Edmunds v. Griffin*, 41 N. H. 530; *Locke v. Whitney*, 5 Eastn. Repr. (N. H.) 340; *Simpson v. Downing*, 23 Wend. (N. Y.) 316; *Jackson v. Woodruff*, 1 Cow. (N. Y.) 286; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Leonard v. Leonard*, 7 Allen (Mass.), 277.

The possession of mere trespassers cannot be tacked. *Baker v. Hale*, 6 Baxt. (Tenn.) 46; *Moffitt v. McDonald*, 11 Humph. (Tenn.) 457. Compare *Hughes v. Pickering*, 14 Pa. St. 297.

In South Carolina it is held, that where possession originally was wrongful, until it ripened into a right by lapse of time, or by descent cast, there was no estate, no right of property, which could be conveyed by deed. Consequently the purchaser from a party thus in possession of lands of another acquired nothing by his deed. They were, as to the real owners, mere trespassers, who could not tack their successive trespasses together so as to defeat the right of him who had the title. *Mazyck v. Wight*, 2 Brev. (S. Car.) \*151; *King v. Smith*, Rice (S. Car.) 11; *Pegues v. Warley*, 14 S. Car. 180. Compare *Moore v. Small*, 9 Pa. St. 194.

The privity between successive possessors may be shown by parol evidence. *Weber v. Anderson*, 73 Ill. 439.

**What does not constitute Tacking.**—An invalid sheriff's deed will not constitute privity between the person whose property is sold and the purchaser. *Hesters v. Coats*, 22 Ga. 36.

The possession of successive purchasers of a tract of land covered by the lien of a judgment, who derived title from the judgment debtor, cannot be united so as to make up the statutory period necessary to give title by adverse possession. *Pegues v. Warley*, 14 S. Car. 180.

Where the grantor vacated the prem-

ises, and they were vacant for a short time before the grantee took possession, *held*, that the possession of the grantor and grantee could not be tacked. *Tegarden v. Carpenter*, 36 Miss. 504.

A bought land upon which was a judgment lien. Subsequent to his entry the land was sold under the judgment. *Held*, that he could not tack the time he was in possession previous to the sheriff's sale to the time he continued in possession after the sale. *Marsh v. Griffin*, 53 Ga. 320.

A widow cannot tack her possession to that of her deceased husband. *Sawyer v. Kendall*, 10 Cush. (Mass.) 241.

The possession of a tenant for life is not privy to that of a remainder-man. *Austin v. Rutland R. Co.*, 45 Vt. 215. Compare *Haynes v. Boardman*, 119 Mass. 414.

A, being in actual possession of a part of a tract and in constructive possession of the remainder, under color of title sold the part actually occupied to B. *Held*, that B did not succeed to it. *Chandler v. Rushing*, 38 Tex. 591.

**Corporations.**—Possession by a corporation cannot be tacked to a previous possession by the individuals forming the corporation, organized as a voluntary society for the same purposes, so as to make a title by adverse possession. *Reformed Church v. Schoolcraft*, 65 N. Y. 134.

1. *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Fugate v. Pierce*, 49 Mo. 441; *Crispin v. Hannavan*, 50 Mo. 536; *Cahill v. Palmer*, 45 N. Y. 478.

2. *Doe v. Thompson*, 5 Cow. (N. Y.) 371; *Thompson v. Burhans*, 79 N. Y. 99; *Bliss v. Johnson*, 94 N. Y. 235; *Sherman v. Kane*, 86 N. Y. 56; *Casey v. Inloes*, 1 Gill (Md.), 430; s. c., 39 Am. Dec. 658; *Core v. Faupel*, 24 W. Va. 238; *Steeple v. Downing*, 60 Ind. 478; *McIntire v. Brown*, 28 Ind. 347; *Crispin v. Hannavan*, 50 Mo. 536; *Malloy v. Bruden*, 86 N. Car. 251; *Holdfast v. Shepard*, 6 Ired. (N. Car.) 364; *Hill v. Saunders*, 6 Rich. (S. Car.) 62; *Joiner v. Borders*, 32 Ga. 239; *Virgin v. Land*, 32 Ga. 572; *Armstrong v. Merrill*, 14 Wall. (U. S.) 120.

In *Core v. Faupel*, 24 W. Va. 238, the

### 30. Offer to purchase Superior Title.—An offer on the part of de-

court said: "It is not sufficient for the wrong-doer to show an act of adverse possession at a point more than ten years prior to the bringing of the action against him. He must show that such adverse possession has been continued, consecutive and unbroken, for the statutory period. It is something done by him, not merely that which is left undone by the owner, that is to be considered. There can be no constructive adverse possession against the owner, when there is no actual possession which he could treat as a trespass and bring an action for; unless the adverse claimant is so in possession of the land that he may at any time be sued as trespasser, the statute will not run in his favor; and although he may have taken actual possession, if he does not continue there so that he may be sued at any time as a trespasser during the prescriptive bar, he cannot rely on the statute of limitations. The moment the premises became vacant, that moment the owner, by reason of his legal title, will be regarded in the constructive possession, and the adverse possession of the wrong-doer at an end. It is, therefore, absolutely necessary that the adverse occupancy shall be continuous, open, visible, and exclusive in order to effect a bar of the title of the true owner."

A subsequent entry, even by the same wrong-doer and under the same claim of title, constitutes a new disseisin, from the date of which the statute takes a fresh start. *Malloy v. Bruden*, 86 N. Car. 251; *Olwine v. Holman*, 23 Pa. St. 274; *Jackson v. Leonard*, 9 Cow. (N. Y.) 653; *Melvin v. Proprietors*, 5 Metc. (Mass.) 5; s. c., 38 Am. Dec. 384; *Allen v. Holton*, 20 Pick. (Mass.) 465.

The interruption need be but for a single day. *Olwine v. Holman*, 23 Pa. St. 279.

Possession under color of title must be continuous; a gap, though occurring during the period the statute was suspended, is sufficient to destroy its continuity. *Malloy v. Bruden*, 86 N. Car. 251.

Where title to land has been acquired by adverse possession, it is not forfeited by an interruption of the actual occupation thereafter. *Sherman v. Kane*, 86 N. Y. 57; *Spofford v. Bennett*, 55 Tex. 293.

Possession once established by material acts of visible, notorious ownership must be presumed to continue until open, notorious, and adverse possession be proven to be taken by another. *Clements v. Lampkin*, 34 Ark. 598.

Where thirty years' actual possession of land is relied upon to presume a grant from the State, it is not necessary to show that there was any connection between the successive occupants during the period. Nor will a three-year breach in the continuity of possession repel such presumption. *Cowles v. Hall*, 90 N. Car. 330.

It is a question for the jury to determine whether in fact the adverse possession has been continuous or has been interrupted. *Stevens v. Taft*, 11 Gray Mass.), 33; *Bowen v. Guild*, 130 Mass. 131; *O'Hara v. Richardson*, 46 Pa. St. 385; *De Haven v. Landell*, 31 Pa. St. 120; *Groft v. Weakland*, 34 Pa. St. 304; *Jackson v. Wood*, 12 Johns. (N. Y.) 242; *Van Gorden v. Jackson*, 5 Johns. (N. Y.) 440; *Jackson v. Joy*, 9 Johns. (N. Y.) 102; *Beverly v. Burke*, 9 Ga. 440; s. c., 54 Am. Dec. 351.

**What is Interruption.**—Mere intrusion of a trespasser does not constitute an interruption. *Bell v. Denson*, 56 Ala. 444. See *Doe v. Eslava*, 11 Ala. 1028; *Raynor v. Lee*, 20 Mich. 384. Compare *Whalley v. Small*, 29 Iowa, 288.

An order of the military power compelling to leave the statute will break the continuity of possession, although an intent to return as soon as safe exists. *Halliday v. Cromwell*, 37 Tex. 437.

In contemplation of law the enforcement of a writ of possession in an action of ejectment puts an end to the adverse possession of defendant as of the day of the institution of the suit. *Dunn v. Miller*, 75 Mo. 260.

An agreement to arbitrate will interrupt the running of the statute. *Perkins v. Blood*, 36 Vt. 273.

Forfeiture to the State as a sale for taxes, interrupts the continuity. *Armstrong v. Morrill*, 14 Wall. (U. S.) 120.

Beginning the erection of a house, leaving it partly built, and returning some months afterwards to finish and occupy it, will break the continuity of possession. *Bryne v. Lowry*, 19 Ga. 27.

Permitting the inclosing fences to decay, and become insufficient to protect the land, will interrupt the possession. *Borel v. Rollins*, 30 Cal. 408.

A, the tenant of B, attorned to C, who claimed to be the legal owner. *Held*, that the possession of B was broken. *Russell v. Ewing*, 38 Ala. 44; see *Thompson v. Pioche*, 44 Cal. 508. Compare *Haynes v. Boardman*, 119 Mass. 414.

Where one holding land permissively under bonds for titles conveyed it absolutely (the vendee taking possession),

fendant to purchase the property which he is holding adversely

**What constitutes Interruption—Continued.** and subsequently rebought from his vendee and resold to another vendee, the adverse possession was broken, and the possession of the first and last vendees could not be tacked so as to make a good prescriptive title. *Hines v. Rutherford*, 67 Ga. 606; *Rutherford v. Hobbs*, 63 Ga. 243. See *Ellege v. Cooke*, 5 Lea. (Tenn.), 622.

An order of the court requiring the conveyance of the land interrupts the occupation. *Gower v. Quinlan*, 40 Mich. 572.

Defendant died, and plaintiffs took possession, who were ousted by defendants' heirs. *Held*, that there was not a continuous possession cast by descent. *Congdon v. Morgan*, 14 S. Car. 587.

Within three years after the recording of a tax deed the grantee therein quitclaimed to the original owner, but the quitclaim deed was not recorded. Subsequently he conveyed the land to a third person, who had no notice of the quitclaim deed and who duly recorded his conveyance. The lands remained unoccupied for more than three years after the tax deed was recorded. *Held*, that the quitclaim deed to the original owner was an abandonment and surrender by the tax-title claimant of the constructive adverse possession which arose in his favor upon the recording of his tax deed, and that the statute of limitations ceased thereupon to run in his favor, but ran thereafter in favor of the original owner, and at the expiration of the three years from the recording of the tax deed barred all right of action in favor of those claiming title thereunder. *Warren v. Putnam*, 63 Wis. 410.

Where one has in good faith entered upon and continued in possession of land under a paper title which he took believing it to be good, the maintenance of such possession during a portion of the three years next after the recording of a tax-deed of the land interrupts the running of the three-year limitation in favor of the tax-title claimant, and defeats the tax title to the extent of such actual possession and of the constructive possession following upon it. *Stephenson v. Wilson*, 50 Wis. 95.

Where a portion of a tract is held by constructive possession, and the other portion by actual possession, the conveyance of the part actually held will stop the running of the statute as to the part constructively held. *Chandler v. Rushing*, 38 Tex. 591.

**What is not Interruption.**—But a purchase of the land at a tax sale, by the adverse claimant, will not impair his right to rely upon the statute. *Hayes v. Martin*, 45 Cal. 559.

Tearing down the fence between one's self and next neighbor after asserting a right to premises inclosed by it is a mere trespass; it does not break his adverse possession of the premises inclosed. *Donovan v. Bissell*, 53 Mich. 462.

The temporary interruption of actual residence on the land, caused by the unlawful and violent acts of strangers in tearing down the house and rendering the premises untenable for the time being, will not stop the running of the statute. *Clark v. Potter*, 32 Ohio St. 49. See *Whalley v. Small*, 29 Iowa, 288. *Bell v. Denson*, 56 Ala. 444; *Ladd v. Dubrocca*, 61 Ala. 25.

If the possession was disturbed by the act of war by an army quartering thereon, such interference would not arrest the running of the statute, if it be shown that defendants resumed their actual possession as soon thereafter as they reasonably could do. *McColgan v. Langford*, 6 Lea (Tenn.), 108. Compare *Halliday v. Cromwell*, 37 Tex. 437.

Adverse possession is not broken by deeding the land away if the grantor continues in possession and takes back a mortgage for purchase money which he afterwards forecloses and under which he himself becomes foreclosure purchaser. And it is immaterial that the foreclosure proceedings are defective, if the possession is retained. *Whitford v. Crooks*, 54 Mich. 261.

One J. held the legal title to the whole of a highway; S., to whose title plaintiff succeeded, took title in 1837, to a farm adjoining the highway under a deed which by its terms bounded the lands on the north by the centre of the highway; immediately thereafter S. built a fence extending one rod into the highway, along the entire north line of his farm, and he and his successor in title continued to occupy the inclosed strip under claim of title until 1846, when, upon a survey establishing J.'s title to the whole highway, the fence was removed back to the south line thereof, and thereafter no part of it was inclosed. From 1867, when plaintiff purchased and took possession, down to 1875, he occupied a strip of land one rod wide adjoining his farm, by ploughing, cultivating, and mowing it each year. *Held*, that conceding both of these peri-

from the plaintiff within the statutory time is a clear recogni-

**What is not Interruption—Continued.**

ods of occupation were hostile in inception and continuous in character and sufficient to initiate a claim to an adverse possession, they did not bar the right of the true owner, as there was not a continuous adverse possession for twenty years. *Bliss v. Johnson*, 94 N. Y. 235.

Where the premises are at times vacant, but no intention to abandon possession exists, the possession will not be interrupted. *Steitnische v. Lamb*, 26 N. W. Repr. (Neb.) 374; *Hughes v. Pickering*, 14 Pa. St. 297; *Hudgins v. Crow*, 32 Ga. 367; *Fugate v. Pierce*, 49 Mo. 441; *Crispin v. Hannavan*, 50 Mo. 536; *De la Vega v. Butler*, 47 Tex. 529; *Harper v. Tapley*, 35 Miss. 506.

A short and reasonable time, occasioned by the change of occupation, will not break the possession. *De la Vega v. Butler*, 47 Tex. 529.

If one member of the family remains there will be no interruption. *Cunningham v. Brumbach*, 23 Ark. 336. Nor will a short absence on business. *Cunningham v. Patton*, 6 Pa. St. 355; *Sailor v. Hertzog*, 10 Pa. St. 296.

The adverse possession of a beach by a town is not affected by the passage of inhabitants of the town over the beach to gather sea-weed or procure sand, or by their using the beach as a place of temporary deposit for the sea-weed. *New Shoreham v. Ball*, 14 R. I. 566.

A forcible entry upon the actual adverse possession of another, followed by an unlawful detainer, does not interrupt the adverse possession, if an action for the forcible entry and detainer is commenced within a reasonable time and prosecuted to a successful termination. *Ferguson v. Bartholomew*, 67 Mo. 212; *Carey v. Edmonds*, 71 Mo. 523. See *San José v. Trimble*, 41 Cal. 536; *Ferguson v. Bartholomew*, 67 Mo. 212.

Where one having an unperfected title enters and collects rent, *held*, not to be an interruption of claimant's possession. *Donahue v. O'Conor*, 45 N. Y. Supr. Ct. 278.

Non-user, caused by the burning of the fences, will not break the continuity. *Ford v. Wilson*, 35 Miss. 490.

Occasional acts of trespass by others, even though claiming under color of title, and an action of trespass during the period, would not necessarily prevent the ripening of possession into title. *Duren v. Sinclair*, 22 S. Car. 361.

**By Entry of Legal Owner.**—Adverse possession is interrupted by the true owner's entry upon the land and claim

of title. *Campbell v. Wallace*, 12 N. H. 362; *Wendell v. Moulton*, 26 N. H. 41; *Gage v. Gage*, 30 N. H. 420; s. c., 37 Am. Dec. 219; *Locke v. Whitney*, 5 East. Repr. (N. H.) 340; *Burrows v. Gallup*, 32 Conn. 493; *Brickett v. Spofford*, 14 Gray (Mass.), 514; *Thompson v. Pioche*, 44 Cal. 508.

Joint possession by the legal owner, and claimant by possession, at any time within the statutory period will stop the running of the statute. *Larwell v. Stevens*, 2 McCrary (U. S.), 311.

Mere verbal objections by the true owner do not constitute an interruption. *Kimball v. Ladd*, 42 Vt. 747.

An entry on land by a person disseised, merely for the purpose of seeing if there is any evidence of an adverse occupation, is not, as matter of law, conclusive evidence of an interruption of the disseisor's adverse possession. *Bowen v. Guild*, 130 Mass. 121. See *Pope v. Henry*, 24 Vt. 560; *Burrows v. Gallup*, 32 Conn. 493; *Hollinshead v. Nauman*, 45 Pa. St. 140; *Crech v. Jones*, 5 Sneed (Tenn.), 631.

On the entry of the true owner upon any part of his land the constructive possession of an adverse claimant, in actual possession of some portion of it, ceases as to uninclosed land. *Evitts v. Roth*, 61 Tex. 81; *Henderson v. Griffin*, 5 Pet. (U. S.) 151.

Entry by the true owner to show the land to a purchaser, and the subsequent execution of a deed, will interrupt the possession. *Brickett v. Spofford*, 14 Gray (Mass.), 514. See *Oakes v. Marcy*, 10 Pick. (Mass.) 195; *Warner v. Bull*, 13 Metc. (Mass.) 1.

During the three years immediately following the record of a tax deed (which was void for irregularity in the tax proceedings), the original owner entered upon the land for the purpose of removing the pine timber; and he cut roads, built sledways, and cut and hauled the pine from the land, during two successive lumbering seasons of three or four months each, but did not erect any shanty or other structure thereon. Such occupancy was open and continuous during the two seasons; it terminated when the pine timber was all removed; and the land, though fit for agricultural purposes, continued during the whole period to be wild and unimproved. *Held*, that the occupancy was sufficient to interrupt the running of the three-year limitation in favor of the tax-title claimant. *Haseltine v. Mosher*, 51 Wis. 443.

tion of plaintiff's title, and will interrupt the running of the statute.<sup>1</sup>

31. *Purchase by Adverse Holder*.—One in possession of land, and claiming to own it, may buy in outstanding claims of title without abandoning or impairing his own title, or even acknowledging the validity of the title so bought.<sup>2</sup>

**Entry of Legal Owner—Continued.**

Adverse holding is not interrupted or suspended by an action of ejectment brought by the owner and afterwards dismissed. *Langford v. Poppe*, 56 Cal. 73; *Workman v. Guthrie*, 29 Pa. St. 495; *Ferguson v. Bartholomew*, 67 Mo. 212; *Kennedy v. Reynolds*, 27 Ala. 364. *Contra*, if the action is successful, *Groft v. Weakland*, 34 Pa. St. 304.

It appeared that R., a former owner of defendant's land, brought an action for trespass against one who had gathered sea-weed upon the beach. R. discontinued the action under an agreement with the town, and agreed not to sue again. *Held*, that this did not entitle plaintiffs to a charge to the jury that R. thereby relinquished his adverse possession; that it was at most evidence bearing upon that question for the consideration of the jury. *Trustees v. Kirk*, 84 N. Y. 215; s. c., 38 Am. Rep. 505.

Where the claimant yields possession, upon threat of legal proceedings, by the true owner, the possession is broken. *Shaffer v. Lowry*, 25 Pa. St. 252.

During the three years immediately following the record of a tax deed (which was void for irregularity in the tax proceedings), the original owner entered upon the land for the purpose of removing the pine timber; and he cut roads, built sledways, and cut and hauled the pine from the land, during two successive lumbering seasons of three or four months each, but did not erect any shanty or other structure thereon. Such occupancy was open and continuous during the two seasons; it terminated when the pine timber was all removed; and the land, though fit for agricultural purposes, continued during the whole period to be wild and unimproved. *Held*, that the occupancy was sufficient to interrupt the running of the three-year limitation in favor of the tax-title claimant. *Haseltine v. Mosher*, 51 Wis. 443.

Where the land in question was timber land, uninclosed, and used for no other purpose than to supply wood, rails, and other timber, and the defendant, who had the patent title, so used it up to the time when the tax title vested in plaintiff, and continued so to use it thereafter for a time exceeding the period prescribed by the statute of limitations, *held*, that the

tax title was barred, notwithstanding the exercise by plaintiff during that time of certain acts of ownership which, however, did not amount to an ouster of defendant. *Brett v. Farr*, 66 Iowa, 684; *Ellsworth v. Low*, 62 Iowa, 178, and *Griffith v. Carter*, 64 Iowa, 193.

The acceptance of a lease by the adverse claimant from the true owner will stop the running of the statute during the term of such lease. *Abbey H. Assoc. v. Willard*, 48 Cal. 614.

1. *Lovell v. Frost*, 44 Cal. 474; *Cent. Pac. R. Co. v. Mead*, 63 Cal. 113; *Pac. Ins. Co. v. Stroup*, 63 Cal. 150; *Jackson v. Britton*, 4 Wend. (N. Y.) 507; *Jackson v. Cuerden*, 2 Johns. Cas. (N. Y.) 353; *Jackson v. Croy*, 12 Johns. (N. Y.) 427. *Compare* *Tobey v. Secor*, 60 Wis. 310; *Walbrunn v. Ballen*, 68 Mo. 164; *Chapin v. Hunt*, 40 Mich. 595.

Adverse possession of real estate loses its adverse character when the holder thereof, for a sufficient consideration, agrees with the true owner that suit to recover such possession shall not be brought during the lifetime of each of them. *Dietrick v. Noel*, 42 Ohio St. 18; s. c., 51 Am. Rep. 788.

If the possession of a tenant in common is adverse to his co-tenant, it will not lose its hostile character by the former tendering a quitclaim deed to the latter, and requesting him to sign it, there being no offer to purchase, nor any acknowledgment of the tenancy. *Unger v. Mooney*, 63 Cal. 586; s. c., 49 Am. Rep. 100.

2. *Jackson v. Given*, 8 Johns. (N. Y.) 137; s. c., 5 Am. Dec. 328; *Jackson v. Smith*, 13 Johns. (N. Y.) 406; *Northrop v. Wright*, 7 Hill (N. Y.), 476; *Parker v. Proprietors, etc.*, 3 Metc. (Mass.) 91; s. c., 37 Am. Dec. 121; *Owens v. Myers*, 20 Pa. St. 134; s. c., 57 Am. Dec. 693; *Bannon v. Brandon*, 34 Pa. St. 263; *Brandon v. Bannon*, 38 Pa. St. 63; *Lodge v. Patterson*, 3 Watts (Pa.), 74; s. c., 27 Am. Dec. 385; *Coperton v. Gregory*, 11 Gratt. (Va.) 505; *Ridgeway v. Holliday*, 59 Mo. 444; *Cannon v. Stockton*, 36 Cal. 535; *Hayes v. Martin*, 45 Cal. 559; *Chapin v. Hunt*, 40 Mich. 595; *Blight v. Rochester*, 7 Wheat. (U. S.) 535.

But an offer to purchase from the true owner is a recognition of his title, and



**32. May not hold adversely to All.**—He may acknowledge that he does not hold adversely as regards a certain person, and his admission will not estop him to hold adversely as to others.<sup>1</sup>

**33. Color of Title** is that which in appearance is title, but which in reality is no title.<sup>2</sup> Where a person is said to have color of title, the phrase implies that some act has been done or some event has occurred by which some title, good or bad, has been conveyed to him. One who thus enters holds to the boundaries described in the deed, writing, or agreement upon which his claim is based.<sup>3</sup>

will break the possession. *Lovell v. Frost*, 44 Cal. 474, and cases cited *ante*.

1. *Portis v. Hill*, 14 Tex. 69; s. c., 65 Am. Dec. 99.

2. *Wright v. Mattison*, 18 How. (U. S.) 50.

3. *Mylar v. Hughes*, 60 Mo. 105; *Ware v. Johnson*, 55 Mo. 500; *Chapman v. Templeton*, 53 Mo. 463; *Thompson v. Cragg*, 24 Tex. 582; *Brooks v. Bruyn*, 35 Ill. 394; *Coleman v. Billings*, 89 Ill. 183; *McEvoy v. Lloyd*, 31 Wis. 143; *Egerton v. Bird*, 6 Wis. 527; s. c., 70 Am. Dec. 473; *Packard v. Moss*, 8 Pac. Repr. (Cal.) 818; *Kile v. Tubbs*, 23 Cal. 431; *Bernal v. Gleim*, 33 Cal. 676; *Gordan v. Tweedy*, 74 Ala. 232; *Beverly v. Burke*, 9 Ga. 440; s. c., 54 Am. Dec. 351; *Field v. Boynton*, 33 Ga. 239; *Janio v. Patterson*, 62 Ga. 527; *Veal v. Robinson*, 70 Ga. 809; *Welborn v. Anderson*, 37 Miss. 155; *Chiles v. Conley*, 9 Dana (Ky.), 385; *Alston v. Collins*, 2 Speers (S. Car.) 450; *Eibert v. Reid*, 1 N. & McC. (S. Car.) 374; *Bank v. Smyers*, 2 Strob. (S. Car.) 24; *Johnson v. McMillan*, 1 Strob. (S. Car.) 143; *Golson v. Hook*, 4 Strob. (S. Car.) 23; *Senior v. South*, 10 Ired. (S. Car.) 237; *Bynum v. Thompson*, 3 Ired. (N. Car.) 578; *Cline v. Catron*, 22 Gratt. (Va.) 378; *Creekmur v. Creekmur*, 75 Va. 430; *Core v. Faupel*, 24 W. Va. 238; *Stevens v. Hollister*, 18 Vt. 294; s. c., 46 Am. Dec. 154; *Ralph v. Bagley*, 11 Vt. 521; *Hubbard v. Austin*, 11 Vt. 129; *Waldron v. Tuttle*, 4 N. H. 371; *Sparhawk v. Bullard*, 1 Metc. (Mass.) 95; *Poignard v. Smith*, 8 Pick. (Mass.) 272; *Jackson v. Oltz*, 8 Wend. (N. Y.) 440; *Simpson v. Downing*, 23 Wend. (N. Y.) 316; *Jackson v. Frost*, 5 Cow. (N. Y.) 346; *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677; *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; s. c., 18 Am. Dec. 463; *Craig v. Goodman*, 22 N. Y. 170; *Munro v. Merchant*, 28 N. Y. 9; *Saxton v. Hunt*, 20 N. J. L. 487; *Waggoner v. Hastings*, 5 Pa. St. 300; *Nearhoff v. Addleman*, 31 Pa. St. 279; *Allen v. Grove*, 18 Pa. St. 377; *Hollingshead v. Naumon*, 45 Pa. St.

140; *Ege v. Medlar*, 82 Pa. St. 86; *Cheney v. Ringold*, 2 H. & J. (Md.) 87; *Baker v. Swan*, 32 Md. 355.

"Color of title is anything in writing purporting to convey title to the land, which defines the extent of the claim, it being immaterial how defective or imperfect the writing may be, so that it is a sign, semblance, or color of title." *Veal v. Robinson*, 70 Ga. 809.

To constitute color of title one must have a paper title. A claim of title may exist wholly by parol. *Hamilton v. Wright*, 30 Iowa, 486; *Provost v. Johnson*, 9 Mart. (La.) 123.

Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. Such an instrument purports to be a conveyance of the title; and because it does not, for some reason, have that effect, it passes only color or semblance of a title. It makes no difference whether the instrument fails to pass an absolute title, because the grantor had none to convey, or had no authority in law or in fact to convey one, or whether such want of authority appears on the face of the instrument or *aliunde*. The instrument fails to pass an absolute title for the reason that the grantor was not possessed of some one or more of these requisites, and therefore it gives the semblance or color only of what its effect would be if they were not wanting. *Brooks v. Bruyn*, 35 Ill. 394.

A deed purporting to be executed by virtue of a power of attorney from the owner of the land, which power is not proved, affords sufficient color of title on which to found an adverse possession, if there has been a good constructive occupation under it. *Munro v. Merchant*, 28 N. Y. 9.

A sale under execution will not give color of title unless a deed is executed. *Baird v. Evans*, 58 Ga. 350.

Whenever an instrument by apt words

**34. Good Faith.**—The claim must be made in good faith, but by this it must not be understood that the inquiry as to good faith in claiming title involves an inquiry into one's belief in the strength

of transfer, in form passes what purports to be the title, it gives color of title. *Hall v. Law*, 102 U. S. 461. The description is sufficient if the land can be identified. *Henley v. Wilson*, 81 N. Car. 405. See *Lynde v. Williams*, 68 Mo. 360; *Jackson v. Frost*, 6 Cow. (N. Y.) 546; *Coleman v. Billings*, 89 Ill. 183.

What constitutes color of title is a question of law for the court. The question of occupancy under it is one of fact for the jury. *Packard v. Moss*, 8 Pac. Repr. (Cal.) 818.

The character of the possession of one who claims to have held land adversely under color of title is to be referred to and determined by the conveyance under which he entered; and one who entered and obtained possession under one deed cannot be heard to say that he entered under another and paramount title unless he has done something tantamount to a re-entry. *Watts v. Owens*, 62 Wis. 512.

**What constitutes Color of Title.**—A bequest of land under a will. *Henley v. Wilson*, 81 N. Car. 405. See *Green v. Mizelle*, 54 Miss. 220. Although the will is that only of a life tenant. *Evans v. Satterfield*, 1 Murph. (N. Car.) 413. See *Teabout v. Daniels*, 38 Iowa, 158. *Compare Callender v. Sherman*, 5 Ired. (N. Car.) 711. A paper purporting to be a will, and proved many years before. *McConnell v. McConnell*, 64 N. Car. 342.

A testator by will dated 1824 devised all his estates and all other his estates of which he might be possessed at the time of his death to his wife for life, with remainder over. He purchased a freehold estate after the date of his will. After his death his widow entered into possession of all of the estates of which he died possessed, believing she was entitled so to do under the will; and she continued in possession more than twenty years. *Held*, that she had acquired title by adverse possession. *Paine v. Jones*, L. R. 18 Eq. 320.

Title by descent. *King v. Rowan*, 10 Heisk. (Tenn.) 675.

A deed from one in possession of land, under color of title, though the deed is not recorded. *Bellows v. Jewell*, 60 N. H. 420. See *infra*.

Where a defendant in an execution denies the validity of the sale of land thereunder and subsequently enters on and holds the premises adversely, the patent and deeds under which he held

before the sale are sufficient to give color of title in aid of such adverse possession. *Gaines v. Saunders*, 87 Mo. 557.

A prescriptive title, by virtue of adverse possession under color of title for seven years will prevail against the lien of a judgment against the vendor of such claimant rendered before the prescription began, but with no levy on the property until after the prescriptive title had ripened. *Johnson v. Neal*, 67 Ga. 528.

An invalid or void bond for title. *Bell v. Coats*, 56 Miss. 776. See *Stamper v. Griffin*, 20 Ga. 312; *Griffin v. Stamper*, 17 Ga. 108.

An ancient deed accompanied with possession is evidence of color of title without proof of its execution. *Davis v. Higgins*, 91 N. Car. 382. See *Nowlin v. Reynolds*, 25 Gratt. (Va.) 137.

A mortgagee's deed. *Stevens v. Brooks*, 24 Wis. 326. Also a quitclaim deed which conveys no interest. *McCarney v. Higdon*, 50 Ga. 629; *Minot v. Brooks*, 16 N. H. 374.

A deed without a seal. *Barger v. Hobbs*, 67 Ill. 592. See *Pillow v. Roberts*, 13 How. (U. S.) 472.

An administrator's sale, under power, if a deed is executed. *Livingston v. Pendergast*, 34 N. H. 544. Or if made without due authority of law, if all the parties to it supposed it was authorized. *Crispen v. Hannavan*, 50 Mo. 536.

Or a guardian's deed, although the decree of sale is void. *Molton v. Henderson*, 62 Ala. 426.

The heirs of a party who held under claim of title. *Teabout v. Daniels*, 38 Iowa, 158.

A deed by the husband of a life tenant given after her death. *Forest v. Jackson*, 56 N. H. 357.

A void decree of court. *Huls v. Buntin*, 47 Ill. 396; *Whiteside v. Singleton*, Meigs (Tenn.), 207. *Compare Melia v. Simmons*, 45 Wis. 334.

A void patent for land. *Logan v. Jelks*, 34 Ark. 547. Or certificate. *Hannibal, etc., v. R. Co. v. Clark*, 68 Mo. 371.

A deed made by an assumed agent in his own name. *Payne v. Blackshear*, 52 Ga. 637.

A deed conveying a life estate is color of title, and, when accompanied by adverse possession for the required time, will ripen into a good title to the life estate so granted. *Staton v. Mullis*, 92 N. Car. 623.

of his title, or that he had any title. It is good faith in claiming possession and title, *i.e.*, a real intention to claim the possession as his own, distinct from, and hostile to, the title of the true owner.

A deed given under a special act of the legislature, which act is held unconstitutional and void. *Fagan v. Rosier*, 68 Ill. 84.

A claim based upon condemnation of land, although the proceedings are declared void. *Mississippi, etc., R. Co. v. Devaney*, 42 Miss. 555.

A record of sale kept by a sheriff. *Field v. Boynton*, 33 Ga. 239.

If a husband, seized as tenant by courtesy, give a deed in fee, and the grantee enter and continue in possession, claiming to own the whole estate absolutely, such possession will be regarded as adverse to the wife, and those claiming under her, from the period of the husband's death. *Constantine v. Van Winkle*, 6 Hill (N. Y.), 177. See *Mellus v. Snowman*, 21 Me. 201; *Bruce v. Wood*, 1 Metc. (Mass.) 542; s. c., 35 Am. Dec. 380; *Miller v. Schackleford*, 3 Dana (Ky.), 289; *Meraman v. Caldwell*, 8 B. Mon. (Ky.) 32.

**What does not constitute Color of Title.**

—The record of a survey does not of itself constitute color of title. *Atkinson v. Patterson*, 46 Vt. 750.

An executory contract does not constitute color of title. *Rigor v. Frye*, 62 Ill. 507. See EXECUTORY CONTRACT, *ante*, p. 229.

The assignment of homestead does not pass title. *Keener v. Goodson*, 89 N. Car. 275; *Littlejohn v. Egerton*, 77 N. Car. 379; *Gheen v. Summey*, 80 N. Car. 187; *Grant v. Edwards*, 86 N. Car. 468.

A void judgment of the court. *Melia v. Simmons*, 45 Wis. 334. Compare *Huls v. Buntin*, 47 Ill. 396; *Whiteside v. Singleton*, Meigs (Tenn.), 207.

A tax certificate. *McKeighan v. Hopkins*, 14 Neb. 361; *Bride v. Watt*, 23 Ill. 507.

An invalid tax lease. *Bensel v. Gray*, 6 J. & S. (N. Y.) 447.

A deed signed by one as "agent." *Simmons v. Lane*, 25 Ga. 178.

A sale of the life estate, as against the reversioner. *Dewey v. McLain*, 7 Kan. 1262; s. c., 12 Am. Rep. 418; *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390; *Hall v. Vandergrift*, 3 Binn. (Pa.) 374. See LIFE ESTATE, *infra*.

An instrument in which the grantor admits title in another, will not give color of title. *Simmons v. Lane*, 25 Ga. 178.

A deed which does not contain the description of the land. *Humphries v. Hoffman*, 33 Ohio St. 395.

Although a pre-emption claim might be, in the language of the act, such "evidence or right to land, recognized by the laws of this government," as would maintain trespass to try title, yet, until perfected, it is neither such title nor color of title as can support limitation. *Burford v. Bostwick*, 58 Tex. 63; *Clark v. Smith*, 59 Tex. 275.

One who has color of title of land, subject to a judgment lien, holds adversely to the judgment creditor. *Sanders v. McAfee*, 42 Ga. 250.

Proceedings in administering, settling, and assigning the estate of a person who, though represented to have deceased, was and still is alive, are absolutely void for all purposes; and an entry and continuous occupation under claim of title, exclusive of any other right, founded upon the judgment of the county court in such a case, would not bar an action to recover the land. *Melia v. Simmons*, 45 Wis. 334.

A deed by one to land which is in the adverse possession of another is void as against such adverse claimant. When by written agreement between opposing counsel, it is admitted that "the defendant was in the actual possession of the land sued for, claiming the same adversely to the plaintiff and all others," this court cannot infer that the defendant was a trespasser. B. makes a deed to land to D., while N. is in adverse possession thereof. *Held*, that the deed is only void as to N., and as against him the title still remains in B., who may sue for and recover the land; that such recovery will inure to the benefit of D., as the deed from B. to D. is valid as between them. *Nelson v. Brush*, S. C. Fla., June 17, 1886.

A and B, as administrators of C, entered into a written agreement to partition lands held in common. B had not obtained an order of court. *Held*, that A had color of title. *Shiels v. Lamar*, 58 Ga. 590.

Where the parties to a deed undertook by verbal contract to rescind the deed, and the grantor thereafter remained in the actual possession of a part of the land, claiming title under the rescission, *held*, that he was in under color of title, and that his possession extended to the

If that was not his real intention, there is an absence of an indispensable element of adverse possession. Fraud is not to be presumed; its existence must be proved.<sup>1</sup>

**35. Under Parol Agreement.**—A parol agreement may constitute a sufficient color of title.<sup>2</sup>

whole tract described in the deed. *Hughes v. Israel*, 73 Mo. 538.

**When Possession is Tortious.**—Where possession under a color of title has been adjudicated to be a trespass, subsequent possession will be tortious. *Presley v. Holmes*, 33 Tex. 476.

1. *Dothard v. Denson*, 72 Ala. 541; *Stubblefield v. Borders*, 92 Ill. 279; *Smith v. Ferguson*, 91 Ill. 304; *Russell v. Mandell*, 73 Ill. 136; *Hardin v. Gouverneur*, 69 Ill. 140; *Brooks v. Bruyn*, 35 Ill. 394; *Read v. Howe*, 49 Iowa, 65; *Brown v. King*, 5 Metc. (Mass.) 173; *Crispin v. Hannavan*, 50 Mo. 536; *McMullin v. Erwin*, 58 Ga. 427; *Newton v. Mayo*, 62 Ga. 11; *Magee v. Magee*, 37 Miss. 138; *Robertson v. Wood*, 15 Tex. 1; s. c., 65 Am. Dec. 140; *Walbrunn v. Ballen*, 68 Mo. 164; *Texas Land Co. v. Williams*, 51 Tex. 51.

A *bona-fide* occupant or possessor has been defined to be "one who not only honestly supposes himself to be vested with the true title, but is ignorant that the title is contested by any other person claiming a superior right to it." *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Cole v. Johnson*, 53 Miss. 94; *Gordon v. Tweedy*, 74 Ala. 233.

Active or constructive notice of irregularities does not necessarily impute bad faith to the party chargeable with notice. *Davis v. Hall*, 92 Ill. 85. Compare *Bowman v. Wettig*, 39 Ill. 416; *Stubblefield v. Borders*, 92 Ill. 279.

The words "good faith" in the statute must receive a practical common-sense construction. *Winters v. Haines*, 84 Ill. 585.

It does not imply or involve a belief on the part of the possessor in the strength or validity of his title. *Dothard v. Benson*, 72 Ala. 541.

Failure to record a deed which constitutes the color of title is not a presumption of bad faith. *Rawson v. Fox*, 55 Ill. 200.

Payment of taxes, while color of title remains in party acquiring it in bad faith avails nothing. *Hardin v. Crate*, 78 Ill. 533.

The assessment to a party and payment by him of taxes are evidence on the question of the good faith of another in entering upon land under color of title, in the light of other circumstances

tending to show a disclaimer of title by the latter. *Gaines v. Saunders*, 87 Mo. 557.

The fact that a deed did not recite a consideration is not necessarily inconsistent with "intrinsic fairness and honesty," and it may constitute a link in a chain of title from and under the sovereignty of the soil. Such a bond may constitute such "color of title" as would sustain the defence, by one in possession of the land, under the statute. *Downs v. Porter*, 54 Tex. 59.

If the grantee knew that the grantor was a mere squatter, his conveyance will afford him no color of title. *McCarney v. Higdon*, 50 Ga. 629. Or if he knew that the grantor had no title to convey, or if he obtained the deed by fraud. *Saxton v. Hunt*, 20 N. J. L. 487. Compare *Cornelius v. Giberson*, 25 N. J. L. 1.

What is good faith in a party claiming under color of title is a question for the jury. *Wright v. Mattison*, 18 How. (U. S.) 50. See, generally, *Hardin v. Crate*, 78 Ill. 533; *Smith v. Ferguson*, 91 Ill. 304; *Russell v. Mandell*, 73 Ill. 136; *McConnell v. Street*, 17 Ill. 253; *McCagg v. Heacock*, 34 Ill. 476; *Hodgden v. Henrichsen*, 85 Ill. 259; *Hardin v. Gouvener*, 69 Ill. 140; *Paris v. Lewis*, 85 Ill. 597; *Rawson v. Fox*, 55 Ill. 200; *Milliken v. Martin*, 66 Ill. 13; *Gaines v. Saunders*, 87 Mo. 557; *Crispin v. Hannavan*, 50 Mo. 536; *Hanna v. Renfro*, 32 Miss. 125; *Wales v. Smith*, 19 Ga. 8; *Green v. Kellum*, 23 Pa. St. 254; s. c., 62 Am. Dec. 332; *Lea v. Polk Co.*, 21 How. (U. S.) 50.

2. In *Niles v. Davis*, 60 Miss. 750, the court said: "Though the complainant has no written deed or contract to support her claim to the property, she is in under a parol agreement, which is good as color of title." See *Magee v. Magee*, 37 Miss. 138; *Gladney v. Barton*, 51 Miss. 216; *Davis v. Bowmar*, 55 Miss. 671; *Rannels v. Rannels*, 52 Mo. 108; *Green v. Kellum*, 23 Pa. St. 254; s. c., 62 Am. Dec. 332; *McClellan v. Kellogg*, 17 Ill. 498, and cases cited; *Baker v. Hale*, 6 Baxt. (Tenn.) 46; *Teabot v. Daniels*, 38 Iowa, 158; *McCall v. Neely*, 3 Watts (Pa.), 69. Compare *Osterman v. Baldwin*, 6 Wall. (U. S.) 116; *Hamilton v. Wright*, 30 Iowa, 480; *Cook v. Long*, 27 Ga. 280.

36. *Gift*.—Possession of land by a donee, under a mere parol gift, accompanied with a claim of right, is an adverse holding as against the donor, which, if continued without interruption, is protected by the statute of limitations, and matures into a good title. That such a parol gift conveys no title, and only operates as a mere tenancy at will, capable of revocation or disaffirmance by the donor at any time before the bar is complete, is immaterial; it is evidence of the beginning of an adverse possession by the donee, which can only be repelled by showing a subsequent recognition of the donor's superior title.<sup>1</sup>

In *Rannels v. Rannels*, 52 Mo. 108, the court held that where a man made a verbal gift of a defined tract of land to his sister, had it surveyed for her, and put her in the possession under this survey and the descriptions in his own deed, she was in possession of the whole tract under color of title. In *Bell v. Longworth*, 6 Ind. 273, the court, while denying the right of a mere intruder to extend his possession beyond the limits of his inclosure, use this language: "But when a party is in possession, pursuant to a state of facts which of themselves show the character and extent of his entry and claim, the case is entirely different; and such facts, whatever they may be in a given case, perform sufficiently the office of color of title. They evidence the character of the entry and the extent of the claim, and no color of title does more." See *Van Cleave v. Milliken*, 13 Ind. 105.

Where the parties to a deed undertook by verbal contract to rescind the deed, and the grantor thereafter remained in the actual possession of a part of the land, claiming title under the rescission, *held*, that he was in under color of title, and that his possession extended to the whole tract described in the deed. *Hughes v. Israel*, 73 Mo. 538.

A parol vendee of land may, as against the vendor, acquire by adverse possession, a title coextensive with the boundaries of the land, though the vendee's actual possession extend to only a part of the tract. And after such possession has ripened into a perfect title, the vendee may assert and maintain his title by a bill to enjoin a sale under an execution issued upon a judgment against the vendor, even though the judgment may have been rendered and become a lien before such title became perfect. *Niles v. Davis*, 60 Miss. 750.

Proof of a verbal sale of the interest of one of the heirs to an estate to another of the heirs, followed by twenty years' adverse possession in such other heir,

*held* to create a sufficient title in the latter. *Hyne v. Osborn*, 28 N. W. Repr. (Mich.) 81.

Where both parties to an oral agreement to exchange lands have taken possession thereunder, the possession of each is adverse to the title of the other. *Bartlett v. Secor*, 56 Wis. 520. Compare *Adams v. Fullam*, 47 Vt. 558.

In the absence of a written instrument to define the limits of the adverse claim, there must be some visible acts, signs, or indications which are apparent to all, showing the extent of the boundaries of the land claimed to amount to color of title. *Cooper v. Ord*, 60 Mo. 420.

If two adjacent or coterminous proprietors agree upon and establish a dividing line between their premises, and actually claim and occupy the land on each side of that line continuously for twenty years, such possession will be adverse and confer a title by prescription. *Bader v. Zeise*, 44 Wis. 96; *Tobey v. Secor*, 60 Wis. 310; *Donohue v. Thompson*, 60 Wis. 500.

1. *Vandiveer v. Stickney*, 75 Ala. 225; *Potts v. Coleman*, 67 Ala. 221; *Collins v. Johnson*, 57 Ala. 304; *Graham v. Craig*, 81\* Pa. St. 465; *Sumner v. Stevens*, 6 Metc. (Mass.) 337; *Ashley v. Ashley*, 4 Gray (Mass.), 197; *Clark v. Gilbert*, 39 Conn. 94; *Bartlett v. Secor*, 56 Wis. 520. See *Hawkins v. Hudson*, 45 Ala. 482. Compare *Rannels v. Rannels*, 52 Mo. 112, as to a gift affording color of title.

A deed of gift made by a parent to his children and their heirs, for the consideration of natural love and affection, contained a warranty of title, but a reservation in the following language: "Hereby expressly reserving to myself the right to manage and control said land and premises, and have, enjoy, and dispose of the occupancy, rents, and profits of said lands and premises for and during my natural life." *Held*, that the deed conveyed to the heirs an estate in remainder, to take effect on the death of the grantor, in whom the deed preserved a life estate.

**37. Under Mistake.**—Land which is held in good faith under a mistake as to descriptions or informality in the execution of the

The possession of such land by the grantees during the life of the father must be regarded as in harmony with the deed, and will be presumed to be the possession of the grantor, and no limitation will run in their favor. *Bombarger v. Morrow*, 61 Tex. 417.

In order to clothe children with a possessory right to land, under the statute of limitations, into the possession of which they had been put by their parent, it must be shown that there was an actual gift, and a continuous adverse holding for the required period without break or recognition of the parent's title, and there can be no adverse holding under a father's will which only takes effect at his death. *Jordan v. Maney*, 10 Lea (Tenn.), 135.

Several parties signed an agreement to form a joint-stock company to build a public hall, and a parol gift of land having been made to them for the purpose, they took possession thereof, and commenced building. Afterward, a corporation was formed, in pursuance of the agreement, to which the possession was transferred. In an action of ejectment by the corporation, in which it appeared that there had been a continuous adverse possession by the parties signing the written agreement and the corporation, for more than five years before the ouster *held*, that the plaintiff was entitled to recover. *Bakersfield, etc., Assoc. v. Chester*, 55 Cal. 98.

The defendant showed that he had entered into possession in 1854 under an alleged parol gift from C, who was his father, who was then unembarrassed and had remained in uninterrupted possession for more than twenty-one years from his father's death. The court directed a verdict for plaintiff on the ground that the evidence of defendant was insufficient to take the case out of the statute of frauds. *Held*, that this was error; that even though the evidence of the parol gift was insufficient to establish a good title, the evidence of adverse possession should have carried the case to the jury. *Campbell v. Broden*, 96 Pa. St. 388.

A daughter, under a parol gift of her father, entered into possession of a tract of land in 1856, and continued to occupy the same ever since. Prior to the death of her husband, in 1862 or 1863, the taxes were paid in his name, and after that in

her own name, during all which time her nephew, the only other heir, treated the land as belonging to her, and never claimed any interest therein, and when going into bankruptcy did not schedule any interest in the same. *Held*, that not only the nephew was estopped from claiming any interest in the land, but that a purchaser of his assignee was equally concluded, and barred of any right of entry. *Stewart v. Duffy*, 116 Ill. 47.

A mortgage of the land by the donor to a stranger, during adverse possession by the donee, is void, although the donee may know that his title is defective, and the mortgagee has no actual notice of the adverse holding.

The fact that the mortgagor was, in such case, in the temporary occupancy of a portion of the land, at the time of the execution of the mortgage, is immaterial, if he entered after the commencement of the donee's adverse possession, and holds as a mere tenant of the latter, fully recognizing his title as landlord and owner. *Vandiveer v. Stickney*, 75 Ala. 225.

A father moved away, leaving a son in possession, who always asserted his title, saying his father gave him the farm. *Held*, that his possession was adverse to the other heirs of the father. *Jackson v. Whitbeck*, 6 Cow. (N. Y.) 632.

When a son enters into the possession of lands, under a parol gift from his father, he is a mere tenant at will; and his possession, however long continued, does not become adverse, until asserted so openly and notoriously as to raise the presumption of notice to his father; and if, after the death of his father, he joins with the other administrators in obtaining an order for the sale of the lands, and becomes himself the purchaser at the sale, this is a distinct recognition of the father's title, and his subsequent possession is held in subordination to it as purchaser. *Boykin v. Smith*, 65 Ala. 204.

**Advancement by Parol.**—When a father puts his son in possession of land, intending it as a gift or advancement, the intention resting only in parol, a mere tenancy at will is created; and such possession cannot become adverse, except by a dissolution of the tenancy, and an open, clear, positive, continuous disavowal of the title of the father, and the assertion of a hostile title which is brought to his knowledge. *Potts v. Coleman*, 67 Ala. 221.

deed will be held adversely, and a title will be acquired by limitation.<sup>1</sup> (See also BOUNDARIES, *infra*.)

1. French v. Pearce, 8 Conn. 430; s. c., 21 Am. Dec. 680; Walbrun v. Batten, 68 Mo. 164. Compare Dow v. McKenney, 64 Me. 138.

"The rule may be said to be, according to the decided cases, that if a person enters upon land under color of title, and takes possession of lands not embraced therein, with the intention of possessing the whole, he is treated as being in possession of the whole; but if he enters upon a certain part, with the intention of possessing such part only, his possession is confined to that part." Wood on Lim. § 263; citing Bodley v. Coghill, 3 A. K. Marsh. (Ky.) 615; Mode v. Loud, 64 N. Car. 433; Schneider v. Batsch, 90 Ill. 577; Smith v. Morrow, 5 Litt. (Ky.) 210; McKinney v. Kenney, 1 A. K. Marsh (Ky.), 460.

Where one enters upon land not covered by his title through mistake, he only acquires possession of what he actually occupies. Napier v. Simpson, 1 Tenn. 453.

Where one by mistake takes possession of a lot adjoining the one that he received a deed for, *held*, that such possession ripened into a title, though it appeared that there was a mistake, either in the deed or in taking of possession. Ricker v. Hubbard, 73 Me. 105.

A is the owner of the west half of a certain section of land, and B is the owner of the east half of the same section. B has been in possession of a part of the west half for more than ten years (the period necessary to establish a title by adverse possession), claiming title thereto in the belief that it was in the east half, and not intending to claim any part of the west half, but recognizing A's title to all of that half. *Held*, that the possession of a part of the west half by B has been adverse, and vests him with the title to that part as against A, though he has claimed it in the mistaken belief that it was in the east half, and embraced within the calls of his deed thereto. Metcalfe v. McCutchen, 60 Miss. 145. Compare Grube v. Welles, 34 Iowa, 148; Napier v. Simpson, 1 Tenn. 453.

A mistake in the description in a deed does not prevent the grantee from acquiring title to the land intended to be conveyed. Bean v. Bachelder, 74 Me. 202.

J., owning a lot of land on the south side of Green Street, in P., with a frontage of one hundred and twenty-six feet,

conveyed a piece thereof with a frontage of sixty feet to the defendant, the latter supposing that by the terms of his deed his lot extended to a certain fence which would give him a frontage of sixty-six feet. Soon after the delivery of his deed, the defendant entered, occupied, and cultivated the lot to the fence for more than twenty consecutive years. *Held*, that if the defendant claimed title to the fence during his entire occupation, his title ripened into an absolute title by disseisin, although he was mistaken as to the true bound. Hitchings v. Morrison, 72 Me. 331.

Where there is a defective or erroneous description of land sold at sheriff's sale, and possession is taken and held for ten years thereunder, the title of the purchaser will be protected by the statute of limitations. Souder v. Jeffreys, 8 N. East. Repr. 288.

A conveyance of land in which A. (then about fifteen years old) was named as grantee was taken by his father, C, who paid for the land, had the deed recorded, and thereafter retained possession of the instrument until his death, twenty-four years later. The son did not know of the existence of a deed in which he was named as grantee until after his father's death. Upon evidence tending strongly to show that the father claimed that there was a mistake in the deed, in that he should have been named as grantee instead of his son; that he attempted to correct the mistake after the deed was recorded; that he took possession of the land, paid the taxes, exercised many acts of ownership, claimed the land as his property, contracted to sell it, and finally conveyed it in his own name after having had possession more than twenty years, *held* to have been a question for the jury whether the original conveyance was intended by the parties thereto to run to the son, and, if so, whether it was delivered to and accepted by the father for the benefit of the son. Such evidence was sufficient to overcome the presumption from the record that the deed was duly delivered to the grantee named. Cross v. Barnett, 65 Wis. 431.

Where the owner of a city lot undertakes to erect a building upon his own ground, but by inadvertence and ignorance of the true line of his lot, places a portion of the wall four inches over the dividing line and upon the adjoining lot, but with no intention then or afterward to claim any portion of such adjoining

**38. Lost Deed.**—A deed executed and delivered, but subsequently lost, gives color of title; and actual possession of part of a lot, claiming possession of the whole under such lost deed, is equal to actual possession of the entire lot without color of title to any part of it.<sup>1</sup>

**Deed not recorded.**—An unrecorded deed will constitute color of title.<sup>2</sup>

lot as his own, and the adjoining lot-owner had no knowledge of such encroachment, the possession thus taken will not be adverse. *Winn v. Abeles*, 35 Kan. 85.

Where one enters under color of title, but by mistake locates upon land not included in the boundaries described in his deed, he will not have the benefit of constructive possession. *Napier v. Simpson*, 1 Tenn. 453. But will acquire seisin only by actual occupation. *Holton v. Whitney*, 30 Vt. 410; *St. Louis University v. McCune*, 28 Mo. 481.

Where the occupation is by mistake or ignorance it will not be adverse. *Thomas v. Babb*, 45 Mo. 384.

A, holding a conveyance from B, by mistake entered upon another tract belonging to B. *Held*, that A's possession is in subordination to B, and not adverse. *Farish v. Coon*, 40 Cal. 33.

Where a deed by mistake misdescribes the land, and the vendor afterwards corrects by executing a new deed, color of title will run from date of last deed. *Weaver v. Wilson*, 48 Ill. 125.

Mere occupation by inadvertence or mistake without any intention to claim title may not be a disseisin, as where a fence is erroneously erected not on the dividing line. *Abbott v. Abbott*, 51 Me. 575. See *BOUNDARIES AND FENCES*, *ante*, p. 248.

In *St. Louis University v. McCune*, 28 Mo. 481, an alleged encroachment beyond the boundary line was under consideration, and the court held that if the party erected an improvement accidentally upon the land of another through mistake or ignorance of the correct line dividing the tracts, and without intending to claim beyond the true line, the occupation thus taken and the possession which followed did not work a disseisin.

In *Hitchings v. Morrison*, 72 Me. 331, a case where a party claimed title to a strip upon an adjoining lot upon the basis of adverse possession, it was held that if the occupation was not accompanied by a claim of title in fact, but was merely inadvertence or mistake as to the extent of his line, without intention to claim title to the extent of his occupa-

tion, but only to the bounds described in his deed, then it was not adverse and would not give title.

In *Howard v. Reedy*, 29 Ga. 152; s. c., 74 Am. Dec. 58, it was held that a possession originating in and continuing under a mistake or misapprehension as to the true lines dividing two lots of land, will not ripen into statutory title. See *Ricker v. Hibbard*, 73 Me. 105; *Brown v. Cockerall*, 33 Ala. 38; *Enfield v. Day*, 7 N. H. 459; s. c., 28 Am. Dec. 360; *Riley v. Griffin*, 16 Ga. 141; s. c., 60 Am. Dec. 726; *Brown v. Gray*, 3 Greenl. (Me.) 126; *Walbrunn v. Ballen*, 68 Mo. 164.

If the disseisor really believes that the land belongs to him, the fact that he is mistaken in his claim will not prevent his holding being adverse. *Faught v. Holway*, 50 Me. 24; *Russell v. Maloney*, 39 Vt. 583; *Johnson v. Gorham*, 38 Conn. 521; *Robinson v. Phillips*, 65 Barb. (N. Y.) 418; 56 N. Y. 634. See *BOUNDARIES AND FENCES*, *ante*, p. 248.

1. *Harbison v. School Dist.*, 4 Westn. Repr. (Mo.) 705.

2. *Bellows v. Jewell*, 60 N. H. 420; *Minot v. Brooks*, 16 N. H. 374; *Chastain v. Phillips*, 11 Ired. (N. Car.) 225; *Hardin v. Barrett*, 6 Jones (N. Car.) 159; *Krow v. Hinson*, 8 Jones (N. Car.) 347; *Davis v. Higgins*, 91 N. Car. 382; *Rawson v. Fox*, 65 Ill. 200; *Dickinson v. Bruden*, 30 Ill. 279; *Lea v. Polk Co. Copper Co.*, 21 How. (U. S.) 493.

Where possession has been had under a valid but unrecorded paper title for upwards of 20 years, it will be established thereby as against a title derived from a subsequent conveyance recorded first, and the latter will be removed as a cloud upon the former. *Jaques v. Lester*, 8 N. Eastn. Repr. 795.

The statute does not begin to run in favor of the holder of a tax deed by merely recording it. *Baldwin v. Merriam*, 16 Neb. 199.

The recording of a tax deed of the land, even if other lands were included in the same deed, would be sufficient claim of title to warrant the bringing of ejectment against the grantee named in such tax deed, unless he notified the person holding the original title of his dis-



**Tax Deed.**—A tax deed which purports to convey the title of real estate to the grantee constitutes color of title, although it may be void.<sup>1</sup>

**Payment of Taxes.**—Payment of taxes is not evidence of adverse possession;<sup>2</sup> but in Illinois and California it is a necessary to perfect title.<sup>3</sup>

claimers of any interest in the land before suit brought, and took the necessary steps to disaffirm the apparent claim of title that a recorded deed asserts. *Hoyt v. Southard*, 58 Mich. 432.

1. *Stubblefield v. Borders*, 92 Ill. 284; *Coleman v. Billings*, 89 Ill. 190; *Hardin v. Crate*, 60 Ill. 215; *Woodward v. Blanchard*, 16 Ill. 433; *Edgerton v. Bird*, 6 Wis. 527; s. c., 70 Am. Dec. 473; *Gettling v. Lane*, 17 Neb. 77, 80; *Haywood v. Thomas*, 17 Neb. 237; *Chicago, etc., R. Co. v. Allfree*, 64 Iowa, 500; *Colvin v. McCune*, 39 Iowa, 502; *Hamilton v. Wright*, 30 Iowa, 490; *Pugh v. Youngblood*, 69 Ala. 296; *Dillingham v. Brown*, 38 Ala. 311; *Hanna v. Renfro*, 32 Miss. 128; *Hall v. Law*, 102 U. S. 461. Compare *Waterson v. Devoe*, 18 Kan. 223; *Hall v. Dodge*, 18 Kan. 277.

Defendant took possession of the land in question under a tax deed, void because the land belonged to the United States, and was not subject to taxation. Plaintiff afterwards procured title from the United States. But defendant continued in uninterrupted possession, under his tax deed, for more than ten years after plaintiff procured his title. *Held*, that, although defendant's color of title began while the government yet owned the land, yet, as possession thereunder was continued for more than ten years after plaintiff acquired his title, plaintiff's right of action to recover the land was barred by the statute of limitations, though the statute would not have run against the government had the title remained in it. *Chicago, etc., R. Co. v. Allfree*, 64 Iowa, 500.

It appeared that the tax deed under which defendant claimed was void on its face, and that the land had never been actually occupied by any one. *Held*, that the statute was no bar. *Shoat v. Walker*, 6 Kan. 65.

When the purchaser of lands sold for taxes has continued in the open and continuous possession thereof, claiming title, for the period of five years from the execution of the deed of the judge of probate, the statute cuts off all inquiry as to the regularity of the sale, and operates a bar to an action brought for the recovery of the land, whatever may be the recitals

of the deed, or however erroneous they may be, or whatever may have been the irregularities attending the sale. *Pugh v. Youngblood*, 69 Ala. 296.

The use and occupation of the land by the true owner for any portion of the statutory period will bar the title of the holder of a tax deed. *Wilson v. Henry*, 35 Wis. 241.

A tax deed made under a sale of swamp land, which was exempt from taxation, as belonging to a county, as well as the deed from such purchaser, constitutes color of title under the limitation act of 1839. *County of Piatt v. Goodell*, 97 Ill. 84.

A survey of six hundred acres of unimproved land was patented to A, B, C, and D, in the proportion of 200, 100, 100, and 200 acres, respectively, to be held by them as tenants in common. Subsequently B's share was sold at a tax sale, described as 100 acres, part of said survey, taxed in the name of B, but without any further description. *Held*, that such tax sale was void for want of description; that one who holds such a tax title cannot survey off to himself the quantity called for in his certificate out of the large tract, and, by an entry thereon, and actual possession and improvement of part only, claim to hold, by constructive possession, to the boundaries of his survey. *Humphreys v. Huffman*, 33 Ohio St. 395.

2. *Sioux City, etc., Land Co. v. Wilson*, 50 Iowa, 422; *Raymond v. Morrison*, 59 Iowa, 371.

A claim under a tax title is necessarily hostile to the owner of the original title. *Sparrow v. Hovey*, 44 Mich. 63.

3. *Dryden v. Newman*, 4 N. E. Repr. 768; *Cooter v. Dearborn*, 4 N. E. Repr. (Ill.) 388; *Holbrook v. Gouverneur*, 3 N. East'n Repr. (Ill.) 220; *McNoble v. Justiniano*, 11 Pac. Repr. (Cal.) 742; *Ross v. Evans*, 4 Pac. Repr. (Cal.) 443.

Where the record shows that both parties in an action of ejectment have paid the taxes on the land in suit for seven years prior to the suit, without showing which paid first, a defence is not made out under the limitation law of 1839. The burden of proof is upon the defendant setting up the statute, to show that

**39. Invalid Conveyance or Title.**—Whatever may be the source of the invalidity of a deed, if it purports to convey land, and in form passes what purports to be the title, it gives color of title.<sup>1</sup>

he paid such taxes before the plaintiff. The party paying first in any year is the one who has paid the taxes of that year. *Bolden v. Sherman*, 101 Ill. 483.

The plaintiff claimed under a patent from the State. More than five years elapsed between the issuing of the patent and the commencement of the action. The defendant pleaded the statute of limitations, and relied upon an adverse possession commencing before the patent issued. It appeared from the evidence that the plaintiff had paid the taxes upon the land. The court instructed the jury as to the proof required to make out an adverse possession, and that in addition to the fact of possession and its adverse character, it was necessary for the defendant to show that the taxes had been paid by him. The jury rendered a verdict in favor of defendant. *Held*, (1) that the statute could not commence to run until the issuing of the patent; (2) that the possession of the defendant, even if sufficient in other respects, was not adverse because of his failure to pay the taxes, the statute requiring it. *O'Connor v. Fogle*, 63 Cal. 9.

Where the last payment of taxes on unoccupied land is made some four months less than seven years from the first payment, but possession is not taken under color of title until after the statutory period has elapsed, *held*, a bar to ejectment by owner of the paramount title. *Hurlbut v. Bradford*, 110 Ill. 397.

Where a defendant in ejectment shows the payment of all taxes on the land, under color of title, for seven consecutive years while the land was vacant and unoccupied and he is found or shown to be in possession when the action was brought it will be presumed that his possession was under his color of title, especially when that fact was not disputed on the trial. *Holbrook v. Gouveneur*, 114 Ill. 623.

Where a party having color of title shows the payment of all taxes on the premises for seven successive years, by the production of his tax receipts, showing the date of each payment and the amount thereof, this makes out a *prima-facie* defence under the Limitation law of 1839, which must prevail unless the plaintiff shows that the taxes for some one of the seven years were paid before the defendant made his payment. The testimony of the plaintiff, that he, by himself or

agent, paid the taxes upon the same land for each of the same years, but not giving the amount or date of any of his payments, will not rebut the defendant's *prima-facie* case and defeat the operation of the statute. In an action of ejectment for a strip of land, the defence being the payment of taxes for seven years under color of title, the defendant admitted that the plaintiff had paid the taxes for the same seven years, and undertook to overcome the force and effect of the admission by proving that he had also paid taxes for the same years, but failed to show whose payments for the several years were first made. *Held*, that the evidence was not sufficient to overcome the admission. Such admission was held to impliedly concede that the plaintiff's payments were first made, otherwise there could be no taxes for him to pay. *Bolden v. Sherman*, 110 Ill. 418.

The holder of claim and color of title to vacant and unoccupied land, paid the taxes thereon in November, 1839, and soon after died. The receipts for the taxes of 1840, 1842, and 1843 were in his name, instead of being in the name of the heir or heirs. *Held*, that these payments could not be presumed to have been made by the heirs, or in his name by some unknown person for them, and without other evidence could not be treated as payments by the owner of the color of title. *Hurlbut v. Bradford*, 110 Ill. 397.

A defendant in ejectment received a warranty deed for the land in 1859, and paid all taxes thereon for the years 1859 to 1878 inclusive, and the proof showed it was timber land and was never inclosed, but that he used it every year since the date of his deed as occasion required in procuring therefrom rails, firewood, posts, etc. *Held*, whether the land was in possession, or vacant and unoccupied, the bar of the statute was complete. *Walcott v. Gibbs*, 97 Ill. 118.

Ejectment will lie where defendants' claim of title consists in his having recorded a tax-deed which he has obtained on the premises, unless before suit brought he has notified the holder of the original title that he disclaims any interest and takes steps to disaffirm the apparent claim asserted by such record. *Hoyt v. Southard*, 58 Mich. 432.

1. *Moulton v. Henderson*, 62 Ala. 426;

It is not necessary that the claim of title should be good,

McCarny v. Higdon, 50 Ga. 629; Payne v. Blackshear, 52 Ga. 637; Moody v. Fleming, 4 Ga. 115; s. c., 48 Am. Dec. 210; Whiteside v. Singleton, Meigs (Tenn.) 207; Farrow v. Edmundson, 4 B. Mon. (Ky.) 605; s. c., 41 Am. Dec. 250; Adams v. Alkire, 20 W. Va. 480; Core v. Faupel, 24 W. Va. 238; Shanks v. Lancaster, 5 Gratt. (Va.) 110; s. c., 50 Am. Dec. 108; Nowlin v. Reynolds, 25 Gratt. (Va.) 137; Hamilton v. Boggess, 63 Mo. 233; Cofer v. Brooks, 20 Ark. 542; Elliott v. Pearce, 20 Ark. 508; Dorr v. School Dist., 40 Ark. 237; Chicago, etc., R. Co. v. Allfree, 64 Iowa, 500; Close v. Samm, 27 Iowa, 503; Vancleave v. Wilkinson, 13 Ind. 105; Kruse v. Wilson, 79 Ill. 233; Russell v. Mandell, 73 Ill. 136; Mason v. Ayres, 73 Ill. 121; Fagan v. Rosier, 68 Ill. 84; Rigor v. Frye, 62 Ill. 507; Hinkley v. Green, 52 Ill. 223; Brooks v. Bruyn, 35 Ill. 394; Edgerton v. Bird, 6 Wis. 527; s. c., 70 Am. Dec. 473; La Frombois v. Jackson, 8 Cow. (N. Y.) 589; s. c., 18 Am. Dec. 463; Munro v. Merchant, 28 N. Y. 9; Thompson v. Burhans, 79 N. Y. 93; Cornelius v. Giberson, 21 N. J. L. 1; Forest v. Jackson, 56 N. H. 357; Livingston v. Pendergast, 34 N. H. 544; Minot v. Brooks, 16 N. H. 374; Hall v. Law, 102 U. S. 461; Ewing v. Burnett, 8 Pet. (U. S.) 41; Roberts v. Pillow, 1 Humph. (U. S.) 624. Compare Hall v. Mooring, 27 La. Ann. 596; Simmons v. Lane, 25 Ga. 178; Field v. Boynton, 33 Ga. 239; Marsh v. Wier, 21 Tex. 97; Hines v. Robinson, 57 Me. 324; Moore v. Brown, 11 How. (U. S.) 424.

When a person enters upon unoccupied land, under a defective title, and holds adversely, if the true owner be at the same time in actual possession of part of the land, claiming title to the whole, he has the constructive possession of all the land not in the actual possession of the intruder. Hunnicutt v. Peyton, 102 U. S. 333; Bellis v. Bellis, 122 Mass. 414; Bradley v. West, 60 Mo. 33; Shultz v. Lindell, 30 Mo. 310; Ballard v. Perry, 28 Tex. 347; Davis v. Perley, 30 Cal. 630; Jakway v. Barrett, 38 Vt. 316.

A conveyance, though invalid, may operate as color of title, but it does not draw with it constructive possession, and does not, of itself, tend to prove adverse possession. Childress v. Calloway, 76 Ala. 130.

A tax deed void upon its face, or illegally issued, constitutes color of title. Colvin v. McCune, 39 Iowa, 502; McMillan

v. Wehle, 55 Wis. 685; Lindsay v. Fry, 25 Wis. 460; Elliott v. Pearce, 20 Ark. 508; Cofer v. Brooks, 20 Ark. 542; Pugh v. Youngblood, 69 Ala. 296; Rivers v. Thompson, 43 Ala. 633; Dillingham v. Brown, 38 Ala. 311; Haywood v. Thomas, 17 Neb. 237; Pillow v. Roberts, 13 How. (U. S.) 472; Cowley v. Monson, 5 Fed. Repr. 779.

Also a deed without a seal. Barger v. Hobbs, 67 Ill. 592.

A void mortgage foreclosure will give color of title. Mason v. Ayers, 73 Ill. 121; Hinkley v. Greene, 52 Ill. 223.

An invalid or informal sheriff's deed will give color of title. Beverly v. Burke, 9 Ga. 440; s. c., 54 Am. Dec. 351; Burkhalter v. Edwards, 16 Ga. 593; Hester v. Coats, 22 Ga. 56; Simmons v. Lane, 25 Ga. 178; Northrop v. Wright, 7 Hill (N. Y.) 476; North v. Hammer, 34 Wis. 425; Bailey v. Doolittle, 24 Ill. 577; Fritz v. Joiner, 54 Ill. 101; Riggs v. Dooley, 7 B. Mon. (Ky.) 236; Brien v. Sargent, 13 La. Ann. 108.

A void patent may be used to give color of title and fix the limits of possession. Logan v. Jelks, 34 Ark. 547; Sanford v. Cloud, 17 Fla. 557. See Charles v. Saffold, 13 Tex. 94; Wofford v. McKinna, 23 Tex. 36; s. c., 76 Am. Dec. 56.

A deed from one having no title to the land is color of title. Kennebec Purchase v. Laboree, 2 Me. 275; s. c., 11 Am. Dec. 79. *Contra*, if the grantee knew that the grantor had no title to convey. Saxton v. Hunt, 20 N. J. L. 487.

A sale which is afterwards avoided by individual or judicial proceedings gives color of title. Hamilton v. Wright, 30 Iowa, 480. Compare Presley v. Holmes, 33 Tex. 476.

A deed under decree of a court of competent jurisdiction, though the decree is void, gives color of title. Huls v. Buntin, 47 Ill. 396.

A deed made by a clerk or master in equity, after he goes out of office, on a sale made by him while in office, is color of title, though not otherwise operative. Williams v. Council, 4 Jones (N. Car.), 206.

So is an agreement of partition by an administrator, although he acted without an order of court. McMullin v. Erwin, 58 Ga. 427.

An invalid sale under a trust deed gives color of title. Gebhard v. Sattler, 40 Iowa, 152.

The deed of an infant is color of title. Murry v. Shanklin, 4 D. & B. L. (N. Car.) 286.

or even believed to be good: it is enough if there be a real

In 1854 certain land belonging to C. was levied upon and sold to satisfy a judgment against him alone. In 1856, his wife executed a deed, in which he did not join, to one claiming under the sheriff's sale. In 1864 C. died, his wife surviving. Action by the latter, in 1884, against a remote grantee to recover one third of the land. *Held*, that while her deed was void, it was sufficient to convey color of title; that the plaintiff's cause of action to avoid the deed which gave color of title accrued when her grantee took possession under the deed in 1856, as there was then an adverse possession of all the land; also, that the defendant and his grantors having been in possession more than twenty years under color of title conferred by the plaintiff's deed, the action is barred by the statute of limitations, the plaintiff's disability of coverture not postponing the time when the statute began to run. *Wright v. Kleyla*, 104 Ind. 223. See *Hunter v. O'Neal*, 4 Baxt. (Tenn.) 494.

A conveyance of land which is at the time in the possession of a prior grantee, holding under an instrument which, though invalid as a conveyance, is color of title, is inoperative and void as against such adverse holder. *Watson v. Mancill*, 73 Ala. 600.

To avoid a deed to land executed by a party out of possession, on account of the adverse possession of a third party, it is not required that the possession of the latter should have been under a *bona-fide* claim of right to the premises, or under the honest belief that his title was good; it is sufficient if he claimed in independent right, adversely. *Bernstein v. Humes*, 75 Ala. 241.

A deed executed by husband and wife, purporting to convey the homestead, but without the necessary certificate of acknowledgment showing the wife's voluntary assent and signature, is totally inoperative and ineffectual as a conveyance of title; but, possession being delivered and held under it, it may constitute color of title, and be admissible to show the extent of the grantee's possession. *Watson v. Mancill*, 76 Ala. 600.

A deed of conveyance of land in fee executed by a married woman alone, without any privity examination, is an assurance of title purporting to convey an estate in fee which will perfect the title of an adverse holder of land. The disseisin occasioned by the possession of the grantee of such a deed would be a

disseisin of the joint estate of husband and wife, and their joint right of action would be barred in seven years, and the title of the husband not only barred, but extinguished, and the heirs of the wife, if she died before the husband, would have only three years after her death and the extinguishment of the husband's right within which to bring suit for the recovery of the land. *Hanks v. Folsom*, 11 Lea (Tenn.), 555.

A *feme covert* died 1854, leaving a will, which was admitted to probate, but was not executed in due form to pass real estate, because the consent of her husband in writing was not annexed thereto, and also because it was not executed sixty days before her death. By said will she devised a farm to her husband for life, with remainder in fee to her nephew. Under it her husband entered into possession of the property, claiming title as tenant for life, and so continued in possession until 1868, when he united with the nephew in a sale and conveyance to J., who thereupon entered upon said property, and continued in possession up to 1882, when the heirs-at-law of the testatrix brought ejectment against him. *Held*, that the claim of title and possession of the husband as tenant for life under the will, being hostile to the title of the heirs-at-law, was as against them adverse and exclusive. That the purchaser from the husband and nephew having immediately taken and held possession under the conveyance to him, his possession was added or tacked to the possession of the husband, making a continuous adverse possession of more than twenty years, which by the statute of limitations was a flat bar to the right of the plaintiffs as heirs-at-law. *Hanson v. Johnson*, 62 Md. 25; s. c., 50 Am. Rep. 199. Compare *Silva v. Wimpenny*, 136 Mass. 253.

Where a deed had but one subscribing witness, the statute requiring two, *held*, that title might be gained by adverse possession. *Lyles v. Kirkpatrick*, 9 S. Car. 265.

The title to the lands was in a trustee for a lunatic. One claiming to be guardian of the lunatic, but acting under a void appointment, obtained an order of the probate court for the sale of the lands, and sold and conveyed them. The purchaser, and those claiming under him, had had possession of the lands under claim of right and of ownership, for a length of time sufficient to bar the right

*bona-fide* purpose to assert and rely on it, as hostile to the true owner.<sup>1</sup>

40. *Interference of Title.*—Where there is an interference between titles, if one of the adverse claimants is in possession of land within the boundaries of his deed or grant, but not on any part of the interlap, the statute does not begin to run against him. But the moment he occupies the land included in the other's grant, and holds possession, either by himself or another, the statute commences to run.<sup>2</sup>

of entry under the statute. The whole proceedings under which the sale and conveyance were made were void, because the order appointing the guardian was invalid and void. It was held, the statute of limitations ran in favor of the derivative purchaser, although the possession of the irregularly appointed guardian was but the possession of the lunatic, in whose right he assumed control and made the sale. *Moulton v. Henderson*, 62 Ala. 426.

Executor's sale. When, at a sale of lands made by an executor under orders of the probate court, a conveyance is made to the purchaser, without a report or confirmation of the sale, without a report that the purchase money had been paid, and without an order of the court to make titles, such a conveyance will be ignored, and the purchaser does not hold adversely, so that his possession will ripen into a title by the expiration of ten years. *Casey v. Morgan*, 67 Ala. 441.

An absolute nullity, as a void deed, judgment, etc., will not constitute color of title. *Bernal v. Gleim*, 33 Cal. 676. See *Simmons v. Lane*, 25 Ga. 178; *Marsh v. Weir*, 21 Tex. 97; *Moore v. Brown*, 11 How. (U. S.) 424. Compare *Pillow v. Roberts*, 13 How. (U. S.) 472, and cases cited *supra*.

1. *Baucum v. George*, 65 Ala. 259; *Dothard v. Denson*, 72 Ala. 541; *Humes v. Bernstein*, 72 Ala. 546; *State v. Conner*, 69 Ala. 212; *Griffin v. Stamper*, 17 Ga. 108; *Campau v. Lafferty*, 50 Mich. 114; *Smith v. Ferguson*, 91 Ill. 304; *Caperton v. Gregory*, 11 Gratt. (Va.) 505; *Jackson v. Brink*, 5 Cow. (N. Y.) 483; *Jackson v. Ellis*, 13 Johns. (N. Y.) 118; *Jackson v. Long*, 7 Wend. (N. Y.) 170; *Hilton v. Bender*, 4 Thomp. & C. (N. Y.) 270; *Leonard v. Leonard*, 10 Mass. 281; *Covey v. Porter*, 22 W. Va. 121; *Dalton v. Bank*, 54 Mo. 105; *Crispen v. Hannavan*, 50 Mo. 536; *Gregg v. Sayre*, 8 Pet. (U. S.) 244; *Jackson v. Huntington*, 5 Pet. (U. S.) 402; *Cowly v. Mason*, 5 Fed. Repr. 779; s. c., 10 Biss. (U. S.) 182. Compare *Marsh v. Weir*, 21 Tex. 97; *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; s. c., 18

Am. Dec. 463; *Dufour v. Campana*, 11 Martin (La.), 715; *Frique v. Hopkins*, 4 Martin N. S. (La.), 715; *Bonne v. Powers*, 3 Martin N. S. (La.) 462; *Powell v. Harman*, 2 Pet. (U. S.) 241.

However wrongful or fraudulent the possession, or defective the title, an entry under claim of exclusive title, founding such claim upon color of title, and accompanied by the continued statutory possession, constitutes an effective adverse possession.

*Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Northrop v. Wright*, 7 Hill (N. Y.), 476; *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 633; *Burbans v. Van Zandt*, 7 Barb. (N. Y.) 91; *Moody v. Moody*, 16 Hun (N. Y.), 189; *Griffin v. Stamper*, 17 Ga. 108; *Robbins v. Sackett*, 23 Kan. 301.

A fraudulent grant of State land may be color of title and become a good title if the fraudulent grantee hold actual adverse possession for seven years against a senior grantee who has a right of entry and a right of action to recover possession, and is under no disability mentioned in the statutes. *Oliver v. Pullam*, 24 Fed. Repr. 127.

2. *Coal Creek M. Co. v. Heck*, 15 Lea (Tenn.), 515. See *Alden v. Grove*, 18 Pa. St. 377; *Beaupland v. McKeen*, 28 Pa. St. 124; s. c., 70 Am. Dec. 115; *Hole v. Rittenhouse*, 37 Pa. St. 116; *Cline v. Catron*, 22 Gratt. (Va.) 378; *Child v. Kingsbury*, 46 Vt. 47; *Bunton v. Cardwell*, 53 Tex. 408; *Peyton v. Barton*, 53 Tex. 298.

One in actual possession of land under an older grant, which conflicts with a junior grant, has constructive possession of all the land in conflict, except such as is in the actual possession of one claiming under the junior title. *Frisby v. Withers*, 61 Tex. 134; *Evitts v. Roth*, 61 Tex. 81; *Crispin v. Hannavan*, 50 Mo. 536; *Hunnicutt v. Peyton*, 102 U. S. 369; *Brimmer v. Proprietors*, 5 Pick. (Mass.) 135; *Winter v. Stevens*, 9 Allen (Mass.), 529; *Bellis v. Bellis*, 122 Mass. 417; *Crispen v. Hannavan*, 50 Mo. 536; *Hodges v. Eddy*, 38 Vt. 344; *Hammond*

A possession under a junior grant conflicting in part with a superior grant, but not on the lap or conflict, will not bar the right of the owner of such superior grant by limitation, but possession under the junior grant, to put the statute of limitations in motion, must be on the conflict, although the owner of the superior grant be not in possession of any part of his grant.<sup>1</sup>

**41. Conflicting Titles.**—Where two persons are in possession, each claiming under color of title, the seisin will be deemed to be in the one having the better or legal title.<sup>2</sup>

*v. Ridgely*, 5 H. & J. (Md.) 245; s. c., 9 Am. Dec. 522; *Burns v. Swift*, 2 S. & R. (Pa.) 439; *Hall v. Powel*, 4 S. & R. (Pa.) 456; s. c., 8 Am. Dec. 722.

A. and P. were respectively in the actual possession of portions of a quarter-section, lying to the north of the river M., which ran across the southern part of the section, parallel to its southern boundary, the two together occupying the whole of the quarter-section north of the river, and the portion to the south not being actually occupied by any one. A State patent, including the quarter-section, was issued to A. in 1862, and a United States pre-emption patent for the quarter-section, conveying the title thereto, was issued to P. in 1863, and the parties continued in the actual possession of the tracts respectively occupied by them, claiming under their patents. *Held*, that A. by his patent acquired constructive possession of the land lying south of the river, and continued to have such possession after the issue of the patent to P. *Langford v. Poppe*, 56 Cal. 73.

Actual possession of granted land under a younger grant, by clearing, inclosing and cultivating a part of the land, especially if notice of the fact be brought home to the claimant under the older grant, will start the running of the statute of limitations, in favor of the possession, to the boundaries of the younger grant, and actual possession kept continuously for seven years, although on other parts of the granted land, would perfect the title. *Coal Creek Co. v. Ross*, 12 Lea (Tenn.), 1.

1. *White v. Burnley*, 20 How. (U. S.) 231; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Clark's Lessee v. Courtney*, 5 Pet. (U. S.) 319; *McEwen v. Den's Lessee*, 24 How. (U. S.) 242; *Trimble v. Smith*, 4 Bibb (Ky.), 257; *Fox v. Hinton*, 4 Bibb (Ky.), 559; *Smith v. Mitchell*, 1 A. K. Marsh. (Ky.) 251; 3 A. K. Marsh. 1022; 1 Marsh. (Ky.) 1097; *Price v. Evans*, 4 B. Mon. (Ky.) 388; *Talbot v. McGavock*, 1 Verg. (Tenn.) 268; *Hole v. Rittenhouse*,

25 Pa. St. 491; *Portis v. Hill*, 3 Tex. 278; *Wheeler v. Moody*, 9 Tex. 377; *Whitehead v. Foley*, 28 Tex. 268; *Staford v. King*, 30 Tex. 277; *Gillespie v. Jones*, 26 Tex. 346.

Where there is only a partial conflict or interference of surveys, the statute will not run in favor of an adverse occupant under a junior title, if his possession does not extend to that part of the land in dispute which is within the conflict. *Angell on Lim.* § 402; *Trimble v. Smith*, 4 Bibb (Ky.), 257; *Fox v. Hinton*, 4 Bibb (Ky.), 559; *Smith v. Mitchell*, 1 A. K. Marsh. (Ky.) 207; *Pogue v. McKee*, 3 Marsh. (Ky.) 127; *Smith v. Frame*, 3 Marsh. (Ky.) 231; *Price v. Evans*, 4 B. Mon. (Ky.) 388; *White v. Burnley*, 20 How. (U. S.) 235; *Hole v. Rittenhouse*, 25 Pa. St. 491 (overruling *Waggoner v. Hastings*, 5 Barr (Pa.), 300; *Beaupland v. McKeen*, 28 Pa. St. 124; s. c., 70 Am. Dec. 115; *Talbot v. McGavock*, 1 Verg. (Tenn.) 262; *Peyton v. Barton*, 53 Tex. 298.

Though actual possession under a junior title of part of a tract of land which interferes with an older grant gives possession of the whole to the holder of the junior title, yet a subsequent entry of the true owner upon any part of his land is an ouster of the intruder from the part of which he has constructive possession. *Altemus v. Long*, 4 Pa. St. 254; s. c., 45 Am. Dec. 688; *Hunnicut v. Peyton*, 102 U. S. 333; *Evitts v. Roth*, 61 Tex. 81.

In case of a lappage, and each bargainee is on his own land, outside the interference, the title will be in him who has the elder title; but if the junior bargainee has had actual adverse possession for the statutory time with color, he acquires a good title to the part so occupied. *Brady v. Maness*, 91 N. Car. 135.

2. *Cushman v. Blanchard*, 2 Me. 266; s. c., 11 Am. Dec. 76; *Bellis v. Bellis*, 122 Mass. 414; *Winter v. Stevens*, 9 Allen (Mass.), 526; *Langdon v. Potter*, 3 Mass. 219; *Crispin v. Hannovan*, 50 Mo. 536; *Semple v. Cook*, 50 Cal. 26.

42. *Extent of Possession.*—He who enters under a claim or color of title may hold to the boundaries described in the instrument under which he claims.<sup>1</sup> But if the boundaries described in the

1. *Whitehead v. Foley*, 28 Tex. 285; *Cantagrel v. Von Lupin*, 58 Tex. 570; *Evitts v. Roth*, 61 Tex. 81; *De Graw v. Taylor*, 37 Mo. 310; *Lynde v. Williams*, 68 Mo. 360; *Long v. Higginbotham*, 56 Mo. 240; *Schultz v. Lindell*, 39 Mo. 310; *Davis v. Perley*, 30 Cal. 630; *Tremaine v. Weatherby*, 58 Iowa, 615; *Teabout v. Daniels*, 38 Iowa, 158; *Calvin v. McCune*, 39 Iowa, 502; *Barger v. Hobbs*, 67 Ill. 592; *Goewey v. Urig*, 18 Ill. 238; *Fairman v. Beal*, 14 Ill. 244; *McEvoy v. Loyd*, 13 Wis. 142; *Pepper v. O'Dowd*, 39 Wis. 538; *Furlong v. Garrett*, 44 Wis. 111; *Bell v. Longworth*, 6 Ind. 273; *Humphries v. Huffman*, 33 Ohio St. 395; *Smith v. McKay*, 30 Ohio St. 409; *Gardner v. Gooch*, 48 Me. 487; *Bailey v. Carleton*, 12 N. H. 9; s. c., 37 Am. Dec. 190; *Jakway v. Barrett*, 38 Vt. 316; *Swift v. Gage*, 26 Vt. 224; *Thompson v. Burhans*, 61 N. Y. 52; *Munro v. Merchant*, 28 N. Y. 9; *Wright v. Sadler*, 20 N. Y., 320; *Ege v. Medar*, 82 Pa. St. 86; *Culler v. Motzer*, 13 S. & R. (Pa.) 356; s. c., 15 Am. Dec. 604; *Parker v. Wallis*, 60 Md. 15; s. c., 45 Am. Rep. 703; *Creekmur v. Creekmur*, 75 Va. 431; *Adams v. Alkire*, 20 W. Va. 480; *Core v. Faupel*, 24 W. Va. 238; *Johnson v. Parker*, 79 N. Car. 475; *Stanton v. Mullis*, 92 N. Car. 624; *Congdon v. Morgan*, 14 S. Car. 587; *Grimes v. Ragland*, 28 Ga. 123; *Veal v. Robinson*, 70 Ga. 809; *McCarney v. Higdon*, 50 Ga. 629; *Wiley v. Warmoch*, 30 Ga. 83; *Childers v. Calloway*, 76 Ala. 130; *Hymes v. Burnstein*, 72 Ala. 546; *Burks v. Mitchell*, 78 Ala. 61; *Wilson v. Williams*, 52 Miss. 487; *Peck v. Houston*, 5 Lea (Tenn.), 227; *Hunnicut v. Peyton*, 102 U. S. 333; *Pike v. Evans*, 94 U. S. 6; *Ellicott v. Pearl*, 10 Pet. (U. S.) 412; *Clymer v. Dawkins*, 3 How. (U. S.) 674.

If the true owner is in actual or constructive possession, one claiming under color of title can acquire seisin only to the portion actually occupied by him. *Barr v. Gratz*, 4 Wheat. 213; *Hunnicut v. Peyton*, 102 U. S. 333; *Livingston v. Peru Iron Co.*, 9 Wend. (N. Y.) 511; *Brimmer v. Proprietors*, 5 Pick. (Mass.) 131; *Bradley v. West*, 60 Mo. 33.

Adverse possession of a plot of land used as a family burial ground will extend only to portion occupied by graves. *Mooney v. Cooledge*, 30 Ark. 640.

A grantee, whose lands are by his deed bounded by a definite line, cannot be

said to claim under that instrument lands outside that line. *Pope v. Hanmer*, 74 N. Y. 240; *Grube v. Wells*, 34 Iowa, 148. But he may acquire title to such lands by actual occupancy. *Slaughter v. Fowler*, 44 Cal. 195.

A plat and survey in connection with other evidence may be used in fixing the origin, date, and limits of the possession. *Dorr v. School District*, 40 Ark. 237. See *St. Louis v. Gorman*, 29 Mo. 593; s. c., 77 Am. Dec. 486.

Color of title may arise under a void or worthless deed. Yet the deed may be used to explain and define the possession. *Pillow v. Roberts*, 13 How. (U. S.) 472; *Hamilton v. Boggess*, 63 Mo. 233; *Dorr v. School District*, 40 Ark. 237.

Clearing a part, with intent to make other improvements, will give constructive possession of the whole tract. *Scott v. Delany*, 87 Ill. 146.

Occupying certain 40-acre tracts of a section for logging purposes held not to be constructive possession of the remaining tracts. *Coleman v. Eldred*, 44 Wis. 210.

Where the possession is greater in extent than the claim, it is the latter which determines the amount of land gained by adverse possession. *Wood v. Willard*, 37 Vt. 377; *Grube v. Wells*, 34 Iowa, 148.

A grant to a railroad company to use a part of a street is not such a color of title as will enable them to hold the entire street adversely. *Pittsburg, etc., R. Co. v. Reich*, 101 Ill. 157.

A railroad company entitled by contract to strip of land of certain width built track and took possession. Held, that this amounted to adverse possession of as much land on either side of track as was necessary and proper for use of road. *Day v. N. Y., etc., R. Co.*, 20; *Am. & Eng. R. R. Cas.* 359; s. c., 41 Ohio St. 392.

Plaintiff's deed contained a description in substance as follows: A certain piece of meadow or land covered by water lying in F. pond (a natural pond), beginning at a certain marked cedar-tree, running thence south 83½ degrees west, 4 chains through lands of one J., to a stake; thence north 2 chains and 13 links, to a stake; thence north 51½ degrees east, to a tree. Held, that the deed could not be the basis of a constructive adverse possession as against J. or his grantees, of land between the first-

deed are ambiguous or incorrect, the party claiming under it cannot acquire title by constructive possession, but is limited to the land actually occupied.<sup>1</sup>

The rule that a party who, under a defective title, has entered into actual possession of a part of the land, claiming the whole, may have constructive possession of the whole, applies only when the part not actually possessed has some necessary connection with the other portion, as by use with it or subservient to it.<sup>2</sup>

mentioned line and low-water mark of the pond, as the deed only purported to convey land in the water, and so did not include, in the general description, land above low-water mark; and as the description of said line was an admission that J. owned on both sides thereof, and so it was no boundary line. *Wheeler v. Spinola*, 54 N. Y. 377.

The extent of the possession is limited to the limits claimed at the time of entry. Additional land cannot be included in the claim, unless a new entry and claim is made which will include such other lands. Neither can adverse possession be sustained to a part of the land in the actual possession of another adverse claimant, if such included part is subsequently abandoned by the holder. In order to include it acts amounting to a new entry as regards that part must be made. *Pepper v. O'Dowd*, 39 Wis. 548.

A void deed purported to convey three fourths of a township containing in all about 19,000 acres. The grantee named in the deed entered upon and improved about 400 acres in the southeast corner of the township, and afterwards brought ejectment for 4000 acres lying along the northern boundary of the township. *Held*, that he had no possession which would support his action, even against a mere trespasser. *Thompson v. Burhans*, 61 N. Y. 52.

Where one takes possession of a government subdivision of land under a claim of title to the whole of it, and puts a portion of it in cultivation, and no other person is in possession of any part thereof, such possession must be regarded as applying to the whole tract claimed by him, especially when the actual possession extends to each government subdivision embraced in the entire tract. *Tremaine v. Weatherby*, 58 Iowa, 615.

1. *Angell on Lim.* § 408; *Jackson v. Woodruff*, 1 Cowen (N. Y.), 276; s. c., 13 Am. Dec. 525.

Where the boundaries are given on a town map, a person claiming under color of title must claim under such map, in order to avail himself of it. *St. Louis v. Gorman*, 29 Mo. 593; s. c., 77 Am. Dec.

586. See *Dorr v. School Dist.*, 40 Ark. 237.

A deed describing land as "lot No. 6, on the westerly side of Peabody River, to run 160 rods each side of the road where it now runs," gives no color of title to land east of Peabody River, though less than 160 rods from the road. *Bellows v. Jewell*, 60 N. H. 420.

2. *Thompson v. Burhans*, 79 N. Y. 93; see *Thompson v. Burhans*, 61 N. Y. 52; *Miller v. L. I. R. Co.*, N. Y. 380; *Beauplan v. McKeen*, 28 Pa. St. 124, s. c., 70 Am. Dec. 115; *Scott v. Delany*, 87 Ill. 146; *Wilson v. Ewen*, 7 Oregon, 87; *Leeper v. Baker*, 68 Mo. 400; *Compare Ballance v. Flood*, 52 Ill. 49.

Although a party may derive his title to different tracts of land from different sources, yet if the tracts adjoin each other, and are all in one inclosure, and there is no one but the owner residing thereon, such residence is an "actual residence" upon all the tracts. *Wharton v. Bunting*, 73 Ill. 16.

In *Tremaine v. Weatherby*, 58 Iowa, 615, the court said: "It is not practicable nor possible for a party to be in actual possession of every part of a tract of land which is cut up by streams or sloughs, by bluffs or the like. He cannot have the whole of such a tract in the grasp of his hands or under his feet. If the owner of eighty acres of land breaks and cultivates sixty acres and up to a slough, leaving twenty acres unbroken and unused, it would be unfair to say that his possession of the twenty acres was not actual and adverse, because it is cut off from the other land by a stream, a bluff, a thicket, or a slough."

In ejectment by L. against B., to recover forty acres of swamp land, L. showed a better documentary title; but B. claimed under a deed conveying, besides this tract, six hundred and fifty-one acres, whereof six hundred acres had been inclosed by B. and his grantors for more than ten years. There was evidence that the forty acres were too wet for cultivation, and any fence thereon would be in danger of being washed away by high water; that B. had paid taxes on it for



**43. Fraud.**—A grantee will not be deprived of the legal advantages of his entry under color of title, unless it be for actual fraud on his part; he will not be prejudiced by the fraud of the grantor in making the title unless he was a participant in the fraud, and if his deed purports on its face to convey a good title, and he has accepted it in good faith, he will be entitled to the benefits to be derived from an entry under color of title. Mere neglect to inquire into the state of the title is not sufficient evidence of fraud; nor does the rule that what is sufficient to put a party on inquiry operate as notice, apply to such a case. There must be clear and satisfactory proof of knowledge that the title supposed to be acquired was invalid, accompanied by proof of an intent to defraud the real owner.<sup>1</sup>

**44. Without Color of Title.**—Where there is no color or claim of title, and naked possession alone is relied on as constituting title to land, there must be an actual occupancy of the land, and the possession cannot be extended by construction beyond that actual occupancy.<sup>2</sup> The doctrine seems to be that when a

more than ten years, and had used it as incident to the six hundred and fifty-one acres to obtain wood, and had included it in a survey of six hundred and ninety-one acres, and recorded the deed; that L. lived eight miles from the land, and had notified B. at the beginning of his occupancy that he owned the forty acres. *Held*, that although B.'s occupation of the six hundred and fifty-one acres did not, of itself, draw to itself adverse possession of the forty acres, a judgment in favor of B. should be affirmed. *Leeper v. Baker*, 68 Mo. 400.

1. *Foulke v. Bond*, 41 N. J. L. 527; *Moody v. Moody*, 16 Hun (N. Y.), 189; *Crispen v. Hannavan*, 50 Mo. 536; *Dalton v. Bank of St. Louis*, 54 Mo. 105; *Hamilton v. Boggess*, 63 Mo. 233; *Russell v. Mandell*, 73 Ill. 136; *McClellan v. Kellogg*, 17 Ill. 498; *Jackson v. Berner*, 48 Ill. 203; *Hall v. Gay*, 68 Ga. 442; *Hammond v. Crosby*, 68 Ga. 767; *Nash v. Fletcher*, 44 Miss. 609; *Welborn v. Anderson*, 37 Miss. 155.

Possession of grantor whose possession originated in fraud cannot be added to complete term necessary to give defendant title by prescription, though he be an innocent purchaser from such fraudulent grantor. *Farrow v. Bullock*, 63 Ga. 360.

Where one received a voluntary deed from her mother, who was in possession of land, took adverse possession thereunder, without any notice of the fact that the grantor had acknowledged herself to be the tenant of another, and sold the property to a third party, and the two held adversely for seven years before

suit, the prescriptive title was good, although the first grantor may, in fact, have been a tenant by sufferance, of which the subsequent takers had no notice. *McDougald v. Reedy*, 71 Ga. 750.

Where a debtor executed a deed to lands for the purpose of placing the title beyond the reach of his creditors, and of creating a secret trust for his own benefit, he continuing in fact the real owner, and enjoying the use, products, and profits of the estate, and the grantee never having been in possession of, and never having exercised or claimed any dominion or ownership over, the lands conveyed, the grantee is not, under such deed, clothed with any ownership or asserted right, which will uphold a claim of adverse possession against a creditor of the grantor, seeking to subject the lands conveyed by the deed to the payment of his debt. *Jones v. Wilson*, 69 Ala. 400; *Williams v. Higgins*, 69 Ala. 517.

Adverse possession for ten years by a grantee in a voluntary conveyance of land, executed while the grantor was surety on a guardian's bond, is, under the statute of limitations, a good defence to a bill filed by an administrator of the deceased ward, to have the conveyance set aside as fraudulent, and the land subjected to the payment of the guardian's liability to his ward. It is immaterial that the right of the complainant to proceed against the surety of the guardian arose within ten years prior to the commencement of the suit. *Snedecor v. Watkins*, 71 Ala. 48.

2. *Bracken v. Jones*, 63 Tex. 184; *Can-tagrel v. Van Lupin*, 58 Tex. 570; *Kim-*

usurper enters upon land, he acquires possession, inch by inch, of the part which he occupies; and that the mere naked possession, without color of title, is adverse only to the extent of the actual inclosure, which must be definite and notorious. No definite rule as to what constitutes sufficient possessory acts under claim of title can be given, as the matter must necessarily depend largely

ball v. Stormer, 65 Cal. 116; Kimball v. Lohmas, 31 Cal. 154; Marble v. Price, 54 Mich. 466; Peterson v. McCullough, 50 Ind. 35; Bristol v. Carroll County, 98 Ill. 84; Schneider v. Botsch, 90 Ill. 577; Coleman v. Billings, 89 Ill. 183; Weber v. Anderson, 73 Ill. 439; Booth v. Small, 25 Iowa, 177; Hamilton v. Wright, 30 Iowa, 480; Huntington v. Allen, 44 Miss. 654; Alexander v. Polk, 39 Miss. 737; Bryan v. Atwater, 5 Day (Conn.), 181; s. c., 5 Am. Dec. 136; Tracy v. Norwich, etc., R. Co., 39 Conn. 382; French v. Pearce, 8 Conn. 439; s. c., 21 Am. Dec. 680; Jewett v. Hussey, 70 Me. 433; Abbott v. Abbott, 51 Me. 584; Lincoln v. Edgecomb, 51 Me. 345; Hitchings v. Morrison, 72 Me. 334; Otis v. Moulton, 20 Me. 203; Hodges v. Eddy, 38 Vt. 327; Stevens v. Hollister, 18 Vt. 294; Paine v. Hutchens, 49 Vt. 314; Spaulding v. Warren, 25 Vt. 316; Burrell v. Burrell, 11 Mass. 297; Melvin v. Proprietors, 5 Metc. (Mass.) 5; s. c., 38 Am. Dec. 384; Proprietors v. Springer, 4 Mass. 416; s. c., 3 Am. Dec. 227; Robinson v. Phillips, 65 Barb. (N. Y.) 429; s. c., 56 N. Y. 634; Crary v. Goodman, 22 N. Y. 170; Baldwin v. Brown, 16 N. Y. 359; Ege v. Medlar, 82 Pa. St. 86; Meade v. Leffingwell, 83 Pa. St. 187; Jones v. Porter, 3 Pa. St. 134; Brown v. McKinney, 9 Whart. (Pa.) 567; Boynton v. Hodgdon, 59 N. H. 247; Wells v. Jackson Mfg. Co., 48 N. H. 491; Enfield v. Day, 7 N. H. 457; Hale v. Glidden, 10 N. H. 401; Smith v. Hosmer, 7 N. H. 436; s. c., 28 Am. Dec. 354; McKinny v. Kenny, 1 A. K. Marsh. (Ky.) 343; Smith v. Morrow, 5 Litt. (Ky.) 210; Hunter v. Chrisman, 6 B. Mon. (Ky.) 465; Clarke v. Wagner, 74 N. Car. 791; Scott v. Elkins, 83 N. Car. 424; Parker v. Banks, 79 N. Car. 480; Moore v. Thompson, 69 N. Car. 120; Seymour v. Carli, 31 Minn. 81; Washburn v. Cutter, 17 Minn. 335; Humphries v. Huffman, 30 Ohio St. 395; Dothard v. Denson, 75 Ala. 482; Bell v. Denson, 56 Ala. 444; Hawkins v. Hudson, 45 Ala. 482; Burks v. Mitchell, 78 Ala. 61; Hall v. Gay, 68 Ga. 442; Hammond v. Crosby, 68 Ga. 767; Anderson v. Dodd, 65 Ga. 402; Whittington v. Wright, 9 Ga. 23; Creekmur v. Creekmur, 75 Va. 431; Kincheloe v.

Tracewell, 11 Gratt. (Va.) 587; Peterson v. McCullough, 50 Ind. 35; Core v. Faupel, 24 W. Va. 238; Haywood v. Thomas, 17 Neb. 237; Wilson v. McEwan, 7 Oregon, 87; Ferguson v. Peden, 33 Ark. 150; Brown v. Leete, 6 Sawy. (U. S.) 332. Compare Wilson v. McEwan, 7 Oregon, 87.

Without color of title there can be no constructive possession. Wells v. Jackson Mfg. Co., 42 N. H. 491.

The extent of the actual inclosure must be definite and notorious. Bristol v. Carroll County, 95 Ill. 84; Humphries v. Huffman, 33 Ohio St. 395.

Where a party has inclosed a larger extent of land than his deed describes, he may claim to the extent of his inclosure. Swettenham v. Leary, 18 Hun (N. Y.), 284.

Under the Illinois act of 1839, actual possession and payment of taxes for seven years successively, but without color of title, afford no defence to an action by the true owner. Stoltz v. Doering, 112 Ill. 234.

A naked assertion of title to the bed of a lake, almost wholly covered by water, is not sufficient to put the statute in operation. State v. Portsmouth Sav. Bank, 106 Ind. 435. See Clarke v. Wagner, 74 N. Car. 791.

One who maintains a mill-dam which causes the waters of an unnavigable stream to set back and overflow the lands of another to a certain height or extent uninterruptedly for ten years, acquires a prescriptive right to flow the lands to that extent. Fluctuation in the height of the water, caused either by extraordinary rainfalls or freshets, or by extreme or unusual drouths, or by excessive draughts upon the water for the use of the mill, occasionally, will not affect or impair the prescriptive right to flow to the usual height acquired during ordinary seasons by uninterrupted use for ten years. Johnson v. Boorman, 63 Wis. 268.

**Possession under Verbal Contract.**— Possession of land taken under a verbal sale or exchange, and held under claim of ownership, is adverse, and may ripen into a title under the statute of limitations. Alexander v. Wheeler, 78 Ala. 167. See PAROL AGREEMENT, *ante*, p. 279.

upon the nature and character of the property, and must be determined from the circumstances of each case, and is for the jury.<sup>1</sup> (See ACTUAL POSSESSION, *ante*, p. 183.)

**45. Improvements.**—According to the strict rule of the common law, no allowance was made for such improvements, however valuable or beneficial, they being regarded as having been made at the peril of the possessor of the freehold. The right to set off such improvements in reduction or recoupment of rents recoverable by the complainant is purely an equitable one, borrowed originally from the civil law by courts of chancery. The rule prevails only in favor of a *bona-fide* occupant or possessor of land. He must be one who is not only in possession, but who asserts adverse ownership under color or claim of title. A mere naked intruder, or trespasser, does not come within the letter or spirit of the rule. It is equally clear, on both principle and authority, that one who has knowledge of an adverse claim is not entitled to the right to set off improvements made after acquiring such knowledge.<sup>2</sup>

1. Wood's Lim., § 267.

2. The New Orleans & Selma R. v. Jones, 68 Ala. 49; s. c., 70 Ala. 227; Gordon v. Tweedy, 74 Ala. 233. See Barker v. Owen, 93 N. Car. 203.

In Gordon v. Tweedy, 74 Ala. 233, the court said: "Actual notice of such adverse claim, according to the better rule, is generally held to be fatal to the occupant's claim for improvements, although mere constructive notice, such as the law implies from the record of a deed, is deemed insufficient. This principle seems to be generally adopted everywhere, so far as I have been able to discover, except in the State of Texas, where a different rule prevails, and actual notice is not regarded as a conclusive test of good faith. In Jackson v. Loomis, 4 Cow. 168; s. c., 15 Am. Dec. 347, the distinction under consideration seems not to have been discussed or clearly taken. The authorities, generally, however, are not wanting in harmony. 2 Story's Eq. Jur. (Redf. Ed.) §§ 799, 799a, 799b; Trial of Titles to Land (Sedgw. & Wait), §§ 694, 705; Sedgwick on Dam. p. 140 (12). note; Blackwell on Tax Titles, marg. p. 590-592; Burroughs on Tax. 345-6. The rule, which we here announce, was followed by this court in Horton v. Sledge, 29 Ala. 478, which was a suit in equity for a partition of lands, and an account of rents and profits, brought by one tenant in common against another. The defendant was allowed only for such permanent and valuable improvements as were made 'before he was apprised that his title was disputed.' The filing of the

bill is considered by all the authorities as tantamount to actual notice. In fact, it is the most solemn and authoritative of all forms of notice."

A landowner cannot be improved out of his estate. Improvements placed upon his land belong to him, and can be used by the maker, at the utmost, only as a set-off against rents and profits—never for the purpose of acquiring title. Pulaski Co. v. State, 42 Ark. 118.

If the legal owner admits a right to the improvements, he acknowledges that the possession was adverse. Moore v. Moore, 61 Me. 417.

No length of possession will give title to one who only claims to own the improvements upon the land. Davenport v. Sebring, 52 Iowa, 364.

In New Hampshire, to sustain a claim for betterments, the tenant must show that he had actual and peaceable possession of the premises, claiming in good faith and supposing that he had a legal title for more than six years prior to the commencement of the suit; so where the defendant was in the actual and peaceable possession of the premises, claiming in good faith, and supposing that he had a good legal title for six years before the action was commenced, and his claim for betterments cannot be allowed. Bellows v. Cole, 20 N. H. 492; Wendell v. Moulton, 26 N. H. 41, 65; Tripe v. Marcy, 39 N. H. 439; Lock v. Whitney, 5 Eastn. Repr. (N. H.) 340.

Where the right to be improvements is acknowledged, it is an admission that the possession has been adverse. Moore v. Moore, 61 Me. 417.

**46. Abandonment.**—Land may be abandoned at any time before a valid title by disseisin is acquired; but after the title has ripened into a perfect one the mere act of leaving the land will not destroy the title.<sup>1</sup>

Under the Ohio statute, where a person, in the quiet possession of land under an agreement for its purchase made with the equitable owner, is evicted by the trustee holding the legal title, he is not entitled, under said act, to compensation for lasting and valuable improvements made upon the premises. *Preston v. Brown*, 35 Ohio St. 18.

In *Wharton v. Moore*, 84 N. Car. 479, the court said: "The right to betterments is a doctrine that has gradually grown up in the practice of the courts of equity, and while it has been adopted in many of the states, it is not recognized in others. But it may now be considered as an established principle of equity, that whenever a plaintiff seeks the aid of a court of equity to enforce his title against an innocent person who has made improvements on land without notice of a superior title, believing himself to be the absolute owner, aid will be given to him only upon the terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises, by reason of the meliorations or improvements, upon the principle that he who seeks equity must do equity."

If a tax title shows upon its face that it is void, it cannot be the foundation for a claim for the value of improvements made in good faith. *Hatchett v. Conner*, 30 Tex. 104; *House v. Stone*, 64 Tex. 677.

There must be possession under color of title in good faith before a defendant is entitled to acquittal for responsibility for rents accruing during his adverse occupancy. *N. O. & S. R. Co. v. Immigration Assoc.*, 2 Am. & Eng. R. Cas. 425; s. c., 68 Ala. 48; s. c., 70 Ala. 227.

**When Action lies for Rents received.**—A person who receives the rents of lands while in possession under claim of title adverse to the plaintiff is not liable to the plaintiff in an action for money had and received, although a suit in equity was at the time pending to hold him liable as trustee of the lands for the benefit of the plaintiff. *Lockhard v. Barton*, 78 Ala. 189.

1. 3 Wash. Real. Pr. (4th Ed.) c. 2. Compare *Vickery v. Benson*, 26 Ga. 582.

In *Bear Valley Coal Co. v. Dewart*, 95 Pa. St. 72, the court said: "An abandoned title is not transferred to an ad-

verse claimant or person who first seizes the land, but it falls back to the State, and by its extinction sometimes makes a younger and conflicting title good. The doctrine of abandonment does not apply to a perfect title, but only to imperfect titles. In favor of a junior warrant or settlement right after long lapse of time, an imperfect title by warrant and survey may be presumed to be abandoned. But such presumption cannot be made of a perfect title; that is never reinvested in the State on such principle. After the land has been located and patented, it will not fall back because it is a derelict nor for the owner's neglect to pay the taxes. *Hoffman v. Bell*, 61 Pa. St. 444.

A stranger will not acquire title by payment of taxes on unoccupied land. Actual possession is necessary to acquire title under the statute of limitations. The presumption arising from the owner's neglect to exercise every act of ownership, often called abandonment, of his waiver of irregularities in sales of land for taxes or on judicial process, is a very different thing from the statutory title by adverse and continuous possession. In case of conflicting titles, the older and better will not be lost by reason of the statute of limitations, nor presumption of waiver upon the mere payment of taxes by the holder of the younger title."

The mere fact that the owner of real estate "has not had possession of it, claiming title to it," for more than twenty years, in the absence of any adversary claim or possession, does not work a forfeiture of his title. *Bernstein v. Humes*, 78 Ala. 134.

Title obtained by disseisin can only be transferred by deed. It cannot be lost by parol abandonment or relinquishment. *School Dist. v. Benson*, 31 Me. 381; s. c., 52 Am. Dec. 618.

Where the possession of the premises is abandoned by either party, the question as to whether they are left *animo revertendi* is one for the consideration of the jury; but whether such a question arises in the case is for the court to determine. *McCall v. Pryor*, 17 Ala. 533; *Wilson v. Glenn*, 78 Ala. 383.

An abandonment after the statutory period will rescind the title adversely acquired. *Vickery v. Benson*, 26 Ga. 582; *Russell v. Slaton*, 25 Ga. 493. Compare *Schall v. Williams Valley R. Co.*, 35

**47. Mines.**—Adverse possession may be acquired of a mine or mining claim; also of a quarry.<sup>1</sup> (See also MINES AND MINING.)

**48. Water.**—An adverse possession and user of water for the statutory period, continuously and uninterruptedly, with the knowledge of and to the injury of the true owner, will bar his right

Pa. St. 191; *Jacks v. Chaffin*, 34 Ark. 534.

1. *Union, etc., Co. v. Taylor*, 100 U. S. 37; *Harris v. Equator, etc., Co.*, 8 Fed. Repr. 863; *Moore v. Thompson*, 69 N. Car. 120; *Hess v. Winder*, 30 Cal. 349.

Adverse possession of the surface of land for the statutory period does not carry with it the possession of minerals below it, where the title to the latter has been severed from that of the surface by deed; and the owner seeking to establish title to a mine must prove possession of the mine as such, independently of his possession of the surface. *Caldwell v. Copeland*, 37 Pa. St. 427; s. c., 78 Am. Dec. 436. See *Caldwell v. Fulton*, 31 Pa. St. 475; s. c., 72 Am. Dec. 760, and note; *Armstrong v. Caldwell*, 53 Pa. St. 287; *Penna., etc., Co. v. Neel*, 54 Pa. St. 17; *Knight v. Indiana Co.*, 47 Ind. 110.

Two adjacent mining-lot owners laid claim to a vein or lode extending through their two lots, one filing a complaint and the other a cross-complaint, setting up their respective rights to the vein in controversy. *Held*, that a court of equity may take cognizance of a cross-action brought to try the adverse claim to the right of possession of a mineral lode, to quiet the title thereto, and enjoin the removal of ore therefrom, when, for these purposes, it becomes necessary to identify the boundaries of the vein and the apex of the lode, and, in view of the issue involved and the relief sought, a judgment at law would not meet the exigencies of the case. *Bullion, etc., M. Co. v. Eureka M. Co.*, 14 Am. & Eng. Corp. Cas. 152.

Possession of the surface of any mining claim is possession of all veins and lodes, the top or apex of which is inside the surface lines, although, as they go downward, such veins or lodes extend outside the vertical line of the surface location. No adverse possession can become operative by a party going outside the boundaries, and striking the vein of the first location on its dip, without the knowledge of the owners of the first location. The statute would only begin to run from the time that it became known to the prior locator that the new location was being worked on the same vein. *Pardee v. Murray*, 4 Montana, 234; s. c., 2 Pac. Repr. 16. See *Iron, etc., Co. v.*

*Cheesman*, 13 Am. & Eng. Corp. Cas. 552.

Where one has entered upon land under a claim of title founded upon a written instrument as a conveyance, his occupation of the land by mining operations, prosecuted as continuously as the nature of the business and the custom of the country permit, constitutes an adverse possession. *Stephenson v. Wilson*, 50 Wis. 95; 37 Wis. 482; *Wilson v. Henry*, 40 Wis. 594.

Where a claimant of a placer-claim makes his application for his patent thereon, knowing nothing of the presence of a quartz lode therein, and afterwards a lode is discovered therein, he is entitled to the possession thereof as against one who thereafter locates the lode. *Montana Copper Co. v. Dahl*, 9 Pac. Repr. (Mont.) 894.

A claimed a quarry on land adjacent to his own. He leased the quarry, and continued to procure stone, and permitted others to do so upon payment. *Held*, an adverse possession. *Colvin v. McCune*, 39 Iowa, 502.

Coal in place is land. The grant of a right to mine coal in the land of the lessor and remove it therefrom, although the instrument may be called a lease, is a grant of an interest in the land itself, and not a mere license to take the coal. *App. of Hope*, 3 East. Repr. (Pa.) 728.

Mere digging for coal in the winter, and abandoning the property the rest of the year, will not constitute adverse possession. *Jackson v. Stoetzel*, 87 Pa. St. 302.

In *Milligan v. Savery*, 9 Pac. Repr. 894, it was held by the Montana Supreme Court that titles to mining claims, before the government has parted with its title therein, are merely possessory, and in a suit on an adverse claim the question is on the right to possession. An action under § 2326 of U. S. Rev. St. to determine the right to the possession of a mining claim ought to be instituted according to the forms and practice within the jurisdiction where the suit is begun. In Montana, if the plaintiff is in possession he should bring an action to quiet title; if he is not in possession his action is in the nature of ejectment. Possession, or right of possession and ouster, should be averred.

thereto. But a mere claim of a right to the use and enjoyment of water, however long continued, will not ripen into adverse title thereto. It is the actual appropriation, followed by open, notorious, continuous, and exclusive possession for the time limited by statute, under claim of title, that gives the right. So, too, on the other hand, if the defendants used and held the water adversely for the statutory period next before suit was brought, the mere disputing their right to such possession by the plaintiffs would not prevent the bar of the statute. The peaceable possession must be disturbed—the continuity of such possession broken—within the statutory period, in order to defeat the plea, if otherwise supported by proof.<sup>1</sup> (See also RIPARIAN RIGHTS; WATERS AND WATERCOURSES.)

**49. Easement.**—The claim of a mere easement, or other right in land less than the entire fee, does not confer any adverse right to the fee; but, to have that effect, under the statute, the claim must be of the entire title, exclusive of the title of any other person.<sup>2</sup> (See also EASEMENTS.)

**50. Right of Way.**—To acquire a right of way by prescription there must be an adverse use of the way for the statutory period, and this use must be continuous and as of right. If the use is interrupted by the owner of the land, by obstructions placed upon it, in the exercise of his right to prevent the use of the way, the continuity of the use is broken. Whether the interruption is acquiesced in by the claimant of the right of way, in such manner that the subsequent use must be regarded as permissive, is a question for the jury upon the facts.<sup>3</sup> (See also EASEMENTS.)

**51. Highways.**—A party can gain no title to a portion of a public highway by occupying it from time to time, or even continuously, for twenty years. When once established, a highway does not cease to be such until discontinued by the proper authorities, and any encroachment upon it by private parties becomes a nuisance which the town authorities may summarily remove.<sup>4</sup>

1. *Cox v. Clough*, 11 Pac. Repr. (Cal.) 732; Angell on Watercourses (7th Ed.), §§ 208–219. This portion of the law of adverse possession will be fully treated under titles RIPARIAN RIGHTS and WATERS AND WATERCOURSES.

2. *Dothard v. Denson*, 75 Ala. 482. This branch of the law of adverse possession will be fully treated under the title EASEMENT.

3. *Webster v. Lowell*, 6 East. Repr. (Mass.) 615.

4. *Driggs v. Phillips*, 7 Eastn. Repr. (N. Y.) 410; *McClelland v. Miller*, 28 Ohio St. 488; *Brooks v. Riding*, 46 Ind. 15; *Visalia v. Jacob*, 65 Cal. 434; *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Cal. 437. Compare *Fort Smith v. McKibbin*, 41 Ark. 45; s. c., 48 Am. Rep. 19; *Webber v. Chapman*, 42 N. H. 326; *Gal-*

*veston v. Menard*, 23 Tex. 351; *Lane v. Kennedy*, 13 Ohio St. 42. See MUNICIPAL CORPORATIONS, *infra*, p. 300.

As the commissioners of highways cannot be grantors of land in any case whatever, their deed for a highway is void, and cannot be relied on as color of title under the Limitation law. *Pittsburgh, etc., R. Co. v. Reich*, 101 Ill. 157.

A highway laid out by the original proprietors of a town ceased to be used by the public in 1812, but had never been legally discontinued. At that time the selectmen of the town undertook to convey to S. by deed the interests of the town in it. S. fenced the land, and he and his grantees held exclusive and adverse possession for over sixty years. *Held*, 1. That the fact that the land was legally highway (if it was still so to be regarded)

**52. Public Lands—United States.**—Adverse possession cannot be held as against the United States; and mere possession of the land, though open, exclusive, and uninterrupted, for twenty years creates no impediment to a recovery by the government, and none to a recovery by one who within that period receives its conveyance.<sup>1</sup>

did not prevent the adverse possession running against the private right of an adjoining owner. 2. That the deed of the selectmen was admissible, although passing no title, as giving character to the possession under it. *Cady v. Fitzsimmons*, 50 Conn. 209.

During the period between 1846 and 1867, T., plaintiff's predecessor in title, once a year cut the grass from a small plat of ground in the highway; a row of trees was also planted by him in the highway in 1864, which were within a few years thereafter taken up or destroyed, and he sometimes piled lumber in the highway against his fence. He did not occupy the highway in any other manner. *Held*, that the evidence failed to establish a claim by adverse possession. *Bliss v. Johnson*, 94 N. Y. 235.

The setting-out of trees or the building of a sidewalk in a highway by the owner of adjoining lands is not such an occupation as can be made the foundation of a claim to title by adverse possession as against the true owner. *Bliss v. Johnson*, 94 N. Y. 235.

Fencing in a portion of the highway by an adjoining landowner will not constitute adverse possession. *Brooks v. Riding*, 46 Ind. 15.

Where a railroad crossing, in connection with the street which it crosses has been used by the public as a highway for more than twenty years, the street during that period having been kept in repair by the town, and the crossing during the same period having been planked and kept in repair by the railroad corporation, it is a question for the jury, upon all the evidence, whether such use was adverse and under a claim of right, or merely permissive. *Fitchburg R. Co. v. Page*, 131 Mass. 391; s. c., 7 Am. & Eng. R. R. Cas. 86.

The use of a street by a railroad company in the usual way is not such a use as will sustain a claim of adverse possession. *Indianapolis, etc., R. Co. v. Ross*, 47 Ind. 25.

To establish a by-road from twenty years' uninterrupted adverse enjoyment, there must be a certain well-defined line of travel in the same place over the entire route for all that time. *South Br.*

*R. Co. v. Parker*, 6 Eastn. Repr. (N. J.) 596.

An adverse use, under an issue of private right of way by prescription, the right of way being over and along a highway, commences from the abandonment of the highway. *Black v. O'Hara*, 5 Atl. Repr. (Conn.) 598.

One who buys lots which his deed describes according to a recorded plat is estopped from disputing the dedication and acceptance of an alley which appears thereon as bounding his lots and passing between them; and the mere occupancy by him of the space designed for the alley, without claim or color of title, does not establish an adverse possession until the interests of some one else are affected by it, nor will it entitle him to maintain trespass against a neighboring lot-owner for driving through the alley and tearing down obstructions placed there to prevent his using it. *Marble v. Price*, 54 Mich. 466.

1. *Oaksmith v. Johnson*, 92 U. S. 343. See *Farley v. Smith*, 39 Ala. 38; *Gardner v. Miller*, 47 Cal. 570; *Union, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176.

There can be no adverse possession as against the United States, or its grantee, unless there be a new entry after the grant; the individual making the original entry, after the grant by the United States, remains an intruder. *Cook v. Foster*, 2 Gilm. 652; *Hughes v. Stevers*, 95 Ill. 391; *Thompson v. Prince*, 67 Ill. 281.

The statute cannot avail a pre-emption claimant whose pre-emption claim is of land already held by a private individual under patent, or location and survey, which would entitle him to a patent. *Clark v. Smith*, 59 Tex. 275; *Sutton v. Carabajal*, 26 Tex. 500; *Buford v. Bostwick*, 58 Tex. 63.

A person claiming under a patent from the United States, or any one succeeding to his rights, may be barred of his right of entry or action by an adverse possession held continuously for ten years. *Coker v. Ferguson*, 70 Ala. 284; *Union, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176.

The title of a claimant of a common field lot, confirmed by the first section of the act of Congress of June 13, 1812,

**53. State Lands.**—Unless the State is especially included in the operation of a statute of limitation, such statute will not apply to the State. This is equally true of statutes of limitation barring the right of entry to lands after a certain period of adverse possession.<sup>1</sup>

was completely vested in him by said act at its date; and title by adverse possession under the statute of limitations might begin to ripen against him from and after such date, without regard to the date of survey of his lot, the approval thereof, or of its return to the office of the recorder of land titles. *Peting v. De Lore*, 71 Mo. 13.

The receipt issued by the receiver of the land-office upon payment of the purchase price of land to the government, containing a description of the land, constitutes such a conveyance of the premises as contemplates a proper foundation for adverse possession. *Cawley v. Johnson*, 21 Fed. Repr. 492.

Land-office certificates operate as a severance of the land from the public domain, and the statute will commence to run from the date of issue if accompanied by actual possession. *Gay v. Ellis*, 33 La. Ann. 249.

Limitation cannot be held to have commenced running prior to the date of the patent. *Manly v. Howlett*, 55 Cal. 94; *Matthews v. Ferrea*, 45 Cal. 51; *Ross v. Evans*, 4 Pac. Repr. (Cal.) 443; *Treadway v. Wilder*, 12 Nev. 108.

Where the plaintiff claims title under a patent issued to him within three years before the commencement of the action, and there is no evidence of any prior claim or act of ownership by any person claiming under the United States, the defendant cannot defeat a recovery by setting up his adverse possession, or his purchase at tax sale, prior to the date of plaintiff's patent. *Bonner v. Phillips*, 77 Ala. 427.

Where a person obtained a patent from the United States, while another was in possession under an entry made prior to that time, it appeared the patentee stated, after the grant from the government, that the person in possession had bought the land, and that he, the patentee, had made him a deed, and that, subsequently, the occupant gave it back to him to secure a store account, and that the occupant had paid him for the land. The witness by whom this statement was proven also testified that he had known the occupant for twenty-five years on the land; that he claimed the premises, cleared and built on it, and cut timber on it, and that the statements

by the patentee were made more than twenty years before the trial. It was held that, under this state of facts, it might be regarded the possession of the occupant was adverse to the patentee, as showing what would be tantamount to a new entry after the grant from the United States; that the occupant was holding adverse to all the world, in his own right, as owner by purchase of the title from the patentee. *Hughes v. Stevers*, 95 Ill. 391.

1. *State v. School Dist.*, 9 Am. & Eng. Corp. Cas. 587; s. c., 34 Kan. 237; *Des Moines v. Harker*, 34 Iowa, 84; *Gardner v. Miller*, 47 Cal. 508; *Cary v. Whitney*, 48 Me. 516; *Alton v. Illinois, etc., Co.*, 12 Ill. 38; *Smead v. Williams*, 6 Ga. 158; *Walls v. McGee*, 4 Harr. (Del.) 108. See *Brinsfield v. Carter*, 2 Ga. 143; *Wright v. Swan*, 6 Port. (Ala.) 84; *Doe v. Townsley's Heirs*, 16 Ala. 239; *Troutman v. May*, 33 Pa. St. 455; *Wallace's Lessee v. Miner*, 6 Ohio, 366; *Harlock v. Jackson*, 3 Brev. (S. Car.) 254; *State v. Arledge*, 2 Bailey (S. Car.), 401; *Lindsey v. Miller*, 6 Pet. (U. S.) 666; *Wilson v. Hudson*, 8 Yerg. (Tenn.) 398; *Levasser v. Washburn*, 11 Gratt. (Va.) 572; *Kirschner v. Western, etc., R. Co.*, 67 Ga. 760; *Glaze v. Western, etc., R. Co.*, 67 Ga. 761.

In the absence of proof to the contrary, the use and occupation of the State's land by a county will be presumed to be by sufferance and without any intention of the county to appropriate it to itself; and mere permissive possession, however long, can never ripen into a title. *Pulaski Co. v. State*, 42 Ark. 118.

A patent issued by the proper officers of the State upon a valid land certificate, though issued to one claiming under a forged transfer of the certificate, conveys title within the meaning of the statute of limitations of three years. One having a pre-existing right attempted to be conveyed by the forged transfer is not concluded by the issuance of the patent, nor is the State; but as to all other persons the patent is conclusive in favor of the patentee. *League v. Rogan*, 59 Tex. 427.

Where the parties and their privies have been in possession of the land for a very long period the law will presume



**54. Municipal Corporations.**—We present herewith the authorities upon this interesting but much vexed question arranged according to States. The question, briefly stated, is this: Can title be acquired by adverse possession through the period fixed by statutes of limitation to property held by a municipal corporation? <sup>1</sup> (See also MUNICIPAL CORPORATIONS.)

a grant from the State. *Davis v. McArthur*, 78 N. Car. 357; *Tray v. Norwich*, etc., R. Co., 39 Conn. 392; Mayor of *Hull v. Horner*, 1 Cowp. 102. See *U. S. v. Williams*, 5 McL. (U. S.) 183; *Swearingen v. U. S.*, 11 G. & J. (Md.) 373.

A *bona-fide* entry upon part of the land, under a certificate of entry, will start the running of the statute as to the whole tract. *Hannibal*, etc., R. Co. *v. Clark*, 68 Mo. 371.

The statute does not commence to run against a title founded upon a certificate of purchase from the State of swamp and overflowed lands until the same have been certified to the State by the United States government. *Packard v. Moss*, 8 Pac. Repr. (Cal.) 818.

The issuance of a patent, being authorized upon a certificate found to be genuine and legal by the travelling board, but not recommended for patent because not obtained in strict accordance with law, such certificate was thereby validated; and possession of land for the period prescribed by law under a location of such certificate and survey is sufficient to support the defence of the statute of limitations. *Spofford v. Bennett*, 55 Tex. 293.

**Massachusetts—Mississippi.**—As to the rule in these States, see *Nichols v. Boston*, 98 Mass. 39; *Green v. Irving*, 54 Miss. 450.

**Grant.**—Where plaintiff in ejectment relies upon the presumption of a grant from the State arising from an adverse possession of thirty years, and introduces deeds which contain no metes and bounds or description by which the land can be located, and offers no evidence of known and visible boundaries, *held*, that he cannot recover. *Price v. Jackson*, 91 N. Car. 11.

A party who relies on thirty years' adverse possession to presume a grant is not bound to show that he and those under whom he claims held the possession and claimed the land up to visible boundaries under the law as it existed when this action was brought. *Yount v. Miller*, 91 N. Car. 331.

Where an easement is granted, to be exercised within certain limits, and the grantor openly exercises a privilege in

excess of the limit continuously and without interruption for twenty-one years under claim of right, the law may presume a second grant superadded to the first, covering the larger right. *Gerhman v. Erdman*, 105 Pa. St. 371.

In ejectment, the plaintiffs claimed under a grant obtained in 1831, the defendants under an entry made in 1836 and grant thereon issued in 1848, and continuous adverse possession of portions of the land within the entry and grant. There was evidence tending to show that the person making the entry in 1836 had, at the time, under inclosure portions of the lands under entries made previous to 1831, the boundaries of which, if ever surveyed, were abandoned after the entry of 1836, which included them all, and could not, in a single instance, be identified at the trial. The inclosures of the defendants had been largely extended since 1831, and since the entry in 1836 and the grant in 1848. *Held*, that the title of the defendants had been perfected by the statute to the extent of the boundaries of their grant and survey. *Peck v. Houston*, 5 Lea (Tenn.), 491.

1. **States holding that such Title can be acquired.**—*Vermont.*—*Knight v. Heaton*, 22 Vt. 480.

**Massachusetts.**—See *City of Wheeling v. Campbell*, 12 W. Va. 66.

**New York.**—*Varick v. Cor. of New York*, 4 Johns. (N. Y.) 53. See also *Sherman v. Kane*, 86 N. Y. 57.

**Connecticut.**—*Litchfield v. Wilmot*, 2 Root (Conn.), 288; *Beardslee v. French*, 7 Conn. 125.

**Maryland.**—See *City of Wheeling v. Campbell*, 12 W. Va. 66.

**Virginia.**—*City of Richmond v. Poe*, 24 Gratt. 149; *Manchester Cotton Mills v. Town of Manchester*, 25 Gratt. 825. See, also, *Levasser v. Washburn*, 11 Gratt. 572.

**North Carolina.**—*Armstrong v. Dalton*, 4 Dev. 368.

**South Carolina.**—*Bowen v. Learn*, 6 Rich. 298; *State v. Pettis*, 7 Rich. 390.

**Mississippi.**—*Clemants v. Anderson*, 46 Miss. 581. But see *City of Vicksburg v. Marshall*, 59 Miss. 563.

**Texas.**—*City of Galveston v. Menard*, 23 Tex. 349.

**55. Effect.**—Adverse possession not only entitles the adverse possessor, like every other possessor, to be protected in his possession

*Missouri.*—County of St. Charles *v.* Powell, 22 Mo. 525; School Directors *v.* Georges 50 Mo. 194.

*Kentucky.*—Rowan's Exrs. *v.* Town of Portland, 8 B. Mon. 232; Dudley *v.* Trustees of Frankfort, 12 B. Mon. 610; Alvin *v.* Town of Henderson, 16 B. Mon. 131.

*Ohio.*—City of Cincinnati *v.* Evans, 5 Ohio St. 594; Lake *v.* Kennedy, 13 Ohio St. 42; Cincinnati *v.* First Presbyterian Church, 8 Ohio, 298.

*Illinois.*—City of Peoria *v.* Johnson, 56 Ill. 45; Chicago, R. I. & P. R. *v.* City of Joliet, 79 Ill. 40.

*Iowa.*—City of Pella *v.* Scholte, 24 Iowa, 128; Burlington *v.* Railroad Co., 41 Iowa, 134.

**States holding that such Title cannot be acquired.**—*Pennsylvania.*—Commonwealth *v.* McDonald, 16. S. & R. 401; Rung *v.* Shoenberger, 2 Watts, 23; City of Philadelphia *v.* Phila. & Reading R., 58 Pa. St. 263; Comm. *v.* Alburger, 1 Whart. 469; Barter *v.* Comm., 3 P. & W. 253; Penny Pat. Landing Case, 16 Pa. St. 79; Evans *v.* Erie County, 66 Pa. St. 222.

*New Jersey.*—Cross *v.* Mayor, 18 N. J. Eq. 311; Jersey City *v.* State, 30 N. J. L. 521; Mayor, etc., *v.* Morris Canal & Banking Co., 1 Beas. 561.

*Rhode Island.*—Simmons *v.* Cornell, 1 R. I. 519.

*Louisiana.*—Mayer *v.* Magnon, 4 Mart. 1; S. P. Mayor, etc., *v.* Maggioli, 4 La. Ann. 73; Ingram *v.* Police Jury, 20 La. Ann. 226. See, also, Delabigarre *v.* Second Municipality, 3 La. Ann. 230; Shreveport *v.* Walpole, 22 La. Ann. 526.

*Indiana.*—Sims *v.* City of Frankfort, 79 Ind. 446.

See, generally, Lane *v.* Kennedy, 13 Ohio St. 42; New Orleans *v.* United States, 10 Pet. 662; De Vaux *v.* Detroit, Harring, Ch. (Mich.) 98; Brooks *v.* Riding, 46 Ind. 15; Abernethy *v.* Dennis, 49 Mo. 468; Baker *v.* Johnson, 33 Iowa, 151; Newport *v.* Taylor, 16 B. Mon. (Ky.) 699; Paine *v.* Commissioner, etc., Wright's (Ohio) Rep. 417; Kelly's Lessee *v.* Greenfield, 2 Har. & McHen. (Md.) 132; North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 137; St. Charles *v.* Powell, 22 Mo. 525; Armstrong *v.* Dalton, 4 Dev. (N. Car.) 568; County *v.* Brinthal, 29 Pa. St. 38; St. Louis *v.* Newman, 45 Mo. 138; Smith *v.* State, 23 N. J. L. 712; Manko *v.* Chambersburg, 25 N. J. Eq. 168; Burbank *v.* Fay, 65 N. Y. 57, 1., P. & C. R. *v.* Ross, 47 Ind.

25; Sims *v.* Chattanooga, 1 Lea (Tenn.), 694; Shreveport *v.* Walpole, 22 La. Ann. 526; Henshaw *v.* Hunting, 1 Gray (Mass.), 203; Fox *v.* Hart, 11 Ohio, 414; McFarlane *v.* Kerr, 10 Bosw. (N. Y.) 249; Kellogg *v.* Thompson, 66 N. Y. 88; State *v.* Pettis, 7 Rich. (S. Car.) Law, 390; Memphis *v.* Lenore, 6 Coldw. (Tenn.) 412; Bowen *v.* Team, 6 Rich. 298; Brooks *v.* Riding, 46 Ind. 19; Mitchell *v.* Rome, 49 Ga. 19.

In *City of Wheeling v. Campbell*, 12 W. Va. 36, the learned judge, after a very complete review of the authorities, and showing the disproportion between them, continues: "We see no reason why municipal corporations should not be held to the same degree of diligence in guarding their streets and squares from encroachments as natural persons are in protecting their property from the adverse claims of others. We do see great reason why no time should bar the sovereign power, because the officers of the sovereign, whether king or state, have such various and onerous duties to perform that the rights of the sovereign may be neglected; and all the people of the kingdom or state are interested in having the rights of the sovereign preserved intact, and not subject to be impaired or lost by the neglect of officers; but the same reason does not apply to a municipal corporation. A city or town is a compact community, with its city or town council, its committee on streets and alleys, and its street commissioners, whose special duty it is to see that the streets and alleys and squares are kept in proper order and free from obstructions and encroachments. And if with all this machinery and power confined to so narrow a compass, and the interest of the corporation to exercise it, the city authorities permit an individual to encroach upon the streets, alleys, or squares of the city, and hold, enjoy, and occupy the same, claiming them as his own under his title, without interruption or disturbance in that right, for the period prescribed in the statute of limitations, the city not only does, but we think according to reason as well as authority, ought to, lose all right thereto."

Two of the latest cases upon the question will be examined with interest. In *City of Vicksburg v. Marshall*, 59 Miss. 563, it is held that streets in a city are held by the corporation in trust for the public; and adverse possession by an abutting lot-owner cannot bar the city's

against all who cannot show a better title, but also, if the adverse possessor remains in possession for the statutory time, produces

right to open them for public use. This case, to all appearances, is a reversal of the decision in *Clemants v. Anderson*, 46 Miss. 581; but that case does not seem to have been referred to by the court, which affirms the opinion expressed in *Dillon's Mun. Corp. sec. 675*. Another case, *Sims v. City of Frankfort*, 79 Ind. 446, is to the same effect, and the opinion is able and interesting.

Adverse possession of an alley in a city for the statutory period will give title to the occupant and bar the city. *Fort Smith v. McKibbins*, 41 Ark. 45; s. c., 5 Am. & Eng. Corp. Cas. 453; *Wheeling v. Campbell*, 12 W. Va. 36; *Pella v. Scholte*, 24 Iowa, 283; *Dudley v. Trustees*, 12 B. Mon. (Ky.) 610.

Title to lands cannot be acquired by adverse possession after the same have been dedicated as a public street. *Visalia v. Jacob*, 6 Am. & Eng. Corp. Cas. 115; s. c., 65 Cal. 434.

Occupancy of a street or alley of a town or city, by fencing the same up, is not adverse when such occupancy is by the permission of the town or city authorities. Such permission creates between the town or city and the possessor the relation of landlord and tenant. Such a holding cannot afterwards become adverse so as to sustain a plea of limitation until the possessor does some open, hostile act, clearly indicating his adverse claim; and this rule applies to the heir who continues the occupancy which was received from the ancestor. *Carter v. La Grange*, 60 Tex. 636. See *Cheek v. Aurora*, 4 Am. & Eng. Corp. Cas. 512; s. c., 92 Ind. 107.

In *County of Piatt v. Goodall*, 97 Ill. 84, the court said: "Upon a careful consideration of the authorities, the better opinion would seem to be that municipal corporations, in all matters involving mere private rights, as contradistinguished from public rights, strictly so called, are subject to limitation laws to the same extent as private individuals. On the other hand, in all matters involving strictly public rights, they are not subject to the limitation laws as such. But, in the latter class of cases, courts occasionally, under special circumstances which would make it highly inequitable or oppressive to enforce such public rights, interpose by holding the municipality estopped from doing so."

In the year 1801, the city of New York sold to W. lot 194 of its "common

lands," so called, the deed describing it as then being in the possession of W. There was a line clearly marking K.'s possession on the south. In 1804, the city leased lot No. 193, adjoining lot 194, on the south; there was then a wall line clearly marking W.'s possession on the south. The tenants of the city occupied lot 193 from the time of said leasing continuously up to 1852, having possession and cultivating up to the said line, W. and his successors in interest occupying north of the line. The city also paid assessments on the land up to said line. In proceedings to open a street across the lots the city treated lot No. 194 as only extending south to said line, paying S., plaintiff's ancestor and the successor to the title of W., the amount awarded, which he received without dissent or claim of title south of the line. Upon the city maps said line was recognized as the boundary between the lots. From 1852 up to 1866 the lands south of said line remained vacant; in the year last mentioned they were sold by the city to defendant, K. In an action of ejectment brought to recover a parcel of land lying south of said line, *held*, that if the same was covered by the description in the deed to W., the city reacquired title by adverse possession; that its possession could not be presumed to have been in subordination to W.'s title; and that the title so acquired was not lost by the failure to occupy after 1852. In 1851, the city executed to S. a release of ground-rent on lot 194. *Held*, that this did not affect its title, as it was evidently intended to only embrace lot No. 194, as then possessed by S. *Sherman v. Kane*, 86 N. Y. 57.

In *Alton v. Ill. Trans. Co.*, 12 Ill. 38, the court said: "Whatever title to public grounds may be vested in the city, she has not the unqualified control and disposition of them. They were dedicated to the public for particular purposes, and only for such purposes can they be rightfully used. For those purposes the city may improve and control them, and adopt all needful rules and regulations for their management and use; but she cannot *alien* or otherwise dispose of them for her own exclusive benefit; nor are they subject to the payment of her debts. At most she but holds them in trust for the benefit of the public. The right to the use of the property is not limited exclusively to the citizens of A., but the

the effect either of barring the right of the true owner, and thus converting the possessor into the owner, or of depriving the true owner of his right of action to recover his property.<sup>1</sup>

**56. Evidence.**—Adverse possession is a fact which must be proved, and the burden is always cast upon him who interposes and relies upon it as a defence. But an actual occupancy of land by a defendant, or by those under whom he derives title or possession, accompanied by acts of ownership inconsistent with the fact of ownership in another, is presumptively adverse possession,<sup>2</sup>

citizens of the State generally have an equal right with them in the appropriate enjoyment of the dedication.”

1. *Clancey v. Houdlette*, 39 Me. 451; *Hodges v. Eddy*, 41 Vt. 485; *Austin v. Bailey*, 37 Vt. 224; *Peele v. Chevees*, 8 Allen (Mass.), 89; *Jackson v. Dieffendorf*, 3 Johns. (N. Y.) 269; *Reed v. Farr*, 35 N. Y. 113; *Reformed Church v. Schoolcraft*, 65 N. Y. 134; *Schrivver v. Schriver*, 86 N. Y. 575; *Schall v. Williams Valley R. Co.*, 35 Pa. St. 191; *Moore v. Luce*, 39 Pa. St. 260; *Munshower v. Patton*, 10 S. & R. (Pa.) 334; s. c., 13 Am. Dec. 678; *Watson v. Gregg*, 10 Watts (Pa.), 289; s. c., 36 Am. Dec. 176; *Doe v. Roe*, 13 Fla. 602; *Dixon v. Cook*, 47 Miss. 220; *Walker v. Ray*, 111 Ill. 315; *Bunce v. Bidwell*, 43 Mich. 542; *Dupont v. Starring*, 42 Mich. 492; *Smith v. Hamilton*, 20 Mich. 433; *Ridgway v. Ludlow*, 58 Ind. 248; *Bowan v. Preston*, 48 Ind. 367; *De Long v. Mulcher*, 47 Iowa, 445; *Williams v. Thomas*, 65 Iowa, 183; *Ridway v. Halliday*, 59 Mo. 444; *Barry v. Otto*, 56 Mo. 177; *Shepley v. Cowan*, 52 Mo. 559; *Bank v. Evans*, 51 Mo. 335; *Blair v. Smith*, 16 Mo. 273; *Horbach v. Miller*, 4 Neb. 31; *Simson v. Eckstein*, 22 Cal. 580; *Crockett v. Lashbrook*, 5 T. B. Mon. (Ky.) 530; s. c., 17 Am. Dec. 98; *Brent v. Chapman*, 5 Cranch. (U. S.) 358; *Leffingwell v. Warren*, 2 Black (U. S.), 599; *Croxall v. Shererd*, 5 Wall. (U. S.) 289; *Bicknell v. Comstock*, 113 U. S. 149; *Dickerson v. Colgrove*, 100 U. S. 578.

A verbal statement, by one whose title by adverse possession is complete, to the owner of the paper title, that the former “recollected that there was a claim taken up for the property,” and if the latter “believed that he was entitled to it, to go ahead and take it, and he would make no objections,” is ineffectual to divest the title by possession. *Byers v. Shephlar*, 5 Cent. Repr. (Pa.) 293.

2. *Hood v. Hood*, 2 Grant (Pa.), 229; *Bradford v. Guthrie*, 4 Brews. (Pa.) 351; *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276; s. c., 13 Am. Dec. 525; *Russell v. Davis*, 38 Conn. 562; *Johnston v. Gorham*, 38

Conn. 513; *Rowland v. Updike*, 4 Dutch. (N. J.) 101; *Parker v. Banks*, 79 N. Car. 480; *Alexander v. Polk*, 39 Miss. 737; *Lynde v. Williams*, 68 Mo. 360; *Jackson v. Berner*, 48 Ill. 203; *Sharp v. Daugney*, 33 Cal. 505.

Every possession of land by one other than the claimant is deemed to be adverse until proof to the contrary is made. *Ruffin v. Overby*, 88 N. Car. 369. See *Wilson v. Spring*, 38 Ark. 181; *Currie v. Gale*, 9 Allen (Mass.), 522.

The fact that the plaintiff's grantor abandoned or relinquished the possession of the premises in controversy to the defendant absolutely, for any cause or consideration, and that the latter thereupon took and held such possession to the exclusion of such grantor and his assigns, may be shown by parol in support of the defence of the statute. The fact that a parcel of land does not appear on the assessment roll of the county in a given year as the property of the defendant, in an action for the recovery of the same, does not tend to contradict the testimony of such defendant to the effect that he paid the taxes thereon, as owner, in such year; nor is it competent evidence in such action, for or against either party, of the ownership of such land. *Zeilin v. Rogers*, 21 Fed. Repr. 103.

Proof of a recorded deed is not sufficient without proof of possession taken and held under it. *Lipscomb v. McClellan*, 72 Ala. 151.

Evidence that a party was in possession of land for the statutory period of limitations, which he had mortgaged and afterwards scheduled in bankruptcy, subject to the mortgage, but not showing how or by what acts he maintained his possession, nor the nature of the property, how improved, or whether improved at all, is not evidence of adverse possession. *Brookfield v. Stephens*, 40 Ark. 366.

Where the title relied on by the plaintiff is that given by the statute of limitations for adverse possession during the statutory time, a deed in fee of the land from the plaintiff to the defendant, given more than ten years before the bringing

liable to be rebutted by countervailing proof to the contrary.

of the action, is competent evidence, in connection with a parol lease taken by the plaintiff from the defendant, to show that the possession was not adverse. *Roggencamp v. Converse*, 15 Neb. 105.

The onus is on one who seeks protection as an adverse possessor to show a hostile possession; but the court pronounces as matter of law the facts which enter into and constitute such a possession. *Potts v. Coleman*, 67 Ala. 221.

The payment of taxes on a tract of land is not evidence of adverse possession. *Raymond v. Morrison*, 59 Iowa, 371; *Chapman v. Templeton*, 53 Mo. 463; *McDermott v. Huffman*, 70 Pa. St. 131.

Where the defendant in ejectment relies upon mere possession, his evidence must distinctly show the limits of his possession. *Hughes v. Israel*, 73 Mo. 538.

In ejectment where the plaintiff claims title by adverse possession, it is proper to permit him to show that the land was generally called and spoken of as his in the neighborhood, as this tends to prove the notoriety of his claim of title. *Sparrow v. Honey*, 44 Mich. 63.

A judgment roll is admissible as evidence of the defendant's adverse possession. *Unger v. Roper*, 53 Cal. 39.

Declarations that a party does not hold adversely are admissible. *Hall v. Sillo-way*, 1 Allen (Mass.), 21; *McNamee v. Moreland*, 26 Iowa, 96; *Leger v. Doyle*, 11 Rich. (S. Car.) 109; *Breidegam v. Hoffmaster*, 61 Pa. St. 223; *Curlee v. Smith*, 91 N. Car. 172; *Clements v. Wheeler*, 62 Ga. 53.

Declarations of a party in possession are not admissible to prove adverse possession, except when part of the *res gesta*, or made against his own interest. *Saugatuck Cong. Soc. v. East Saugatuck School Dist.*, 2 Atl. Repr. (Conn.) 751.

The adverse character of the possession is ordinarily, if not always, shown by the facts of the case, and does not receive its character from the declarations of the party in possession, except when such declarations may be regarded as *res gesta*; consequently, as the mere declarations of a party cannot be admitted in his own favor, it follows that the absence of such declarations cannot be shown by the adverse party against him. *Seymour v. Ohio River School Dist.*, 4 Atl. Repr. (Conn.) 244.

Proof of a verbal sale of the interest

of one of the heirs to an estate to another of the heirs, followed by 20 years' adverse possession in such other heir, held to create a sufficient title in the latter. *Hyne v. Osborn*, 28 N. W. Repr. (Mich.) 821.

Evidence is admissible to show that a person, since dead, was in occupation. *Lick v. Diaz*, 44 Cal. 479.

It is not necessary to show by direct and pointed evidence that the co-tenant has such knowledge of the adverse claim. It is sufficient if it is not shown otherwise, and the circumstances are such that it may reasonably be presumed that the co-tenant has such knowledge. *Knowles v. Brown*, 28 N. W. Repr. (Iowa), 409.

The record of proceedings in an action of trespass is evidence of a claim of title. *Hollister v. Young*, 42 Vt. 403.

Where, in ejectment, the defendant sets up title in his landlord acquired by adverse possession, the evidence of a disclaimer by the landlord in a prior ejectment suit for the same premises against the then possessor is admissible in such action. *Dillon v. Center*, 10 Pac. Repr. (Cal.) 176.

In ejectment, plaintiff claimed title from a deceased ancestor; widow of ancestor remained in possession, and, on petition asserting that her husband left no heirs, obtained an act of legislature granting her the rights of the State in the land; widow married again, and after her death her husband remained in possession for over twenty years. Held, proper for the jury to determine whether the widow's and her surviving husband's possession was adverse to any heir-at-law. *Colgan v. Pellans*, 48 N. J. L. 27.

The owner of the servient tenement may show that the right claimed is one that could not be granted away, or that the owner of the servient tenement was legally incapable of making, or the owner of the dominant tenement incapable of receiving, such a grant. He may explain the user or enjoyment by showing that it was under permission asked and granted, or that it was secret and without means of knowledge on his part, or that the user was such as to be neither physically capable of prevention nor actionable. But if there be neither legal incompetency nor physical incapacity, and the user be open and notorious, and be such as to be actionable or capable of prevention, the servient owner can only defeat the acquisition of the right on the ground that the user was contentious, or

The proof to sustain an adverse possession must not be inferential, but clear and positive.<sup>1</sup>

the continuity of the enjoyment was interrupted during the period of prescription. *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 695.

Where the parties in ejectment, being co-tenants, rely upon an ouster, and the defendant claims title by adverse possession, the plaintiff has the burden of showing that he was ousted within the period of the statute of limitations, and the defendant of showing that he had ousted the adverse claimant so long before that the period of limitation had run since. *Highstone v. Burdette*, 54 Mich. 329.

Ouster is a question of fact which it is the province of the jury to determine, and the facts and circumstances which go to establish the ouster ought, under proper instructions from the court, to be submitted to the jury. *Cummings v. Wyman*, 10 Mass. 465; *Taylor v. Hill*, 10 Leigh (Va.), 457; *Purcell v. Wilson*, 4 Gratt. (Va.) 16; *Harmon v. James*, 7 Sm. & M. (Miss.) 111; *Blackmore v. Gregg*, 2 W. & S. (Pa.) 182; *Washburne v. Cutter*, 17 Minn. 361; *Carpentier v. Mendenhall*, 28 Cal. 484; *Clark v. Crego*, 47 Barb. (N. Y.) 599; *Highstone v. Burdette*, 54 Mich. 329. And the burden of proof rests upon the party alleging it. *Newell v. Woodruff*, 30 Conn. 492; *Van Bibber v. Ferdinand*, 17 Md. 436; *Highstone v. Burdette*, 54 Mich. 329.

Whether an agreement has been made and acted upon by two owners of adjoining lands, that a division fence should be the dividing line between their respective premises, is a question of fact for the jury, to be decided by the preponderance of the evidence, the same as in any other disputed question of fact. *Bitter v. Saathoff*, 98 Ill. 266.

That defendant and his predecessors in title had gathered seaweed from the premises, while not alone evidence of adverse possession, was such evidence, taken in connection with the fact that they claimed to prevent other freeholders of the town from gathering, and that they did so under claim of exclusive right as owners, which claim was known to plaintiffs. *Trustees v. Kirk*, 84 N. Y. 215; s. c., 38 Am. Rep. 505.

To defeat the paramount title by the payment of taxes under color of title, the proof of the payments by the holder of the color of title, or some one interested in the same or on his behalf, must be

clear and convincing. Such titles should not be overcome by loose and uncertain testimony, or upon mere conjecture or violent presumptions. *Hulbut v. Bradford*, 110 Ill. 397.

Where one has the right to the use of land, his occupation will be presumed to be in accordance with this right. *Howe v. Stevens*, 61 Me. 592.

The mere act of inclosing the land is not evidence of an adverse claim. *Russell v. Davis*, 38 Conn. 562. Nor the record of a survey. *Oatman v. Fowler*, 43 Vt. 462.

In an action to determine an adverse claim to vacant or unoccupied real estate, the plaintiff must allege in his complaint, and, if denied, show upon the trial, some title to, or interest in, the land; otherwise he has no standing in court to enable him to recover against a person making an adverse claim to the property. *Herrick v. Churchill*, 29 N. W. Repr. (Minn.) 129.

When a witness swears to his possession, with repeated acts of ownership extending over many years, such evidence is allowed to go unchallenged to jury; it is not improper for the judge to assume a legal possession to have then been testified to, and to so present the case in his charge to the jury. *Stanton v. Mullis*, 92 N. Car. 623.

Where it appeared that the defendant in ejectment had conveyed the land in controversy to his son under whom the plaintiff claimed, and the defendant gave evidence tending to show that his son had shortly afterward returned it to him; and that he had ever since held it in open and notorious adverse possession, held, that it was error to exclude evidence offered by the plaintiff to show that at the time of the conveyance to the son the defendant was insolvent, and that he made the deed in order to defraud his creditors, and that his debts had never been paid. *Hughes v. Israel*, 73 Mo. 538.

1. *Weaver v. Wilson*, 48 Ill. 125; *Jackson v. Berner*, 48 Ill. 203.

**Authorities for Adverse Possession.**—*Washburne's Real Prop.* (4th Ed.); *Tiedeman's Real Prop.* §§ 693, 704; *Tyler on Eject.*; *Wood on Lim.* chap. 20; *Sedgwick & Wait on Trial of Title to Land* (2d Ed.), chap. 28; 2 *Smith's Lead. Cas.* (8th Am. Ed.) pp. 706, 727; *Angell on Limitations*.

## ADVERTISEMENTS.

**ADVERTISEMENTS.**—Advertisements are “notices published either by handbills or in a newspaper,”<sup>1</sup> and the law relating to them forms a branch—the least satisfactory one—of the subject of NOTICE.

It may be well to state generally, first, that advertisements should be sufficiently full and precise in their terms, as to time, persons, place, and description, to identify the subject-matter notice of which is intended to be given; and, second, that an advertisement cut from a newspaper is not a handbill,<sup>2</sup> nor is a mere advertising sheet a newspaper, for the purposes of advertisement required by law.<sup>3</sup>

When not required by statute, ordinance, rule of court, or other formal regulation, advertisements do not, *per se*, amount to actual notice of their contents, but are resorted to, and accepted, as the most available, and, under the circumstances, the best, substitute therefor, in cases where actual notice is either a legal or physical impossibility. Hence, in the absence, and independently, of a positive direction to advertise, the general rule of law is: Whenever actual notice is necessary, but is legally or physically impossible (as by reason of a want of knowledge or jurisdiction of the parties to be notified, or of their whereabouts) publication of the notice must be made in a newspaper, if any there be, published at, or as near as possible to, the place where the persons to be affected thereby are supposed to be, or were when last heard of. Such advertisement would, in law, generally be construed to have the same effect as actual notice; of course, if it could be shown that the party to whom it was addressed did, as a matter of fact, see and read the advertisement, or was informed of its contents, the notice would be actual in fact as well as in theory. For the occasions when such advertisements are necessary, the reader is referred to the general subject of NOTICE, under which head they properly belong.

Where an advertisement is directed to be inserted in a particular paper, the course pointed out must be pursued; and all other local requirements must likewise be complied with. If not otherwise expressly provided, the paper is to be one printed in the English language.<sup>4</sup>

1. Bouvier's Law Dict.

**Public Sales.**—The statutory directions to advertise public judicial sales of land for a certain period of time are only directory. *Ware v. Bradford*, 2 Ala. 676. And failure to comply therewith will not invalidate the sale. *Maddox v. Sullivan*, 2 Rich. Eq. 4; *Howard v. North*, 5 Texas, 290. Though it will make the sheriff liable to any one injured in consequence thereof. *Brooks v. Rooney*, 11 Georgia, 423. An adjournment of the sale need not be published in the newspapers: public proclamation thereof at the place where the sale was to have been held is suffi-

cient. *Allen v. Cole*, 1 Stockt. 286. The officer making the sale must, if he entrusts the duty of advertising to others, be able to state from his own knowledge that the property was advertised. *Price v. Simpson*, 8 Ky. L. Rep. 327. The description need only be sufficient to identify the property to be sold. *Allen v. Cole*, 1 Stockt. 286. What constitutes such a description is a question for the jury. *Collier v. Vason*, 12 Ga. 440.

2. *Clark v. Chambers*, 1 Pittsb. 222.

3. *Tyler v. Bowen*, 1 Pittsb. 225.

4. Road in Upper Hanover, 44 Pa. St. 277.

## ADVICE—AFFECTED—AFFIDAVITS.

Moreover, it is generally understood that secular newspapers, if there be any, are intended; in fact, this is, in some few instances, positively directed in the enactment.

When an advertisement is commanded to be inserted in more than one newspaper, publication should not (where there is any alternative) be made in two papers published in the same office, or by the same man or company; indeed, this is specifically prohibited in sections of some of the States.

**ADVICE.**—Advice implies the giving of counsel.

**AFFECTED.**—To produce or effect a change about something.<sup>2</sup>

**AFFIDAVITS.** See also APPEAL; ATTACHMENT; COSTS; EQUITY; EVIDENCE; PRACTICE; SERVICE.

1. *Definition.*

2. *Who may make.*

3. *Who may take.*

4. *Requisites.*

5. *Language.*

6. *Use.*

7. *Amendment.*

8. *Stale Affidavits.*

1. **Definition.**—An affidavit is a formal<sup>3</sup> written<sup>4</sup> (or printed) voluntary<sup>5</sup> *ex parte*<sup>6</sup> statement, sworn (or affirmed) to before an officer authorized to take it, to be used in legal proceedings.

2. **Who may make.**—The uses of an affidavit necessitate other rules as to the affiant's testimony than those governing the case of witnesses. All affidavits may be, and those to the merits must

1. In *Norcum v. D'Ench & Ringling*, 17 Mo. 99, power was given by the testator to his widow to sell and dispose of his property with the advice and consent of the executor. *Held*, the refusal of the executor to give his consent did not prevent a valid sale; advice meant general advice, and not consent to each act; and therefore a court of equity would on application authorize the sale.

2. **In Statute.**—A judgment entered upon a warrant of attorney given by a beneficed clergyman to secure payment of an annuity need not be registered, under 8 G. 2, c. 6; for though it may be enforced by sequestration, yet the benefice is not affected by the judgment. *Cottle v. Warrington*, 5 B. & Ad. 453. But a suit for the specific execution of a contract for the sale of land is a suit concerning real estate whereby the same may be affected, under the Missouri code. *Ens-worth v. Holly et al.*, 33 Mo. 370.

3. For the formal requisites of an affidavit, see below, 4. A bare oath (or affirmation) need not contain these formal requisites, but as every affidavit includes the oath (or affirmation) a defective affidavit may be valid as an oath (or affirmation), to show what facts were testified to. *Burns v. Doyle*, 28 Wis. 460.

4. There is no such thing as an unwritten affidavit. *Windley v. Bradway*, 77 N. Car. 333.

5. The law presumes that the perform-

ance of every act required by law is voluntary, but no affidavit is valid unless obtained by legal means and for a legal purpose. Where affidavits can only be compelled for legal use as evidence, they cannot be compelled merely for information. *Dudley v. McCord*, 65 Ia. 671. In *Robb v. McDonald*, 29 Ia. 330, and *State v. Seaton*, 61 Ia. 563, it was held, by a divided court, that a justice's decision as to his jurisdiction to require an affidavit was final, and that a party refusing to make an affidavit was in contempt, except in gross cases of abuse of authority. An affidavit is also voluntary in the sense of not being made under cross-examination. See next note.

6. The term "deposition" is often used as a generic expression, to comprehend all written evidence verified by oath, affidavits included, but there is a clear distinction between the two, in that in taking depositions the opposite party can always cross-examine, while affidavits are *ex parte*. "A deposition is evidence given under interrogatories, oral or written, and usually written down by an official person; while an affidavit is the mere voluntary act of the party making the oath, and may be, and generally is, taken without the cognizance of the one against whom it is to be used." *Stimpson v. Brooks*, 3 Blatch. (U. S.) 456. By the Kansas Code notice to the adverse party is the distinctive criterion. *Atchison v. Bartholow*, 4 Kan. 124.



be, made by parties<sup>1</sup> to the cause in which the affidavits are used.

A person convicted of an infamous crime,<sup>2</sup> a very young child, or a person governed by insane delusions<sup>3</sup> as to the matter in hand, is incompetent to make an affidavit.

*Agent.*—An agent<sup>4</sup> may sometimes make an affidavit for his principal. So, too, a third person who is not an agent.<sup>5</sup>

1. "Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, which facilitate the preparation for it, often depend on the oath of the party. An affidavit to the materiality of a witness, for the purpose of obtaining a continuance, or a commission to take his deposition, or an affidavit of his inability to attend, is usually made by the party and received without objection. So affidavits in support of a motion for new trial are often received." Marshall, C. J., in *Taylor v. Biggs*, 1 Pet. 591. In that case a party's affidavit that a document had been lost or destroyed was received to make secondary evidence of the contents admissible. So a party's affidavit was received in support of a motion for judgment as in case of nonsuit. *Ames v. Merriman*, 9 Wend. (N. Y.) 498. An affidavit may be made by a party in interest, even if not a party to the record. *Fraley v. Steinmetz*, 22 Pa. St. 437; *Sleeper v. Dougherty*, 2 Whart. (Pa.) 177; *Hunter v. Reilly*, 36 Pa. St. 509; *Miller v. Hooker*, 2 How. Pr. (N. Y.) 124.

*Corporations.*—The chief officer of a corporation should make its affidavits. *Ex parte Sergeant*, 17 Vt. 425.

The affidavit of a wife, prosecuting or defending as a *feme sole* in a suit for divorce, will be received. *Kirby v. Kirby*, 1 Paige Ch. (N. Y.) 261. So that of a negro, in former times, was received in support of a *habeas corpus*. *Norris v. Newton*, 5 McL. 92. An affidavit cannot be attacked by a counter-affidavit that the affiant is an atheist. He must have an opportunity for explanation or reply. *Leonard v. Manard*, 1 Hall (N. Y.), 200.

2. A convicted felon does not become competent to make an affidavit by serving out his term. *People v. Robertson*, 26 How. Pr. (N. Y.) 90. It makes no matter that the affidavit was made before conviction. The incompetency relates back to the time of the indictment. *Webster v. Mann*, 56 Tex. 119.

3. The affidavit of a person in a lunatic asylum must state in the *jurat* the circumstances under which, and the place where, it was made, so that the affiant's mental condition can be inquired into before the affidavit is received. *Spittle v. Walton*, L. R. 11 Eq. 420; 40 L. J. Ch. 368.

4. The affidavits necessary at various stages of legal procedure, in support of motions, petitions, appeals, attachments, etc., are often made by the party's attorney or solicitor. In the U. S. courts, bills in equity are usually verified by oath, and this may be done by an agent or solicitor, if he has signed the bill. Such agent should make oath (except, perhaps, in the case of a corporation plaintiff), to the reason for his doing so instead of his principal. *Blake Crusher Co. v. Ward*, 1 Am. Law Times R. 423.

A proctor in admiralty can make an affidavit for the party. *The Harriet Olc.* Adm. 222.

When counsel, who is not solicitor, makes an affidavit, he must show why it is not made by the party or his solicitor. *People v. Spaulding*, 2 Paige (N. Y.), 326.

In Michigan the agent or attorney need not swear that he is such agent or attorney, if the fact be stated in the affidavit by way of recital. *Wetherwax v. Paine*, 2 Mich. 555. In Arkansas the affidavit need not state that the affiant made it for the plaintiff, as the court will not presume that he was unauthorized. *Mandel v. Peet*, 18 Ark. 236. The contrary was held in *Miller v. R. W. Co.*, 58 Wis. 310; *Wiley v. Aultman*, 53 Wis. 560; *Wallace v. Byrne*, 17 La. Ann. 8; and *Willis v. Lyman*, 22 Tex. 268. In the latter case the petition was signed by "Fly & Fly, attorneys for plaintiffs," and the affidavit made by B. F. Fly, without stating that he was their attorney. It was said, "The court cannot know that the person who makes the affidavit is one of the persons who signed the petition, nor will the court look to the records in the original suit to find information which ought to be contained in the affidavit itself." In Missouri, where an affidavit was sworn to by the same person who had signed the petition as attorney for plaintiff, it was held good. *Gilkeson v. Knight*, 71 Mo. 403. When a party's attorney-at-law makes an affidavit, he need not state that he is attorney in fact. *Austin v. Latham*, 19 La. 88. But the affidavit of an attorney's clerk is invalid, without some good reason. *Jackson v. Woodworth*, 3 Paige (N. Y.), 136; *Chase v. Edwards*, 2 Wend. (N. Y.) 283.

5. When the party is disabled by illness, the affidavit of a third person will

**3. Who may take.**—An affidavit must be sworn to before a competent<sup>1</sup> person, *i.e.*, before a particular officer, or one of a particular class, where a statute or rule of court requires it; otherwise, before any one<sup>2</sup> authorized to administer an oath.

In most States,<sup>3</sup> a party cannot make an affidavit before his

be received. *James v. Young*, 1 Dall. (Pa.) 248.

In Pennsylvania an affidavit of defence made by counsel, or any one other than the defendant himself, must state that it was made for him, and also show sufficient cause for his not making it himself. *Marshall v. Witte*, 1 Phila. 117; *Gross v. Painter*, 1 Weekly Notes of Cases (Phila.), 154; *City v. Devine*, 1 Weekly Notes of Cases (Phila.), 358; *Russell v. Foran*, 1 Weekly Notes of Cases (Phila.), 470.

The affidavits of two attorneys, each swearing to different facts, will be received if, taken together, they cover all the facts required to be sworn to. *Lewis v. Stewart*, 62 Tex. 352.

An affidavit by an attorney or agent, stating the facts positively, need not state his means of knowledge. *Anderson v. Wehe*, 58 Wis. 615.

In Iowa the professional statement of counsel is equivalent to an affidavit. *Rice v. Griffith*, 9 Iowa, 539.

1. An affidavit made before an officer incompetent to take it will be disregarded. *Haight v. Proprietors*, 4 Wash. C. C. 601, 606. In *Regina v. Bloxham*, 6 A. & E. N. S. 528, the words "before me" had been omitted from the *jurat*, so that the affidavit did not show that it had been sworn to before a competent officer. This was a fatal defect. See also *Wood v. Jefferson Co. Bank*, 9 Cow. (N. Y.) 194; *Dunn v. Ketchum*, 38 Cal. 93; *Love v. McAlister*, 42 Ark. 183.

Affidavits for use in the U. S. courts must be sworn to before a commissioner, or, in bankruptcy, a register. Affidavits taken before notaries are valid only in equity, or in proof of debts in bankruptcy, or as depositions *de bene esse*. *In re McKibben*, 12 Bank. Reg. 97; 2 Cent. L. J. 277.

An affidavit in a proceeding in a federal court, taken before a State master in chancery, and not by a person empowered by act of Congress to administer oaths, will be disregarded. *Haight v. Proprietors*, 4 Wash. C. C. 601, 606. But a State officer may be made competent by appointment of a federal court, under authority of an act of Congress. *Gray v. Tunstall*, Hemp. 558. Or by the regulation of the head of a federal department. *U. S. v. Bailey*, 9 Pet. (U. S.) 238. Or by the custom of a department.

*U. S. v. Winchester*, 2 McL. (U. S.) 135.

Where a statute authorizes certain officers out of the State to take affidavits, an affidavit made before one not named in the statute is invalid. *People v. Tioga*, 7 Wend. (N. Y.) 516; *Stanton v. Ellis*, 16 Barb. (N. Y.) 319; *Benedict v. Hall*, 76 N. Car. 113; *Love v. McAlister*, 42 Ark. 183.

Where a justice of the peace is authorized to take affidavits only in certain cases, he is incompetent outside the limits of his authority. *Christman v. Floyd*, 9 Wend. (N. Y.) 340. In Scotland, however, a justice can take affidavits in any matter. It is a ministerial, not judicial, act. *Kerr v. Marquis of Ailsa*, 1 Macq. 736.

Where a court has power to appoint persons to take affidavits, it may appoint classes as well as individuals. *Gray v. Tunstall*, Hemp. (U. S.) 558. An officer of the court, as such, has no power to take an affidavit, except in its presence and by its direction. *Roberts v. Railway Co.*, 1 Brew. (Pa.) 538; but, under those circumstances, it may be done by one who has no general authority. *U. S. v. Nihols*, 4 McL. (U. S.) 23.

If an affidavit must be taken before a special officer of the court, (*e.g.*, a commissioner of the court of chancery), it will be worthless if the officer signs the *jurat* as acting in another capacity. *Frost v. Hayward*, 10 M. & W. 673.

The commission of a public commissioner need not be proved to validate an affidavit taken by him. *Rex v. Howard*, 1 Moo. & Rob. 187.

The affidavit required by the Illinois statute, on an information, may be taken by a justice as well as a county judge. *Carrow v. People*, 113 Ill. 550.

2. A notary of another State. *Tucker v. Ladd*, 4 Cow. (N. Y.) 47. When authenticated in substantial compliance with the statute. *Bank v. Cowen*, 3 Hill (N. Y.), 461; but *contra*, *Benedict v. Hall*, 76 N. Car. 113. A commissioner for one State residing in another State, even in the case of an application for a receiver. *Young v. Rollins*, 78 N. Car. 485.

3. In England it has been held that a court will discharge, with costs, a rule obtained on an affidavit before the party's attorney. *Hopkinson v. Buckley*, 8

own attorney, even if such attorney be authorized to take them *ex officio*; but this rule does not obtain everywhere.<sup>1</sup>

Notaries have no power by the common law to take affidavits *ex officio*, but it is universally granted by statute.<sup>2</sup>

4. **Requisites.**—A false affidavit makes the affiant liable to a prosecution for perjury; and therefore no affidavit is valid unless it be such as to support an indictment, if false, *i.e.*, unless it is certain both as to form and substance.

A. The formal requisites are: (a) *Title*, (b) *Venue*, (c) *Signature*, (d) *Jurat*, (e) *Authentication*.

(a) *Title*.—An affidavit must generally be entitled in the suit in which it is used.<sup>3</sup>

There are some cases, however, in which an affidavit cannot be legally entitled, *e.g.*, an affidavit purporting to be made in a suit when no such suit is pending.<sup>4</sup>

Taunt. 74; Tidd's Prac. \*494. So in the United States, the rule is that an affidavit cannot be taken before an attorney in the cause. *Taylor v. Hatch*, 12 Johns. (N. Y.) 340; *Toorle v. Smith*, 34 Kan. 27. The other party should at once move to set the proceedings aside for irregularity, as it is too late to do so after judgment. *Gilmore v. Hempstead*, 4 How. (N. Y.) 152. The attorney must be such when he took the affidavit. *Vary v. Godfrey*, 6 Cow. (N. Y.) 587. It is insufficient to show merely that he is such when the objection is taken. *Kidde v. Davis*, 5 Dowling's Pr. Cas. 568. This may, however, be shown by general statements of the party himself. *Haddock v. Williams*, 7 Dowling's Pr. Cas. 327. Or by the description in the declaration. *Prynne v. Roe*, 8 Dowling's Pr. Cas. 340.

The rule does not apply to proceedings to admeasure dower. *Griffin v. Borst*, 4 Wend. (N. Y.) 195. Nor to an affidavit to hold to bail. *Adams v. Mills*, 3 How. (N. Y.) 219.

Where a party's attorney and counsel are different persons, an affidavit may be made before the counsel. *Willard v. Judd*, 15 Johns. (N. Y.) 531. It may be made before the attorney's partner if he be not also attorney of record. *Hallen back v. Whitaker*, 17 Johns. (N. Y.) 2; *Duke of Northumberland v. Todd*, L. R. 7 Ch. Div. 777; *Turner v. Bates*, L. R. 10 Q. B. 292. Where a solicitor was a party, but his firm not solicitors of record, an affidavit taken by a clerk of the firm was allowed. *Foster v. Harvey*, 4 De G. J. & S. 59.

A party's attorney is incompetent even to take an affidavit of service of notice by one not the party himself. *Hammond v. Freeman*, 9 Ark. 62.

1. The rule as to a party's attorney is

not held to in *California* (*Reavis v. Cowell* 56 Cal. 588), *Minnesota* (*Young v. Young*, 18 Minn. 90), or *Wisconsin* (*Daws v. Glasgow*, 1 Burn. 8; s.c. 1 Pin. 171).

2. Proffat on Notaries, § 20.

3. *Baxter v. Seaman*, 1 How. (N. Y.) 51;

In *Humphrey v. Caude*, 2 Cow. (N. Y.) 509, it was held that an affidavit wrongly entitled was invalid though the cause was correctly set out in the body of the instrument. Usually, however, the absence of title or a mistake in the title will not invalidate the affidavit, if it can be clearly identified as having been filed in the case. *Anonymous*, 4 Hill (N. Y.), 597; *Harris v. Lester*, 80 Ill. 307.

Minor defects in the title, which would not prevent an indictment for perjury, do not vitiate the affidavit; *e.g.*, the omission of the Christian name of one of several parties. *Maury v. Van Arnum*, 1 Hill (N. Y.), 370.

The title need not have been written upon the affidavit when it was made, if it be shown that it was made for the purposes of the suit in which it was filed, and for no other purpose. This may be shown by the affidavit of counsel. *Shook v. Rankin*, 2 Law and Eq. R. 236.

4. In such a case the affidavit is treated as a nullity. The affidavit accompanying a writ of replevin is an instance of this. *Milliken v. Seelye*, 3 Den. (N. Y.) 54; *Stacy v. Farnham*, 2 How. (N. Y.) 26. The reason is that there being no such cause in existence at the time, the affiant could not be convicted of perjury, if the affidavit were false. The title is not surplusage, as it would, in many cases, render the body of the affidavit meaningless. *Blake Crusher Co. v. Ward*, 1 Am. L. Times R. 423. On appeal from one court to another, the affidavit and other proceedings must be en-

(b) *Venue*.—The venue, being *prima-facie* evidence of the county in which the affidavit was made, is an essential part of the affidavit.<sup>1</sup>

(c) *Signature*.—Where the affiant's signature is required by statute or rule of court, the affidavit is a nullity without it;<sup>2</sup> otherwise not,<sup>3</sup> as the swearing, not the signing, will support an indictment for perjury.

(d) *Jurat*.—As an affidavit must appear on its face to have been taken in compliance with all legal requisites<sup>4</sup> and before the proper officer,<sup>5</sup> the *jurat* must be signed by him.<sup>6</sup>

This rule has sometimes been relaxed on clear proof that the affidavit was in fact sworn to, and all other legal requirements complied with.<sup>7</sup>

titled in the appeal cause, but where the court is the same, as on appeal from a Vice-Chancellor to a Chancellor, there is no change of title. *Hawley v. Donnelly*, 8 Paige (N. Y.), 415.

1. Without a venue, an affidavit is a nullity, even though sworn to before an officer whose residence is mentioned in the *jurat*. *Cook v. Staats*, 18 Barb. (N. Y.) 407; *Lane v. Morse*, 6 How. (N. Y.) 394; *Thompson v. Burhans*, 61 N. Y. 52; *People v. De Camp*, 5 N. Y. Weekly Dig. 462. The venue should show that it was taken within the officer's jurisdiction. *Ladow v. Groom*, 1 Den. (N. Y.) 429. When the venue is stated, the officer need not state his place of residence or official district. It will be presumed that he resided and acted within the venue or within his proper official district. *Parker v. Baker*, 8 Paige (N. Y.), 428; *Mosher v. Heydrick*, 30 How. (N. Y.) 161; *In re Sheephead*, etc., R. Co., 5 N. Y. Weekly Dig. 488.

It has been held that while a venue is proper and desirable, its absence is not fatal, since, in case of a prosecution for perjury, evidence of the place and the officer's authority might be adduced *dehors* the *jurat*. *Reavis v. Cowell*, 56 Cal. 558; *Young v. Young*, 18 Minn. 90; *Barnard v. Darling*, 1 Barb. Ch. (N. Y.) 218; *Parker v. Baker*, 8 Paige (N. Y.), 428; *Prof-fat on Notaries*, § 52. The omission of the letters "ss." from the venue is immaterial. *Smith v. Richardson*, 1 Utah, 194.

2. *Hargardine v. Van Horn*, 72 Mo. 370; *Hathaway v. Scott*, 11 Paige (N. Y.), 173; *Nave v. Ritter*, 41 Ind. 301.

Where a statute gives a form for an affidavit with a blank space for the signature, it will apparently be required. *Cohen v. Mance*, 28 Ga. 27.

3. *Jackson v. Vogel*, 3 Johns. (N. Y.) 540; *Haff v. Spicer*, 3 Paige (N. Y.), 190; *Melins v. Shaffer*, 3 Denio (N. Y.), 60;

*Hitsman v. Garrard*, 1 Harr. (N. J.) 124; *Shelton v. Berry*, 19 Tex. 154; *Watts v. Womack*, 44 Ala. 605; *Noble v. U. S.*, Dev. (Ct. Cl.) 83; *Alford v. McCarmac*, 90 N. Car. 151; *Gill v. Ward*, 23 Ark. 16; *Redus v. Wofford*, 4 Sm. & M. (Miss.) 579; *Bates v. Robinson*, 8 Iowa, 318.

4. A certificate that the affiant was duly sworn creates a *prima-facie* presumption that he was so sworn as to make the oath binding on his conscience. *Fryatt v. Lindo*, 3 Edw. (N. Y.) 239. Where several persons take the oath, the officer need not certify that they were severally sworn. *Randall v. Baker*, 30 N. H. 335.

5. The *jurat* must contain the words "before me" or their equivalent. *Regina v. Bloxham*, 6 Q. B. 528; *Smart v. Howe*, 3 Mich. 590.

6. *State v. Green*, 15 N. J. Law, 88; *Ladow v. Groom*, 1 Denio (N. Y.), 429; *Davis v. Rich*, 2 How. (N. Y.) 86; *Morris v. State*, 2 Tex. App. 502. A paper drawn and filed as an affidavit cannot be treated as such if not signed by the proper officer. *Bank v. Hinchcliffe*, 4 Ark. 444; *Cantwell v. State*, 27 Ind. 505; *McDermaid v. Russell*, 41 Ill. 490. An omission of the officer's title of office is immaterial. *People v. Van Rensselaer*, 6 Wend. (N. Y.) 543; *Hunter v. Leconte*, 6 Cow. (N. Y.) 728. Where an oath not required to be in writing is written, the omission of the officer's attestation does not invalidate it. *Pottsville v. Curry*, 32 Pa. St. 443.

7. *Kruse v. Wilson*, 79 Ill. 233; *Cook v. Jenkins*, 30 Ia. 452. In the former case it was said: "If an oath was administered, and by the proper officer, as it assuredly was, the law was satisfied, and the mere omission of the clerk to put his name to an act, which was done through him as the instrument, should not prejudice an innocent party who has

(c) *Authentication*.—In most States the *jurat* must be authenticated by the officer's seal.<sup>1</sup>

B. Affidavits must be certain in substance, *i.e.*, something definite must be sworn to.<sup>2</sup>

done all he was required to do. The clerk's omission to write his name, where it should have been written, was not the fault or neglect of the affiant. He signed and swore to the affidavit."

1. *Tunis v. Withrow*, 10 Iowa 305; *Chase v. Street*, 10 Iowa 593. It has been held in Illinois that a notary's *jurat*, signed but not sealed, is valid within the county of his residence. *Stout v. Slaterry*, 12 Ill. 162. An affidavit sworn to before a court clerk, for use only in that court, does not need the court's seal. *Mountjoy v. State*, 78 Ind. 172. In *Everson v. Selby*, 32 Ind. 344, an authentication by the clerk of the Supreme Court of New York, an affidavit having been taken by a judge, was held defective because it did not certify that the court was a court of record. So *Coward v. Dillinger*, 56 Md. 59. An affidavit made before a commissioner of one State, resident in another State, is sufficiently authenticated by his signature and seal. *Young v. Rollins*, 85 N. Car. 485.

2. The test to determine the sufficiency of an affidavit is the possibility of charging perjury on its falsity. An affidavit which does not comply with the statute is bad, whether it follows literally the words of the statute or not. Thus, where the law authorized the issue of an attachment upon affidavit "that the defendant has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, any of his property with intent to defraud his creditors," and the affidavit was in the precise words of the law, it was considered bad. *Miller v. Munson*, 34 Wis. 579; *Drake on Attachment*, § 107 a. The Texas revised statutes require that the affidavit on an attachment shall state that the attachment is not sued out for the purpose of injuring or harassing the defendant. An affidavit stated, "This attachment is not sued out for the purpose of injuring and harassing the said defendant," and a motion to quash for non-compliance with the statute was sustained. *Moody v. Levy*, 58 Tex. 532. In *Blum v. Davis*, 56 Tex. 426, the rule was followed that where the disjunctive *or* is used ("that the defendants were about to convert their property *or* a part thereof") not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same results, it was proper for the affidavit to pursue the

language of the statute, notwithstanding the disjunctiveness of the sentence. This was followed in *Irvin v. Howard*, 37 Ga. 23. See *Drake on Attachment*, § 102. An affidavit must be consistent in itself. In *Dunnenbaum v. Schram*, 59 Tex. 281, the affidavit stated that the defendants "had disposed of their property, etc.," and that they "were about to dispose of" it. *West, A. J.*, said: "The affidavit in this case states that two distinct, separate, and inconsistent facts exist. The existence at the same time of both facts is sworn to. The statute requires in every case a direct, positive assertion, under oath, of the existence of the specific ground or fact on account of the existence of which the writ of attachment is demanded. There must be no ambiguity or uncertainty contained in the affidavit itself on the subject," and the affidavit was held bad. Where, however, the statute treats the disposing of the property and the being about to dispose of it as one entire cause for the attachment, an affidavit stating both is good. *Klenk v. Schwalm*, 19 Wis. 111; *Parsons v. Stockbridge*, 42 Ind. 121.

In *Pearce v. Hawkins*, 62 Tex. 435, an affidavit for attachment alleging "that defendants aforesaid have secreted their property for the purpose of defrauding their creditors, and that they (defendants) have disposed of their property with intent to defraud their creditors," was held defective, because it charged two inconsistent grounds for attachment.

In *Hopkins v. Nichols*, 22 Tex. 206; *Garner v. Burleson*, 26 Tex. 348; *Culbertson v. Cabeen*, 29 Tex. 247, and *Carpenter v. Pridgen*, 40 Tex. 32, it has been held that an affidavit for a writ of attachment, in which more than one of the distinct statutory grounds of attachment was embraced, and set out in the alternative, was not sufficient.

If two separate grounds can rationally coexist, an affidavit stating both is good. *Kennan v. Evans*, 36 Ga. 90.

An affidavit must comply with the statute requiring it. A statute allowing service of a summons by publication when the defendant cannot "after due diligence be found within the State," is not complied with by an affidavit of the defendant's non-residence. *Carleton v. Carleton*, 85 N. Y. 313.

An averment in an affidavit for an attachment, that "the defendant is indebted

The facts stated in an affidavit must not vary from those stated

ed to the plaintiff in a sum stated," and that the latter "is justly entitled to recover said sum," is not a compliance with the requirement of the Code of Civil Procedure (§ 636) that plaintiff must show by affidavit that he "is entitled to recover a sum stated therein, over and above all counter-claims known to him;" and when the requirement is only met by the averments stated, the affidavit is insufficient to give the judge jurisdiction to grant the warrant. *Ruppert v. Haug*, 87 N. Y. 141.

An affidavit for the possession of personal property which alleges that the property is wrongfully detained, instead of "unlawfully," as required by the statute, and does not charge that the detention is by the defendant, seems to be bad. *Louisville, etc., R. Co. v. Payne*, 103 Ind. 183.

An affidavit that "this appeal is in good faith" is a substantial compliance with the statute requiring an affidavit "that the appeal is made in good faith." *Filer, etc., Co. v. Sohns*, 63 Wis. 118.

Where the affidavit, made to entitle the holder of a tax certificate of purchase to a deed, shows that the property was "taxed or specially assessed in the names of Robert Hervey and Robert Henry," and the allegation of service is that "he served said notice on said Robert Hervey and Robert Henry, by handing the same to and leaving the same with Robert Hervey personally," it fails to show a sufficient service as to Robert Henry, and will not authorize the making of a tax deed, and, if made, it may be set aside as a cloud on the title, upon payment of the amount paid at the tax sale and for subsequent taxes, with six per cent interest. *Gage v. Hervey*, 111 Ill. 305. "The constitution requires the service of notice of a tax sale and when the time of redemption will expire, upon the occupant of the land, to be a personal service, and the statute requires the affidavit of service to state particularly the facts relied on as a compliance with the constitution. A failure to state the mode of service, and the facts relied on as showing a service, is a fatal defect, and renders a tax deed made under it invalid." *Davis v. Gassnell*, 113 Ill. 121; *Price v. England*, 109 Ill. 395.

An affidavit must state specific facts. In an action of covenant on an agreement under seal, an affidavit of defence making general allegations of undue influence in procuring the agreement is insufficient. The acts resulting in undue

influence should be set out. *Mathews v. Sharp*, 99 Pa. St. 560.

An affidavit for an attachment must state the amount of the defendant's indebtedness to the plaintiff; and if the cause of action be of such a character that the plaintiff cannot know the amount, no attachment founded upon it can be lawfully executed. Hence, an affidavit stating that the defendant is indebted to the plaintiff in an amount specified "as near as this plaintiff is able to determine" is insufficient. *Hawes v. Clement*, 64 Wis. 152.

An affidavit in attachment stating that "the claim in this action is for money due on three promissory notes, copies of which are filed with the complaint, executed by the defendants to the plaintiff, that the claim is just, and that he believes the plaintiff ought to recover," etc., sufficiently describes the nature of the plaintiff's claim. *Fremont Co. v. Fulton*, 103 Ind. 393.

An affidavit for the taxation of costs should itemize them with exactness, especially if those to be charged with them are not interested alike. *Genesee Bank v. Ottawa Circuit Judge*, 54 Mich. 305. An affidavit by the plaintiffs' attorney, stating generally that "plaintiffs cannot safely go to trial, for want of material testimony," giving neither the name nor the residence of any witness, and failing to show the substance of the testimony sought, or any diligence used, or excuse for want of diligence, is wholly inadequate to obtain a continuance. *Ilett v. Collins*, 102 Ill. 402. See also *Moon v. Helfer*, 25 Kan. 139; *Kew Valley Bank v. Chester*, 55 Cal. 49.

An affidavit for publication in a chancery cause which merely states that the affiant cannot find the defendant in the State by reason of his absence from the State, or of his concealment within it, is not sufficient. The affidavit should state the facts of inquiry and investigation, so that the court can see that the conclusion that the party cannot be found for the reason stated is a reasonable one upon such facts. *Thompson v. Shiawassee Circuit Judge*, 54 Mich. 237.

An affidavit in support of an application for a special legal process, e.g., attachment, must state facts sufficient to warrant the court in granting the application. Consequently, an affidavit which states that the debtor did an act or acts which of themselves are not necessarily fraudulent, with an intent to defraud his creditors, without more is not sufficient.

in the petition.<sup>1</sup> An affidavit, however, will not be technically construed, but will be held sufficient if in good faith it seemed intended to meet the plaintiff's case.<sup>2</sup>

Affidavits must not contain scandalous matter,<sup>3</sup> and must be free from interlineations and erasures.<sup>4</sup>

5. **Language.**—The fact that the affidavit has been translated,<sup>5</sup> or is in a language not understood by the affiant,<sup>6</sup> is immaterial, if it appears to have been properly made.

6. **Use.**—In practice, affidavits are often required at the inception of proceedings, where a stringent remedy (*e.g.*, attachment) is sought; at intermediate stages in a suit, when it is sought to modify the status of the litigation by an exercise of the court's discretionary power; on all motions to open defaults or grant delay in proceedings, and other applications by the defendant to the favor of the court; to show a *prima-facie* defence to a certain class of demands, thereby entitling the defendant to a trial of the cause, and for other ends.<sup>7</sup>

They are not, in general, competent as evidence<sup>8</sup> upon a material question at issue, except against the affiant, as evidence of an admission by him.

7. **Amendment.**—All minor defects in affidavits may be amended;<sup>9</sup> and even some more fundamental ones.<sup>10</sup>

*Delaplain v. Armstrong*, 21 W. Va. 211. It must show that the plaintiff's claim is just. This may be by a direct statement to that effect, or by a showing of facts. *Wilkins v. Tourtellot*, 28 Kan. 825.

An affidavit for attachment before a justice of the peace containing as a statement of the plaintiff's cause of action "that the said claim in said action is for damages in not delivering goods purchased," does not show that the case is for a debt or demand arising upon contract, judgment, or decree, and does not authorize the issuance of an attachment against a foreign corporation or a non-resident of the State. *Rouss v. Wright*, 14 Neb. 457.

All matters stated on information and belief must be distinctly shown to be so stated. *Fleming v. Wells*, 65 Cal. 336.

1. *Evans v. Tucker*, 59 Tex. 249.

2. *Haight v. Arnold*, 48 Mich. 512.

3. *Opdyke v. Marble*, 18 Abb. (N. Y.) 375; *Lewis v. Woolrych*, 3 Dowl. Pr. Cas. 692; *Cassen v. Bond*, 2 Younge & J. 531; *Balls v. Smythe*, 2 M. & G. 350.

4. *Didier v. Warner*, 2 Edm. (N. Y.) 41; *Williams v. Clough*, 1 A. & E. 376; *Chambers v. Barnard*, 9 Dowl. Pr. Cas. 557.

5. An affidavit in German, sworn before a German court, is valid if translated, and the translation verified. *In re Eady*, 6 Dowl. Pr. Cas. 615.

6. The oath may be administered in a foreign language, if it is translated by an

interpreter to the affiant. *In re Eady*, 6 Dowl. Pr. Cas. 615. Where the *jurat* certified "that the affidavit was interpreted by F. C., professor of languages (he having first sworn that he understood the French and English languages), to the deponent, who was afterwards sworn to the truth thereof," it was held sufficient, though it did not appear that the affiant understood the language into which the affidavit was interpreted, nor that the interpreter was sworn truly to interpret. *Bosc v. Solliers*, 6 Dow. & Ry. 514; 4 B. & C. 358; *Marzetti v. Du Jouffroy*, 1 Dowl. Pr. Cas. 41.

7. *E.g.*, the affidavit, accompanying an appeal or writ of error, that it is not intended for delay.

8. *Richardson v. Golder*, 3 Wash. C. C. 109; *Patterson v. Maryland Ins. Co.*, 3 Har. & J. (Md.) 71; *Layton v. Cooper*, 2 N. J. Law, 47; *Armstrong v. Boylan*, 4 N. J. Law, 84; *Lewis v. Bacon*, 3 Hen. & M. (Va.) 89.

An affidavit made *ante litem motam* may be received as hearsay to prove pedigree. *Hurst v. Jones*, 1 Wall, Jr. (U. S.) App. iii.

9. *E.g.*, title improperly inserted. *Stacy v. Farnham*, 2 How. (N. Y.) 26. The affiant's signature may be added. *Watts v. Womack*, 44 Ala. 605; *Agric. Assoc. v. Madison*, 9 Lea (Tenn.) 407. *Contra*, *Cohen v. Manco*, 28 Ga., 27.

10. An affidavit so drawn as to appear

## AFFINITY—AFFIRMANCE—AFFRAY.

**8. Stale Affidavits.**—Affidavits in support of special applications, if not used within a certain time, usually one year, become "stale."<sup>1</sup>

**AFFINITY.**—The relation contracted by marriage between a husband and his wife's kindred, and between a wife and her husband's kindred, in contradistinction from consanguinity or relation by blood.<sup>2</sup>

**AFFIRMANCE.**—A decision upholding the validity of a judgment.<sup>3</sup>

**AFFRAY.** See also RIOT; ROUT.

**Definition.**—An affray is the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people.<sup>4</sup>

to have been made upon hearsay may be amended. *Cutler v. Rathbone*, 1 Hill (N. Y.), 204. Under the Missouri attachment act (Rev. Code, 1855) the affidavit may be amended. *Henderson v. Drace*, 30 Mo. 358; *Hardin v. Lee*, 51 Mo. 241. So in *Illinois*. *Moore v. Mauck*, 79 Ill. 391; *Kruse v. Wilson*, 79 Ill. 233. When the absence of an affidavit has not been objected to in time, it may sometimes be filed *nunc pro tunc*. *Jones v. Slate Co.*, 16 How. (N. Y.) 129. The *jurat* may sometimes be added *nunc pro tunc*, on proof that the affidavit was actually sworn to at the proper time. *Williams v. Stevenson*, 103 Ind. 243.

1. *Ramsden v. Maugham*, 4 Dowling Pr. Cas. 403; *Burt v. Owen*, 1 Dowling Pr. Cas. 691. But this staleness may depend on circumstances. *Clarke v. Stillwell*, 8 A. & E. 645. See *Tidd's Prac.* \*190, and the special forms of action in which affidavits are used.

2. *Carman v. Newell*, 1 Denio (N. Y.), 26; *Spear v. Robinson*, 29 Me. 545: "By the marriage one party thereto holds by affinity the same relation to the kindred of the other that the latter holds by consanguinity; and no rule is known to us under which the relation by affinity is lost on a dissolution of the marriage more than that by blood is lost by the death of those through whom it is derived." *Waterhouse v. Martin*, Peck (Tenn.), 389: "The connection between the husband and his wife's parents, and the wife and her husband's parents."

In *Foot v. Morgan*, 1 Hill, 654, it was held that a justice of the peace whose wife is the sister of A's wife cannot take jurisdiction of a cause in which A is the plaintiff; because such relation between the plaintiff and juror is a cause of challenge for the juror, or, if the sheriff is thus related to the plaintiff, a cause of

challenge to the array on the ground of affinity.

*Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 333: "Affinity properly means the tie which arises from marriage betwixt the husband and the blood-relatives of the wife and between the wife and the blood-relatives of the husband. But there is no affinity between the blood-relatives of the husband and the blood-relatives of the wife." See also *Solinger v. Earle*, 45 N. Y. S. Ct. 80.

*Higbe v. Leonard*, 1 Denio (N. Y.), 186: "A husband is related by affinity to all the *consanguinei* of his wife and, *vice versa*, the wife to the husband's *consanguinei*; for, the husband and wife being considered one flesh, those who are related to the one by blood are related to the other by affinity." "But the *consanguinei* of the husband are not all related to the *consanguinei* of the wife." "If this rule be correct, and I think it is, although the justice was related by affinity to the two sisters of Higbe, the plaintiff, there was no such relation between him and Higbe."

In *Cann v. Ingham*, 7 Cow. (N. Y.) 478, there was a deficiency of jurors, and the sheriff summoned one A, whose father had married the widow of the defendant's brother. A's father died before the trial, and his widow was also the widow of the defendant's brother. *Held*, there was no ground of challenge to A on his alleged affinity.

3. *Drummond v. Husson*, 14 N. Y. 60: "A dismissal of the appeal for want of prosecution is clearly not an affirmance of the judgment. This court has decided nothing whatever in respect to the validity of the judgment."

4. 2 Bishop's Cr. L. § 1; *Bouvier's Law Dict.*, 2 Black. Com. 145.

The fighting of two or more persons in



**Affray—Continued.**

some public place to the terror of others; and there must be a stroke given and offered, otherwise it is no affray, howsoever quarrelsome or threatening the words may be; and the fighting must also be in public, for if it be in private, it is no affray, but an assault. *Brown's Law Dict.*

If a number of persons being met together at a fair or market, or on any other lawful occasion, happen on a sudden quarrel to fall together by the ears, it seems agreed that they will not be guilty of a riot, but only of a sudden affray, of which none are guilty but those actually engaged in it; and this on the ground of the design of their meeting being innocent and lawful, and the subsequent breach of the peace happening unexpectedly without any previous intention. 1 *Russell on Crimes* (9th Am. Ed.), 406.

Thus, if a number of persons meet together at a fair or market, or upon any other lawful or innocent occasion, and happen on a sudden quarrel to engage in fighting, they are not guilty of a riot, but of an affray only (of which none are guilty but those who actually engage in it); because the design of their meeting was innocent and lawful, and the breach of the peace happened without any previous intention. *Hawk. P. C. b. 1, c. 65, s. 3.*

The common-law definition of an affray does not involve an agreement to fight, and one might become engaged in such affray without culpable fault. *Supreme Council, etc., v. Garrigus*, 104 Ind. 133.

An affray and an assault are distinct offences. *Champer v. State*, 14 Ohio St. 437.

The principals and seconds in a prize-fight were indicted in one count for a riot, and in another for an affray. The evidence was that the two first prisoners had fought together amidst a great crowd of persons, and that the others were present aiding and abetting; that the place where they fought was at a considerable distance from any highway, and when the officers made their appearance the fight was at an end. The prisoners, on being required to do so, quietly yielded. *Alderson, B.*, said: "It seems to me that there is no case against these men. As to the affray, it must occur in some public place, and this is, to all intents and purposes, a private one. As to the riot, there must be some sort of resistance made to lawful authority to constitute it, some attempt to oppose the constables who are there to preserve the peace.

The case is nothing more than this: Two persons choose to fight, and others look on, and the moment the officers present themselves, all parties quietly depart. The defendants may be indicted for an assault, but nothing more." *R. v. Hunt*, 1 Cox C. C. 177; and see *R. v. Brown*, Car. & M. 314.

Person indicted for an affray may be convicted of an assault and battery, the latter offence being necessarily included in the former. *McClellan v. State*, 53 Ala. 640; *Thompson v. State*, 70 Ala. 26.

A person who has been convicted of an affray cannot subsequently be tried for assault and battery where the charge covers in the same acts. *Fritz v. State*, 40 Ind. 18.

Where several are indicted for an affray, any may be acquitted, and the other or others convicted. *Cash v. State*, 2 Overt. (Tenn.) 108. Compare *Hawkins v. State*, 13 Ga. 322; s. c., 58 Am. Dec. 517. See *State v. Benthall*, 5 Humph. (Tenn.) 519.

To support a prosecution for an affray, the prosecutor must prove (1) the affray, or fighting, etc.; (2) that it was in a public place; (3) that it was to the terror of the king's subjects; (4) that two or more persons were engaged in it. *Roscoe's Cr. Ev.* (10th Ed.) 277.

**Prevention of Affrays.**—"It seems to be agreed that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace in order to their finding sureties for the peace; and it is said that any private person may stop those whom he shall see coming to join either party. Any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace officer; and so any person may arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it. Both cases fall within the same principle, which is, that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue:

**What is an Affray.**—No quarrelsome or threatening words what-

and during the affray, the constable may, not merely on his own view, but on the information and complaint of another, arrest the offenders, and of course the person so complaining is justified in giving the charge to the constable. The plaintiff went into the defendant's shop, and offered to purchase an article at a price marked on a ticket; the plaintiff disputed with the shopman about the price, and was desired to leave the shop, which he refused to do, and declared he would strike any man who laid hands on him; a shopman then struck him on the face; the plaintiff returned the blow, and a contest commenced, the noise of which brought down the defendant from the room above; when he came down the plaintiff was scuffling with the shopman; the defendant sent for a policeman, and on his arrival the plaintiff was requested by the defendant to go from the shop quietly, but he refused; he was standing still in the shop, insisting on his right to remain there, and a mob gathering round the door, when the defendant gave him in charge to the policeman, who took him to the police station. It was held that the defendant had a right, the danger continuing, to deliver the plaintiff into the hands of the policeman, and that the circumstance that the plaintiff was not guilty of the first illegal violence made no difference; for at the time the defendant interfered he was ignorant of that fact: he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate for the sake of securing the peace of his house and neighborhood, and the persons of all those concerned from violence. *Timothy v. Simpson*, 1 C. M. & R. 757. And it seems to be clear that if either party be dangerously wounded in such an affray, and a stander-by, endeavoring to arrest the other, be not able to take him without hurting or even wounding him, yet he is in no way liable to be punished, inasmuch as he is bound, under pain of fine and imprisonment, to arrest such an offender, and either detain him till it appear whether the party will live or die, or carry him before a justice of peace.

"It seems agreed that a constable is not only empowered, as all private persons are, to part an affray which happens in his presence, but is also bound, at his peril, to use his best endeavors for this purpose; and not only to do his utmost himself, but also to demand the assistance of others, which, if they refuse to

give him, they are punishable with fine and imprisonment. In order to support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove: first, that the constable actually saw a breach of the peace committed by two or more persons; secondly, that there was a reasonable necessity for the constable calling upon other persons for their assistance and support; and, lastly, that the defendant was duly called upon to render his assistance, and that without any physical impossibility or lawful excuse, he refused to give it; and whether the aid of the defendant, if given, would have proved sufficient or useful, is not the question or criterion. And it is laid down in the books, that if any affray be in a house, the constable may break open the doors to preserve the peace; and if affrayers fly to a house, and he follow with fresh suit, he may break open the doors to take them. And so far is the constable intrusted with a power over all actual affrays that though he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress them; and therefore if an assault be made upon him, he may not only defend himself, but also imprison the offender in the same manner as if he were in no way a party. It is said, also, that if a constable see persons either actually engaged in an affray, as by striking, or offering to strike, or drawing their weapons, etc., or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice of the peace, to the end that such justice may compel him to find sureties for the peace, etc., or he may imprison him of his own authority for a reasonable time till the heat be over, and also afterwards detain him till he find such surety by obligation. But it seems that he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to jail till he shall be punished for his offence; and it is said that he ought not to lay hands on those who barely contend with hot words, without any threats of personal hurt; and that all which he can do in such a case is to command them, under pain of imprisonment, to avoid fighting.

"It has been much doubted whether a private individual, who has seen an affray

soever can amount to an affray.<sup>1</sup> Appearing in a public place armed with dangerous and unusual weapons constitutes an affray at common law.<sup>2</sup> It must be in a public place;<sup>3</sup> the fighting must be by mutual consent,<sup>4</sup> and between two or more persons, or by two or more persons against another person.<sup>5</sup>

committed, may give in charge to a constable who has not; and whether such constable may, therefore, take into his custody the affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and there was no danger of renewal, but it seems now to be settled that a constable has no power to arrest a man for an affray done out of his own view without a warrant from a justice of peace (*Cook v. Nethercote*, 6 C. & P. 741; *Fox v. Gaunt*, 3 B. & Ad. 798; *R. v. Curvan*, R. & M. C. C. R. 132; *R. v. Bright*, 4 C. & P. 387; *R. v. Light*, D. & B. C. C. 332; *R. v. Walker*, Dears. C. C. 358), unless a felony be done, or likely to be done; for it is the proper business of a constable to preserve the peace, not to punish the breach of it; and where a breach of the peace has been committed, and is over, the constable must proceed in the same way as any other person; namely, by obtaining a warrant from a magistrate. *Cook v. Nethercote*, 6 C. & P. 741. It is said that he may carry those before a justice of peace who were arrested by such as were present at an affray, and delivered by them into his hands. Where the plaintiff was imprisoned by a constable in a cell on a false charge of assault, and the defendant, another constable, on hearing the charge from a third constable, without inquiry into the facts, took the plaintiff before the magistrate, it was held that the defendant, in order to justify himself, was bound to show that the charge was well founded, and, having failed to do so, was liable to an action of trespass." *Griffin v. Coleman*, 4 H. & N. 265; 1 Russell on Cr. (9th Am. Ed.) 408.

1. *O'Neil v. State*, 16 Ala. 65; *Hawkins v. State*, 13 Ga. 322; s. c., 58 Am. Dec. 517.

If one person, by such abusive language as is calculated and intended to bring on a fight, induces the other to strike him, he is guilty of an affray, though he may be unable to return the blow. *State v. Perry*, 5 Jones L. (N. Car.) 9; s. c., 69 Am. Dec. 768. See *State v. Robbins*, 78 N. Car. 431; *State v. Davis*, 80 N. Car. 351; s. c., 30 Am.

Rep. 86; *State v. Sumner*, 5 Strobl. (S. Car.) 53. Compare *Harrison v. Mosely*, 31 Tex. 608.

2. 1 Russell on Crimes (9th Am. Ed.) 407. Compare *Simpson v. State*, 5 Yerg. (Tenn.) 356.

3. The indictment need not describe the public place; that is a matter of proof. *Shelton v. State*, 30 Tex. 431. See *State v. Baker*, 83 N. Car. 649. Compare *State v. Heflin*, 8 Humph. (Tenn.) 84.

Where two of the prisoners had fought together amidst a great crowd of persons, and the others were present aiding and assisting, at a place a considerable distance from any highway, and the fight ceased on the appearance of some peace officers, it was held that this was not an affray; for an affray must occur in some public place, and this was, to all intents and purposes, a private one. *R. v. Hunt*, 1 Cox Cr. Cas. 177.

Evidence is admissible to show that the affray commenced in a private house, where it further shows that the combatants passed out of the house and continued the fight without cessation in a public street. *State v. Billings*, 72 Mo. 662. See *Wilson v. State*, 3 Heisk. (Tenn.) 278.

A field surrounded by a forest, and situated one mile from any highway or other public place, does not lose its private character by the casual presence of three persons, so as to make two of them, who fight together willingly, guilty of an affray. *Taylor v. State*, 22 Ala. 15. See *R. v. Hunt*, 1 Cox C. C. 177; *R. v. Brown*, C. & M. 314.

An inclosed place, ninety feet from the street, and visible from it, is a public place. *Carwile v. State*, 35 Ala. 392.

A highway is not necessarily a public place. *State v. Weekly*, 29 Ind. 206.

4. *Klum v. State*, 1 Blackf. (Ind.) 377; *Duncan v. Commonwealth*, 6 Dana (Ky.) 295; *State v. Downing*, 74 N. Car. 184. Compare *Cash v. State*, 2 Overt. (Tenn.) 198.

On trial of an affray, a party cannot be heard to say that he did not intend to bring about a breach of the peace. *State v. King*, 86 N. Car. 603.

5. *Thompson v. State*, 70 Ala. 26.

## AFFRAY—AFORE—AFORESAID.

**Accessories.**—All persons who assist, or, being present, aid and encourage parties engaged in an affray, are guilty as principals.<sup>1</sup>

**AFORE.**—Priority in point of time.<sup>2</sup>

**AFORESAID.**—Means generally next before.<sup>3</sup>

1. *Sikes v. Johnson*, 16 Mass. 389; *Avery v. Bulkly*, 1 Root (Conn.), 275; *State v. Lanier*, 71 N. Car. 288; *Hawkins v. State*, 13 Ga. 322; s. c., 58 Am. Dec. 517; *Gillon v. Wilson*, 3 T. B. Mon. (Ky.) 216; *Curlin v. State*, 4 Yerg. (Tenn.) 143.

Successful defence of one will operate as acquittal of both defendants where the two are indicted for an affray. *Hawkins v. State*, 13 Ga. 322; s. c., 58 Am. Dec. 517; *Cruce v. State*, 59 Ga. 83.

2. The statute 3 H. 7 c. 10 enables a defendant in error "to recover his costs and damages for his delay" if a writ of error be sued out "afore execution had." *Held*, that the writ is sued out "afore execution had" if an execution has issued before the writ, but has been rendered ineffectual by proceedings taken adversely to the plaintiff below. *Newlands v. Holmes*, 4 S. B. 859.

3. "Aforesaid means generally next before; yet a different signification will be given to it if required by the context and the facts of the case." *Simpson v. Roberts et ux.*, 35 Ga. 181.

**In Statute.**—The United States statutes provide "Every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the State or Territory where the bank is located. . . . And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture," etc. The question before the court was whether "aforesaid" applied only to the immediately preceding clause, "when no rate is fixed by the laws of the State or Territory," or to the whole section. It was *held*, there was no rule of grammatical construction which limits its reference to the paragraph immediately preceding. *Central Nat. Bank v. Pratt*, 115 Mass. 544; *contra*, *First National Bank v. Lamb et al.*, 50 N. Y. 95. The words "as aforesaid" do not necessarily apply to the

preceding section alone, but they may refer to others also. *Reg. v. Eastern Railway Co.*, 2 Q. B. 347.

**As Aforesaid.**—Sec. 3 of 12 and 13 Vict. c. 92 enacts that any person who shall keep or use or act in the management of any place for fighting or baiting animals shall be liable to a penalty; and by way of proviso, in order to obviate the difficulty of proving who such person was, defines that every person who receives money for the admission to any place kept or used for any of the purposes aforesaid "shall be deemed to be a keeper thereof," and then adds that every person who shall encourage, aid, or assist at the fighting or baiting of any bull, etc., "or other animal aforesaid," shall be also liable to a penalty. Looking into the frame of the section, and considering also that it is a penal enactment, I think that the words "as aforesaid" mean, "in any place kept or used for any purposes aforesaid." *Morley v. Greenhalgh*, 3 B. & S. (Eng. C. L.) 379, affirming *Clark v. Hague*, 2 El. & El. 281.

**Brought up as Aforesaid.**—These words do not apply where no one is brought up and where the registrar in bankruptcy goes to the bankrupt. *Bramwell v. Eylington*, 5. Best & Smith, 56.

**Convicted as Aforesaid.**—These words do not refer alone to the section or clause immediately preceding. *Rex v. Bellamy*, 1 B. & C. 505.

**In Deed: "County Aforesaid."**—By a parish indenture which purported to be made between the church-warden, etc., of D. parish in the county of N. of the one part, and A B of C., in the county of L., of the other part, it was witnessed that the said church-warden, etc., of D. parish, with the consent of two of his majesty's justices of the peace for the said county, dwelling in or near said parish, had bound, etc. The justices in their written consent on the margin of the indenture described themselves as justices "of the county aforesaid." *Held*, that the words "county aforesaid" had the same meaning as the words "said county," and that it sufficiently appeared by reference to the latter words that the consenting justices were justices of the county of N. *Rex v. Countesthorpe*, 2 Barn. & Ad. 487.

**Aforesaid—Continued.**

**In Indictment:** "County Aforesaid."—"Here the county of Hickory is named, and also the county of Polk—two counties mentioned in the body of the indictment—and the offence is stated to have been committed 'at the county aforesaid' without showing certainly which county; this is not sufficient." *State v. McCracken*, 20 Mo. 411.

In *Regina v. Hunt et al.* 10 Q. B. 926, the first count of the indictment charged a conspiracy to defraud the prosecutor of his money by bringing an unfounded action on promises against him, which came on to be tried at the assizes for "the county of Surrey." The second count charged another conspiracy "at the parish aforesaid in the county aforesaid;" and the objection was, that as the county last named was Surrey, it appeared that the Middlesex jury could have had no jurisdiction to try the indictment. The court pointed out that the only "parish aforesaid" was alleged to be in the county of Middlesex.

In *Reg. v. Albert*, 5 Q. B. 41, Denman, C. J., said: "The objection as now presented to us brings the question to this: whether the parish of St. Stephen, Coleman Street, sufficiently appears by the indictment to be in the city of London. The act 22 Car. 2, c. 11, shows that it is within the city; and where an indictment mentions a parish in a county and afterwards an act is alleged to have been done in the 'county aforesaid,' that averment as to place is sufficient."

**In Plea:** "County Aforesaid."—One Fenn of Wills County was attached to answer one Sutton, and whereupon the said Sutton complains that the said Fenn in the "county aforesaid" was indebted to the said Sutton. The court: "There is no difficulty in this case. The margin given is the whole. All references to counties are supposed to be the county named in the margin. The other county of Wills is in the recital of the writ and makes no part of the count or declaration." *Sutton v. Fenn*, 2 W. Bl. 847.

**From Any of the Places Aforesaid.**—"Aforesaid" naturally refers to the places named immediately before. *Peake v. Screech*, 7 Q. B. 610.

**From the Day and Year Aforesaid.**—*Held*, that "from" was to be taken as including the day on which the contract containing the above clause was entered into. *Wilkinson v. Gaston*, 9 Q. B. 137.

**Her Part Aforesaid.**—Testator devised as follows: "I give and bequeath to my daughter, Mary Gill, all the houses, out-houses, garden and other property which

I now hold under the trustees of the poor of the township of Almondbury, for the term of 999 years; and I also give one half part of my books to my daughter, Mary Gill, aforesaid, the other half to my widow, Sarah Gill, to be equally divided by T. S. If my daughter Mary should happen to die unmarried, it is my will then that her part aforesaid shall be equally divided," etc. *Abbott, C. J.*: "I think the expression 'her part aforesaid' applies to the whole, which by the former part of the will had been given to the daughter." *Doc. dem. Gibson v. Gill*, 2 Barn. & Cress. 680.

**Purposes Aforesaid.**—The words "purposes aforesaid," in sec. 32 of the Railways Clauses Consolidation Act, 1845, refers to the purposes mentioned in the former part of the same section only. *Fenwick v. East London R. Co.*, L. R. 20 Eq. Cas. 544.

**So as Aforesaid.**—In *Reg. v. Craddock*, Temp. & M. 365, Williams, J., was of the opinion that the words: "so as aforesaid" meant "as I said before;" but Pollock, C. B., doubted whether they were intended to refer to the matter immediately preceding.

**Time Aforesaid.**—A sheriff's deed recited that the grantor, having taken on execution the equity of redemption which J. S. had at 9 A.M. on January, 1865, "being the time when the same was attached by mesne process," in certain land, having given specified notices, and "having for sufficient cause duly adjourned the sale once not exceeding seven days," sold the said equity on December 23, 1865. The grant in the deed was of all the right to redeem which J. S. had at the "time aforesaid." *Held*, that the "time aforesaid" referred to the time of attachment and not to the day of sale. *Sanborn v. Chamberlin et al.*, 101 Mass. 409.

**When and so soon as she shall Marry as Aforesaid.**—Under a will a rent charge was devised to L. for life, subject to a restriction as to her marriage (mentioned in one of the preceding items of the will); the testator then said, "When and so soon as she shall marry as aforesaid, then upon trusts," etc. *Held*, the clause "when and so soon as she shall marry as aforesaid" did not make the marriage of L. according to the terms of the previous devise to her a condition precedent to the vesting of the estates. *Beamont v. Squire*, 17 Q. B. 906.

**Voyage or Voyages Aforesaid.**—The United States chartered a vessel to go to N. and return. It was further stipu-

*AFORETHOUGHT—AFOUL—AFTER.*

**AFORETHOUGHT.**—Premeditated, or thought of before.<sup>1</sup>

**AFOUL.**—In an action for slander, the use of this word, without a special averment, was held not to warrant the innuendo that the plaintiff was guilty of buggery.<sup>2</sup>

**AFTER.**—This word is used in reference to time to denote a sequence; it also refers to order in point of right or enjoyment; subject to.<sup>3</sup>

lated that the charter should continue so long as the vessel was required by the United States. The United States also agreed to employ the vessel "for the voyage or voyages aforesaid." It was held that the contract only embraced the employment of the vessel when on such voyage or voyages, and did not extend to demurrage. *Mitchell v. United States*, 96 U. S. 162.

1. "'Premeditated' and 'aforethought' are synonymous, and 'premeditated malice' and 'malice aforethought,' are in sense and meaning the same." *Edwards v. State*, 25 Ark. 446.

**Malice aforethought.**—The legal meaning of 'malice aforethought' in cases of homicide is not confined to homicide committed in cold blood, with settled design and premeditation, but extends to all cases of homicide, however sudden the occasion, when the act is done with such cruel circumstances as are ordinary symptoms of a wicked, depraved, and malignant spirit. *United States v. Cornell*, 2 Mason, 91.

"Murder is the voluntary killing of any person of malice prepense or aforethought, either express or implied by law; the sense of which word, malice, is not only confined to a particular ill-will to the deceased, but is intended to denote, as Mr. Justice Foster expresses it, an action flowing from a wicked and corrupt motive, a thing done *malo animo*." *Commonwealth v. Webster*, 5 Cush (Mass.) 306.

So "malice aforethought" is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart." *State v. Ricke*, 49 N. H. 404; *Commonwealth v. Drum*, 58 Pa. 9; *Jones v. The State*, 29 Ga. 594.

2. The statement that the plaintiff had been caught "afoul" of a cow does not warrant the innuendo that he was guilty of the crime of bestiality. The most usual signification of the word foul, as an adjective, is unclean, filthy, dirty. The phrase "to fall foul" is not an uncommon one. The definition of it, given in

Webster's dictionary, is, to rush on with haste, rough force, and unreasonable violence; to run against, as, the ship fell foul of her consort. Dr. Johnson gives the following example: "In his sallies, their men might fall foul of each other." If the defendant had been in the practice, by the words laid, to impute the crime of bestiality, or if he had used them on this occasion in that sense, and they were so understood by the hearers, there should have been a special averment to that effect. *Harper v. Delp*, 3 Ind. 225, 231.

3. The word "after," like "from," "succeeding," "subsequent," and similar words, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations, and is used in different senses, and with an exclusive or inclusive meaning according to the subject to which it is applied; and as it would deprive it of some of its proper significations to affix one invariable meaning to it in all cases, it would, of course, in many of them, pervert it from the sense of the writer or speaker. Its true meaning, therefore, in any particular case must be collected from its context and subject-matter, which are the only means by which the intention is ascertained. *Sands v. Lyon*, 18 Conn. 18, 27.

Where a statute enacted that warrants of attorney to confess judgment should be filed "within twenty-one days after the execution," it was held that the twenty-one days for filing are to be reckoned exclusively of the day of execution. *Williams v. Burgess et al.*, 12 Ad. & Ell. 635.

The language of the statute is that writs of a *fi. fa.* may be issued, etc., "after the expiration of thirty days from the entry of such judgment." According to the rule of construing statutes adopted by this court the computation of the thirty days excludes the day of entering the judgment; in other words, as to the first and last days, one is to be counted exclusively and the other inclusively. *Commercial Bank of Oswego v. Ives*, 2 Hill (N. Y.), 355. *Cf. Butts v. Edwards*, 2 Denio

**After—Continued.**

(N. Y.), 164; *Judd v. Fulton*, 10 Barb. (N. Y.), 117; *Page v. Weymouth*, 47 Me. 238.

Where a clause in a will was, "It is my will that, after settling my estate, my wife have the interest of the remainder of my personal estate," the court said: "After settling my estate" seems equivalent to "subject to the settlement." The word "after" does not always or necessarily refer to time, but to order in point of right or enjoyment. *Lamb v. Lamb*, 11 Pick. (Mass.) 371, 378.

The fourth clause of the will says, "I give to my sons each one ninth part of my estate, real and personal, after providing for the bequest to my wife." The word "after" used in such a connection is often and properly construed to mean "subject to" "after taking out, deducting, or appropriating." *Hooper, Ex. v. Hooper et al.*, 9 Cush. (Mass.) 122, 128. *Cf. Gibson v. Walker*, 20 N. Y. 476, 484.

The term "after" does not always designate the time at which one thing is done in reference to something else, but it expresses the relative priority and subordination of one claim to another in matter of right. So we think it does here: the residue is to be formed subject to the payment of debts and charges, although they may be actually paid afterwards. *Treadwell v. Cordis*, 5 Gray (Mass.). 341, 353.

**After Conviction.**—Where the constitution grants the power to pardon "after conviction," the pardon is not invalid because the prisoner appealed and thereby vacated the sentence or judgment. Conviction is ordinarily used to denote the verdict of the jury. *State v. Alexander*, 76 N. C. 231. *Cf. Blair's Case*, 25 Gratt. 850.

In Arkansas it has been held that the power to pardon "after conviction," vested in the governor by the constitution of 1864, is not prohibitory of the exercise of that power by the legislature before conviction. *State v. Nichols*, 26 Ark. 74.

**After Judgment.**—Under a motion by persons who had given bond, under the eighth section of stat. 1 and 2 Vict. c. 110 (for abolition of arrest on mesne process), to be allowed to render their principal after verdict against him and before judgment (said section reading as follows: "If a creditor of a trader shall file an affidavit in the court of bankruptcy that his debt is justly due, . . . and if such trader shall not within twenty-one days . . . enter into a bond . . . to pay . . . or to render himself . . . according

to the practice of such court . . . 'after judgment' shall have been recovered," etc.), the court held "some doubt existed as to the words 'after judgment' in the eighth section; namely, whether they apply to the whole preceding matter or not; as to which we think that, at all events, they do not apply to a render, 'according to the practice of such court;' and as bail would by that practice have been at liberty to render a defendant after verdict and before judgment, we think that the obligors in this bond must be at liberty to do the same." *Owston v. Coates*, 10 Ad. & Ell. 193.

An order discharging a defendant from imprisonment, under "the act for the relief of persons imprisoned on civil process," though entered by the judge of another court, who is authorized by law to take jurisdiction of such proceedings, is a "special order made after final judgment," within the meaning of the three hundred and thirty-sixth section of the Practice Act, and an appeal therefrom taken more than sixty days after the entry of the order is too late. *Wells, Fargo & Co. v. Anthony*, 35 Cal. 696.

**After Verdict.**—The statute 6 G. 4, c. 50, enacts that the party who shall apply for a special jury shall pay the costs occasioned thereby, unless the judge before whom the cause is tried shall immediately after the verdict certify that the cause was proper to be tried by a special jury. *Held*, that a defendant who had applied for a special jury was not entitled to the costs of that jury, where the judge who tried the cause nonsuited the plaintiff on his opening, even though the judge had certified as above. *Wood v. Grimwood*, 10 B. & C. 689, 700.

**After the Fact Committed.**—Under the 53 Geo. 3, c. 127, s. 12, which requires that an action for anything done in pursuance of the act shall be commenced within three calendar months after the fact committed, an action of trespass for seizing, taking and carrying away, and distraining and selling the plaintiff's goods under a warrant of distress for arrears of a church rate, may be brought within three calendar months after the sale. For, said the court: "The fact committed under color or in pursuance of the statute is not merely the seizure, but the sale also. The seizure of the goods is made not absolutely, but with a view to their detention only until the amount should be paid, and their subsequent sale if it should not; and the seizure, when a sale has taken place, is but a part of the entire act complained of, and

*After—Continued.*

which forms the real grievance to the plaintiff. And this circumstance distinguishes the present case from those in which the seizure was for a forfeiture, and was in its nature absolute, and must be considered as intended to deprive the plaintiff of his property immediately." *Collins v. Rose*, 5 M. & W. 164, 202.

**After the Payment.**—The words in a will, "after my debts and funeral charges are paid, I devise and bequeath as follows," amount to a charge upon the real estate for the payment of debts. *Fenwick v. Chapman*, 9 Peters, 461.

The words, "after payment of my debts," mean that he will not give anything until his debts are paid. He could not help paying his debts out of his personal estate; he could not give a pecuniary legacy, but after his debts paid. Therefore, if I do not make that construction, part of the will is perfectly nugatory. I agree that if testator does manifest in any part of his will that his debts shall be paid, they are to be paid before any disposition of what he has power to dispose of. "After payment of his debts" means that until his debts are paid he gives nothing; that everything he has shall be subject to his debts. To give those words any effect, they must charge the real estate. I am very clearly of opinion that wherever a testator says he wills that his debts shall be paid, that will ride over every disposition, either as against his heir-at-law or devisee; and the words, "after my debts are paid," mean the same thing. *Arden, M. R. Shallcross v. Finden*, 3 Vesey, Jr., 738.

Where a testator directed his trustees to pay the annual sum of £100 to his mother for life, and from and "after the payment" of the said annual sum of £100, and subject thereto, he declared that they should stand possessed of his estate upon trusts, the income of the whole estate proving insufficient to pay the annuity, it was held that the terms of the gift over made the annuity a charge upon the *corpus*, out of which it must be paid annually. *Birch v. Sherratt*, L. R. 2 Ch. App. 644.

**After Work.**—Under a fire-insurance policy which required an examination of the mill "thirty minutes after work," it was held that the assured were bound, by their representation that the mill was examined thirty minutes after work, to make such examination thirty minutes after the extra work, as well as after regular work; and also that the question what is a cessation of work at the factory from which the thirty minutes are to be computed is a question for the jury, un-

der all the circumstances of each particular case. *Houghton v. Manufacturers' Mutual Fire Ins. Co.*, 8 Metc. (Mass.) 114.

**After Date.**—It is entirely clear, from *Pugh v. The Duke of Leeds*, Cowper, 714, that the words "from" or "after the date," or "the day of the date," include the day when they are used in a conveyance to create an estate; but it is just as clear, from other cases about to be noticed, that they exclude it when they are used in an instrument to perpetuate the evidence of a debt. Indeed, it seems from what is said in *Preston on Conveyancing*, p. 387, that the distinction sprung out of that decision, previous to which the general rule was to exclude the day in both cases. It is now a settled rule that as the law rejects fractions of a day, it views it for most purposes as an indivisible point, and consequently that "the date," or "the day of the date," being coextensive with the entire day, excludes it when it occurs in a bill, note, or bond. *Taylor v. Jacoby*, 2 Pa. St. 495.

The words in the Stamp Act, 55 Geo. 3, c. 184, schedule pt. 1 (title "Bill of Exchange"), which imposes a certain duty on bills "exceeding two months after date," mean the time expressed on the face of the bill, not the time when it actually issued. *Williams v. Jarrett*, 5 B. & Ad. 32.

The words "after date of appointment," and "from such date," which occur in sec. 1556 of the Revised Stat. U. S., fixing the annual pay of passed assistant surgeons of the navy, refer not to the original entry of the officer into the service as an assistant surgeon, but to the notification by the Secretary of the Navy that he has passed his examination for promotion to the grade of surgeon, and will thereafter, until such promotion, be considered a passed assistant surgeon. *U. S. v. Moore*, 5 Otto (U. S.) 760.

"For the space of one month after the return day" and "within one month from the return day" are equivalent expressions. *Gore v. Hedges*, 7 T. B. Mon. (Ky.) 521.

Ten days after peace is made between the United States and the Confederate States, used in a bond to specify the time at which the money is payable, means "ten days after peace," and does not render the ratification of a treaty of peace between the powers mentioned a condition precedent to the payment. *Chapman v. Wacater*, 64 N. C. 532.

On the question under the Georgia statute giving four days within which appeals may be entered as to whether Sunday is



## AFTERNOON—AFTERWARD.

**AFTERNOON.**—Subsequent to or following noon or midday: generally used of the earlier part of that time, as distinguished from evening.<sup>1</sup> See also **TIME**.

**AFTERWARD — AFTERWARDS.**—Subsequent in order of time.<sup>2</sup>

to be counted as one of the "four days after," etc., the court said: "Our judgment, therefore, is that four clear days, as they are called in the old books, or working days, as they might perhaps be more appropriately designated, are allowed for entering appeals; and that whether Sunday be the first or last or an intervening day, it is not to be counted. *Neal v. Crew*, 12 Ga. 93, 100.

**After the Passing or Passage.**—An act in contemplation of law comes into effect from the commencement of the day on which it received the royal assent; and inasmuch as the law takes no notice of the fractions of a day where the right of a single woman who is delivered of a bastard child to apply for an order of affiliation depends on the birth of her child "after the passing of the act," it is sufficient if the child is born on the day the act receives the royal assent. *Tomlinson v. Bullock*, L. R. 4 Q. B. Div. 230.

From the impracticability of deciding at what particular moment of time the President gives his seal to a bill, we have never heard of such an inquiry being made, and the least which courts have ever said on such occasions is that where an act is to take place from the day of its passing, it must embrace the whole of that day. *U. S. v. Williams*, 1 Paine (U. S.), 261. The statute was to take effect from its passage; and it is a general rule that where the computation is to be made 'from an act done,' the day on which the act is done is to be included. *Arnold v. U. S.*, 9 Cranch (U. S.), 104, 120.

1. Under an act of Parliament prohibiting the keeping open a place for the sale of liquor during "the usual hours of afternoon divine service" in the parish church, where the evening service was read in the church at 6 P.M., but there was an afternoon service at 2 P.M. in the parish workhouse, and the innkeeper had his place open for the reception of customers at half-past 6 o'clock P.M., the court held: "The question is, what was the usual hour of afternoon divine service? The word 'afternoon' has two senses. It may mean the whole time from noon to midnight, or it may mean the earlier part of that time as distinguished from the evening. I think that in this act it is used in the latter sense, and that the in-

tention of the legislature was to prohibit the opening of public houses during the usual hour of divine service in the afternoon, if there was one in the church. In Newport Pagnell divine service was in the workhouse." *Earle, J.*: "The legislature has not said that it shall be penal to keep open an inn during evening service, but during afternoon divine service. Was, then, this evening service, performed at six o'clock, afternoon service? No; it certainly was evening service. In the parish of Newport Pagnell since 1836 there is no afternoon service in the church; it is in the workhouse; and the hours at which the evening service is performed in the church are no more the usual hours of afternoon divine service than they would be if the afternoon divine service, instead of being performed in the workhouse, was performed in the church." *Campbell, C. J. Queen v. Knapp*, 2 Ellis & Blackburn, 447.

2. "There Afterwards" also may have its use in the sentence, without supposing that another time was intended to be expressed by it. It most probably was intended to show that the beating with a rope, though a part of the same outrage as the beating with a plank, was subsequent to it in order of time. *Benson v. Swift*, 2 Mass. 50.

Under the statutory conditions of the province of Canada to a fire-insurance policy which require the assured to give notice of his loss and to deliver "as soon afterwards as practicable" a particular account, it has been held that the words "as soon afterwards as practicable" mean within a reasonable time. *Parsons v. Queen Ins. Co.*, 43 Upper Canada Q. B. 271, 280; *cf. Cammell v. Beaver Mut. Ins. Co.*, 39 U. C. R. 1.

Where an act of Parliament prohibited the recovery of any costs on a verdict of less than 40s. unless the judge certified "immediately afterwards" on the back of the record, it was held that "immediately afterwards" means within a reasonable time, and that a delay of ten days, during which no application was made to the judge, although there was nothing to prevent it, was not a compliance with the statute, and that a certificate made after such lapse of time was too late, and it was set aside. *Forsdike et ux. v. Stone*, L. R. 3 C. P. 607.

**AGAINST.**—In opposition to ; in contradiction to.<sup>1</sup>

1. Where an indictment charged that the defendant, "in and upon one," A. B., "did feloniously, purposely, and with premeditated malice make an assault, and then and there, at and against the said" A. B., "did feloniously, purposely, and with premeditated malice shoot a certain pistol, then and there loaded with gunpowder and leaden ball, which he," the defendant, "then and there had and held in his hand, with intent," etc., the court held that the indictment sufficiently charged an assault and battery, saying: "The particular meaning of the word 'against' depends, to a very considerable extent, on the connection in and the purposes for which it is used. To push or run against a person implies, in common parlance, a coming in contact or collision with the person so pushed or run against. To say that a stone was hurled at and against a person would very naturally make the impression that such person was hit by the stone. It is said that where one person wilfully pushes a drunken man against another person, from which an injury ensues, it constitutes an assault and battery. See Russell on Crimes, 1021. Although the words used in this indictment are not the most appropriate that might have been selected for the purpose, we are of the opinion that an assault and battery is sufficiently charged against the appellee." *State v. Prather*, 54 Ind. 63.

Where a complaint was made in this form, "F., on oath, complains against P., at M., on the first of February in the year 1844 did sell to C. one glass of spirituous liquors," etc., it was *held*, that the word "against" might be rejected as surplusage, and that the complaint without that word was sufficient. *Com. v. Peniman*, 8 Metc. (Mass.) 519.

**Against Her Will.**—In statutes defining the crime of rape, this expression means "without her consent," and the crime is committed if the woman's consent has not been obtained, even though no violence has been used. "The earlier and more weighty authorities," says Gray, J., in a case where a woman had been ravished while insensible, "show that the words 'against her will,' in the standard definitions, mean exactly the same thing as 'without her consent,' and that the distinction between these phrases, as applied to this crime, which has been suggested in some modern books, is unfounded. We are therefore unanimously of the opinion that the crime which the evidence in this case

tended to prove, of a man's having carnal intercourse with a woman without her consent, while she was, as he knew, wholly insensible, so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was rape." *Com. v. Burke*, 105 Mass. 376.

So the inducing a woman, by misrepresentation, fraud, and falsehood, to go to the house where she was defiled, although no force was used to take her there, is within the provision of the New York statute (2 R. S. 664, § 25) declaring the punishment for the offense of taking a "woman unlawfully, against her will, with the intent to compel her by force, menace, or duress to be defiled." *Beyer v. People*, 86 N. Y. 369.

**Against the Form of the Statute.**—Technical words which must be used in framing an indictment for a breach of the statute complained of.

If one statute subjects an act to a pecuniary penalty, and a subsequent statute makes it a felony, an indictment for the felony concluding "against the form of the statute" (in the singular number only) is right. *Rex v. Pim*, English Crown Cases, Russ. & Ry. 424.

Where, in trover by the assignees of a bankrupt, the defendant pleaded that before the bankruptcy he advanced the bankrupt a sum of money upon the deposit of the goods in respect of which the action was brought, and the assignees filed a replication that it was corruptly and "against the form of the statute," and agreed between the defendant and the bankrupt that the latter should pay the defendant for the loan of the money £10 per cent, it was *held*, on a special demurrer, that the averment of the contract being against the form of the statute was not a sufficient allegation that it was illegal; and that the replication should have alleged what particular statute it was in contravention of. *Jurquand v. Mose-don*, 7 M. & W. 504.

In an action upon the case for infringement of copyright, although the court refused to allow a count founded on a common-law right to be joined with counts under a statute upon the same cause of action, it was *held*, that, notwithstanding the words "against the form of the statute" in counts framed upon the statute, a plaintiff might give in evidence, under those counts, an infringement of his common-law right. *Boozey v. Jolkien*, 5 C. B. 476.

**Against the Peace of the State.**—An indictment in Wisconsin which does not

**AGE.** (See also **INFANCY.**)

It signifies in the law those periods in the lives of persons of both sexes which enable them to do certain acts which, before they had arrived at those periods, they were prohibited from doing. As, for example, a male at the age of twelve years may take the oath of allegiance; at fourteen, which is his age of discretion, he may consent to marriage or choose his guardian; and at twenty-one he may alien his lands, goods, and chattels. A female at nine years of age is dowable; at twelve may consent to marriage; at fourteen is at years of discretion, and may choose a guardian; and at twenty-one may alien her lands, etc. But the full age of either male or female is twenty-one, until which time they are considered as infants.<sup>1</sup>

conclude "against the peace and dignity of the State" (as required by sec. 17, art. 7 of the constitution) is bad; and the words "against the peace of the State of Wisconsin" are not sufficient.

**Against Law.**—Where it appears that the jury, in rendering their verdict, must either have disregarded the law as given in the instructions of the court, or else have found a fact wholly contrary to the evidence, the verdict is "against law." *Sweeney v. C. P. R. Co.*, 57 Cal. 15.

Whatever else may be meant by the expression "decision against law," we think that there is no doubt that it includes a case where the decision is based upon findings which do not determine all of the material issues of fact raised by the pleadings. *Knight v. Roche*, 56 Cal. 18.

When a court draws erroneous conclusions of law from its finding of facts, it is a "decision against law," for which a new trial should be granted under subdivision 6 of § 657 of the Code of Civil Procedure. *Simmons v. Hamilton*, 56 Cal. 493.

A verdict of a jury in obedience to the instructions of the court upon a point of law is a verdict "against law" within the meaning of subdivision 6, sec. 193, of the Practice Act, and for that reason should be set aside without further consideration.

To this Crockett, J., dissented on the ground that when it is apparent that the instruction disregarded by the jury was erroneous, and the verdict is in other respects proper, and no injury has been done the party or can result from the error complained of, the verdict should not be set aside as "against law." *Emerson v. County of Santa Clara*, 40 Cal. 545.

In the Extradition Act of 1870 (33 and 34 Vict. c. 52), which enumerated as extradition crimes "crimes by bankrupts

against bankruptcy law," no mention was made of accessories; and in 1873 it was held that this could not be extended to complicity by a person not himself a bankrupt in a fraudulent bankruptcy. *In re Counhay*, L. R. 8 Q. B. 410.

Subsequently the act of 1873 authorized that indictable offences under the laws for the time being in force in relation to bankruptcy might be made the subject of extradition treaties. By such a treaty, among other crimes for which extradition was to be granted were "crimes against bankruptcy law;" and in 1878 a warrant for the apprehension of a fugitive criminal by virtue of such a treaty which described the offence as "the commission of crimes against bankruptcy law" within the jurisdiction of the foreign power demanding the extradition was held good. *Ex parte Terraz*, L. R. 4 Exchequer D. 63.

The words "any crime or offence against the laws of China," in the provision of the Hong Kong ordinance No. 2 of 1850, must be limited to those ordinary crimes and offences which are punished by the laws of all nations, and which are not peculiar to the laws of China. *Attorney-General v. Kwok-A-Sing*, L. R. 5 Privy Council Ap. 179.

1. *Brown's Law Dict.* (Sprague's Ed.); *Bouvier's Law Dict.*; *Co. Litt.* 78.

A female under ten years of age is incapable at common law of giving her consent to an act of carnal knowledge. *Moore v. State*, 17 Ohio St. 521; *Com. v. Roosnell*, 8 N. East. Repr. (Mass.) 747. This principle has been clearly maintained with reference to kidnapping children and removing young slaves. *Com. v. Nickerson*, 5 Allen (Mass.), 518; *Com. v. Taylor*, 3 Metc. (Mass.) 72; *Com. v. Aves*, 18 Pick. (Mass.) 193; *Com. v. Roosnell*, 8 N. East. Repr. (Mass.) 747; *State v. Rollins*, 8 N. H. 550; *State*

**Computation of Age.**—The age of twenty-one years is complete on the first moment of the last day next before the twenty-first anniversary of the birth.<sup>1</sup>

**In Criminal Law.**—No act done by any person under seven years of age is a crime. Nor is an act done by any person over seven and under fourteen years of age a crime, unless it be shown affirmatively that such person had sufficient capacity to know that the act was wrong.<sup>2</sup> In some States, the age under which a

*v. Farrar*, 41 N. H. 53; also in cases of indecent assaults. *People v. McDonald*, 9 Mich. 150; *Hays v. People*, 1 Hill (N. Y.), 351; *Singer v. People*, 13 Hun (N. Y.), 418; *State v. Dancy*, 83 N. Car. 608; *State v. Johnston*, 76 N. Car. 209. See *Givens v. Com.* 29 Grat. (Va.) 830; *The Queen v. Dee*, L. R. 14 Ir. 468.

It is at the age of puberty, and not at the age of majority, that a female ceases to be a "child" and becomes a "woman," within the meaning of a statute defining the crime of rape. *Blackburn v. State*, 22 Ohio St. 102.

**Evidence.**—The age must be proved by sworn testimony. Neither the court nor the jury can judge from the appearance of the child. *Stephenson v. State*, 28 Ind. 272. Compare *State v. Arnold*, 13 Ired. (N. Car.) 184.

The N. Y. Penal Code, § 19, provides: Whenever in any legal proceeding it becomes necessary to determine the age of a child, the child may be produced for personal inspection, to enable the magistrate, court, or jury to determine the age thereby; and the court or magistrate may direct an examination by one or more physicians, whose opinion shall also be competent evidence upon the question of age.

A statement in a will of the date of a person's birth is *prima-facie* evidence of his age. *Vulliamy v. Huskisson*, 3 Y. & C. 80.

But evidence of reputation is inadmissible to prove a person's age. *Colclough v. Smyth*, 15 Ir. Ch. 347; 10 L. T. N. S. 918.

Family discussion as to birthday, and acts done on the reputed day, are evidence for the jury as to the age of an infant prosecutrix on whom a rape is charged to have been committed. *R. v. Hayes*, 2 Cox C. C. 226.

A prisoner was charged with carnally abusing a child under ten, on February 5, 1832. To prove the child under ten years, an examined copy of the register of her baptism on February 9, 1822, was put in, and her father stated that he left his house about a week before the 9th of February, 1822, his wife not being then

confined; and that on his return on that day he found this child, and was told by his wife's mother that it had been born on the day before. *Held*, that this was not sufficient evidence of the child's being under ten years. *R. v. Wedge*, 5 C. & P. 298.

A mother stated that a child was ten years old last March, but on cross-examination her evidence as to the knowledge of her children's ages seemed by no means clear. The evidence, though objected to as too unsatisfactory to leave to the jury on a charge of carnally knowing and abusing a girl under the age of twelve, was submitted to the jury, who found that the girl was under twelve, and convicted the prisoner of the charge. *Held*, that the conviction must be affirmed. *R. v. Nicholls*, 10 Cox C. C. 476.

1. 1 Black. Com. 464; *State v. Clark*, 3 Harr. (Del.) 557; *Hamlin v. Stevenson*, 4 Dana (Ky.), 597; *Wells v. Wells*, 6 Ind. 447.

A person attains his twenty-fifth year when he becomes twenty-four. *Grant v. Grant*, 4 Y. & C. 256.

2. *State v. Fowler*, 52 Iowa, 103; *State v. Aaron*, 1 South. (N. J.) 231; s. c., 7 Am. Dec. 592; *Willet v. Commonwealth*, 13 Bush (Ky.), 230; *Com. v. Mead*, 10 Allen (Mass.), 398; *State v. Doherty*, 2 Overt. (Tenn.) 80; *Godfrey v. State*, 31 Ala. 323; *State v. Learnard*, 41 Vt. 585; *Walker's Case*, 5 C. H. R. (N. Y.) 137.

Mr. Russell says (Russ. on Crimes, 9th Am. Ed.): "With regard to capital crimes, the law is minute and circumspect; distinguishing with great nicety the several degrees of age and discretion; though the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. 4 Black. Com. 23. But within the age of seven years an infant cannot be punished for any capital offence, whatever circumstances of a mischievous discretion may appear; for, *ex presumptione juris*, such an infant cannot have discretion; and against this presumption no averment shall be admitted."

person is incapable of committing a crime has by statute been extended to an age beyond seven years.

1 Hale 27, 28; 1 Hawk. c. 1, s. 1, note (1); 4 Black. Com. 23. A pardon was granted to an infant within the age of seven years, who was indicted for homicide, the jury having found that he did the act before he was seven years old. 1 Hale, 27 (edit. 1800), note c.

On a charge of homicide against an infant a little more than eleven years old, the legal presumption being that he was incapable of committing any crime, it devolves on the prosecution to make strong and clear proof of capacity before a conviction can be had, and without such proof a judgment of conviction will be reversed. *Angelo v. People*, 96 Ill. 209; s. c., 36 Am. Rep. 132. See *Com. v. French, Thatcher's Cr. Cas. (Mass.)* 163; *Com. v. Elliott*, 4 Boston L. R. 329.

It is not necessary that such proof be made by direct and positive testimony. *Wusnig v. State*, 33 Tex. 651. But on confessions alone, an infant under twelve years of age cannot be convicted of murder. *State v. Aaron*, 1 South. (N. J.) 231; s. c., 7 Am. Dec. 592. See *McCoon v. Smith*, 3 Hill (N. Y.), 147; *State v. Bostick*, 4 Harr. (Del.) 563. Compare *State v. Guild*, 5 Halst. (N. J.) 163.

Where the defence is, that the prisoner is under the age of presumed capacity, the burden of proof is on the prisoner. *State v. Arnold*, 13 Ired. (N. Car.) 184.

A person under thirteen years of age, unless discretion is proved, is not guilty of larceny. *Gardiner v. State*, 33 Tex. 692. See *People v. Davis*, 1 Wheel. C. C. (N. Y.) 230; nor of assault and battery. *State v. Going*, 9 Humph. (Tenn.) 175. Compare *Sikes v. Johnson*, 16 Mass. 389; *Bullock v. Babcock*, 3 Wend. (N. Y.) 391.

An infant between the ages of seven and fourteen is presumed to be incapable of committing crime, and the onus is on the State to prove his criminal capacity. *State v. Adams*, 76 Mo. 355; *State v. Tice*, 1 S. W. Repr. (Mo.) 269.

An infant of fourteen years is presumed incapable of committing rape, but this presumption may be rebutted by proof of puberty. *Williams v. State*, 14 Ohio, 222. See *Hiltabiddle v. State*, 35 Ohio St. 52. Compare *Com. v. Green*, 2 Pick. (Mass.) 380; *State v. Sam*, 1 Win. (N. Car.) 300; *State v. Pugh*, 7 Jones (N. Car.), 61; *People v. Randolph*, 2 Park. Cr. (N. Y.) 174.

A boy over fourteen years of age will be presumed capable of committing rape. *State v. Handy*, 4 Harr. (Del.) 566. But *contra*, if under fourteen years of age.

*Winst. (N. Car.)* 300. See *People v. Randolph*, 2 Park Cr. (N. Y.) 174.

A boy under fourteen years of age, who assists another person in an attempt to commit a rape, may be punished the same as the principal, in the first degree, if it appear, under all the circumstances of the case, that he had a "mischievous discretion." The fact that a boy eleven years and eleven months old, of "average capacity" for his age, put his hand over the mouth of a female whilst his elder brother attempted to commit a rape upon her, is not sufficient of itself for his conviction as principal in the second degree of the felony of which his elder brother had been convicted. *Law v. Commonwealth*, 75 Va. 885; s. c., 40 Am. Rep. 750.

A boy of fourteen years of age was indicted for selling liquor. He did so in the presence and by direction of his mother. *Held*, that the child's legal capacity to commit crime must be established as a distinct fact. *Com. v. Mead*, 10 Allen (Mass.), 398. See *People v. Richmond*, 29 Cal. 414; *State v. Learnard*, 41 Vt. 585.

The capacity of an infant under fourteen years of age to commit the crime of malicious trespass is a question to be determined from the facts of the case; independent evidence of such capacity is not essential. *State v. Toney*, 15 S. Car. 409.

A boy about twelve years of age was convicted of perjury. The trial judge gave no instruction as to the effect of his age on the crime. *Held* error. *Willet v. Commonwealth*, 13 Bush (Ky.), 230.

In an action for rape or carnal knowledge of a child under twelve, against a boy under fourteen, the failure of the trial court to direct the jury to consider the question whether or not the boy had at the time discretion and mind enough to know the wrongful character of the act is ground for a new trial. *Heilman v. Commonwealth*, 1. S. West n. Repr. (Ky.) 731.

On the trial of a boy of fourteen years of age for breaking in a store, an instruction which tells the jury that if appellant broke into the store, as alleged, but did so at the request of another, and, in consequence of youth or mental infirmity, he did not understand the character of the act he was committing, they should find for defendant, should have been given. *McClure v. Commonwealth*, 81 Ky. 448.

The evidence of malice, which is to supply age, must be clear and strong

### An infant is liable criminally for obtaining goods by false pre-

beyond all doubt and contradiction. *Law v. Commonwealth*, 75 Va. 885; s. c., 40 Am. Rep. 750.

An infant under the age of seven years cannot be guilty of felony; and therefore a defendant cannot justify taking such an infant into custody and taking him before a magistrate upon the ground that he had been caught stealing a piece of wood. *Marsh v. Loader*, 14 C. B. (N. S.) 535.

On the attainment of fourteen years of age, the criminal actions of infants are subject to the same modes of construction as those of the rest of society; for the law presumes them at those years to be *doli capaces*, and able to discern between good and evil, and therefore subjects them to capital punishments as much as if they were of full age. Dr. & Stu. c. 26; Co. Lit. 79, 171, 274; Dalt. 476, 505; 1 Hale, 25; Bac. Abr. Inf. A. & H. But during the interval between fourteen years and seven, an infant shall be *prima facie* deemed to be *doli incapax*, and presumed to be unacquainted with guilt; yet this presumption will diminish with the advance of the offender's years, and will depend upon the particular facts and circumstances of his case. The evidence of malice, however, which is to supply age, should be strong and clear beyond all doubt and contradiction; but if it appear to the court and jury that the offender was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. 1 Hale, 25, 27; 4 Black. Com. 23. Thus, it is said that an infant of eight years old may be guilty of murder, and shall be hanged for it. Dalt. Just. c. 147. And where an infant between eight and nine years old was indicted, and found guilty of burning two barns, and it appeared, upon examination, that he had malice, revenge, craft, and cunning, he had judgment to be hanged, and was executed accordingly. Dean's case, 1 Hale, 25 note (u).

An infant of the age of nine years, having killed an infant of the like age, confessed the felony; and, upon examination, it was found that he hid the blood and the body. The justices held that he ought to be hanged; but they respited the execution that he might have a pardon. 1 Hale, 27; F. Corone, 57; B. Corone, 133. Another infant, of the age of ten years, who had killed his companion and hid himself, was, however, actually hanged; upon the ground that it appeared by his hiding that he could discern between good and evil; and *malitia supplet aetatem*. Spigurnal's Case, 1 Hale,

26; Fitz. Rep. Corone, 118. And a girl of thirteen was burnt for killing her mistress. *Alice de Waldborough's Case*, 1 Hale, 26. Whenever a person under the age of fourteen is charged with committing a felony, the proper course is to leave the case to the jury to say whether, at the time of committing the offence, such person had guilty knowledge that he was doing wrong. *R. v. Owen*, 4 C. & P. 236; *R. v. Smith*, 1 Cox C. C. 260; *R. v. Vanplew*, 3 F. & F. 520.

In the case of rape, the law presumes that an infant under the age of fourteen years is unable to commit the crime, and therefore he cannot be guilty of it. *R. v. Groombridge*, 7 C. & P. 582. So, also, for the like reason, such an infant cannot be guilty of an assault with intent to commit a rape. *R. v. Eldershaw*, 3 C. & P. 396; *R. v. Phillips*, 8 C. & P. 736. Or of carnally knowing a girl under ten years of age. *R. v. Jordan*, 9 C. & P. 118. And this presumption cannot be rebutted, and evidence is not admissible to prove that the infant is in fact competent to commit any such offence. *R. v. Phillips*, and *R. v. Jordan*, *supra*. But this presumption is upon the ground of impotency rather than the want of discretion; for he may be a principal in the second degree, as aiding and assisting in this offence as well as in other felonies, if it appear by sufficient circumstances that he had a mischievous discretion. 1 Hale, 630.

In 1748, W. York, a boy of ten years of age, was convicted for the murder of a girl of about five years of age; but Willes, C. J., out of regard to the tender years of the prisoner, respited execution till he could take the opinion of the rest of the judges, whether it was proper to execute him or not.

The boy and girl were parish children, under the care of a parishoner; and on the day of the murder he and his wife went out to their work, and left the children in bed together. When they returned the girl was missing, and the boy being asked what was become of her, answered that he had helped her up and put on her clothes, and she had gone he knew not whither. Upon this, strict search was made for the child. During this search, the man observed that a heap of dung near the house had been newly turned up; and, upon removing the upper part of the heap, he found the body of the child about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner. Upon this discovery, the boy, who was the only person

tences.<sup>1</sup> An infant of tender years upon whose lands a nuisance is erected cannot be made criminally answerable for it.<sup>2</sup> (See also INFANCY.)

capable of committing the fact, that was left home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said that the child had been used to foul herself in bed; that she did so that morning (which was not true, for the bed was searched and found to be clean), that thereupon he took her out of the bed and carried her to the dung-heap, and with a large knife which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung-heap; placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having so done, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighboring justice of the peace, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice of the peace very prudently deferred proceeding to a commitment until the boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself; and then ordered him into a room where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession, upon which he was committed to jail. On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice of the peace; and of many declarations to the same purpose which the boy made to other people after he came to jail, and even down to the day of his trial; for he constantly told the same story in substance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confessions, he was convicted. The judges having taken time to consider this report, unanimously agreed: 1. That the declarations stated in the report were evidence proper to be left to the jury. 2. That supposing the boy to have been

guilty of this fact, there were so many circumstances stated in the report which were undoubtedly tokens of what Lord Hale calls a mischievous discretion that he was certainly a proper subject for capital punishment, and ought to suffer; for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity. That there are many crimes of the most heinous nature, such as (in the present case) the murder of young children, poisoning parents or masters, burning houses, etc., which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy of ten years old might savor of cruelty, yet, as the example of that boy's punishment might be a means of deterring other children from the like offences, and as the sparing the boy, merely on account of his age, would probably have a quite contrary tendency, in justice to the public, the law ought to take its course; unless there remained any doubt touching his guilt. In this general principle all the judges concurred; but two or three of them, out of great tenderness and caution, advised the chief judge to send another reprieve for the prisoner; suggesting that it might possibly appear, on further inquiry, that the boy had taken this matter upon himself at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice. Accordingly the chief justice granted one or two more reprieves; and desired the justice of the peace who took the boy's examination, and also some other persons, in whose prudence he could confide, to make the strictest inquiry they could into the affair, and report to him. At length he, receiving no further light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last; but, before the expiration of that reprieve, execution was respite till further order by warrant from one of the secretaries of state; and at the summer assizes, 1757, the prisoner had the benefit of His Majesty's pardon, upon condition of his entering immediately into the sea service. York's case, *Fost. 70 et seq.*

1. *People v. Kendall*, 25 Wend. (N. Y.) 399.

2. *People v. Townsend*, 3 Hill (N. Y.) 479.

## AGENCY.

**AGENCY.** (See also ATTORNEYS; AUCTIONEERS; BROKERS; COLLECTION AGENCIES; COMMERCIAL AGENTS or DRUMMERS; COMMISSION MERCHANTS or FACTORS; CORPORATIONS; MUNICIPAL CORPORATIONS; POWER OF ATTORNEY; SHIPMASTERS.)

DEFINITION, 333.

WHO MAY BE PRINCIPAL, 333.

*Legally Incompetent: Infants, Married Women, Aliens, 333.*

*Naturally Incompetent: Lunatics, Idiots, Drunkards, 334.*

*Corporations, 334.*

*Joint Principals, 334.*

WHO MAY BE AGENTS, 334.

*Adverse Interests Disqualify, 335.*

*Joint Agents, 335.*

APPOINTMENT, 336.

*Form of, 336*

*When under Seal, 337.*

*By Corporations, 338.*

*When by Parol, 339.*

*By Implication, 340.*

*Implied by Scope of Employment, 341.*

*Implied by Former Employment, 342.*

*By Direct Instructions, 343.*

*Must be Distinct, 344.*

*Parties Bound by Implication, 345.*

*Limited by Usage, 347.*

CLASSES OF AGENTS, 347.

GENERAL AND SPECIAL AGENTS, 348.

*Universal Agents, 349.*

*How Principal Bound by Acts of General Agent, 350.*

*How by Acts of Special Agent, 351.*

*Instances:*

*Power to Sell—to Collect, 355.*

*Power to Collect, 357.*

*Power to Sell—to Warrant, 358.*

*Agent to Sell may Rescind Sale, 359.*

*Power to Sell—Miscellaneous Restrictions, 359.*

*Miscellaneous Powers—Restrictions, 362.*

*Power to Sell or Issue Negotiable Paper, 362.*

*Power to Conduct Business, 363.*

*Power to Employ, 364.*

*Power to Provide Surgical Aid, 364.*

*Power to Manage Property, 365.*

*Power to Control Real Estate, 366.*

*Power to Use Principal's Credit, 366.*

*Power to Loan and Borrow, 366.*

*Power to Mortgage, 366.*

*Power to Settle, 367.*

*Power to Perform Contracts, 367.*

DUTIES OF AGENTS, 368.

*To Perform Duties Undertaken, 368.*

*To Act in Name of Principal, 368.*

DUTIES OF AGENTS—Continued.

*To Act in Person, 368.*

*Power of Substitution, 369.*

*To Obey Instructions, 369.*

*To Conform to Usage, 371.*

*To Use Ordinary Skill, 371.*

*To Make full Disclosure of Adverse Interest, 372.*

*Same Rule as to Officers of Corporations, 373.*

*Fiduciary Relations, 375.*

*Purchasing Agent may not Buy his own Property, 375.*

*Selling Agent cannot Buy himself, 375.*

*But may Buy direct from Principal, 376.*

*Agent to Buy may not Buy for himself, 378.*

*All Profits belong to Principal, 379.*

*Cannot Act for both Parties, 380.*

*Except by Consent, 381.*

*After Termination of Agency, 382.*

*Must Render Full Accounts, 382.*

*And Keep Regular Accounts, 383.*

*Demand Necessary, 383.*

*Interest on Accounts, 384.*

*To Keep Goods of Principal Separate from his Own, 384.*

SIGNATURES OF AGENTS, 385.

*Instruments under Seal, 385.*

*Signed and Sealed in Name of Principal, 386.*

*Intention appearing on Face of Instrument, 387.*

*Intention not appearing, 387.*

*Bills and Notes, 388.*

*Name of Principal appearing on Face of Instrument, 389.*

*Corporate Seal on Instrument, 390.*

*Agents in the Habit of Signing Negotiable Paper, 390.*

*Ambiguous Instruments, 391.*

*Credit of Parties whose Names appear, 391.*

*Simple Contracts, 392.*

*Agent must Sign his Name also, 393.*

SUB-AGENTS, 394.

*How are Agents Liable for Acts of Sub-agents, 394.*

*Public Agents not Liable for Acts of Sub-agents, 395.*

*Must Account to Immediate Principal, 395.*

*Look to him for Compensation, 395.*



## AGENCY.

**DUTIES OF PRINCIPAL TO AGENT,**  
*Compensation of Agent,* 396. [396.  
*Salary or Commission,* 396.  
*Del Credere Commission,* 396.  
*May be Fixed by Jury,* 397.  
*After Termination of Agency,* 397.  
*For Illegal Services,* 397.  
*When not Entitled to,* 397.  
*How when Agency Prematurely Ended,* 399.

*Agent must be Indemnified for Expenses,* 399.

**LIABILITIES OF AGENT TO THIRD PARTIES, 401.**

*Not Personally Liable when Acting in Name of Principal,* 401.

*Liable when Acting in his own Name,* 402.

*Liable when he Pledges his own Credit,* 403.

*Public Officers not Personally Liable,* 404.

*Agents for Foreign Principals,* 404.

*How for Mispaid Money,* 405.

*Liable when Contract only effective in Agent's Name,* 406.

*Not Liable for Negligence,* 406.

*Liable for Misfeasance,* 407.

*Liable when in full Control of Work done,* 407.

*Liable for Fraud and Malice,* 407.

*When in Control of Work Liable for Torts of Employees,* 408.

**RIGHTS OF AGENTS AGAINST THIRD PARTIES, 408.**

*Can Sue when Acting in Principal's Name,* 408.

*Not when Acting in his own Name,* 409.

*How when it is Doubtful who Contracted,* 409.

*Can Sue when he has an Interest,* 410.

**LIABILITIES TO THIRD PARTIES, 410.**

*Liable for all Acts of Agent,* 410.

*The Existence of Agency must be Proved,* 415.

*Principal Liable when Agent Exceeds Authority,* 415.

*And when he Contracts in his own Name,* 415.

*Not Liable when Exclusive Credit given to Agent,* 416.

*Liable for Fraud and Deceit of Agent,* 417.

*When Committed in Course of Employment,* 418.

*Liable for Negligence of Agent,* 419.

**NOTICE TO AGENT IS NOTICE TO PRINCIPAL, 419.**

**NOTICE TO AGENT IS NOTICE TO PRINCIPAL—Continued.**

*Also in Case of Corporations,* 421.

*To whom Notice must be Given for a Corporation,* 422.

*When Notice must have been Received by Agent,* 422.

*Not if Agent Colludes with Third Party,* 423.

**RIGHTS OF PRINCIPALS AGAINST THIRD PARTIES, 423.**

*May Sue on Contracts of Agents,* 423.

*His Right is Modified by Representations of Agent,* 425.

*Subject to Equities where Agent has Contracted in his own Name,* 425.

*May Recover Money Mispaid by Agent,* 427.

*May Follow his Property,* 427.

*May Sue for Torts,* 428.

**RIGHTS OF AGENT AGAINST PRINCIPAL, 428.**

*Right to Lien,* 428.

*Does not Impair Right to Sue,* 429.

**RATIFICATION, 429.**

*Has same Effect as Original Authority,* 429.

*Only Voidable Acts can be Ratified,* 430.

*Act must be done in Name of Principal,* 431.

*Principal must be in Existence when Act done,* 432.

*Must have Knowledge of all Facts,* 432.

*Must be Capable of Ratifying,* 433.

*Disavowal does not Prevent Subsequent Ratification,* 434.

*Acts of Public Officers can be Ratified,* 434.

*Ratification of Torts,* 434.

*Ratification cannot be Retracted,* 434.

*Cannot be in Part of Transaction,* 434.

*Ratification after Termination of Agency,* 435.

*Form of Ratification,* 435.

*Must Refer to Precise Act,* 436.

*May be Implied,* 437.

*Clear Intention must be Shown,* 438.

*May be Implied from Form of Action,* 439.

*Acts not Promptly Disavowed are Ratified,* 439.

*Principal must have full Knowledge of Facts,* 441.

*Acts must have been Done under Appointment,* 442.

*Slight Evidence of Ratification sometimes Sufficient,* 442.

## TERMINATION OF AGENCY, 443.

*By Agreement*, 443.

*By Act of Principal*, 444.

*Appointment under Seal Revoked by Parol*, 444.

*Revocation may be Implied*, 444.

*By Act of Agent*, 445.

*Any Naked Power Revoked*, 445.

*But not when Coupled with an Interest*, 445.

*Interest must be in Subject-matter*, 446.

*Not when Conferred for a Consideration*, 446.

*By Death of Principal*, 446.

## TERMINATION OF AGENCY — Continued.

*When does Revocation by Death take Effect*, 447.

*Revokes Power of Sub-agent*, 447.

*By Insanity of Principal*, 447.

*By Insanity of Agent*, 448.

*By Bankruptcy*, 448.

*By Marriage*, 448.

*By Dissolution of Partnership*, 448.

*Not by War*, 448.

*Revocation of Power of Agent Revokes Power of Sub-agent*, 448.

*Acts of Agent after Revocation, but before Notice Received*, 448.

1. **Definition.**—An agent is a person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified.<sup>1</sup>

2. **Who may be Principal.**—It may be laid down generally that any person *sui juris*, unless prohibited by law to which he is subject, may be a principal;<sup>2</sup> but persons who are neither naturally nor legally *sui juris* are, as a rule, incompetent to act as principals and to appoint agents.<sup>3</sup>

*Infants—Married Women—Aliens*, are legally not *sui juris* and are incompetent to appoint agents except as authorized by statute.<sup>4</sup>

1. Evans on Agency (Ewell's Ed.) 1; Sweet's Law Dict.

2. Evans on Agency (Ewell's Ed.), 11; Story on Agency, § 5.

In general, it may be stated, as a rule of the common law, that whenever a person has a power, as owner or in his own right, to do a thing he may do it by an agent. Story on Agency, § 6.

A principal cannot confer on an agent power to do that in his behalf which he himself could not do if he were personally present and acting for himself. Ferguson v. Morris, 67 Ala. 389.

3. Story on Agency, § 6; Evans on Agency (Ewell's Ed.), 12.

4. Story on Agency, § 6.

A married woman is, as a rule, incapable of appointing agents, except when empowered by statute to dispose of her separate property. She can, however, appoint her husband her agent. Walker v. Carrington, 74 Ill. 446; Vail v. Meyer, 71 Ind. 159; Griffin v. Ransdell, 71 Ind. 440; McLaren v. Hall, 26 Iowa, 297; Jones v. Smith, 121 Mass. 15; Coolidge v. Smith, 129 Mass. 554; Paine v. Farr, 118 Mass. 74; Lavassar v. Washburne, 50 Wis. 200; Wright v. Hood, 49 Wis. 235; Ready v. Bragg, 1 Head (Tenn.), 511; Martin v. Rector, 4 N. East. Repr. (N. Y.) 183; Wood v. Wood, 83 N. Y. 575; Bodine v. Killeen, 53 N. Y. 93; Rowe v. Smith, 45 N. Y. 230; Draper v.

Stouvenel, 35 N. Y. 507; Knapp v. Smith, 27 N. Y. 277; Freiberg v. Brangan, 18 Hun (N. Y.), 344; Penn v. Whiteheads, 12 Gratt. (Va.) 74; Manhattan L. I. Co. v. Smith, 5 N. East. Repr. (Ohio) 417.

A married woman, owning an equitable separate estate, may authorize her husband to manage it as her general agent; and the fact of such agency being clearly shown, the same incidents attach as in the case of any other general agency, and she is bound by his acts as any other principal would be bound. Louisville Coffin Co. v. Stokes, 78 Ala. 372.

A husband may be the agent of his wife. The declarations of a party, made at the time that she handed a deed to her husband to deliver as her agent to the grantee, are admissible in evidence as a part of the *res gesta*. Harper v. Dail, 92 N. Car. 394. See also HUSBAND AND WIFE.

Whether the appointment of an agent by an infant is an act absolutely void or one voidable is an unsettled question. The weight of authority inclines to the former proposition, as will be seen by the following cases: Fetrow v. Wiseman, 40 Ind. 148; Trueblood v. Trueblood, 8 Ind. 195; s. c., 65 Am. Dec. 756; Waples v. Hastings, 3 Harr. (Del.) 403; Carnahan v. Alderdice, 4 Harr. (Del.) 99; Bennett v. Davis, 6 Cow. (N. Y.) 393; Fonda

**Disabilities.**—Persons naturally incompetent to appoint agents are lunatics, idiots, drunkards, etc. They are wholly incapable.<sup>1</sup>

Corporations, being mere artificial creations, cannot act except through the instrumentality of an agent or attorney. They therefore must be principals.<sup>2</sup>

**Joint Principals.**—Two or more parties who have an undivided interest in the same matter may be joint principals. They must, however, concur in the appointment of an agent. One cannot act for the other except in the case of partnership matters.<sup>3</sup>

**3. Who may be Agents.**—Agents are not required to possess the same qualifications as principals, and it may be laid down as a general rule that all persons of sane mind are capable of becoming agents. Few persons, if any, are excluded from exercising a naked authority to which they are delegated. Hence infants, *femes covertes*, persons attainted, outlawed, or excommunicated, and aliens may be agents.<sup>4</sup>

*v. Van Horne*, 15 Wend. (N. Y.) 631; s. c., 30 Am Dec. 77; *Knox v. Flack*, 22 Pa. St. 337; *Armitage v. Widoe*, 36 Mich. 124; *Lawrence v. McArter*, 10 Ohio, 37; *Pyle v. Craven*, 4 Litt. (Ky.) 17; *Semple v. Morrison*, 7 T. B. Mon. (Ky.) 298; *Dexter v. Hall*, 15 Wall. (U. S.) 9. See *Vasse v. Smith*, 1 Am. Lead. Cas. 243, note.

An infant cannot have an attorney in fact; a power of attorney executed by him being absolutely void. *Glass v. Glass*, 76 Ala. 368.

Judge Story, in his work on Agency, § 6, holds that the appointment is voidable. He says: "An infant may authorize another person to do any act which is for his benefit." See *Whitney v. Dutch*, 14 Mass. 457; s. c., 7 Am. Dec. 229; *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Hastings v. Dollarhide*, 24 Cal. 195; *Hardy v. Waters*, 38 Me. 450; *Robinson v. Weeks*, 56 Me. 102; *Patterson v. Lippincott*, 47 N. J. L. 457.

But he cannot where it is to his prejudice. *Lawrence v. McArter*, 10 Ohio, 37; *Pyle v. Cravens*, 4 Litt. (Ky.) 18; *Bennett v. Davis*, 6 Cow. (N. Y.) 393; *Waples v. Hastings*, 3 Harr. (Del.) 403; *Knox v. Flack*, 10 Harr. (Pa.) 337.

For an elaborate discussion of this subject, see Ewell's Lead. Cas. on Infancy, 35, 44 *et seq.* See also INFANCY.

1. Story on Ag. § 6.

When one of the parties to a contract is of unsound mind, and the fact is unknown to the other contracting party, no advantage having been taken of the lunatic, this unsoundness of mind will not vacate a contract, especially where the contract is not merely executory but executed in whole or in part, and the par-

ties cannot be restored to their original position. *Evans on Ag.* (Ewell's Ed.) 13. See Ewell's Lead. Cas. on Insanity, 184 *et seq.*

Where a principal, after appointing an agent, became of unsound mind, and the power of the agent, being coupled with an interest or given for a consideration, was irrevocable, the insane person will still be a principal. *Matthieson Ref. Co. v. McMahon*, 38 N. J. L. 536. See INSANE PERSONS.

The contract of a man so drunk as not to know what he is doing is voidable, but may be ratified when he becomes sober. *Hamilton v. Grainger*, 5 H. & N. 40; *Matthews v. Baxter*, L. R. 8 Ex. 132.

2. Story on Agency, § 16. *Atchison, etc., R. Co. v. Reeher*, 24 Kan. 228; *Home L. Ins. Co. v. Pierce*, 75 Ill. 426; *McWilliams v. Detroit Central Mills Co.*, 31 Mich. 275.

The liability of a corporation for the acts of one who, with its assent, has controlled and sold its paper for his own benefit, is no less than that of an individual would be. *Genesee Sav. Bank v. Mich. Barge Co.*, 52 Mich. 164. See also CORPORATIONS.

3. Story on Ag., §§ 39, 40.

4. *Evans on Ag.* (Ewell's Ed.) 13; Story on Ag. § 7; *Lyon v. Kent*, 45 Ala. 656.

An infant can be an agent. *Brown v. Hartford Ins. Co.*, 117 Mass. 479. Or a wife for her husband. *Lang v. Waters*, 47 Ala. 624; *Krebs v. O'Grady*, 23 Ala. 726; s. c., 58 Am. Dec. 312; *Hopkins v. Mollinieux*, 4 Wend. (N. Y.) 465; *Fenner v. Lewis*, 10 Johns. (N. Y.) 38; *Edgerton v. Thomas*, 9 N. Y. 40; *Gaiusha v. Hitchcock*, 29 Barb. (N. Y.) 193; *Marselis v.*

**Adverse Interest.**—The only disqualification which seems to exist to prevent a person from becoming an agent is the fact that he has interests adverse to those created by the agency; or that he has already an agency which is incompatible with the new agency.<sup>1</sup> (See also DUTIES OF AGENT TO PRINCIPAL, *infra*.)

**Joint Agents.**—Two or more parties may be appointed as agents for the same matter; their authority will be joint, and they must act together, unless it is apparent from the appointment that they may act severally or by majority.<sup>2</sup>

Seaman, 21 Barb. (N. Y.) 319; Goodwin v. Kelly, 42 Barb. (N. Y.) 194; Rosenthal v. Mayhugh, 33 Ohio St. 155; White v. Oeland, 12 Rich. L. (S. Car.) 308; Nelson v. Garey, 114 Mass. 418; Meader v. Page, 39 Vt. 306; Sawyer v. Cutting, 23 Vt. 486; Felker v. Emerson, 16 Vt. 653; s. c., 42 Am. Dec. 532; Pickering v. Pickering, 6 N. H. 120; Kellogg v. Robinson, 32 Conn. 335; Stall v. Meek, 70 Pa. St. 181; McKinley v. McGregor, 3 Whart. (Pa.) 369; Butts v. Newton, 29 Wis. 632; Cantrell v. Colwell, 3 Head (Tenn.), 471; Stewart's Marr. and Div. § 174. Or for a third person in dealings with her husband. Pickering v. Pickering, 6 N. H. 124; McKinley v. McGregor, 3 Whart. (Pa.) 369; Felker v. Emerson, 16 Vt. 653.

A married woman is capable of being appointed and acting as the agent of a third person, without the consent of her husband; she may execute a power without his co-operation, and her acts as such agent impose no legal liability on him; and the knowledge or consent of the husband does not confer, by operation of law, any authority on him to do any act, in the scope of the wife's agency, so as to bind her principal. Pullam v. State, 78 Ala. 31.

A husband may act as his wife's agent, and such agency may be conferred before he acts, or his acts may be subsequently ratified. Sims v. Smith, 99 Ind. 469; Martin v. Rector, 101 N. Y. 77; Buckley v. Wells, 33 N. Y. 518; Knapp v. Smith, 27 N. Y. 277; Manhattan L. Ins. Co. v. Smith, 5 N. E. Repr. (Ohio) 417; Ready v. Bragg, 1 Head (Tenn.), 511; McLaren v. Hall, 26 Iowa, 297; Penn v. Whiteheads, 12 Gratt. (Va.) 74. See Rolling v. Bordenave, 15 La. Ann. 647; Lawrence v. Finch, 17 N. J. Eq. 234.

A father may be agent for his son, and the son for the father. Reeves v. Kelly, 30 Mich. 132; Chase v. Snow, 52 Vt. 525; Com. v. Holmes, 119 Mass. 195.

An alien enemy may be an agent in order to collect the money and preserve the property of his absent principal,

and so far has power to bind his principal. Wharton on Agency, § 16.

1. Tewksburg v. Spruance, 75 Ill. 187; Taussig v. Hart, 58 N. Y. 425; Bunker v. Mile, 30 Me. 431; Walker v. Palmer, 24 Ala. 358.

2. Salisbury v. Brisbane, 61 N. Y. 617; Hawley v. Keeler, 53 N. Y. 114; Sinclair v. Jackson, 8 Cow. (N. Y.) 543; Green v. Miller, 6 Johns. (N. Y.) 39; s. c., 5 Am. Dec. 184; Franklin v. Osgood, 14 Johns. (N. Y.) 527; (per Thompson, J.); Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180; Union Bank v. Beirne, 1 Gratt. (Va.) 226; Johnston v. Bingham, 9 W. & S. (Pa.) 56; Rollins v. Phelps, 5 Min. 463; Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 198; Sutton Parish v. Cole, 3 Pick. (Mass.) 232; Kupfer v. Augusta, 12 Mass. 189; Heard v. March, 12 Cush. (Mass.) 580; Jewett v. Alton, 7 N. H. 253; Low v. Perkins, 10 Vt. 532; s. c., 33 Am. Dec. 137; Cedar Rapids, etc., Co. v. Stewart, 25 Iowa, 115; Peter v. Beverly, 10 Pet. (U. S.) 532, 564.

In private agencies, a joint power of attorney to two or more persons cannot be executed by one of them alone; but in its execution all must act jointly. Nor can one of the agents delegate to another authority to act for him in the execution of such power. Loeb v. Drakeford, 75 Ala. 464.

This principle refers only to agents acting in private matters; when appointed by law or to transact public business a majority may act. Soens v. Racine, 10 Wis. 271; Worcester v. Railr. Comm'rs, 113 Mass. 161; Towne v. Jaquith, 6 Mass. 46; s. c., 4 Am. Dec. 84; Woolsey v. Tompkins, 23 Wend. (N. Y.) 324; Green v. Miller, 6 Johns. (N. Y.) 39; s. c., 5 Am. Dec. 184; *Ex parte* Rogers, 7 Cow. (N. Y.) 526; *Ex parte* Willcocks, 7 Cow. (N. Y.) 402; s. c., 17 Am. Dec. 525; *In re* Turnpike, 5 Binn. (Pa.) 481; Comm'rs v. Lecky, 6 S. & R. (Pa.) 166; s. c., 9 Am. Dec. 418; Caldwell v. Harrison, 11 Ala. 755; Keyser v. School Distr., 35 N. H. 477; Jewett v. Alton, 7 N. H.

**4. Appointment.**—There must be an appointment to constitute one an agent. It is a rule of law that no one can become an agent except by the will of the principal.<sup>1</sup>

**Form of Appointment.**—The appointment may be under seal, in writing, or verbal, or may be implied from the fact that a person

253; *Charles v. Hoboken*, 3 Dutch. (N. J.) 203; *Martin v. Lemon*, 26 Conn. 192; *Junkins v. School Distr.*, 39 Me. 220. *Compare Ballard v. Davis*, 31 Miss. 525; *Pulaski Co. v. Lincoln*, 4 Eng. (Ark.) 320.

Where corporations appoint a number of their own members a committee, a majority of such committee may act and bind the corporation. *Damon v. Granby*, 2 Pick. (Mass.) 345.

An agency, coupled with an interest, will survive when one of the joint agents dies, and the survivors will have power to act. *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Franklin v. Osgood*, 14 Johns. (N. Y.) 527; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543.

1. *Evans on Agency* (Ewell's Ed.), 22; *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. App. Dec. (N. Y.) 315; *McGoldrick v. Willis*, 52 N. Y. 612; *Rochester Bank v. Bentley*, 27 Minn. 87; *Gifford v. Landrine*, 37 N. J. Eq. 127; *Bericch v. Marye*, 9 Nev. 312; *Rust v. Eaton*, 24 Fed. Repr. 830.

In the absence of evidence of express appointment, of ratification, or of an estoppel, there is no sufficient evidence of agency. *Alexander v. Rollins*, 84 Mo. 657; s. c., 14 Mo. App. 109.

Agency is a fact to which a witness, having knowledge of its existence, may testify; but it cannot be proved by general reputation. *Railroad & Banking Co. v. Smith*, 76 Ala. 572.

Where one person assumes to act as the agent of another, but without authority to do so, he makes himself personally liable as a principal in the transaction. *Terwilliger v. Murphy*, 104 Ind. 32; *Simmons v. More*, 100 N. Y. 140. And to the alleged principal in case he sustains damages. *Philpot v. Taylor*, 75 Ill. 309.

A, B, and C were holders of a joint mortgage. The assignee of the mortgagor, under an order of court, exposed the mortgaged premises at sheriff's sale, where they were bought in by A in pursuance of a parol arrangement with B and C, that he should buy for their joint benefit. C being applied to by A to advance his share of the purchase-money, declined to do so. Two years afterwards A and B sold the property at an advance,

whereupon C claimed a share of the profits. *Held*, that complainant's conduct had been such as to preclude his right to the relief sought. *Yeager's Appeal*, 100 Pa. St. 88.

By the terms of the contract under which the defendant T. was to acquire a one-eighth interest in the brig C., then building by one P., the title would not pass to T. until the delivery of the brig, completed according to such contract. Before such delivery, libellant, on the order of P. who was afterwards managing owner, and who informed libellant that T. was a part owner, furnished an outfit for the vessel, which was charged to the brig and owners, and was delivered to the ship before the title passed to T. The purchase was made without the knowledge of defendant T., who afterwards paid to P. the price of his one-eighth share. T. was afterwards informed of the purchase, but not that it was made in part on his credit. The evidence left it doubtful whether the price agreed on between P. and T. for the one-eighth interest was intended to cover the outfit. *Held*, that, under the circumstances, P. had no authority to bind T. in the purchase of the outfit; that if T. was liable for the outfit it was solely to P., and subject to the state of their private accounts; that for supplies furnished subsequently T. was liable, and a reference as to these was ordered. *De Wolf v. Tupper*, 24 Fed. Repr. 289.

The will of the principal need not be expressed by direction or request. Permission to do a thing will be sufficient. *Fay v. Richmond*, 43 Vt. 25; *Williams v. Williams*, 11 Heisk. (Tenn.) 95.

Whether there is sufficient evidence of agency is a question for the jury. *Mechanics' Bank v. Nat. Bank*, 36 Md. 5; *Lamb v. Irwin*, 69 Pa. St. 436; *Whitman v. Bolling*, 47 Ga. 125; *Nichols v. Hail*, 4 Neb. 210. *Compare Gulick v. Grover*, 33 N. J. L. 463.

Where the principal in a suit brought to enforce a contract, entered into in his name by a supposed agent, denies the authority of the agent, the burden of proof to establish the agent's authority is on the party who seeks to enforce the contract. *McCarty v. Strauss*, 21 La. Ann. 592.

is placed in a situation in which, according to ordinary usage, he would be understood to represent and act for another.<sup>1</sup>

*When under Seal.*—It is a maxim of the common law that an authority to execute a deed or instrument under seal must be conferred by an instrument of equal dignity and solemnity; that is, by one under seal.<sup>2</sup>

Where a sealed instrument is delivered with blanks in an essential part; as the name of the obligee, the blank to be filled in by an agent, he must have authority under seal.<sup>3</sup>

1. Evans on Agency (Ewell's Ed.) 23.  
2. Worrall v. Munn, 5 N. Y. 229; s. c., 55 Am. Dec. 330; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 12 Wend. (N. Y.) 525; s. c., 27 Am. Dec. 151; Wells v. Evans, 20 Wend. (N. Y.) 251; Hanford v. McNair, 9 Wend. (N. Y.) 54; Wheeler v. Nevins, 34 Me. 54; Baker v. Freeman, 35 Me. 485; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205; s. c., 37 Am. Dec. 203; Emerson v. Providence Hat Mfg. Co., 12 Mass. 237; s. c., 7 Am. Dec. 66; Damon v. Granby, 2 Pick. (Mass.) 345; Banorgree v. Hovey, 5 Mass. 11; s. c., 4 Am. Dec. 17; McNaughton v. Partridge, 11 Ohio, 223; s. c., 38 Am. Dec. 731; Rowe v. Ware, 30 Ga. 278; Deumright v. Philpot, 16 Ga. 424; s. c., 60 Am. Dec. 738; Scheutze v. Bailey, 40 Mo. 69; Harshaw v. McKesson, 65 N. Car. 688; King v. Brooks, 9 Ired. L. (N. Car.) 218; Maus v. Worthing, 3 Scam. (Ill.) 26; Adams v. Power, 52 Miss. 828; Gordon v. Bulkeley, 14 S. & R. (Pa.) 331; Cooper v. Rankin, 5 Binn. (Pa.) 613; Rhode v. Louthain, 8 Blackf. (Ind.) 413; McMurtry v. Frank, 4 T. B. Monr. (Ky.) 39; Mitchell v. Sproull, 5 J. J. Marsh. (Ky.) 264; Smith v. Perry, 29 N. J. L. 74; Wagoner v. Watts, 44 N. J. L. 127; Long v. Hartwell, 34 N. J. L. 116; Cain v. Heard, 1 Coldw. (Tenn.) 163; Preston v. Hull, 23 Gratt. (Va.) 600; s. c., 14 Am. Rep. 153. Compare Phillips v. Hornsby, 70 Ala. 414; Brown v. Eaton, 21 Minn. 409; Dickerman v. Ashton, 21 Minn. 558; Peine v. Weber, 47 Ill. 41.

Where a power of attorney given for the sale of land is insufficient in itself an oral direction to sell will not help it. Allis v. Goldsmith, 22 Minn. 123.

A deed may be signed by one person for another if the deed is signed in his presence by his direction upon an oral request. McMurtry v. Brown, 6 Neb. 368; Gardner v. Gardner, 5 Cush. (Mass.) 483; s. c., 52 Am. Dec. 740; Meyer v. King, 29 La. Ann. 567.

3. Burns v. Lynde, 6 Allen (Mass.), 305; Basford v. Pearson, 9 Allen (Mass.), 387; Cross v. State Bank, 5 Ark. 525; Preston v. Hull, 23 Gratt. (Va.) 600; s. c.,

14 Am. Rep. 153; Harrison v. Tiernans, 4 Rand. (Va.) 177; Williams v. Crutcher, 5 How. (Miss.) 71; s. c., 35 Am. Dec. 422; Lamar v. Simpson, 1 Rich. Eq. (S. Car.) 71; s. c., 42 Am. Dec. 345; Boyd v. Boyd, 2 Nott. & M. (S. Car.) 125; Permynter v. McDaniel, 1 Hill (S. Car.) 267; 26 Am. Dec. 179; Pollard v. Gibbs, 55 Ga. 46; Ingram v. Little, 14 Ga. 173; s. c., 58 Am. Dec. 549; Drumright v. Philpot, 16 Ga. 424; s. c., 60 Am. Dec. 738; Gilbert v. Anthony, 1 Yerg. (Tenn.) 69; 24 Am. Dec. 439; Byers v. McClanahan, 6 Gill. & J. (Md.) 250; Ayres v. Harness, 1 Ohio, 368; s. c., 13 Am. Dec. 629; McKee v. Hicks, 2 Dev. (N. Car.) 379; Davenport v. Sleight, 2 Dev. & B. (N. Car.) 381; s. c., 31 Am. Dec. 420.

Verbal authority has, however, also been held sufficient to authorize an agent to fill up blanks in a deed. White v. Duggan, 140 Mass. 18; Woolley v. Constant, 4 Johns. (N. Y.) 54; s. c., 4 Am. Dec. 246; Exp. Kerwin, 8 Cow. (N. Y.) 118; Stahl v. Berger, 10 S. & R. (Pa.) 170; s. c., 13 Am. Dec. 666; Sigfried v. Levay, 6 S. & R. (Pa.) 308; s. c., 9 Am. Dec. 427; Wiley v. Moore, 17 S. & R. (Pa.) 438; s. c., 17 Am. Dec. 696; Ogle v. Graham, 2 Pa. 132; Burnside v. Wayman, 49 Mo. 356; Field v. Stagg, 52 Mo. 534; s. c., 14 Am. Rep. 435; Boardman v. Gore, 1 Stew. (Ala.) 517; s. c., 18 Am. Dec. 73; Vliet v. Camp, 13 Wis. 198.

Even authority implied from circumstances. Van Etta v. Evenson, 28 Wis. 33; s. c., 9 Am. Rep. 486.

A mortgagee of land executed and acknowledged an assignment in blank of the mortgage, and orally authorized his son to find a purchaser, write in the latter's name as grantee, and deliver the assignment. The son did so, the assignee not knowing that the son was acting as agent in any respect except to deliver the assignment. Held, that the assignment was valid. Phelps v. Sullivan, 140 Mass. 36.

Plaintiff sold to defendant, by deed, a lot of gravel according to specifications and profiles made by a surveyor. Blanks

**Partnership.**—In the case of partners, one partner can bind the other in the course of partnership business by an instrument under seal, without special authority under seal. The verbal or implied consent of the other partner must, however, be proved, or his ratification, if the instrument is signed without his knowledge.<sup>1</sup>

**In Equity.**—A deed signed and executed by an agent without authority under seal, although not sufficient to make a conveyance, will give an equitable title, which will bar a suit in equity to have the sale set aside.<sup>2</sup>

**Contract for Sale of Real Estate.**—Although an agent who has no power under seal can make no conveyance of real estate, he may make a valid contract for the sale under a written appointment.<sup>3</sup>

**Corporations.**—It has been formerly held that a corporation could delegate no power except under its common seal;<sup>4</sup> but this doctrine has been greatly modified, and it is now gen-

were left in the deed for the quantity of gravel and the sum to be paid; and the parties orally agreed that the surveyor should fill them up after ascertaining the quantity. *Held*, that he might do so after the delivery of the deed, and in the plaintiff's absence. *Vose v. Dolan*, 108 Mass. 155; s. c., 11 Am. Rep. 331. See ALTERATION OF WRITTEN INSTRUMENTS.

1. *Cady v. Shepherd*, 11 Pick. (Mass.) 400; s. c., 22 Am. Dec. 379; *Marsh v. Gold*, 2 Pick. (Mass.) 285; *Holbrook v. Chamberlain*, 116 Mass. 161; *Russell v. Annable*, 109 Mass. 72; s. c., 12 Am. Rep. 665; *McIntyre v. Park*, 11 Gray (Mass.), 102; s. c., 71 Am. Dec. 690; *Van Deusen v. Blum*, 18 Pick. (Mass.) 229; s. c., 29 Am. Dec. 582; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Skinner v. Dayton*, 19 Johns. 513; s. c., 10 Am. Dec. 286; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; s. c., 10 Am. Dec. 193; *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299; *Bond v. Aitkin*, 6 W. & S. (Pa.) 165; s. c., 40 Am. Dec. 550; *Drumright v. Philpot*, 16 Ga. 424; s. c., 60 Am. Dec. 738. Compare *Worrall v. Munn*, 5 N. Y. 229; s. c., 55 Am. Dec. 330. See also PARTNERSHIP.

2. *Watson v. Sherman*, 84 Ill. 263; *Ingram v. Little*, 14 Ga. 173; s. c., 58 Am. Dec. 549; *Jones v. Marks*, 47 Cal. 242.

Where a seal is not vital to the contract, and the agent has power to execute it without a seal, it operates as a simple contract although executed under seal. *Wagoner v. Watts*, 44 N. J. L. 126; *Long v. Hartwell*, 34 N. J. L. 116; *Drumright v. Philpot*, 16 Ga. 424; s. c., 60 Am. Dec. 738; *Lawrence v. Taylor*, 5

Hill (N. Y.), 113; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513; s. c., 10 Am. Dec. 286; *Evans v. Wells*, 22 Wend. (N. Y.) 324; *Everit v. Strong*, 5 Hill (N. Y.), 163; *Cady v. Shepherd*, 11 Pick. (Mass.) 400.

3. *Watson v. Sherman*, 84 Ill. 263; *Peabody v. Hoard*, 46 Ill. 242; *Baum v. Dubois*, 43 Pa. St. 260; *Lawrence v. Taylor*, 5 Hill (N. Y.), 107; *Worrall v. Munn*, 5 N. Y. 229; s. c., 55 Am. Dec. 330; *Newton v. Bronson*, 13 N. Y. 587; s. c., 67 Am. Dec. 89; *Lyon v. Pollock*, 99 U. S. 668.

A letter from a principal to his agent directing a sale of his real estate is sufficient authority to the agent to sell such property according to the terms of the writing; but if the authority is denied, and the letter is lost, its contents must be clearly proved to sustain a contract made by the agent. *Stadleman v. Fitzgerald*, 14 Neb. 290. And in some States it is not even required that this authority should be given in writing. *Dickerman v. Ashton*, 21 Minn. 538; *Brown v. Eaton*, 21 Minn. 409; *McWharter v. McMahan*, 10 Paige (N. Y.), 386; *Lawrence v. Taylor*, 5 Hill (N. Y.), 107; *Worrall v. Munn*, 5 N. Y. 229; s. c., 55 Am. Dec. 330; *Moody v. Smith*, 70 N. Y. 598; *Mortimer v. Cornwell*, 1 Hoff. Ch. (N. Y.) 351; *Riley v. Minor*, 29 Mo. 439; *Rottman v. Wasson*, 5 Kans. 552; *Long v. Hartwell*, 34 N. J. L. 116. Compare *Wallace v. McCullough*, 1 Rich. Eq. (S. Car.) 426; *Rockford, etc., R. Co. v. Shunick*, 65 Ill. 223; *Bissell v. Terry*, 69 Ill. 184.

4. *Com. Dig. Franchise*, F. 12, 13.

erally held that a corporation may appoint agents either by a written vote of its directors or by implication, unless the charter makes a different appointment obligatory.<sup>1</sup> (See also CORPORATIONS.)

*By Parol.*—Although formerly it was held that the authority to act as attorney or agent must be by deed,<sup>2</sup> it was laid down by Justice Story that the rule was the other way: that an agent or attorney may ordinarily be appointed by parol in the broad sense of that term at the common law; that is, by a verbal declaration in writing not under seal, or by acts and implications.<sup>3</sup>

1. *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738; *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64; *Clark v. Corp. of Washington*, 12 Wheat. (U. S.) 40; *Bank of Metropolis v. Guttschlick*, 14 Pet. (U. S.) 19; *Fleckner v. Bank of U. S.*, 8 Wheat. (U. S.) 338; *Bank of Columbia v. Patterson*, 7 Cranch. (U. S.) 299; *Essex Turnpike Corp. v. Collins*, 8 Mass. 292; *Bristol Savings Bank v. Keavy*, 128 Mass. 298; *Hutchins v. Byrnes*, 9 Gray (Mass.), 367; *Pusey v. N. J. W. L. R. Co.*, 14 Abb. Pr. N. S. (N. Y.) 434; *Middleton v. R. Co.*, 43 How. Pr. (N. Y.) 481; *Danforth v. Schoharie, etc., Co.*, 12 Johns. (N. Y.) 227; *Peterson v. Mayor of N. Y.*, 17 N. Y. 449; *Darst v. Gale*, 83 Ill. 136; *Rockford, etc., R. Co. v. Wilcox*, 66 Ill. 417; *Gowen Marble Co. v. Tarrant*, 73 Ill. 608; *Adams Expr. Co. v. Schlessinger*, 75 Pa. St. 246; *Kelsey v. Nat. Bank*, 69 Pa. St. 426; *Atchison, etc., R. Co. v. Reecher*, 24 Kan. 228; *Flint v. Clinton Co.*, 12 N. H. 430; *Goodwin v. Union Screw Co.*, 34 N. H. 378; *Kiley v. Forsee*, 57 Mo. 390; *Southgate v. Atlantic, etc., R. Co.*, 61 Mo. 89; *Union Mining Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 248; *Smiley v. Mayor of Chattanooga*, 6 Heisk. (Tenn.) 604; *Steel v. Solid Silver, etc., Mining Co.*, 13 Nev. 486; *Stanwood v. Laughlin*, 73 Me. 112; *Lime R. Bank v. Macomber*, 29 Me. 564; *Warren v. Ocean Ins. Co.*, 16 Me. 439; s. c., 33 Am. Dec. 674; *Swazy v. Union Mfg. Co.*, 42 Conn. 556; *Vicksburg, etc., R. Co. v. Ragsdale*, 54 Miss. 200; *LeGrand v. Hampden S. College*, 5 Munf. (Va.) 324; *The Banks v. Poitiaux*, 3 Rand. (Va.) 143; s. c., 15 Am. Dec. 706; *Union Bank v. Ridgeley*, 1 Harr. & G. (Md.) 413; *Elysville M. Co. v. Okisko Co.*, 1 Md. Ch. 392; *Ross v. City of Madison*, 1 Carter (Ind.), 281; *Garvey v. Colcock*, 1 Nott & McC. (S. Car.) 231; *Buncombe Turnpike Co. v. McCarron*, 1 Dev. & B. (S. Car.) 306; *Petrie v. Wright*, 6 S. & M. (Miss.) 647; *Baptist Church v. Mulford*, 3 Halst. (N. J.) 182; *Merrick v. Burlington Co.*, 11 Iowa, 75; *Waller v. Bank*

of Ky., 3 J. J. Marsh. (Ky.) 201; *Lee v. Flemingsburg*, 7 Dana (Ky.) 28; *Muir v. Canal Co.*, 8 Dana (Ky.) 161; *Poultney v. Wells*, 1 Aiken (Vt.), 180; *Sheldon v. Fairfax*, 21 Vt. 102; *San Antonio v. Lewis*, 9 Tex. 69.

The authority of a corporation or its officers to issue its promissory note need not be expressly given by its by-laws, or by formal resolution of the board of directors. Such authority can be inferred from the acquiescence of the corporation in, or the recognition by it of, the acts of its accredited officers in the regular course of its authorized business. *First Nat. Bank v. North Miss. Coal, etc., Co.*, 86 Mo. 125.

The authority to appoint an agent need not be specifically mentioned in the charter. *Kitchen v. Cape Girardeau R. Co.*, 59 Mo. 514; *Old Colony R. Co. v. Evans*, 6 Gray (Mass.), 25; s. c., 66 Am. Dec. 394.

The appointment of an agent by or for a corporation, as by a natural person, may be implied from a confirmation of his acts, or an acceptance of his services without objection; and after such confirmation, or acceptance, the corporation cannot evade payment for his services by denying the validity of his appointment. *Ala. Gr. So. R. Co. v. Hill*, 76 Ala. 303; *Reynolds v. Collins*, 78 Ala. 94.

A contract between two corporations will not be void for lack of seals; but a court of equity will, if necessary, compel the parties to affix their seals. *Missouri, etc., R. Co. v. Miami Co.*, 12 Kans. 482. See CORPORATIONS.

2. *Bac. Abr.*, Authority A.

3. *Story on Ag.* § 47. *Doty v. Wilder*, 15 Ill. 407; s. c., 60 Am. Dec. 756; *Equitable, etc., Co. v. Baltimore, etc., Co.*, 2 Cent. Repr. (Md.) 863; *Brooks v. Jameson*, 55 Mo. 505; *Rice v. Groffmann*, 56 Mo. 434; *Cook v. State Bank*, 52 N. Y. 96; s. c., 11 Am. Rep. 667; *Pickett v. Pearsons*, 17 Vt. 470; *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 125.



*By Implication.*—So it can in general be said that the manner in which a party treats one who apparently acts as his agent, and holds him up before third parties, will be a sufficient implication of agency.<sup>1</sup>

An agent for the payment of taxes may be appointed by parol. *Paris v. Lewis*, 85 Ill. 597.

1. *South, etc., Ala. R. Co. v. Henlein*, 52 Ala. 606; *Shaffer v. Sawyer*, 123 Mass. 204; *Hull v. Jones*, 69 Mo. 587; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455; *Columbia, etc., Bridge Co. v. Geisse*, 38 N. J. L. 39; *Haughton v. Maurer*, 55 Mich. 323; *Lovell v. Williams*, 125 Mass. 439; *Rice v. Groffmann*, 56 Mo. 434; *Brooks v. Jameson*, 55 Mo. 505; *Engh v. Greendaum*, 4 Th. & C. (N. Y.) 426.

Agency is generally a mere question of fact. *Roberts v. Pepple*, 55 Mich. 367.

The question of agency is one of fact to be determined from the evidence in a case. Therefore, where a correspondent of the C. Banking Co., who had advertised money to loan, in filling out an application for a loan stated therein that the applicant employed him and the C. Banking Co. to negotiate a loan for him, *held*, that the applicant was not estopped from showing that the correspondent was the agent of the C. Banking Co. *New Engl., etc., Sec. Co. v. Addison*, 15 Neb. 335.

Agency, as a question of fact, may be proved by the acts, declarations, or conduct of the principal and agent, although the agent was appointed by power of attorney. *Columbia D. B. Co. v. Geisse*, 38 N. J. L. 39.

Agency will be implied where one party accepts the benefits resulting from the transactions of another party ostensibly acting as his agent. *Milligan v. Davis*, 49 Iowa, 126; *Veazie v. Williams*, 8 How. (U. S.) 134; *Foster v. Swasey*, 2 W. & M. (U. S.) 217; *Hatch v. Taylor*, 10 N. H. 538; *Fouch v. Wilson*, 59 Ind. 93.

A mortgagor conveys a stock of goods on hand, and any other goods he may buy to replenish the stock, with power of sale if the debt is not paid by a certain time. *Held*, that by accepting the deed the mortgagee assented to its provisions—to the mortgagor's continuing the business, with the right to sell and replenish the stock, and constituting him an agent for that purpose. *Bynum v. Miller*, 89 N. Car. 393.

Where a son acts for his father in procuring a mortgage, undertakes the whole negotiation, decides upon the security, satisfies himself as to the title, attends to

the execution of the papers, receives the money from his father and pays it over to the mortgagor,—in short, does everything an agent could do, and his father accepts the benefits of the transaction, the son may properly be regarded as his father's agent, in spite of his testimony to the contrary, especially if he admits being his agent just before and just after these acts; it is idle, under such circumstances, for him to claim to have been agent for the person giving the mortgage. *Matteson v. Blackmer*, 46 Mich. 393.

A contract between a hotel company and the manager of the hotel was treated by the parties as a lease, and provided that the manager should take the hotel from July, 1883, to April, 1884, and pay the company twenty per cent of the gross results of the whole business, after deducting \$200 per month for his services. *Held*, that the company would be liable, notwithstanding the character of the contract, if the company, in its relations with one furnishing supplies for the hotel, treated him as its agent for their procurement; otherwise the company was not liable. *Freiberg v. B. H. & S. I. Co.*, 63 Tex. 449; *Beecher v. Venn*, 35 Mich. 466.

Plaintiff sold one Y. a tract of land, the title to which was in doubt. By an instrument under seal, to which defendant was no party and in which he was not named, plaintiff agreed to use diligence in perfecting the title and to have it vested in Y., and thereupon Y. was to pay one half of the purchase-money, the other half being paid in cash. In making the purchase Y. was acting as agent of defendant, and he immediately assigned the contract to defendant, who took possession. Defendant had furnished the money for the cash payment. Plaintiff subsequently aided in perfecting the title, and the same was finally vested in defendant. *Held*, that though plaintiff could not maintain an action against defendant on the contract, because it was under seal and defendant was no party to it and was not named in it, yet he could sue on the implied obligation growing out of all the facts stated. *Moore v. Granby M. & S. Co.*, 80 Mo. 86.

As a general rule, the fact of agency cannot be established by proof of the acts of the professed agent, in the absence of evidence tending to show the principal's

**Scope of Employment.**—The appointment may be inferred from the scope of the alleged agent's employment.<sup>1</sup>

knowledge of such acts, or assent to them; yet, where the acts are of such character, and so continuous, as to justify a reasonable inference that the principal had knowledge of them, and would not have permitted them if unauthorized, the acts themselves are competent evidence of the agency. *Reynolds v. Collins*, 78 Ala. 94; *Proctor v. Tows*, 115 Ill. 138.

If A purchases B's stock in trade at sheriff's sale and B continues business as agent without disclosing his principal, it was held that it may be presumed that B was A's agent. *Hansell v. Levy*, 5 Del. 407.

Where a person acts openly and publicly as the agent of a corporation, and in such capacity employed a party to perform certain work, and the work when completed was appropriated and used by the corporation, and the work was done with the knowledge of its agents, *held*, that the agency and authority of such person so permitted to act must be presumed. *Rockford, etc., R. Co. v. Wilcox*, 66 Ill. 417; *Singer, etc., Co. v. Holdfodt*, 86 Ill. 455; s. c., 29 Am. Rep. 43; *Franklin v. Globe, etc., Ins. Co.*, 52 Mo. 461; *Ketchum v. Verdell*, 42 Ga. 534; *Bank v. Dandridge*, 12 Wheat. (U. S.) 64.

A single act of an assumed agent, and a single recognition of his authority by the principal, may be sufficient to prove the agency. *Wilcox v. Chicago, etc., R. Co.*, 24 Minn. 269.

But authority to do a certain act cannot be implied from the fact that another act of an entirely different character done by the agent in the name of the principal was assented to. *Humphrey v. Havens*, 12 Minn. 298.

The allowance of a commission to one who solicits orders for sales effected through such orders does not make him an agent with authority to make an absolute sale. *Clough v. Whitcomb*, 105 Mass. 482.

Where the agent has the possession of a promissory note after due, it may be inferred that he has authority to receive payment of it, but the burden is on the debtor who makes payment to the agent, relying upon such inference, to show that the promissory note was in his possession when the payment was made. *Stiger v. Bent*, 111 Ill. 328; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Haines v. Pohlmann*, 25 N. J. Eq. 179; *Smith v. Kidd*, 68 N. Y. 130; *Adams v. Humphreys*, 54 Ga. 496; *Doubleday v. Kress*, 60 Barb.

N. Y. 181; *Jones on Mortgages*, 2d ed., sec. 964.

The fact that the note was neither surrendered nor offered to be surrendered, under the circumstances, is conclusive evidence that he did not then have it. *Lucas v. Harris*, 20 Ill. 165; *Mayo v. Moore*, 28 Ill. 428; *Keohane v. Smith*, 97 Ill. 156; *Stiger v. Bent*, 111 Ill. 328; *Draper v. Rice*, 56 Iowa, 114; s. c., 41 Am. Rep. 88; *Guilford v. Stacer*, 53 Ga. 618.

Debtor paying one not possessing the note or evidence of the debt assumes the risk of the authority of the payee to collect the money. *Wooding v. Bradley*, 76 Va. 614.

1. *Adams Mining Co. v. Senter*, 26 Mich. 73; *Atlantic, etc., R. Co. v. Reisner*, 18 Kans. 458; *Elsner v. State*, 30 Tex. 524; *Leake v. Sutherland*, 25 Ark. 219; *Gallup v. Lederer*, 3 Th. & C. (N. Y.) 710; *Whelan v. Reilly*, 61 Mo. 565; *Noble v. Nugent*, 89 Ill. 522; *Thurber v. Anderson*, 88 Ill. 167; *Starring v. Mason*, 4 Neb. 367.

Where the travelling salesman of a corporation has power to make a contract in its name, take payments thereon, receive a bond for its fulfilment, and settle with the other party to the contract, his agency is sufficiently established to charge the corporation with notice of what was said and done in respect to liability on the bond at the time of the settlement. *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 386.

Where an agent of a banking firm is authorized to certify the checks of drawers with sufficient funds, the fact that he transgresses his authority and certifies checks where the drawer has no funds will not relieve the bank from responsibility to an innocent holder. In a suit by a *bona-fide* holder of a certified check against the bank, the authority of an assistant teller of the bank to certify checks as "good" may be shown by evidence of a course of dealing as between himself, his principals, and the bank customers. *Semble*, that such authority could not be shown by evidence of a general custom of banks to authorize such agents to pledge the credit of the bank by certifying checks. *Hill v. Nat. Trust Co.*, 108 Pa. St. 1.

A debtor applied to an agent of his creditor for an extension of the time of payment or a renewal of the loan, the creditor being a non-resident corporation, and the agent a resident of the State, acting generally for the creditor as to loans in this State. At the first inter-

*Former Employment.*—Agency cannot be implied from a former employment in the same capacity without further proof.<sup>1</sup>

view the agent stated to the debtor that he would communicate with the home office in regard to the proposition made, and afterward such agent, in another interview, said he was ready to enter into the arrangement that was thereupon made. *Held*, that from these facts the debtor might properly infer that the agent received the principal's sanction for entering into the arrangement he made, and that the debtor was justified in his reliance upon the agent's authority to make it. *Union Mut. L. Ins. Co. v. Slee*, 110 Ill. 35.

Where a person employs the cashier of a bank to purchase certain railroad-aid bonds for him, the cashier is his agent in the purchase of the bonds; but when the bonds are deposited as a special deposit he ceases to be agent of the purchaser and becomes agent of the bank; and, if he afterwards embezzles the funds of the bank, and, to hide his embezzlement, takes the bonds from the special deposit and places them among and reports them as assets of the bank, the depositor may recover their value from the bank. *First National Bank of Monmouth v. Dunbar*, 6 Western Repr. (Ill.) 530.

Where a party contracted to pay a certain price for cars to carry four hundred head of cattle, and delivered a part and signed a contract restricting the liability of the company, it will be presumed that other persons, who delivered the remainder of the cattle, acted as his agents, and had authority to sign similar contracts. *Illinois, etc., R. Co. v. Morrison*, 19 Ill. 136.

To establish a retail store in a place from twenty to thirty miles away from the owner's residence, place a clerk or agent in the sole charge of it, the owner only visiting such store or the town where it is situated once a month, and sometimes only once in two or three months, is to hold out such clerk or agent as not only authorized to sell goods at retail, but also to keep the stock replenished by purchases according to the usual course of business. *White v. Leighton*, 15 Neb. 424; *Gilbraith v. Lineberger*, 69 N. Car. 145; *Darst v. Slevins*, 2 Disney (Ohio), 473.

A traveller, when he goes to a hotel at night and finds a clerk in charge of the office, assigning rooms, etc., has the right to assume that such clerk represents the proprietor and has authority to take charge of money which may be handed him by a guest for safe-keeping. *Curtis v. Murphy*, 63 Wis. 4.

Where a defendant intimated to the plaintiff that a certain man was his agent, and such person was known by the plaintiff to have, at or about the time of plaintiff's negotiations with him, transacted similar business with other parties for the defendant, the plaintiff will be justified in inferring that such man is an agent, and any contract entered into within the scope of his supposed agency will be binding on the defendant. *Thompson v. Clay*, 27 N. W. Repr. (Mich.) 699.

Where an agent who usually passed upon the validity of drafts drawn against his principals, and was conversant with the business of his principals, represented that a certain draft was for a legitimate expense of the firm, and was genuine, the principals are bound by his statements, although the draft prove a forgery. *Western Min. Co. v. Toole*, 11 Pac. Repr. (Ariz.) 119.

On the issue whether the defendant had, by a salesman, made a certain contract with the plaintiff, there was evidence that the salesman had authority to make such a contract, and that the plaintiff wrote to the defendant stating that such a contract was made, to which the only reply received was a letter written by the salesman on the letter-paper of the defendant, to which the defendant's name was signed by the salesman, admitting the contract to be as the plaintiff contended it was. *Held*, that the jury might properly infer that the salesman had authority to write the letter. *Thomas v. Wells*, 140 Mass. 517.

An agent who has been in the habit of indorsing his principal's name on notes will be presumed to have the power. *Weaver v. Ogletree*, 39 Ga. 586. See *Friedlander v. Cornell*, 45 Tex. 585.

Plaintiff owned sight drafts drawn on defendant P., who had authority to receive payment for them, indorsed them for deposit in the Broadway National Bank, and gave them to the office boy to deposit. The boy took the drafts to the defendant and received the money for them, which he handed to P., who appropriated it. *Held*, that the payment was valid. *Johnson v. Donnell*, 90 N. Y. 1. See *Doubleday v. Kress*, 60 Barb. (N. Y.) 181; *Guilford v. Stacer*, 53 Ga. 618; *Stiger v. Bent*, 111 Ill. 328.

1. *Cobb v. Hall*, 49 Iowa, 366; *Fisher v. Schiller lodge*, 50 Iowa, 459; *Greene v. Hinkley*, 52 Iowa, 633; *Alabama Gr. S. R. Co. v. Roebuck*, 76 Ala. 277; *Ishell v. Brinkman*, 70 Ind. 118; *Campbell v. Murray*, 62 Ga. 86; *People v. North Ameri-*

*Direct Instructions.*—An agency may be constituted by direct instructions.<sup>1</sup>

ca Bank, 75 N. Y. 547; *Kent v. Tyson*, 20 N. H. 121; *Reed v. Baggott*, 5 Ill. App. 257; *Danahar v. Garlock*, 33 Mich. 295. See *Gano v. Chicago, etc., R. Co.*, 49 Wis. 57.

Plaintiff authorized K. & B., insurance brokers, to procure insurance on certain property for a sum specified; they procured a policy from defendant, which was delivered to plaintiff; it contained a clause giving the company the right to terminate the insurance "on giving notice to that effect." Defendant directed its agents to cancel the policy; they notified K. & B. of this fact, and arranged with them to issue a policy in another company to take the place of defendant's policy. K. & B. agreed to procure said policy from defendant, and thereupon defendant's agent wrote a policy in another company. Plaintiff had no knowledge or information as to this arrangement until after a loss, and had the original policy in his possession. *Held*, that the notice to K. & B. was not notice to plaintiff, and the transaction did not operate as a cancellation of defendant's policy. A clause in the policy declared that any person other than the assured procuring the policy should be deemed an agent of the assured, not of the company, "in any transaction relating to this insurance." *Held*, that this did not constitute K. & B. continuing agents, or make the notice to them binding upon plaintiff. *Hermann v. Niagara Ins. Co.*, 100 N. Y. 411.

A wife having authorized her husband to collect moneys due her at different times, and in one or two instances to use the money to pay his own debts, does not thereby constitute him her general agent so as to enable him to bind her in a special manner by acts beyond the authority given him. *Brooke v. Barnes*, 1 Mackey (D. C.), 5.

1. W. S. W. procured several fire-insurance policies, which were issued to him, losses, if any, to be paid to W. Bros., a firm composed of W. S. W., J. W., and A. W.; N. was his agent to procure the policies. After insurance a company issuing one of the policies notified N. that it desired to cancel the policy, and sent him a policy for same amount and similar provisions on another company to be substituted. N. saw A. W., who assented to the substituted policy. Loss occurred before he saw W. S. W., and before the policy was delivered. Afterwards substituted policy was delivered and original policy surrendered. *Held*, the sub-

stituted company was liable, as the assent by one of the beneficiaries and partners was sufficient. And *held* further, that N., as to the substitution, was the agent of the company, and it was estopped to deny its liability. *Whiteman Bros. v. Insurance Company*, 14 Lea (Tenn.), 327.

The defendant having a claim against S. & S., and knowing them to be insolvent, authorized them to buy wool, expressly agreeing to furnish the money to pay for it, the wool to be consigned to defendant, who was to sell the same, and after deducting expenses, commissions, and cost, credit S. & S. with the balance. Accordingly, S. & S. bought wool from the plaintiffs and their assignors, who supposed that they were dealing with S. & S. alone. The defendant received and sold the wool, and without paying for the same, credited S. & S. on their indebtedness with the net proceeds, but without deducting the cost. *Held*, that the facts constituted an agency in S. & S. sufficient to charge the defendant. *Thomas v. Moody*, 57 Cal. 215.

Where the owner of a slave called with her on an auctioneer and requested him to sell her, and was told to call in the morning, there being no more sales that night; and the slave called in the morning alone, stating that she came to be sold, and he sold her; *held*, that he was authorized to do so, although the owner had in fact no intention to sell, but merely to frighten her. *Morgan v. Darragh*, 39 Tex. 171.

The owner of real estate situated in Kansas City, in this State, wrote from Chicago, Ill., where he resided, to his agent at Kansas City, in terms as follows: "Your letter received last night; I will leave the sale of the lots pretty much with you; if the party, or any one, is willing to pay sixty dollars per foot, one third cash and balance one and two years, interest seven per cent per annum, and pay commission of sale, I think I am willing to have you make out a deed and I will perfect it; I think you have the deeds to those lots, have you not? If you think better to try spring market, hold till then; the party buying may want the abstract in full, which I believe I have at Rockford, and will sell much less than cost. The above price is only for the present. . . . It is understood that if I pay the taxes now due, that hereafter I am relieved from any taxes." *Held*, that the letter authorized the agent to make a

*Facts must be Distinct.*—The facts from which an agency may be implied must, however, be sufficiently distinct to leave no doubt about the intention of the party appointing.<sup>1</sup>

contract for the present sale of the lots. *Smith v. Allen*, 86 Mo. 178.

1. *Fisher v. Moyer*, 4 Atl. Repr. (Pa.) 64; *Hood v. Adams*, 128 Mass. 207.

At the trial of an action upon a guaranty of the soundness of goods sold, it appeared that the written guaranty upon which the plaintiff relied had been altered after it was signed by the defendant. The plaintiff contended that it was altered by the defendant in his office; and the defendant denied that it was altered by him or by his authority. The plaintiff introduced a witness, who testified that A. brought the defendant's bill into a store where the plaintiff then was; that a roll of bills was given to A.; and that A. and the plaintiff went out of the store together. The plaintiff then offered to show by this witness that the plaintiff found fault with the terms of the guaranty; and that A. said that "he was authorized by the defendant to say, if it was not right, to return it to him, and that he would make it satisfactory." The judge excluded the evidence offered, upon the ground that there was no evidence that A. had any authority from the defendant to receive or make such statements. *Held*, that the plaintiff had no ground of exception. *Bowker v. De-long*, 141 Mass. 315.

A travelling salesman had in his possession a horse belonging to his principals, and used it in their business. His principals wrote him that they should charge him with the horse unless he paid for it, or returned it to them, and accounted for his sales. He did not pay for it, or return, or account, but sold the horse, showing the purchaser the letter. *Held*, that the letter was not a proposition of sale, and the purchasers got no title. *Calhoun v. Thompson*, 56 Ala. 166; s. c., 28 Am. Rep. 754.

A book-keeper has no authority as such to make his employer liable for the debts of a third person. *Ruppe v. Edwards*, 52 Mich. 411.

The fact that a house was built upon land of a married woman, and that, while it was in course of construction, she made suggestions in regard to certain alterations, and once paid the contractors on account, does not operate to make her a principal in the matter, where it appears that the house was being built for a son by the husband, and that he selected the site, employed the

contractors, and paid for the house out of his own money; and that, in doing so, he was acting under his authority as husband, and that the money paid by the wife was gotten from his store, and paid in his absence. *Conway v. Crook*, 7 Atl. Repr. (Md.) 402.

In an action for money lent, the following facts appeared: The pastor of a Roman Catholic church borrowed money of the plaintiff, for the use of the church, upon a written contract of repayment, in the form of a deposit-book in the name of the church. The church had no corporate existence, and was incapable of making a contract. The money borrowed was mingled with the revenues of the church; and from the fund thus constituted the ordinary expenses of the church and sums due other similar depositors were paid, and payments were made for real estate. The defendant was the bishop of the diocese in which this church was situated, and held the legal title to all the real estate of the church. It was his duty not to permit priests to contract debts in the name or for the sake of a church without written permission. He knew that the pastor of the church in question was doing a banking business, and did not stop it, though he had the power to do so. He also knew of the manner in which the money received from depositors was mingled with the other funds of the church. Shortly before the death of a pastor of the church, the defendant received from him a large sum of money to meet the claims of depositors; and this sum was turned over to the successor of said pastor for the benefit of depositors. The defendant also raised money upon mortgages of the church property and upon his own unsecured notes for the same purpose; and subsequently transferred the real estate of the church to an ecclesiastical corporation, which afterwards became insolvent. The defendant testified, and his testimony was the only evidence in the case on the question of what the canon law was, that, under the canon law, the bishop has full power in the management of church affairs; that the diocese is the parish, and the bishop the universal parish priest; that all power possessed by priests is delegated from the bishop; that the clergyman in charge of a church has charge of all its temporalities; that it belongs to such pastor to

*Parties Bound by Implication.*—Where facts exist sufficient to

make all contracts relating to the temporal affairs of the church, and he is not the agent or servant of the bishop in such matters; that the only control of the bishop over the pastor is by ecclesiastical discipline. *Held*, a verdict for the plaintiff could not, upon this evidence, be sustained, as the pastor could not be considered to be the agent of the bishop. *Leahey v. Williams*, 141 Mass. 345.

Leaving a subscription-list with a party does not constitute an agent with power to collect the money. *Antram v. Thorndell*, 74 Pa. St. 442.

Where one was requested by the owner of a piece of property to ascertain the amount of taxes due on it, he was not held to be the agent of the owner so as to be guilty of fraud when afterward he bought the land for less than its actual value. *Collar v. Ford*, 45 Iowa, 331.

The fact that the maker of a note, at the mutual desire and request of the proposed payee and surety, takes it to obtain the signature of an additional surety, does not constitute him the agent of such payee. *Hunter v. Fitzmaurice*, 102 Ind. 449.

Where the only evidence to show an agency was that some money belonging to the alleged principal had been paid to the party sought to be proved an agent, and the alleged agent had done sundry acts of kindness for the alleged principal, *held*, no evidence to create an agency. *Fortescue v. Makeley*, 92 N. Car. 56.

A written instrument, signed only by a railroad company, by which, in consideration of a promise by the owner of lands to convey to it a right of way through his lands, the company binds itself to establish a station or depot at or near a named road-crossing, and to appoint him agent for said station, to continue him as such so long as he faithfully discharged the duties of the agency, and to pay him a salary as agent of \$30 per month, should the business of the station justify the same, does not, of itself, constitute him an agent of the railroad company at said station on the completion of the road. *Evans v. Cincinnati, etc., R. Co.*, 78 Ala. 341.

A delivery by a wife to her husband of a check payable to the order of a third person does not necessarily constitute the husband the agent of the wife to receive the amount of the check. A husband having a check in his possession, which had been delivered to him by his wife, and which was signed by her and was payable to the order of a third per-

son, said to this person that the wife had given it to him (the husband), and he wanted it cashed. The third person gave the husband the amount of the check, and collected the money from the bank. *Held*, in an action by the wife against the third person, for money had and received, that the statement of the husband was not evidence against the wife, either that the check was a gift to the husband, or that he was authorized to receive the proceeds of it. *Hunt v. Poole*, 139 Mass. 224.

The relation of landlord and tenant does not imply an agency. The tenant is not *per se* the agent of the landlord. *White v. Montgomery*, 58 Ga. 204.

Neither is the debtor the agent of the creditor in procuring security according to the creditor's directions. *Campbell v. Murray*, 62 Ga. 86.

The relation of agency does not exist between joint-debtors arising from community of interest; their community of interest is confined to the payment of the debt. *Walter v. Kraft*, 23 S. Car. 578.

Nor does it *per se* exist between father and son. *Ritch v. Smith*, 82 N. Y. 627; *McNamara v. McNamara*, 62 Ga. 200.

Defendant, a corporation, had a general agent who induced a number of citizens of S. to form an association which was known as a local board, the object of which was to procure applications to defendant for life insurance and loans of money. Each member of the board was insured in the company, and it was one of its rules that it would loan money only to persons who were insured with it. The board had a secretary who transacted all its business. D. was vice-president of the plaintiff corporation. He was also secretary of said local board. During the time he acted as such secretary he assisted in conducting plaintiff's business, and received a salary from it. The compensation as secretary was such fees as were charged for insurance and loans of money, and these sums were paid over to plaintiff. The president of the plaintiff company was also a member of the local board. In Nov. 1876 one T. made application for a policy of insurance and a loan of \$300, which he proposed to secure by a mortgage on the land in question. D. received this application and forwarded it to defendant, and with it he sent an abstract of the title of the land, which was given by plaintiff, it being part of its business to furnish abstracts of title. T.'s application was accepted. This mort-

imply the relation of principal and agent, the parties are bound by them.<sup>1</sup>

gage was foreclosed in 1877, and the premises were sold, defendant being the purchaser, and in Dec. 1878 it obtained a sheriff's deed therefor. Indorsed on the abstract of title given by plaintiff at the time the loan was made was the certificate of the county treasurer to the effect that there were no taxes due and unpaid upon the land at the time the certificate was signed, which was Nov. 20, 1876. The taxes for that year, however, had not been paid. In Oct. 1877 the land was sold therefor, and plaintiff was the purchaser, and in Nov. 1880 it obtained a tax deed of the land. *Held*, that while plaintiff's cashier was, in his personal capacity, and not as cashier, defendant's agent, plaintiff was not such agent, there being no proof of an express contract of agency on its part, nor of any circumstance from which such contract could be presumed or implied. *Storm Lake Bank v. Mo. Valley L. Ins. Co.*, 66 Iowa, 617.

The owner of a mortgaged farm traded it for another, the purchaser assuming the mortgage. It was understood, however, that if the amount due upon it should vary either way from \$3300 the difference should be paid by one party to the other. The vendor advanced fifty dollars to cover a possible excess which the purchaser might have to pay. The parties had a meeting with the mortgagee's agent, and the amount due was roughly estimated at \$3302.42. The agent afterwards found that this reckoning was wrong, and that the amount should have been \$3357.38. The difference, if any, between the excess and the fifty dollars was to be returned to the vendor, and he sued the purchaser for all but \$2.42, on the ground that the estimate fixed the excess to be paid. *Held*, that in the absence of any showing by plaintiff that the difference between the two sums had been remitted by the mortgagee, or that her agent had authority to remit it, or that there was any consideration for so doing, the action would not lie. *Baird v. Randall*, 58 Mich. 175.

The word "sell" in a power of attorney to "sell or lease any and all real estate" was held to give ample power to execute a deed of conveyance. *Hemstreet v. Burdick*, 90 Ill. 444.

The execution of a simple power of attorney, without words of conveyance, but authorizing a conveyance to be made upon certain conditions and for certain purposes, vests no interest in the benefi-

ary. *Sharp v. Brenneman*, 41 Iowa, 251. See *Bossean v. O'Brien*, 4 Biss. (U. S.) 395; *Treat v. Celis*, 41 Cal. 202.

The mortgagee of a stock of goods signed at the foot of the mortgage a memorandum, whereby he appointed the mortgagor his agent to sell and dispose of and replace the stock. *Held* not to make the mortgagor an agent of the mortgagee for the purchase and sale of goods, but to be merely a waiver of the right to take possession. *Barrett v. Franklin*, 14 R. I. 241.

In an action upon an account for merchandise sold, where it is sought to connect the defendant with the purchaser of the goods by showing by circumstantial evidence that the latter acted as defendant's partner and general agent and clerk, and that he ordered other goods and signed defendant's name to notes, and managed mills and threshing-machines for defendant, it is error to admit in evidence, to show that defendant bought the goods or ordered them to be bought for him, notes given by defendant to other parties, and notes made by other parties to strangers, and an interplea by defendant, claiming a threshing-machine and its earnings, in a suit between the purchaser of the goods and a third party. *Field v. Stubblefield*, 85 Mo. 199.

A denial by an alleged principal of the existence of any agency operates to destroy any previous implication. Circumstances establishing the former implication serve then only to explain the import of his answer. *Norton v. Richmond*, 93 Ill. 367.

1. Where a contract was made between two parties, whereby the first party was to purchase corn with money to be furnished by the second party, the corn to be the property of the second party, and the cribs containing the same to be marked with his name; and the corn was to be sold by the second party, who was to retain out of the proceeds the amount of the original purchase-money, with interest at eight per cent, and one cent per bushel upon the corn so handled, all of which the first party was to guarantee to the second party, and to have the residue of the proceeds as compensation for his services, *held* that under the contract the first party became the agent of the second party, and that the money advanced to him under the contract was not in the nature of a loan. *Van Sandt v. Dows*, 63 Iowa, 594.

*Usual Course of Business.*—An implied authority is limited by the usual course of dealing as respects the particular agency, or agencies of that character in general.<sup>1</sup>

**5. Classes of Agents.**—According to the nature and extent of the authority delegated to them, and the end sought to be accomplished by their appointment, agents are divided into several classes, and their duties and liabilities vary with the extent of the authority conferred and the objects for which they are appointed. According to the character of their employment and the object of their appointment they are called *brokers*—viz., stock brokers, exchange and money brokers, real-estate and insurance brokers, ship brokers, merchandise brokers, etc.;<sup>2</sup> *auctioneers*;<sup>3</sup> *commission agents* or *factors*;<sup>4</sup> *commercial travellers* or *drummers*;<sup>5</sup>

S. was appointed by B. his agent for the sale of harvesters. S. was to pay part in cash and part in notes at the delivery of the machines to him. The cash paid by S. was to be deducted from the cash received for sales, and his notes to be taken up in exchange for notes given by customers to the order of B. *Held*, that the relation of principal and agent existed between B. and S., and that the transactions were not conditional sales, and that S. was entitled to credit on his notes for the value of machines recovered from a party to whom S. had fraudulently sold them. *Bayliss v. Davis*, 47 Iowa, 340.

1. *Jones v. Warner*, 11 Conn. 48; *U. S. Life Ins. Co. v. Advance Co.*, 80 Ill. 549.

2. A broker is one who is engaged for others in negotiating contracts relative to property with the custody of which he has no concern. One who negotiates sales of grain or produce of others, without having its possession, is a produce or grain broker; and one who negotiates for the sale of lands of others is a real-estate broker. *Braun v. Chicago*, 5 Am. & Eng. Corp. Cas. 298; s. c., 110 Ill. 186; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378; *Barnard v. Monnot*, 34 Barb. (N. Y.) 90; *Wylie v. Mar. Nat. Bank*, 61 N. Y. 415; *Keys v. Johnson*, 68 Pa. St. 42; *U. S. v. Simons*, 1 Abb. (U. S.) 470. See **BROKERS**.

3. An auctioneer is to a certain extent a broker. He may, however, not buy, but only sell, and that not at private sale but only at a public auction. He is the agent of both the buyer and the seller. *Story on Agency*, § 27; *Crandall v. State*, 28 Ohio St. 479; *Fretwell v. Troy*, 18 Kans. 271; *Goshen v. Kern*, 63 Ind. 468; s. c., 30 Am. Rep. 234. See **AUCTIONEERS**.

4. The name commission agent is synonymous with factor and means one who

receives goods, chattels, or merchandise for sale, exchange, or other disposition, and who is to receive a compensation for his services. *Perkins v. State*, 50 Ala. 154. He may sell in his own name. *Slack v. Tucker*, 23 Wall. (U. S.) 321. Or maintain an action for any damage done to them while in his possession. *Robinson v. Webb*, 11 Bush (Ky.), 464. See **COMMISSION AGENTS; FACTORS**.

5. Where an agent simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for such goods, which goods are afterward to be delivered by the principal to the purchasers, and payment for the goods is to be made by the purchasers to the principal on such delivery, such agent is generally called a "drummer" or commercial traveller. *City of Kansas v. Collins*, 34 Kans. 434.

Such agent is neither a pedler nor a merchant, so as to make him subject to the payment of taxes under a city ordinance; nor will a single sale and delivery of goods by such agent, or by any other person, out of the samples exhibited, or out of any lot of goods, constitute such agent or other person a pedler or a merchant. *Kansas v. Collins*, 34 Kans. 436; *Exp. Taylor*, 58 Miss. 478; *Com. v. Jones*, 7 Bush (Ky.), 502; *Com. v. Far-num*, 114 Mass. 267; *Alcott v. State*, 8 Blackf. (Ind.) 6; *Colson v. State*, 7 Blackf. (Ind.) 590; *Merriam v. Langdon*, 10 Conn. 460; *State v. Belcher*, 1 McM. (S. Car.) 40; *Com. v. Ober*, 12 Cush. (Mass.) 493; *Wynne v. Wright*, 1 Dev. & B. (N. Car.) L. 19; *Page v. State*, 6 Mo. 205; *Cincinnati v. Bryson*, 15 Ohio, 625; s. c., 45 Am. Dec. 593; *Mays v. Cincinnati*, 1 Ohio St. 268; *Fisher v. Patterson*, 13 Pa. St. 338; *Com. v. Willis*, 14 Serg. & R. (Ga.) 398; *State v. Hodgdon*, 41 Vt. 139; *Whitfield v. Longest*, 6 Ired. (N. Car.) L. 268; *State v. City Council*, 10 Rich. (S. Car.)



*clerks*; <sup>1</sup> *mercantile agencies*; <sup>2</sup> *ship-masters*; <sup>3</sup> *ship-husbands*; <sup>4</sup> *attorneys* at law and in fact; <sup>5</sup> *public agents* or officers.<sup>6</sup>

6. **General and Special Agents.**—An authority is as to its extent either general or special. General authority is an authority to act in a certain character, and unless it is restricted to a smaller limit, and the restriction is known or ought to be known to third parties,

240; *State v. Pinckney*, 10 Rich. (S. Car.) 474; *City Council v. Ahrens*, 4 Strobbh. (S. Car.) 241; *Keller v. State*, 11 Md. 525; s. c., 69 Am. Dec. 226; *Woolman v. State*, 2 Swan (Tenn.), 353; *Higgins v. Rinker*, 47 Tex. 402; *Chicago v. Bartee*, 100 Ill. 57; *Davis v. City of Macon*, 64 Ga. 128. See COMMERCIAL TRAVELLERS.

1. Clerks are persons employed by a merchant, manufacturer, or other person to transact certain parts of the employer's business, while the principal superintends the whole. He always acts in the name of the principal, and is authorized to transact generally all such business as is intrusted to him, and to bind his employer while he keeps within the bounds of his express or implied authority. *Bouvier Inst.* § 1287; *Portland v. Lewis*, 2 S. & R. (Pa.) 197; *Eagle Bank v. Smith*, 5 Conn. 71; s. c., 13 Am. Dec. 37.

2. Their business is to collect information as to the circumstances, standing, and pecuniary ability of merchants and dealers throughout the country, and keep accounts thereof, so that the subscribers to the agency when applied to by a customer to sell goods to him on credit may, by resorting to the agency or to the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit. A person furnishing information to such an agency in relation to his own circumstances, means, and pecuniary responsibility can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a wilfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency and, in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured. *Eaton v. Avery*, 83 N. Y. 31; *Genesee Sav. Bank v.*

*Barge Co.*, 52 Mich. 164. See MERCANTILE AGENCIES.

3. The master of a ship is the person who has command of her. The power delegated to this agent depends upon the express authority given him. This authority extends generally to all the acts which are necessary to carry out the purpose of a voyage or to employ the ship profitably. But he cannot perform acts which from their nature cannot be necessary for this purpose—as, to sell the ship. *Bouvier Inst.* § 1290; *Johnson v. Wingate*, 29 Me. 404. See SHIPPING.

4. The duties of a ship's husband are to see to the proper outfit of the vessel, that she is properly repaired, prepared for the voyage, and furnished with provisions and sea stores; to provide a proper master, mate, and crew; to see that she has a proper register and documents on board, and is duly cleared from the custom-house; to engage and settle for freight and adjust averages, to enter into charter-parties for the employment of the ship; and to settle and pay and keep a regular account of all contracts, payments, and receipts in the course of such employment. In relation to all these matters he is the general agent of the owners. *Turner v. Burrows*, 8 Wend. 144, 151. See SHIPPING.

5. Attorneys at law are ordinarily intrusted with the management of suits and controversies in courts of law and other judicial tribunals; attorneys in fact are so-called in contradistinction to attorneys at law, and may include all other agents employed in any business, or to do any act or acts *in pais* for another. But it is sometimes used to designate persons who act under a special agency or a special letter of attorney, so that they are appointed *in factum* for the deed or act required to be done. Story on Agency, §§ 24, 25. See ATTORNEYS.

6. A public office is a right to exercise a public function or employment and take the fees and emoluments belonging to it; and an officer is one who is invested with an office. *Olmstead v. Mayor of N. Y.*, 42 N. Y. Super. Ct. 289; *Sauner v. State*, 2 Tex. App. 458; *Woodworth v. State*, 26 Ohio St. 196. See MUNICIPAL CORPORATIONS.

carries with it all the ordinary powers incident to that character. It is a delegation to do all acts connected with a particular trade, business, or employment.

A special agent is one whose authority is confined to a particular or individual instance; but in another sense it may be said that every express agency is special, because it specifies what is to be done.<sup>1</sup>

*Universal Agents.*—General agents are to be carefully distinguished from universal agents; that is, from agents who may be appointed to do all the acts which the principal can personally do, and which he may legally delegate the power to another to do. Such an agency may potentially exist, but it must be of the very rarest occurrence. It is very certain that the law will not from any general expressions, however broad, infer the existence

1. Story on Agency, § 58; Evans on Ag., Ewell's Ed., 134, 135; Bouvier Law Inst. 1298, 1299; Beals v Allen, 18 Johns. (N. Y.) 363; s. c., 9 Am. Dec. 221; Martin v. Farnsworth, 49 N. Y. 555; Ladd v. Franklin, 37 Conn. 53; Willard v. Buckingham, 36 Conn. 395; Gulick v. Grover, 33 N. J. L. 463; Dart v. Hercules, 57 Ill. 446; Baxter v. Lamont, 60 Ill. 237; U. S. Life Ins. Co. v. Advance Co., 80 Ill. 549; Fatman v. Leet, 41 Ind. 133; Cruzan v. Smith, 41 Ind. 288; Palmer v. Cheney, 35 Iowa, 281; Crescent City Bank v. Hernandez, 25 La. Ann. 43; Lattomus v. Farmers' M. F. Ins. Co., 3 Houst. (Del.) 404; Atlantic, etc., R. Co. v. Reisner, 18 Kans. 458; Butler v. Maples, 9 Wall. (U. S.) 766; Golding v. Merchant, 43 Ala. 705. Compare Dickinson Co. v. Miss. Valley Ins. Co., 41 Iowa, 286; Leblanc v. Perron, 21 La. Ann. 26.

A special agency properly exists when there is a delegation of authority to do a single act. Story on Ag. § 17.

A special agent is one authorized to do one or two special things. 1 Pars. on Contr. 41.

A special agent is appointed only for a particular purpose, and is invested with limited powers. Chitty on Contr. 285.

The authority of an agent being limited to a particular business does not make it special; it may be as general in regard to that as if the range of it were unlimited. Anderson v. Coonley, 21 Wend. (N. Y.) 279; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 513; s. c., 28 Am. Dec. 478; Crain v. First Nat. Bank, 114 Ill. 516; Rountree v. Davidson, 59 Wis. 522; Bell v. Offutt, 10 Bush (Ky.), 632.

Brokers, factors, bank cashiers and tellers, shipmasters, etc., are, on account of the character of their occupation, considered as general agents in the line of

their business. The extent of their authority is regulated by usages and customs, and cannot be restricted by instructions from their principals, unless such instructions are known to the third parties dealing or contracting with them. Nat. Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427; Cameron v. Durkheim, 55 N. Y. 425; Cooke v. State Nat. Bank, 52 N. Y. 96; Commercial Bank v. Kortright, 22 Wend. (N. Y.) 348; s. c., 34 Am. Dec. 317; Arnold v. Halenbake, 5 Wend. (N. Y.) 33; Dows v. Greene, 16 Barb. (N. Y.) 72; Commercial Bank v. Norton, 1 Hill (N. Y.), 501; McEwen v. Montgomery, etc., Ins. Co., 5 Hill, 101; Jacques v. Todd, 3 Wend. (N. Y.) 83; Minor v. Mech. Bank, 1 Pet. (U. S.) 46, 70; Fleckner v. U. S., 8 Wheat. (U. S.) 338; Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604; Arthur v. Schooner Cassius, 2 Story (U. S.), 81; Cochecho Nat. Bank v. Haskell, 51 N. H. 116; Hatch v. Taylor, 10 N. H. 528; Planters' Bank v. Cameron, 3 Sm. & M. (Miss.) 609; Wilkins v. Commercial Bank, 6 How. (Miss.) 217; Lansdale v. Shackelford, Walk. (Miss.) 149; Wilcox v. Routh, 9 Sm. & M. (Miss.) 476; Eagle Bank v. Smith, 5 Conn. 71; s. c., 13 Am. Dec. 37; Walsh v. Pierce, 12 Vt. 130; Davis v. Waterman, 10 Vt. 526; s. c., 33 Am. Dec. 216; Gibbs v. Linsley, 13 Vt. 208; Cross v. Haskins, 13 Vt. 536; Stothard v. Aull, 7 Mo. 318; St. John v. Redmond, 9 Port. (Ala.) 428; Fisher v. Campbell, 9 Port. (Ala.) 210; Williams v. Mitchell, 17 Mass. 98; Lobdell v. Baker, 1 Metc. (Mass.) 193; s. c., 35 Am. Dec. 358; Odiorne v. Maxcy, 13 Mass. 181; Rapp v. Palmer, 3 Watts (Pa.), 178; Lansatt v. Lippincott, 6 S. & R. (Pa.) 386; Lyell v. Sanbourn, 2 Mich. 109; Longworth v. Conwell, 2 Blackf. (Ind.) 469; Frankfort Bank v. Johnson, 24 Me. 490.

of any such unusual agency; but will rather construct them as restrained to the principal business of the party, in respect to which it is presumed his intention to delegate the authority was principally directed.<sup>1</sup>

*How Principal Bound under General Authority.*—An agent acting under a general authority binds his principal by any act done within the scope of his employment, even if done against instructions. Secret instructions cannot affect third parties dealing with the agent.<sup>2</sup>

1. Story on Agency, § 21.

2. *Hatch v. Taylor*, 10 N. H. 538; *Towle v. Leavitt*, 23 N. H. 360; s. c., 55 Am. Dec. 195; *State v. Foster*, 23 N. H. 348; s. c., 55 Am. Dec. 191; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348; s. c., 34 Am. Dec. 317; *Johnson v. Jones*, 4 Barb. (N. Y.) 369; *Dows v. Greene*, 16 Barb. (N. Y.) 72; *Angell v. Hartford Ins. Co.*, 59 N. Y. 171; *Barber v. Britton*, 26 Vt. 112; *Walsh v. Pierce*, 12 Vt. 130; *Lobdell v. Baker*, 1 Metc. Mass. 193; s. c., 35 Am. Dec. 358; *Williams v. Mitchell*, 17 Mass. 98; *Wilkins v. Commercial Bank*, 6 How. (Miss.) 217; *Planters' Bank v. Cameron*, 3 Sm. & M. (Miss.) 609; *St. John v. Redmond*, 9 Port. (Ala.) 428; *Talmage v. Bierhouse*, 103 Ind. 270; *Robbins v. Magee*, 76 Ind. 381; *Stothard v. Aull*, 7 Mo. 318; *Minter v. Pac. R. Co.*, 41 Mo. 503; *Eagle Bank v. Smith*, 5 Conn. 71; s. c., 13 Am. Dec. 37; *Swazey v. Un. Man. Co.*, 42 Conn. 556; *Woodbury Sav. Bank v. Charter Oak Ins. Co.*, 31 Conn. 529; *Lyell v. Sanbourn*, 2 Mich. 109; *Bell v. Offutt*, 10 Bush (Ky.) 632; *Palmer v. Cheney*, 35 Iowa, 281; *Nussbaum v. Heilbron*, 63 Ga. 312; *Thompson v. Douglass*, 64 Ga. 57; *City Bank of Macon v. Kent*, 57 Ga. 283; *Carmichael v. Buck*, 10 Rich. (S. Car.) 332; s. c., 70 Am. Dec. 226; *Sterling Bridge Co. v. Baker*, 75 Ill. 139; *Etna Ins. Co. v. Maguire*, 51 Ill. 342; *Hartford Ins. Co. v. Farrish*, 73 Ill. 166; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Union M. L. Ins. Co. v. White*, 106 Ill. 67; *Houghton v. First Nat. Bank*, 26 Wis. 663; *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253; *Continental Ins. Co. v. Kasey*, 25 Gratt. (Va.) 268; *Georgia, etc., Ins. Co. v. Kinier*, 28 Gratt. (Va.) 88; *Walker v. Skipwith*, Meigs (Tenn.) 502; s. c., 33 Am. Dec. 161; *Kinealy v. Burd*, 9 Mo. App. 359; *Chouteaux v. Leech*, 18 Pa. St. 224; s. c., 57 Am. Dec. 602; *Bryant v. Moore*, 26 Me. 84; s. c., 45 Am. Dec. 96; *Allen v. Ogden*, 1 Wash. (U. S.) 174; *U. S. v. Howard*, 7 Biss. (U. S.) 56.

One to whom money is intrusted to be loaned for the benefit of the principal, without any restrictions, except that he

is to get ten per cent, is a general agent; and if he takes usury, the presumption is that the principal authorized it. *Stevens v. Meers*, 11 Ill. App. 198.

The authority of a general agent is measured by the usual scope and character of the business he is empowered to transact; and for any act done by him which is natural and customary in the management of such business, the principal cannot avoid liability because of any secret instructions or limitations imposed on the agent. If a married woman, owning an equitable separate estate, invests her money in a particular business, which she authorizes her husband to conduct and manage as her general agent, she cannot avoid liability for debts contracted by him in the purchase of merchandise within the scope of the business, in the natural and usual mode of conducting such business, by alleging secret authority and instructions to buy for cash only. *Louisville Coffin Co. v. Stokes*, 78 Ala. 372; *Nat. Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427.

An agent had authority to sell only for cash. He did sell on credit, and the goods were sent marked C. O. D. The carrier delivered the goods without receiving the cash, on the written order of the agent. *Held*, that the carrier, who knew of the authority of the agent to sell, was not affected by the limitation of which he had no notice, and that the mark C. O. D. did not put him on inquiry as a matter of law. *Daylight Burner Co. v. Odlin*, 51 N. H. 56; s. c., 12 Am. Rep. 45.

A corporation entered into a written contract with an agent, by the terms of which he guaranteed that his sales should not be less than a certain sum for the term of his employment, and that all sales should be made to good and responsible parties, and at not less than market prices. *Held*, in an action against the corporation for the breach of a written contract, made by its agent in its name, to sell goods to the plaintiff, that the authority of the agent was not limited by the provisions in the contract between

*Agent's Own Declarations.*—The authority of a supposed agent cannot be established by his own declarations; but if the agency is otherwise proved, such declarations are admissible.<sup>1</sup>

*Ambiguous Authority.*—If the instructions are given in such uncertain terms as to be susceptible of two different meanings, and the agent *bona fide* adopts one of them and acts upon it, it is not competent for the principal to repudiate the act as authorized because he meant the instructions or orders to be read in another sense of which they are equally capable.<sup>2</sup>

*How Principal Bound by Special Agent.*—The principal of a special agent is only bound by acts of the agent which are strictly

him and the corporation, and such provisions could not affect third persons; and that evidence that the agent, in making the sale to the plaintiff, violated such provisions was inadmissible. *Byrne v. Ma. Packing Co.*, 137 Mass. 313.

Where a third party has notice of such instructions, the principal will, of course, not be bound. *Stainer v. Tysen*, 3 Hill (N. Y.), 279; *Barnard v. Wheeler*, 24 Me. 412; *Bryant v. Moore*, 26 Me. 84; s. c., 45 Am. Dec. 96; *Longworth v. Conwell*, 2 Blackf. (Ind.) 469; *Leathers v. Springfield*, 65 Mo. 507.

1. *Winch v. Baldwin*, 28 N. W. Repr. (Iowa) 62; *Wood Mowing, etc., Co. v. Crow*, 30 N. W. Repr. (Iowa) 609; *Hardy v. Cheney*, 42 Vt. 417; *Lafayette, etc., R. Co. v. Ehman*, 30 Ind. 83; *French v. Wade*, 35 Kan. 391; *Bacon v. Johnson*, 56 Mich. 182; *McDonough v. Heyman*, 38 Mich. 334; *Grover & B. S. M. Co. v. Polhemus*, 34 Mich. 247; *Haughton v. Maurer*, 55 Mich. 323; *Seymour v. Matteson*, 42 How. Pr. (N. Y.) 496; *Rhodes v. Lowry*, 54 Ala. 4; *Baldwin v. Ashby*, 54 Ala. 82.

Evidence of an agent's acts should not ordinarily be admitted before his authority is shown, though it is discretionary with the court to permit it where authority is to be shown by circumstances. But it cannot be done in the case of sub-agents. *Turner v. Phoenix Ins. Co.*, 55 Mich. 236.

The testimony of a young man in the employ of defendant, to the effect that "he was authorized by defendant to say if it was not all right to return it to defendant and he would make it satisfactory," where the court understood the statement was offered as declarations or admissions binding upon defendant, was properly rejected where there was no evidence that the young man had any authority to receive or make such statements. *Bowker v. Delong*, 141 Mass. 315.

Neither can the authority of an agent be extended by his own unauthorized statements; nor can the extent be proved by such statements. *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302; *Lycoming Ins. Co. v. Ward*, 90 Ill. 545; *Maxcy v. Heckethorn*, 44 Ill. 437; *Chicago, etc., R. Co. v. Fox*, 41 Ill. 106; *Brigham v. Peters*, 1 Gray (Mass.), 139; *Stollenmerck v. Thacher*, 115 Mass. 224; *Lohner v. Ins. Co.*, 121 Mass. 439; *Carter v. Burnham*, 31 Ark. 212; *Howe Mach. Co. v. Clark*, 15 Kans. 492; *Dawson v. Landreaux*, 29 La Ann. 363; *Peck v. Ritchey*, 66 Mo. 114; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Grover & Baker S. Mach. Co. v. Polhemus*, 34 Mich. 247; *Hartford Ins. Co. v. Reynolds*, 36 Mich. 502; *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. App. Dec. (N. Y.) 315; *Mapp v. Phillips*, 32 Ga. 72; *Galbreath v. Cole*, 61 Ala. 139. *Compare Farmers, etc., Bank v. Butchers, etc., Bank*, 16 N. Y. 125; s. c., 69 Am. Dec. 678.

2. *Winne v. Niagara Ins. Co.*, 91 N. Y. 185; *Johnson v. Jones*, 4 Barb. (N. Y.) 369; *Longmire v. Herndon*, 72 N. Car. 629; *Bessent v. Harris*, 63 N. Car. 542; *Long v. Pool*, 68 N. Car. 479; *Mattocks v. Young*, 66 Me. 459; *Minnesota, etc., Co. v. Montague*, 65 Iowa, 67; *Foster v. Rockwell*, 104 Mass. 167; *Mann v. Laws*, 117 Mass. 293; *Mech. Bank v. Merch. Bank*, 6 Metc. (Mass.) 13; *Very v. Levy*, 13 How. (U. S.) 345; *Marsh v. Whitmore*, 21 Wal. (U. S.) 178; *Nat. Bank v. Merch. Nat. Bank*, 91 U. S. 92; *LeRoy v. Beard*, 8 How. (U. S.) 451; *Lorraine v. Cartwright*, 3 Wash. (U. S.) 151; *DeTastett v. Crousellatt*, 2 Wash. (U. S.) 132; *Ireland v. Livingstone*, L. R. 2 Q. B. 99, L. R. 5 Q. B. 516, 5 H. L. 395. See *Brown v. McGran*, 14 Pet. (U. S.) 480.

An agent is not responsible for an error in judgment where he does the best he can. *Long v. Poole*, 68 N. Car. 479.

in accordance with his authority, and a third party is bound at his peril to ascertain the limit of the authority.<sup>1</sup>

1. Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125; s. c., 69 Am. Dec. 678; Clarke Nat. Bank *v.* Bank of Albion, 52 Barb. (N. Y.) 592; People *v.* Bostwick, 43 Barb. (N. Y.) 9; Eaton *v.* Delaware, etc., R. Co., 57 N. Y. 282; Craighead *v.* Peterson, 72 N. Y. 279; Delafield *v.* Illinois, 26 Wend. (N. Y.) 193; s. c., 2 Hill (N. Y.) 159; Andrews *v.* Kneeland, 6 Cow. (N. Y.) 354; Stainer *v.* Tysen, 3 Hill (N. Y.), 279; Munn *v.* Commission Co., 15 Johns. (N. Y.) 44; s. c., 8 Am. Dec. 219; Hovey *v.* Brown, 59 N. H. 114; Towle *v.* Leavitt, 23 N. H. 360; s. c., 55 Am. Dec. 195; Hatch *v.* Taylor, 10 N. H. 538; Jeffrey *v.* Hursh, 49 Mich. 39; Weaver *v.* Bechtel, 53 Mich. 516; Brown *v.* Johnson, 12 Sm. & M. (Miss.) 398; s. c., 51 Am. Dec. 118; Fox *v.* Fisk, 6 How. (Miss.) 345; Carter *v.* Taylor, 6 Sm. & M. (Miss.) 367; Roberts *v.* Rumley, 58 Iowa, 301; Lobdell *v.* Baker, 1 Metc. (Mass.) 193; s. c., 35 Am. Dec. 358; Snow *v.* Perry, 9 Pick. (Mass.) 539; Wood *v.* Goodridge, 6 Cush. (Mass.) 123; s. c., 52 Am. Dec. 771; Bliss *v.* Clark, 16 Gray (Mass.), 60; Jackson *v.* Badger, 26 N. Western Repr. (Minn.) 908; Thomas *v.* Joslyn, 30 Minn. 388; Siebold *v.* Davis, 25 N. Western Repr. (Iowa), 778; Hampton *v.* Moorhead, 62 Iowa, 91; Veeder *v.* McMurray, 23 N. Western Repr. (Iowa), 285; Rountree *v.* Davidson, 18 N. Western Repr. (Wis.) 518; Campbell *v.* Campbell, 57 Wis. 288; Fisher *v.* Campbell, 9 Port. (Ala.) 210; Powell *v.* Henry, 27 Ala. 612; Baring *v.* Pierce, 5 Watts & S. (Pa.) 548; s. c., 40 Am. Dec. 534; Johnson *v.* Wingate, 29 Me. 404; Thompson *v.* Stewart, 3 Conn. 171; s. c., 8 Am. Dec. 168; Equitable Life Ass. Soc. *v.* Poe, 53 Md. 28; Bryden *v.* Taylor, 2 Harr. & J. (Md.) 396; s. c., 3 Am. Dec. 554; Blane *v.* Proudft, 3 Call. (Va.) 207; s. c., 2 Am. Dec. 546; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71; Huntington *v.* Wilder, 6 Vt. 334; Brown *v.* Frantum, 6 La. 39; Bank of Hamburg *v.* Johnson, 3 Rich. (S. Car.) 42; Tomlinson *v.* Collet, 3 Blackf. (Ind.) 436; Walker *v.* Skipwith, Meig. (Tenn.) 502; s. c., 33 Am. Dec. 161; Schimmelpennich *v.* Bayard, 1 Pet. (U. S.) 264; Parsons *v.* Armor, 3 Pet. (U. S.) 413; United States *v.* Williams, 1 Ware (U. S.), 175; Waters *v.* Brogden, 1 You. & Jerv. 457; Blackwell *v.* Ketcham, 53 Ind. 184; Taft *v.* Baker, 100 Mass. 68.

One buying an overdue note from an agent is thereby put on inquiry about the extent of the agent's authority. Earp *v.* Richardson, 81 N. Car. 5.

Receipting in a firm-name but in the form used by agents puts the person making payment on inquiry as to the authority to take the payment. Chase *v.* Buhl Iron Works, 55 Mich. 139.

A principal is not bound by the act of a special agent when done in disregard of his instructions, unless perhaps where the principal's own negligence has enabled the agent to perpetrate a fraud thereby. Saginaw, etc., R. Co. *v.* Chappell, 56 Mich. 190; Hall *v.* Parker, 37 Mich. 590; Brown *v.* Judge of Probate, 42 Mich. 501; Atlas Mining Co. *v.* Johnston, 23 Mich. 36; Trudo *v.* Anderson, 10 Mich. 357; Hutchings *v.* Ladd, 16 Mich. 493; Matter of Drops, 3 Pa. L. J. 87; Atlas Mining Co. *v.* Johnston, 23 Mich. 36.

The agent of a county to contract for repairs on county buildings has no power to bind the county to pay more in county warrants than the cash value of the labor and materials in United States currency; and parties contracting with such agent must take notice of the limits of his authority. Barton *v.* Swebston, 44 Ark. 437.

The depositary of an *escrow* is a special and not a general agent, and the person dealing with him is bound to know the extent of his powers. The delivery of an *escrow* by the depositary to the grantee named therein, without a compliance with the conditions, is not a delivery with the assent of the grantor, and conveys no title. The authority of the depositary of an *escrow* is limited strictly to the conditions of the deposit, a compliance with which alone justifies its delivery. Land Co. *v.* Peck, 112 Ills. 408.

A principal executed a sealed note, expressed to be for "value received in mule," with the name of the payee left blank, and delivered it to her husband, as her agent, to purchase a mule from a certain drover whose name was forgotten. The husband used the note in the purchase of a horse of greater value from another person. *Held*, that as to the other parties to the note there was no delivery, and the husband was alone liable to the holder, even if no notice, other than that expressed in the note, was brought home to the holder that the note was intended for another person. Mills *v.* Williams, 16 S. Car. 593; Gourdin *v.* Read, 8 Rich. (S. Car.) 230.

Where an agent with only authority to contract for the sale of musical instruments, sold a piano, taking a note pay-

*As Held out to the World.*—In case of special agency the principal will be bound to the extent of the authority he has held out to the world as given to the agent. This will be the test of the principal's responsibility, both in general and special agencies.<sup>1</sup>

*Knowledge of Extrinsic Facts.*—Where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may

able to his *principal* therefor, and without authority sold and indorsed it, and the maker paid it to the indorsee, after he had been notified by the payee not to do so, it was held that the payee could recover of the maker, and the maker could also recover the money he had paid the indorsee. *McClure v. Ewartson*, 14 Lea (Tenn.), 495.

The defendants sent their agent for the plaintiff (a physician), and clothed him with authority to employ plaintiff to visit a boy, and though the agent was told to inform the plaintiff that the defendants would pay him for the first visit, yet this the agent for some cause neglected to do, and employed the plaintiff generally to attend the boy so long as he might need medical aid. The law is well settled that if an injury is to result to one man from the omission or neglect of an agent of another, the principal must be held liable. In this cause the defendants, through the neglect of their agent, caused the services to be rendered upon their credit, and the case is within the above principle. *Bennett, J., in Barber v. Brittan*, 26 Vt. 112.

A special agent may use the proper means to effect the object of the agency unless specially restricted in the choice of the means. *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Anderson v. Coonley*, 21 Wend. (N. Y.) 279; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Peck v. Harriott*, 6 S. & R. (Pa.) 146; s. c., 9 Am. Dec. 415; *Benjamin v. Benjamin*, 15 Conn. 347; s. c., 39 Am. Dec. 384; *Vanada v. Hopkins*, 1 J. J. Marsh (Ky.), 285; s. c., 19 Am. Dec. 92; *Shackman v. Little*, 87 Ind. 181; *Star Line v. Van Vliet*, 43 Mich. 364; *Earnest v. Stoller*, 2 McCrary (U. S.), 380; *State v. Gates*, 67 Mo. 139; *Taylor v. Hudgins*, 42 Tex. 244; *Farrar v. Duncan*, 29 La. Ann. 126.

1. Story on Agency, § 133; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518; s. c., 28 Am. Dec. 478; *Anderson v. Cooley*, 21 Wend. (N. Y.) 279; *North River Bank*

*v. Aymar*, 3 Hill (N. Y.), 263; *Delafield v. Illinois*, 26 Wend. (N. Y.) 192; *Eilenberger v. Protective F. Ins. Co.*, 89 Pa. St. 464; *Baring v. Pierce*, 5 W. & S. (Pa.) 548; s. c., 40 Am. Dec. 534; *Briggs v. Large*, 30 Pa. St. 291; *City Bank of Macon v. Kent*, 57 Ga. 283; *Drumright v. Philpot*, 16 Ga. 424; s. c., 60 Am. Dec. 738; *Putnam v. French*, 53 Vt. 402; s. c., 38 Am. Rep. 682; *Cutler v. Boyd*, 124 Mass. 181; *Dresser Mfg. Co. v. Waterston*, 3 Metc. (Mass.) 9; *Snow v. Perry*, 9 Pick. (Mass.) 539. *Towle v. Leavitt*, 23 N. H. 360; s. c., 55 Am. Dec. 195; *Hatch v. Taylor*, 10 N. H. 538; *McCoy v. McKowen*, 26 Miss. 487; s. c., 59 Am. Dec. 264; *Brown v. Johnson*, 12 Sm. & M. (Miss.) 398; s. c., 51 Am. Dec. 118; *Fox v. Fisk*, 6 How. (Miss.) 345; *Johnson v. Wingate*, 29 Me. 404; *Keener v. Harrod*, 2 Md. 63; s. c., 56 Am. Dec. 706; *Powell v. Henry*, 27 Ala. 612; *Lake Shore, etc., R. Co. v. Foster*, 104 Ind. 293; *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 447; *Lewis v. Farrell*, 51 Conn. 216; *Union, etc., Ins. Co. v. Masten*, 3 Fed. Repr. 881; *Schimmelpennich v. Bayard*, 1 Pet. U. S. 264.

When one holds another out to the world as his agent, in determining the liability of the principal the question is, not what authority was intended to be given to the agent, but what authority was a third person dealing with him justified from the acts of the principal in believing was given to him. *Griggs v. Selden*, 58 Vt. 561; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5.

Where a firm doing business in one place take charge, under a chattel mortgage, of the business of an insolvent debtor in another place and leave him to carry it on in their name, it is not negligence for others to sell to the agent on the responsibility of the firm without inquiring into the agent's authority; the firm must take the risks of the arrangement, which is of a questionable nature. *Banner Tobacco Co. v. Jenison*, 48 Mich. 459.

rely upon the representation, and the principal is estopped from denying its truth to his prejudice.<sup>1</sup>

*Secret Instructions.*—There is a distinction to be observed between the authority of a special agent, which the person dealing with him not only has a right but is bound to know, and the private instructions given him respecting the mode and manner of executing his agency, intended to be kept secret and not communicated to those with whom he may deal, concerning which it would of course be useless to inquire. Such private instructions are not to be regarded as limitations upon his authority; and notwithstanding he may disregard them, his act, if otherwise within the scope of his agency, will be valid and binding on his employer.<sup>2</sup>

*Determined by Usage.*—If there be an invariable, certain, and general usage or custom of any particular trade or place, the law will imply on the part of one who employs another to contract for him upon a matter to which such usage or custom has reference a promise for the benefit of the other party, in conformity with such usage or custom; provided, that is, there be no express stipulation between them which is inconsistent with such usage. To be binding, however, such usage must be uniform and universal; but when such invariable usage is proved, it is to be considered as the basis of contract between the parties; and their respective rights and liabilities are held to be precisely the same as if, without any usage, they had entered into a special agreement to the like effect.<sup>3</sup>

1. New York, etc., *R. Co. v. Schuyler*, 34 N. Y. 30, 73; *Gould v. Sterling*, 23 N. Y. 439-456.

If the act is within the apparent scope of the agent's authority the principal is bound. *Continental Bank v. National Bank*, 50 N. Y. 575; *Cook v. State Nat. Bank*, 52 N. Y. 96; *Banks v. Everest*, 35 Kan. 687; *Fougne v. Burgess*, 71 Mo. 389.

2. 1 *Chitty on Contracts*, p. 286; *Barber v. Britton*, 26 Vt. 112; *Tradesmen's Bank v. Astor*, 11 Wend. (N. Y.) 87; *Hill v. Miller*, 76 N. Y. 32; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44; s. c., 8 Am. Dec. 219; *Beals v. Allen*, 18 Johns. (N. Y.) 363; s. c., 9 Am. Dec. 221; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494; s. c., 24 Am. Dec. 62; *Commercial Bank v. Norton*, 1 Hill (N. Y.), 501; *Lightbody v. North Am. Ins. Co.*, 23 Wend. (N. Y.) 18; *Exchange Bank v. Monteath*, 26 N. Y. 505; *Cosgrove v. Ogden*, 49 N. Y. 255; *Winne v. Niagara Ins. Co.*, 91 N. Y. 185; *Willard v. Buckingham*, 36 Conn. 395; *Hatch v. Taylor*, 10 N. H. 528; *Adams Exp. Co. v. Schlesinger*, 75 Pa. St. 246; *Reany v. Culbertson*, 21 Pa. St. 507; *Kinealy v. Burd*, 9 Mo. App. 359; *Minter v. Pac. R. Co.*, 41

Mo. 503; *Morton v. Scull*, 23 Ark. 289; *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *Anderson v. State*, 22 Ohio St. 305; *Palmer v. Cheney*, 35 Iowa, 281; *Furnas v. Frankman*, 6 Neb. 429; *Cruzan v. Smith*, 41 Ind. 288; *Abbott v. Rose*, 62 Me. 194; *Golding v. Merchant*, 43 Ala. 705; *Bell v. Offutt*, 10 Bush (Ky.), 632; *Butler v. Maples*, 9 Wall. (U. S.) 766; *Calais, etc., Co. v. Van Pelt*, 2 Block (U. S.), 372; *Union Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

Plaintiff agreed to sell to defendant 12,000 hop-poles. Two papers were prepared, one written by plaintiff and signed by defendant's agent, the other a printed form filled up and signed by plaintiff. The agreement was stated substantially alike in each, with this exception: the former contained this clause, "No objection to any kind of cedar;" while the latter required "said poles to be of yellow cedar, first growth." *Held*, that as the agent had verbal authority to buy hop-poles, the blanks might be regarded in the nature of private instructions by which the public dealing with the agent would not be bound. *Hill v. Miller*, 76 N. Y. 32.

3. 1 *Chitty's Cont. (Perkins' Ed.)* 83.

*Power to Sell—to Collect.*—The power to sell does not necessarily imply a power to collect, unless the agent is intrusted with the delivery of the goods, or unless there are other circumstances from which such power can be implied.<sup>1</sup>

See *Randall v. Kehlor*, 60 Me. 37; *Winsor v. Dillaway*, 4 Metc. (Mass.) 221; *Mixer v. Coburn*, 11 Metc. (Mass.) 559; s. c., 45 Am. Dec. 230; *Upton v. Suffolk Mills*, 11 Cush. (Mass.) 586; s. c., 59 Am. Dec. 163; *Day v. Holmes*, 103 Mass. 306; *Schnitzer v. Oriental Print Works*, 114 Mass. 123; *Daylight-Burner Gas Co. v. Odlin*, 51 N. H. 56; *Crosby v. Fitch*, 12 Conn. 410; s. c., 31 Am. Dec. 745; *Willard v. Buckingham*, 36 Conn. 395; *McKinstry v. Pearsall*, 5 Johns. (N. Y.) 319; *Smith v. Tracy*, 36 N. Y. 79; *Shelton v. Merchants' D. Co.*, 59 N. Y. 258; *Sumner v. Stewart*, 69 Pa. St. 321; *Rosenstock v. Tormey*, 32 Md. 169; *Kraft v. Fanchir*, 44 Md. 204; *Frank v. Jenkins*, 22 Ohio St. 597; *Amer. Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *Phillips v. Moir*, 69 Ill. 156; *Corbett v. Underwood*, 83 Ill. 324; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Raitt v. Mitchell*, 4 Camp. 146; *Sutton v. Tatham*, 10 Adolph. & El. 27; *Bayliffe v. Butterworth*, 1 Exch. 425; *Jones v. Bowden*, 4 Taunt. 847. See *Farmers, etc., Bank v. Sprague*, 52 N. Y. 605; *Boardman v. Gaillard*, 60 N. Y. 617.

The general rule is, as to all contracts, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. *Benj. on Sales* (Bennet's Ed.), § 624; *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Gaines v. McKinley*, 1 Ala. 446; *Sandford v. Handy*, 23 Wend. 260; *Williamson v. Canaday*, 3 Ired. (N. Car.) L. 349; *Woodford v. McClenahan*, 4 Gilm. (Ill.) 815; *Peters v. Farnsworth*, 15 Vt. 155; s. c., 40 Am. Dec. 671; *Lane v. Dudley*, 2 Murph. (N. Car.) 119; s. c., 5 Am. Dec. 523; *Ala. Gr. So. R. v. Hill*, 76 Ala. 303.

In an action for the breach of a written contract, made by an agent of the defendant in another State, for the sale of goods to the plaintiff, evidence of a custom among dealers in such goods in this commonwealth to accept or reject contracts made by their selling agents is inadmissible, in the absence of evidence that such a custom was known in the place where the contract was made, or that any notice of it was given to the plaintiff. *Byrne v. Ma. Packing Co.*, 137 Mass. 313.

But the usage must not be repugnant to the terms of the contract, nor inconsistent with a rule of the common law on the subject. *Boardman v. Spooner*, 13

*Allen* (Mass.), 353; *Dickinson v. Gay*, 7 *Allen* (Mass.), 29; *Dodd v. Farlow*, 11 *Allen* (Mass.), 426; *Haskins v. Warren*, 115 Mass. 514.

If the power of the agent is created by a written instrument, and that known to the party with whom the contract is made, it cannot be enlarged by evidence of usage. *DeLafield v. Illinois*, 26 *Wend. (N. Y.)* 192. *Compare Le Roy v. Beard*, 8 How. (U. S.) 451.

A formal instrument, delegating powers, is ordinarily subject to a strict interpretation, and the authority is not extended beyond that given in terms, or which is necessary to carry into effect that which is expressly given. *Craighead v. Peterson*, 72 N. Y. 279; *Bissell v. Terry*, 69 Ill. 184; *Neal v. Patten*, 40 Ga. 363.

Where the extent of the power of an agent may be known by public records, as in the case of public officers, any restriction on his powers so created will be binding. *Woodward v. Campbell*, 39 Ark. 580; *Sprague v. Cornish*, 59 N. H. 142; *Lewis v. Commissioners*, 12 Kans. 186; *N. Y., etc., Steamship Co. v. Harrison*, 16 Fed. Repr. 688.

1. Authority to sell land on credit does not imply authority to receive payment for it. *Mann v. Robinson*, 19 W. Va. 49; s. c., 42 Am. Rep. 771.

Unless a principal has held his selling agent out to the buyer as having authority to collect, a payment to the agent is not good. *Clark v. Smith*, 88 Ill. 298.

If there is an expressed or implied notice to the purchaser, a payment to the agent will not be binding on the principal, as in the case of brokers. *Higgins v. Moore*, 34 N. Y. 417; *Wright v. Cabot*, 89 N. Y. 570; *Crosby v. Hill*, 39 Ohio St. 100; *Graham v. Duckwall*, 8 Bush (Ky.), 12. Or salesman on commission, who has not possession of the goods. *Seiple v. Irwin*, 30 Pa. St. 513. Or where a printed notice on bill-head gives notice that salesmen are not authorized to collect. *Law v. Stokes*, 32 N. J. L. 249; *McKindly v. Dunham*, 55 Wis. 515; s. c., 42 Am. Rep. 740. Or travelling salesmen who sell goods by sample or solicit orders to be sent to their principals for approval, and to be filled by them if accepted. *Korneman v. Monaghan*, 24 Mich. 36; *Butler v. Dorman*, 68 Mo. 298; s. c., 30 Am. Rep. 795; *McKindly v. Dunham*, 55 Wis. 515; s. c.,



*Agent in Possession of Goods.*—Where the goods sold are in the hands of the agent and delivered by him, a power to receive payment is generally implied.<sup>1</sup>

*Power to Sell and to Collect.*—Where an agent is authorized to sell and to collect he must follow his instructions, and if so instructed must receive his payment in cash. No other mode of payment will be implied.<sup>2</sup>

42 Am. Rep. 740; *Clark v. Smith*, 88 Ill. 298; *Abrahams v. Weiller*, 87 Ill. 179; *Higgins v. Moore*, 34 N. Y. 417; *Greenleaf v. Egan*, 30 Minn. 316; *Janney v. Boyd*, 30 Minn. 319; *Chambers v. Short*, 79 Mo. 204; *Kohn v. Washer*, 64 Tex. 131; *Greenhood v. Keator*, 9 Ill. App. 183. Consequently where an agent having authority to sell, but having neither the possession nor the indicia of the property, sells in his own name without disclosing his principal, the purchaser may not set off a debt due him from the agent in an action by the principal for the contract price. *Bernshouse v. Abbott*, 45 N. J. L. 531; s. c., 46 Am. Rep. 789.

An agent selling goods only by sample, and forbidden to receive payment, sold goods on a credit of four months. Six days thereafter he drew in his own name for part of the price, which was paid. The money not being paid to the principal, *held*, that the payment did not protect the purchaser. *Butler v. Dorman*, 68 Mo. 298; s. c., 30 Am. Rep. 795.

Under a contract of agency for the sale of pianos, it was required that all orders should be sent to the principal to be filled by him. The agent had possession of a piano under a special contract of bailment, which he sold. *Held*, the purchaser, having knowledge of agency, was chargeable with notice of its terms, and acquired no title as against the principal. *Cummins v. Beaumont*, 68 Ala. 204.

The employment of a canvassing agent for the sale of books by subscription confers no authority to receive payment for books sold but not delivered by him, nor ever in his possession. *Chambers v. Short*, 79 Mo. 204.

An agent to sell imports has power to receive payment unless the buyer had notice to the contrary. *Collins v. Newton*, 7 Baxt. (Tenn.) 269.

1. In *Seiple v. Irwin*, 30 Pa. St. 513, the court said: "It is undeniable that an agent to whom merchandise has been intrusted with authority to sell and deliver it, is authorized to receive the price."

An agent sold a new safe and took an old one in part payment, which was accepted by the principal and the new one sent. *Held*, that the agent had implied

power to receive payment for the safe. *Harris v. Simmerman*, 81 Ill. 413.

Authority given to an agent to make a contract for the sale of lands will authorize him also to receive so much of the purchase-money as is to be paid in hand on the sale, as an incident to the power to sell. *Alexander v. Jones*, 64 Iowa, 207; *Peck v. Harriott*, 6 S. & R. (Pa.) 146; s. c., 9 Am. Dec. 415; *Yerbey v. Grigsby*, 9 Leigh. (Va.) 387; *Johnson v. McGruder*, 15 Mo. 365; *Hackney v. Jones*, 3 Humph. (Tenn.) 612; *Higgins v. Moore*, 6 Bosw. (N. Y.) 344; *Goodale v. Wheeler*, 11 N. H. 424; *Hoskins v. Johnson*, 5 Sneed (Tenn.), 469.

2. *Falls v. Gaither*, 9 Port. (Ala.) 605; *Broughton v. Silloway*, 114 Mass. 71; s. c., 19 Am. Rep. 312; *Burks v. Hubbard*, 69 Ala. 379.

Authority under seal to sell and convey land for cash empowers the agent to receive in cash the purchase-money when the sale is made. *Mann v. Robinson*, 19 West Va. 49; s. c., 42 Am. Rep. 771; *Peck v. Harriott*, 9 Serg. & R. (Pa.) 146; s. c., 9 Am. Dec. 415. But not to take merchandise in payment. *Lumpkin v. Wilson*, 5 Heisk. (Tenn.) 555; *Taylor v. Starkey*, 59 N. H. 142; *Rhine v. Blake*, 59 Tex. 240. Nor other land. *Reese v. Medlock*, 27 Tex. 120. Nor to mortgage the property. *Switzer v. Wilvers*, 24 Kan. 384; s. c., 36 Am. Rep. 259; *Wood v. Goodridge*, 6 Cush. (Mass.) 117; s. c., 52 Am. Dec. 771; *Jeffrey v. Hursh*, 49 Mich. 31; *Morris v. Watson*, 15 Minn. 212.

An agent with power to sell and receive payment for his principal cannot, in general, compound with his principal's debtor, and receive payment by cancelling his own debt, unless the power be conferred, or results from the general usage of the business or the habits of dealing between the parties. *Belton Compress Co. v. Belton Brick Mfg. Co.*, 64 Tex. 337.

But where A gave B a power of attorney to sell and convey land, B conveyed the land to C, and under an arrangement contemporaneously made, whereby D was to make a loan to C to enable him to pay for the land, took notes and a mort-

*Power to Collect.*—So must an agent to collect follow his instructions strictly.<sup>1</sup>

gage from C payable to himself (B), and immediately indorsed the notes and assigned the mortgage in his individual capacity to D, and received the money, *held*, it was a sale for cash, and not a barter, nor sale on time. *Plummer v. Buck*, 16 Neb. 322.

1. He is not authorized to release. *McHany v. Schenck*, 88 Ill. 357; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; *Herring v. Farrell*, 74 N. Car. 588. Nor to receive merchandise or other property or other evidences of debt in payment. *Padfield v. Green*, 85 Ill. 529; *Reynolds v. Ferree*, 86 Ill. 570; *Rhine v. Blake*, 59 Tex. 240; *Rodgers v. Bass*, 46 Tex. 505; *Aultman v. Lee*, 43 Iowa, 404; *Drain v. Doggett*, 41 Iowa, 682; *Taylor v. Robinson*, 14 Cal. 396; *Earnhardt v. Robertson*, 10 Ind. 8; *Kirk v. Hiatt*, 2 Ind. 322; *Wiley v. Mahood*, 10 W. Va. 206; *McCulloch v. McKee*, 16 Pa. St. 289; *Woodbury v. Larned*, 5 Minn. 339.

But while it is a well-established rule that an agent having a money demand for collection is authorized to receive nothing but money in payment, unless specially authorized by his principal so to do, yet, where the agent is a bank of deposit, it may receive its own certificates of deposit as money; and its principal will be bound by such payment, and the debtor discharged thereby, even though the bank soon afterwards becomes insolvent and never remits to its principal. Whether the result would be different in case the debtor knew at the time that the bank was insolvent is not decided. But especially is the principal bound by such payment where the agent bank, as in this case, was also a bank of exchange, and the principal had directed it to remit by draft on New York; for in such case it must be presumed that the principal expected that the draft of its agent would be sent; and its failure to send the draft was the failure of its own agent, and the debtor should not suffer for its default. *British, etc., Co. v. Tibballs*, 63 Iowa, 468.

An agent to collect a debt payable in a particular sort of currency has no power to receive payment in any other kind of currency; and if loss ensues he will be liable, even where the currency he receives is the only currency circulating at the time and place of collection. *Mangum v. Ball*, 43 Miss. 288.

An agent having authority to collect a debt will not be presumed to have the right to take, as payment of such debt,

the note of the debtor payable to himself; and the principal, having repudiated the unauthorized act, may sue on the original debt. One cannot bind his principal by any arrangement short of an actual collection of the money. *Robinson v. Anderson*, 106 Ind. 152; *McCormick v. Wood, etc., Co.*, 72 Ind. 518; *O'Conner v. Arnold*, 53 Ind. 203. He may not receive notes in payment of a bond. *Mathews v. Hamilton*, 23 Ill. 470. Nor indorse the principal's name on checks received in payment. *Millard v. Republic Bank*, 3 McA. (D. C.) 54; *Robinson v. Chemical Bank*, 86 N. Y. 404; *Graham v. U. S. Sav. Inst.*, 46 Mo. 186; *McClure v. Ewartson*, 14 Lea (Tenn.), 495.

A power to collect a mortgage does not authorize an extension of time of payment. *Ritch v. Smith*, 82 N. Y. 627; *Hutchins v. Munger*, 41 N. Y. 155. See *Gerrish v. Maher*, 70 Ill. 470; *Chappel v. Raymond*, 20 La. Ann. 277. Nor does power to receive a note in payment of an account imply power to dispose of it. *Hays v. Lynn*, 7 Watts (Pa.), 524.

Authority to settle for inland exchange does not authorize the acceptance of the bill of exchange of an insolvent drawer. *Goldsborough v. Turner*, 67 N. Car. 403. See *Osborne v. Rider*, 62 Wis. 235.

An agent to collect a note has no power to sell it. *Smith v. Johnson*, 71 Mo. 382. See *Hannon v. Houston*, 18 Kans. 561.

Full power to act for the principal in settling an account will, however, authorize the agent to receive personal property in settlement. *Oliver v. Sterling*, 20 Ohio St. 391. But not to purchase more of the debtor's property than is necessary to cancel the debt, when by so doing he creates a debt against the principal. *Pollock v. Cohen*, 32 Ohio St. 514.

An attorney having in charge certain notes for collection and settlement cannot, without his client's consent, include in the settlement other notes not in his hands. *Melcher v. Exchange Bank*, 85 Mo. 362.

Authority to receive the whole of a debt implies power to receive part. *Whelan v. Reilley*, 61 Mo. 565.

Authority delegated by a creditor to an agent to collect and settle a debt leaves the medium of payment largely at the agent's discretion, but it does not extend to a settlement which the debtor knows will inure entirely to the benefit of the agent. So where the debtor contracted with an agent who was authorized

**Power to Sell—to Warrant.**—A general agent appointed to sell merchandise has, according to usage, power to warrant the quality of the article sold;<sup>1</sup> but a person not the general agent of the

to collect a debt that he would deliver timber at the agent's mill, for the agent's individual use, which was to be applied in payment of the debt, *held*, that the delivery of the timber under this contract does not discharge the debt due the principal. *Williams v. Johnston*, 92 N. Car. 532.

A power to cancel a mortgage and the notes secured thereby and to take new notes and a new mortgage does not authorize the cancellation without taking the renewals. *Foster v. Paine*, 56 Iowa, 622.

An attorney authorized to receive the interest on a bond and mortgage has no implied authority to receive the principal. *Brewster v. Carnes*, 8 Eastn. Repr. (N. J.) 433.

Power to receive certain chattels is no proof of authority to dispense with their delivery. *Boyett v. Braswell*, 72 N. Car. 260.

A power to collect debts with authority to make, seal, and execute all releases and conveyances made necessary in consequence of the payment of such debts does not give authority to sell real estate. *Berry v. Harnage*, 39 Tex. 638.

A general power to collect implies power to sue. *McMinn v. Richtmyer*, 3 Hill (N. Y.), 236; *Brush v. Miller*, 13 Barb. (N. Y.) 481; *Scott v. Elmendorf*, 12 Johns. (N. Y.) 317; *Hirschfield v. Landman*, 2 E. D. Smith (N. Y.), 208; *Neille v. U. S.*, 7 Ct. of Cl. 535; *Joyce v. Duplessis*, 15 La Ann. 242; s. c., 77 Am. Dec. 185; *Moore v. Hall*, 48 Mich. 143; *And to attach*. *De Poret v. Gusman*, 30 La Ann. pt. 2, 930.

A collecting agent may sue in his own name on a note indorsed in blank. *Boyd v. Corbitt*, 37 Mich. 52; *Hazewell v. Coursen*, 45 N. Y. Super. Ct. 22. But he cannot do so if the note is not indorsed. *Padfield v. Green*, 85 Ill. 529.

Where the investment of money is the object of a power of attorney, and the attorney is authorized thereby to use the principal's signature and seal, when necessary or proper, in the transaction of the business of the principal, the agent has authority to reassign a bond, assigned as collateral security for a loan of the moneys of his principal, upon payment of the loan. *Feldman v. Beier*, 75 N. Y. 293.

1. *McCormick v. Kelly*, 28 Minn. 135; *Deering v. Thom*, 29 Minn. 120; *Upton v. Suffolk Co. Mills*, 11 Cush. (Mass.)

586; s. c., 59 Am. Dec. 163; *Randall v. Kehlror*, 60 Me. 37; s. c., 11 Am. Rep. 169; *Bryant v. Moore*, 26 Me. 84; s. c., 45 Am. Dec. 96; *Nelson v. Cowing*, 6 Hill (N. Y.), 336; *Smith v. Tracy*, 36 N. Y. 82; *Tice v. Gallup*, 2 Hun (N. Y.), 446; *Murray v. Brooks*, 41 Iowa, 45; *Boothby v. Scales*, 27 Wis. 626; *Deming v. Chase*, 48 Vt. 382; *Fay v. Richmond*, 43 Vt. 25; *Huguley v. Norris*, 65 Ga. 666; *Dayton v. Hooglund*, 39 Ohio St. 671; *Palmer v. Hatch*, 46 Mo. 585; *Victor, etc., Co. v. Rheinschild*, 25 Kan. 534; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Croom v. Shaw*, 1 Fla. 211; *Applegate v. Moffitt*, 60 Ind. 104; *Hunter v. Jameson*, 6 Ired. (N. Car.) 252; *Ezell v. Franklin*, 2 Sneed (Tenn.), 236; *Bradford v. Bush*, 10 Ala. 386; *Dingle v. Hare*, 7 C. B. N. S. 145.

An agent upon whom general authority to sell is conferred will be presumed to have authority to warrant unless the contrary appears. It will be presumed, in the absence of a showing to the contrary, that a warranty is not an unusual incident to a sale by an agent for a dealer in a commodity, where the thing sold is not present and subject to the inspection of the purchaser. *Talmage v. Bierhaue*, 103 Ind. 270.

Where one having general authority to solicit orders for plaster busts, but no authority to guarantee satisfaction, took an order with the understanding that the party ordering would not be obliged to accept it if not satisfied, and the bust was refused as unsatisfactory, *held*, that the general authority of the agent would seem to be sufficient to enter into such a contract; still, if the authority was not sufficient, the result would be that there was no special contract; and as the defendant had not accepted the bust, there was no sale. *Zaliski v. Clark*, 44 Conn. 218.

An agent has no implied authority to warrant where the property is of a description not usually sold with warranty. *Smith v. Tracy*, 36 N. Y. 79.

A general selling agent has no authority to warrant that flour will keep sweet during a voyage from Massachusetts to California. *Upton v. Suffolk Co. Mills*, 11 Cush. (Mass.) 586; s. c., 59 Am. Dec. 163.

A general agent has no implied authority to warrant iron safes to be burglar-proof in the absence of express authority, unless there existed at the time of the

principal, who has the naked power to sell a chattel, has no such authority.<sup>1</sup>

**Power to Sell.**—An agent empowered to sell may rescind a sale or make a different one.<sup>2</sup>

Authority to sell at once at a certain price does not imply a

sale a custom in the sale of safes to so warrant them. *Herring v. Skaggs*, 73 Ala.) 446.

An agent intrusted with harvesters to sell may give a reasonable opportunity to try it, and make a contract to take effect as a sale if it prove satisfactory. *Deering v. Thom*, 29 Minn. 120; *McCormick v. Kelly*, 28 Minn. 135; *Murray v. Brooks*, 41 Iowa, 45; *Boothby v. Scales*, 27 Wis. 626; *The Monte Allegre*, 9 Wheat. (U. S.) 616.

An agent intrusted with personal property to sell may make a conditional sale on trial, or a contract to take effect as a sale, in case the article on trial work satisfactorily. *Oster v. Mickleby*, 28 N. Westn. Repr. (Minn.), 710.

One selling by sample has authority to warrant the goods shall be like sample. *Murray v. Smith*, 4 Daly (N. Y.), 277; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Dayton v. Hooglund*, 39 Ohio St. 671. But not to warrant against seizure for violation of revenue laws. *Palmer v. Hatch*, 46 Mo. 585. Nor that the principal will not sell to others goods of the same kind at a less price. *Anderson v. Bruner*, 112 Mass. 14.

Authority to sell threshing-machines on trial, to be returned if not satisfactory, empowers the agent to waive such return. *Pitsinowski v. Beardsley*, 37 Iowa, 9.

A power to sell negotiable paper implies the power to certify that it is regular. *Ahern v. Goodspeed*, 72 N. Y. 108; *Ferguson v. Hamilton*, 35 Barb. (N. Y.) 427.

A broker has no implied power to warrant bank stock sold by him. *Smith v. Tracy*, 36 N. Y. 79. He cannot warrant that it will be paid at maturity. *Graul v. Strutzel*, 53 Iowa, 712.

An agent with authority to sell land may warrant against the lawful claims of all persons claiming under the principal. *Ward v. Bartholomew*, 6 Pick. (Mass.) 409; *Blackman v. Charlestown*, 42 N. H. 125. But he may not warrant the quality and quantity of the land. *Nat. Iron Co. v. Bruner*, 4. C. E. Green (N. J.) 331.

1. *Perrine v. Cooley*, 42 N. J. L. 623; s. c., 32 Am. Rep. 210; *Scott v. McGrath*, 7 Barb. (N. Y.) 53; *Decker v. Fredericks*, 47 N. J. L. 469; *Brady v. Todd*, 9 C. B. N. S. 592.

A vendor of a horse, sold by his agent authorized merely to sell for a fixed sum, is not responsible for a breach of a warranty made by such agent, and the innocent vendor is not liable in an action for deceit brought for the fraudulent representation of his agent. Although the principal may have knowledge of defects in the horse, he is not bound to disclose them, and is an innocent vendor unless he authorized the agent to make misrepresentations or use some artifice to conceal defects. *Decker v. Fredericks*, 47 N. J. L. 469.

In a few cases it has, however, been held that a special agent for the sale of a horse has power to warrant, unless he is expressly forbidden. *Deming v. Chase*, 48 Vt. 382; *Milburn v. Belloni*, 34 Barb. (N. Y.) 607; *Tice v. Gallup*, 2 Hun (N. Y.), 446; *Gaines v. McKinley*, 1 Ala. 446; *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Bradford v. Bush*, 10 Ala. 390; *Cocke v. Campbell*, 13 Ala. 286.

If a person who constitutes another his agent for the sale of any article of merchandise furnishes him with the kind of warranty he is to give, a purchaser who has knowledge that such a warranty was furnished the agent cannot accept a parol warranty from the agent different in its terms and require the principal to comply with such oral warranty. *Wood Mowing, etc., Co. v. Crow*, 30 N. Westn. Repr. (Iowa), 609.

An auctioneer cannot warrant the quality of the goods sold. He has only power to sell, not to warrant. *The Monte Allegre*, 9 Wheat. (U. S.) 616, 647; *Blood v. French*, 9 Gray (Mass.), 197.

An agent authorized to sell a claim due by judgment on execution does not authorize a guaranty of the validity of the claims proposed for sale. *Lipscomb v. Kitrell*, 11 Humph. (Tenn.) 256.

2. *Sott v. Wells*, 6 Watts & S. (Pa.) 357; s. c., 40 Am. Dec. 568; *Anderson v. Coonley*, 21 Wend. (N. Y.) 279; *Victor, etc., Co. v. Rheinschild*, 25 Kans. 534.

And the principal will be liable to refund the money paid. *Bloomer v. Denman*, 12 Ill. 240.

But not after the sale is executed. *Adrian v. Lane*, 13 Shand (S. Car.) 183; *Saladin v. Mitchell*, 45 Ill. 79; *Luke v. Grigg*, 30 N. Western Repr. (Dak.) 170.

power to sell for the same price at a subsequent time,<sup>1</sup> nor to sell at a price different from the one given;<sup>2</sup> nor does a power to sell upon a certain day authorize a sale upon any other day.<sup>3</sup>

Power to sell does not authorize an agent to sell on credit;<sup>4</sup> nor to barter;<sup>5</sup> nor to sell in payment of agent's debt;<sup>6</sup> nor to pay commissions;<sup>7</sup> nor a power to sell on credit, to give unreasonable credit.<sup>8</sup>

A power to sell claims and effects does not give power to sell lands;<sup>9</sup> nor a power to "close a bargain" to sign a bill of sale;<sup>10</sup> nor does authority to obtain an offer imply a power to sell.<sup>11</sup>

Nor does authority of a purchasing clerk to make a single sale imply a power to make an unauthorized sale long afterward.<sup>12</sup>

**Power to Sell Land.**—Authority to sell land authorizes the agent to execute all instruments necessary to complete the sale;<sup>13</sup> but he has no right under such power to grant a license to the purchaser, previous to a conveyance, to enter and cut timber, although such license be given with a *bona-fide* intent to effect a sale;<sup>14</sup> nor to sell at auction,<sup>15</sup> nor to mortgage.<sup>16</sup>

Authority to "bargain, sell, grant, release, and convey," which does not specify some particular property, authorizes the agent to sell whatever real estate the principal may own;<sup>17</sup> and a power of

1. *Matthews v. Sowle*, 12 Neb. 398.

2. *Holbrook v. McCarthy*, 61 Cal. 216.

3. *Bliss v. Clark*, 16 Gray (Mass.), 60; *Reed v. Baggott*, 5 Ill. App. 257.

So where an agent empowered to sell land at a given price sells it three years later, when the value was much increased and was still increasing, for the same price, without informing his principal of the changed circumstances, this was considered such a fraud that a court of equity would refuse to enforce the sale. *Proudfoot v. Wightman*, 78 Ill. 553.

4. *Burks v. Hubbard*, 69 Ala. 379; *School Dist. v. Etna Ins. Co.*, 62 Me. 330; *Scoby v. Wood*, 59 Tenn. 66; *Frank v. Ingalls*, 41 Ohio St. 560.

5. *Taylor v. Starkey*, 59 N. H. 142; *Brown v. Smith*, 67 N. Car. 245.

6. *Powell v. Henry*, 27 Ala. 612; *Wheeler, etc., Co. v. Givan*, 65 Mo. 89; *Buckwalter v. Craig*, 55 Mo. 71; *Greenwood v. Burns*, 50 Mo. 52; *Flanagan v. Alexander*, 50 Mo. 51; *Victor, etc., Co. v. Heller*, 44 Wis. 265; *Stewart v. Woodward*, 50 Vt. 78; s. c., 28 Am. Rep. 388.

7. *Atlee v. Fink*, 75 Mo. 100; s. c., 42 Am. Rep. 385.

8. *Brown v. Central Land Co.*, 42 Cal. 257.

9. *DeCordova v. Knowles*, 37 Tex. 19.

10. *Duffy v. Hobson*, 40 Cal. 240; s. c., 6 Am. Rep. 617.

11. *Levi v. Booth*, 58 Md. 305; s. c., 42 Am. Rep. 382; *Dempsey v. West*, 69 Ill. 613.

12. *Cupples v. Whelan*, 61 Mo. 583.

13. *Valentine v. Piper*, 22 Pick. (Mass.) 85; s. c., 33 Am. Dec. 715; *Yale v. Eames*, 1 Metc. (Mass.) 488; *People v. Boring*, 8 Cal. 407; s. c., 68 Am. Dec. 331; *Fogarty v. Sawyer*, 17 Cal. 589; *Plummer v. Buck*, 16 Neb. 322; *Hemstreet v. Burdick*, 90 Ill. 444.

Where such agent has the power to sell, he has the authority to sign an agreement in his principal's name and to bind him thereby. *Smith v. Allen*, 86 Mo. 178; *Haydock v. Stow*, 40 N. Y. 363.

14. *Hubbard v. Elmer*, 7. Wend. (N. Y.) 446; s. c., 22 Am. Dec. 590.

15. *Towle v. Leavitt*, 23 N. H. 360; s. c., 55 Am. Dec. 195.

16. A power of attorney to sell will not support a mortgage; and if the deed is really intended as security they are conveyed without authority and the grantee cannot maintain ejectment for them. *Jeffery v. Hursh*, 58 Mich. 247.

17. *Marr v. Given*, 23 Me. 55; s. c., 39 Am. Dec. 600; *Roper v. McFadden*, 48 Cal. 346; *Berkey v. Judd*, 22 Minn. 287.

But a power of attorney "to buy and sell real estate and to receive and execute all necessary contracts and conveyances" was held not to authorize the attorney to sell and convey lands to which the principal acquired title before the execution of the power. *Greve v. Coffin*, 14 Minn. 340.

attorney which authorizes an agent to sell land "on such terms in all respects as he shall deem most advantageous" empowers him to make full covenants of warranty.<sup>1</sup>

A power to sell and convey does not imply authority to dedicate or give any part of the principal's property to the public;<sup>2</sup> but a power to "sell, convey, plat, and subdivide, in such manner as to make the property marketable, and to acknowledge and record such plat," implies a power to dedicate such part of the property as may be necessary to the public for streets.<sup>3</sup>

*Railroad Agents.*—A station agent authorized to receive and forward freight may contract to supply cars;<sup>4</sup> but he has no implied power to contract to furnish cars at other stations than his own,<sup>5</sup> and authority to solicit passengers does not imply power to solicit or receive freight.<sup>6</sup>

An agent authorized to sell tickets, and stamp and deliver the same upon receiving pay therefor, cannot bind his company by stamping and delivering such tickets, without the knowledge or consent of its proper officers, to a third person, to be sold by him, and to be paid for when sold.<sup>7</sup>

Nor does a telegraph operator sustain such relation to the company as to constitute him its representative in reference to passing upon the subject-matter of a claim, its allowance or payment.<sup>8</sup>

Representations by the agent of a railroad corporation, soliciting subscriptions for stock from persons living along the contemplated route of the road, as to its intended location, and the time within which it will be completed to a particular place, are but the mere expression of an opinion, and neither constitute a fraud nor are available as a defence to an action on a subscription for stock made on the faith of them, unless known by the agent to be false, and made by him with intent to deceive.<sup>9</sup>

An engineer in the employ of a railroad company has no power to bind the company by his contracts unless he is specially authorized.<sup>10</sup>

*Power to Ship.*—One employed to ship goods may make a reasonable contract limiting carriers' liabilities;<sup>11</sup> and employment to

1. *Le Roy v. Beard*, 8 How. (U. S.) 451.

2. *Wirt v. McEnery*, 21 Fed. Rep. 233; *Gosselin v. Chicago*, 103 Ill. 623.

3. *Wirt v. McEnery*, 21 Fed. Rep. 233. Power to lay out land, in order to dispose of it, implies authority to dedicate highways. *State v. Atherton*, 16 N. H. 203.

Authority to purchase a town site and lay it out empowers the agent to dedicate land for streets. *Bartean v. West*, 23 Wis. 416.

An authority to locate and survey land confers no power to sell. *Moore v. Lockett*, 2 Bibb. (Ky.) 67; s. c., 4 Am. Dec. 683.

4. *Harrison v. Missouri Pac. R. Co.*,

7 Am. & Eng. R. R. Cas. 382; s. c., 74 Mo. 364.

5. *Missouri Pac. R. Co. v. Stults*, 15 Am. & Eng. R. R. Cas. 97; s. c., 31 Kans. 752.

6. *Taylor v. Chicago, etc., R. Co.*, 74 Ill. 86.

7. *Frank v. Ingalls*, 41 Ohio St. 560.

8. *Young v. Tel. Co.*, 65 N. Y. 163; *Western Union Tel. Co. v. Rains*, 63 Tex. 27.

9. *Montgomery S. R. Co. v. Matthews*, 77 Ala. 357.

10. *Gardner v. Boston, etc., R. Co.*, 70 Me. 181.

11. *Illinois Cent. R. Co. v. Jonte*, 13 Ill. App. 424; *Shelton v. Merch. Des. Co.*, 59 N. Y. 258; *Nelson v. Hudson*

deliver freight implies power to make terms in regard to its delivery;<sup>1</sup> power to purchase implies power to direct as to shipment and delivery;<sup>2</sup> but authority to procure a cargo in a foreign port does not empower the agent to modify or cancel the charter-party.<sup>3</sup>

*Miscellaneous.*—Authority to hire a towboat and "make the best bargain you can" does not imply power to assume the perils of the service or risks of the voyage, or to insure against the negligence of any one employed in the navigation or handling of the boat.<sup>4</sup> Authority to search for goods delivered to a railroad but either missent or lost does not imply a power to settle with the company for damages.<sup>5</sup> Authority to advertise does not give power to do an unreasonable amount of advertising;<sup>6</sup> and power to close up a business does not authorize a re-investment of the funds.<sup>7</sup> Authority to erect a monument in a burial-lot implies the power of the agent to give a contractor the right to enter the lot to build the monument, and to remove it if not satisfactory or not paid for.<sup>8</sup> Health officers authorized to remove small-pox patients to a pest-house have implied power to employ nurses.<sup>9</sup> Authority to open a new channel for a stream implies a power to construct a dam.<sup>10</sup>

*Negotiable Paper.*—Authority to sell negotiable paper includes power to indorse it;<sup>11</sup> but an agent authorized to receive a note in payment, made to order of principal, has no authority to receive payment for it, if he has delivered the note to the principal.<sup>12</sup> A power to draw checks, sign or indorse notes, which are to be used at a certain bank will not empower an agent to sign notes in the principal's name to be used in other transactions.<sup>13</sup>

River R. Co., 48 N. Y. 498; *Redfield v. Carriers*, § 52.

1. *Michigan, etc., R. Co. v. Day*, 20 Ill. 375; s. c., 71 Am. Dec. 278.

2. *Owen v. Brockschmidt*, 54 Mo. 285. See *Shelton v. Merchants, etc., Co.*, 59 N. Y. 258.

3. *Ye Seng Co. v. Corbitt*, 7 Sawy. (U. S.) 368; s. c., 9 Fed. Rep. 423.

4. *Martin v. Farnsworth*, 49 N. Y. 555.

5. *Congar v. Galena, etc., R. Co.*, 17 Wis. 477.

6. *Holloway v. Stephens*, 2 Th. & C. (N. Y.) 561.

7. *Stoddart's Case*, 4 Ct. of Cl. 511.

8. *Fletcher v. Evans*, 140 Mass. 241.

9. *Labrie v. Manchester*, 59 N. H. 120; s. c., 47 Am. Rep. 179.

10. *Barns v. Hannibal*, 71 Mo. 449.

11. *Merchants' Bank v. Central Bank*, 1 Ga. 418; s. c., 44 Am. Dec. 665.

A party intrusted with another person's note, and authorized to negotiate it and use it for his own benefit, in the absence of any express direction by the latter may make such a contract with a

bank concerning it as he sees fit; and his subsequent declarations as to the disposition of the note are admissible in evidence in a suit by the bank against the maker of it. *Bank of Newbury v. Sinclair*, 60 N. H. 100.

12. *Draper v. Rice*, 56 Iowa, 114; s. c., 41 Am. Rep. 88; *Guilford v. Stacer*, 53 Ga. 618.

13. *Citizens' Sav. Bank v. Hart*, 32 La. Ann. 22; *Camden Safe Dep., etc., Co. v. Abbott*, 44 N. J. L. 257.

A power to indorse and discount for one purpose cannot be extended to another. *Callender v. Golsan*, 27 La. Ann. 311.

Nor a power to draw checks to overdraw the principal's bank account. *Breed v. Bank*, 4 Colo. 481.

Nor to borrow money. *Morahurst v. Boies*, 24 Iowa, 99.

Nor a power to sign notes to sign notes for the agent's benefit. *North River Bank v. Aymar*, 3 Hill (N. Y.), 262; *Stainer v. Tysen*, 3 Hill (N. Y.), 279; *Stainback v. Read*, 11 Gratt. (Va.) 281; s. c., 62 Am. Dec. 648.

**To Conduct Business.**—An agent with power to conduct a business has authority to do everything necessary or proper and usual in the ordinary course of the business.<sup>1</sup>

An agent, the principal being absent, having full charge, management, and control of the business of the principal, must necessarily possess and exercise the same power and authority in the business that his principal could if present. A general agency, until revoked, is coextensive in scope and duration with the business. Where a principal is absent, his general agent, having sole authority to manage his business, will necessarily have authority

Nor for the benefit of third parties. *Gulick v. Grover*, 33 N. J. L. 463; *Wallace v. Branch Bank*, 1 Ala. 565. An absolute power to settle claims does not give authority to set off a private debt of the agent. *McCormick v. Keith*, 8 Neb. 142; *Burks v. Hubbard*, 69 Ala. 379.

Nor to submit to arbitration. *Mich. R. Co. v. Gongar*, 55 Ill. 503. See ARBITRATION AND AWARD.

Plaintiff, who was executrix and sole legatee under the will of M., executed certain powers of attorney to F., authorizing him in her name as executrix and legatee, as well as individually, "to sign, indorse, and make and deliver checks and drafts, promissory notes, receipts and drafts, and all other vouchers and papers necessary and proper in and about settling the affairs pertaining to the estate, . . . and to settle . . . and receive payment of all claims, debts, demands due or to become due to said estate." Also, to satisfy and discharge all mortgages made to the testator, "and to demand, receive, and receipt for any and all moneys payable" on any such mortgages. At the time of the death of M., defendant held a bond and mortgage assigned to it by him as collateral for a loan. In pursuance of a written request, signed in plaintiff's name by F., as her attorney, defendant, on payment of the amount due it, assigned the bond and mortgage to F. and E., a firm in which F. was a partner. F. subsequently received payment of the bond, and his firm satisfied the mortgage. In an action to compel a reassignment of the bond and mortgage, or damages, in case a reassignment could not be had, *held*, that F., as far as plaintiff was concerned, had full authority under the power of attorney to receive payments on the bond, and conceding the assignment to the firm was unauthorized, he continued to have such right with power to cancel the bond and to satisfy the mortgage when paid in full; and as he did thus receive payment, no injury was done the plaintiff, and defend-

ant was not liable; but *held*, that F., under the powers of attorney, had power to direct the assignment to be made to his firm, and defendant was justified in obeying his instructions. *Myers v. Mut. L. Ins. Co.*, 99 N. Y. 1.

A power to sign and acknowledge bonds includes power to sign the bonds of a county officer in the name of the principal. *Jernegan v. Gray*, 14 Lea (Tenn.), 536.

1. *Banner Tobacco Co. v. Jenison*, 48 Mich. 459; *Cummings v. Sargent*, 9 Metc. (Mass.) 172; *Taylor v. Labeaume*, 14 Mo. 572, 17 Mo. 338; *Baltimore, etc., Co. v. Brown*, 54 Pa. St. 77; *Bailey v. Rawley*, 1 Swan (Tenn.), 295; *Shepherd v. Milwaukee Gas Co.*, 11 Wis. 234; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Sentell v. Kennedy*, 29 La. Ann. 679; *German Ins Co. v. Grunert*, 112 Ill. 68.

To give notes for purchases necessary to carry on the business. *Odiorne v. Maxcy*, 13 Mass. 178; *White v. Westport Mfg. Co.*, 1 Pick. (Mass.) 215; s. c., 11 Am. Dec. 168; *Bailey v. Rawley*, 1 Swan (Tenn.), 295. To contract for the board of the workmen. *Burley v. Kitchell*, 20 N. J. L. 305. But not to pledge or mortgage machinery or buildings. *Dispatch Line v. Bellamy M. Co.*, 12 N. H. 205; s. c., 37 Am. Dec. 203. But see *Perkins v. Boothby*, 71 Me. 91, where it was held that an agent appointed by a company to have charge of a store, sell the goods, and from time to time make such purchases of goods as might be necessary in his judgment, subject to the general oversight of the directors, has no authority to give notes of the company in order to procure loans of money; and when notes in suit were thus given the plaintiff cannot recover.

If necessary for the conduct of the business he can employ a sub-agent. *Planters', etc., Bank v. First Nat. Bank*, 85 N. Car. 534.

He has an insurable interest where he



to bring suits to collect debts, and insurance in case of loss by fire, such power being essential to an efficient discharge of his duties.<sup>1</sup>

**Power to Employ.**—Authority to employ an agent or servant includes, in the absence of restrictive words, authority to make a complete contract, definite as to the amount of wages, as to all other terms.<sup>2</sup>

**To Employ Surgical Aid.**—The business manager of a manufac-

is liable to account for the property. *Kline v. Queen Ins. Co.*, 7 Hun (N. Y.), 267.

He can settle claims morally, though not legally, binding upon his principal. *Bergenthal v. Fiebrantz*, 48 Wis. 435.

A intrusted B with the management of his foundry. B was accustomed to buy materials, employ workmen, sell goods, collect accounts, and receipt for moneys and pay them out. During A's absence B contracted to cast a lot of jack-screws for C. Before they were cast and delivered B borrowed from one D a sum of money for use in the foundry, and after the delivery of the jack-screws assigned the account against C therefor as security to D, who collected the same from C. *Held*, a valid payment by C. *Hoskins v. Swain*, 61 Cal. 338.

1. *German Fire Ins. Co. v. Grunert*, 112 Ill. 68.

Authority as general superintendent of a railroad implies power to contract for fencing. *New Albany R. Co. v. Haskell*, 11 Ind. 301.

The general agent and manager of a mining company is presumably empowered to sell its personal property. *Scudder v. Anderson*, 54 Mich. 122.

But where an agent was authorized to manage a hotel, and without the knowledge of the principal entered into an arrangement with a livery-stable keeper that the latter should furnish carriages for the guests of the house, and that the house would be responsible for the safe-keeping and return of the carriages, *held*, that the principal was not bound. *Brockway v. Mullin*, 4 N. J. L. 448; s. c., 50 Am. Rep. 442.

But authority to manage and superintend a farm does not imply power to allow a creditor to cut, remove, and sell on execution grass growing on the land. *Benjamin v. Benjamin*, 15 Conn. 347; s. c., 39 Am. Dec. 384.

Nor does authority to purchase mules, implements, and supplies for the farm imply a power to purchase goods for farm hands. *Carter v. Burnham*, 31 Ark. 212.

Nor does authority to employ work-

men for the construction of a mill and pay them imply a power to purchase lumber or enter into contracts respecting it. *Rankin v. New England, etc., Co.*, 4 Nev. 78.

A clerk managing his principal's business during his absence has no power to bind his principal for the debt of a third party. *Ruppe v. Edwards*, 52 Mich. 411; *New York Iron Mine v. Negaunee Bank*, 39 Mich. 644; *Clayton v. Martin*, 31 Ark. 217; *Meyer v. Baldwin*, 52 Miss. 263; *Doan v. Duncan*, 18 Ill. 96.

An authority given by an administrator of an estate to manage her own affairs does not extend to the affairs of the estate. *Succession of Pipes*, 26 La Ann. 203.

A manager of a plantation has no power to agree for the exchange of cotton. *Ball v. Bender*, 22 La Ann. 493.

Power to represent all the interests of the principal's business does not imply power to engage in a new and different business. *Campbell v. Hastings*, 29 Ark. 512.

Nor to sell the principal's land. *Watson v. Hopkins*, 27 Tex. 637; *Smith v. Stephenson*, 45 Iowa, 645.

Nor to indorse notes. *Sewanee Mining Co. v. McCall*, 3 Head (Tenn.), 619.

Nor to make notes. *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494; s. c., 24 Am. Dec. 62; *Holtsinger v. Nat., etc., Bank*, 1 Sweeney (N. Y.), 64.

Nor to give accommodation notes. *Gulick v. Grover*, 33 N. J. L. 463; *Bank v. Johnson*, 3 Rich (S. Cal.) 42.

2. *Ala. Gr. So. R. Co. v. Hill*, 76 Ala. 303.

As to the length of the engagement, *Williams v. Getty*, 31 Pa. St. 461; s. c., 72 Am. Dec. 757. *Compare Pasco v. Smith*, 49 Conn. 576. But does not include the power to allow an employee to engage in other business antagonistic to the interests of the principal. *Adams Exp. Co. v. Trego*, 35 Md. 47.

It seems that an agent, to give notice of the intention of one party to a contract to end it, cannot withdraw the notice so as to continue the contract, after it has ceased to be operative. *Patrick v. Richmond, etc., R. Co.*, 93 N. Car. 422.

turing corporation has implied power to employ surgical aid for an injured employee.<sup>1</sup>

*Power to Manage Property.*—Authority by parol to rent and care for real property will not empower an agent to bring suit in his own name to recover possession of the property from claimant under a tax deed;<sup>2</sup> nor one who is empowered to manage property and make the necessary repairs to rebuild after a fire or make

1. *Swazey v. Union Mfg. Co.*, 42 Conn. 556.

So has the general manager of a railroad company. *Walker v. Great Western R. Co.*, L. R. 2 Exch. 228, 36 L. J. Exch. 123.

Also a sub-inspector of railway police. *Langan v. Great Western R. Co.*, 30 L. T. N. S. 173.

A local agent has no power to bind the company by such a contract. *Toledo, etc., R. Co. v. Rodrigues*, 47 Ill. 188; *Tucker v. St. Louis, etc., R. Co.*, 54 Mo. 177. Nor has a station-master any such power. *Cox v. Midland Counties R. Co.*, 3 Exch. 268. Nor a conductor. *Tucker v. St. Louis, etc., R. Co.*, 54 Mo. 177. Nor a physician. *Mayberry v. Chicago, etc., R. Co.*, 11 Am. & Eng. R. Cas. 29; s. c., 75 Mo. 492.

A general superintendent has such power. *Atchison, etc., R. Co. v. Beecher*, 1 Am. & Eng. R. R. Cas. 343; s. c., 228. But not if he has merely power as to the running of the road and pays the employees, but has no control over the treasury. *Stephenson v. New York, etc., R. Co.*, 2 Duer (N. Y.), 341.

A division superintendent or a yard-master has no such power unless it is expressly conferred on him. *Brown v. Missouri, etc., R. Co.*, 67 Mo. 132; *Marquette v. Taft*, 28 Mich. 289; *Union Pac. R. Co. v. Beatty*, 10 Pac. R. (Kans.) 845.

A telegram from the general superintendent authorizing a station-master to employ the best doctor for an injured employee, and to do all he could to save his foot and make him comfortable, is sufficient to bind the company for board and nursing. *Atchison, etc., R. Co. v. Beecher*, 1 Am. & Eng. R. R. Cas. 343; s. c., 24 Kan. 228.

Where a local agent entered into a contract such as above, and wrote to the superintendent stating what he had done, and the letter did not countermand the order, but on the contrary, on receipt of the bill, admitted the validity of the contract and contested the claim solely on the ground of its alleged excessive nature, the company was held liable. *Toledo, etc., R. Co. v. Rodrigues*, 47 Ill. 188.

Where a brakeman is injured in the

discharge of his duty at a point distant from the chief offices of the company, and is in need of immediate surgical attendance, the conductor has implied power to employ a surgeon, if there is no superior agent of the company present. *Terre Haute, etc., R. Co. v. McMurray*, 22 Am. & Eng. R. R. Cas. 371; s. c., 98 Ind. 358; 49 Am. Rep. 752.

It is the duty of agents in charge of a train to take care of one injured by a collision. *Northern, etc., R. Co. v. State*, 29 Md. 420.

A railway road-master, having charge of the repairs of the roadway, has no implied authority to contract for the nursing of a person injured on the line of the road, there being no emergency calling for immediate action, and there being a superior agent within reach; but the corporation will be bound by the ratification of such contract by the general manager. *Louisville, etc., R. Co. v. McVay*, 22 Am. & Eng. R. R. Cas. 382; s. c., 98 Ind. 391, 49 Am. Rep. 770.

As to ratification of acts of the employees in above cases, see *Indianapolis, etc., R. Co. v. Morris*, 67 Ill. 295; *Cairo, etc., R. Co. v. Mahoney*, 82 Ill. 73; *Pacific, etc., R. Co. v. Thomas*, 19 Kans. 256; *Southgate v. Atlantic, etc., R. Co.*, 61 Mo. 89; *Louisville, etc., R. Co. v. McVay*, 22 Am. & Eng. R. R. Cas. 382; s. c. 98 Ind. 391, 49 Am. Rep. 770.

Authority to care for an injured employee implies a power to arrange for his board and care. *Atchison, etc., R. Co. v. Reecher*, 1 Am. & Eng. R. R. Cas. 343; s. c., 24 Kans. 228.

But authority to purchase medicines on credit does not imply power to contract for board and nursing. *Mayberry v. Chicago, etc., R. Co.*, 11 Am. & Eng. R. R. Cas. 29; s. c., 75 Mo. 492.

Nor does authority to employ surgical aid for a passenger authorize it for an injured employee. *Shriver v. Stephens*, 12 Pa. St. 258.

A managing agent has no power to employ an attorney to bring suit for personal injuries to employees of the principal. *Cochran v. Newton*, 5 Den. (N. Y.), 482. See RAILROADS.

2. *McHenry v. Painter*, 58 Iowa, 365.

unnecessary alterations;<sup>1</sup> nor does authority to use property for the agent's benefit imply a power to rent it.<sup>2</sup>

A power to manage property gives no authority to sell it;<sup>3</sup> nor a power to insure property, to insure it in a mutual company which would make the principal an insurer of others.<sup>4</sup>

*To Control Real Estate.*—A power to exercise control and supervision over all lands that may belong to the principal extends to after-acquired lands;<sup>5</sup> and a full power to act for a principal in regard to his real estate will authorize the bringing of a suit to restrain trespass and to execute an injunction bond in the principal's name,<sup>6</sup> and to settle a mortgage debt by taking the mortgage property in full satisfaction.<sup>7</sup>

*Credit.*—Power to purchase implies power to purchase on credit, if the agent is not supplied with funds.<sup>8</sup>

An agent furnished with funds and instructed to build a house has no implied power to build on credit.<sup>9</sup> A travelling agent has implied authority to hire teams to transport himself and samples on his principal's credit, even though he is supplied with funds to pay for such hire.<sup>10</sup>

*To Loan and Borrow.*—A general power to loan money authorizes an extension in time of payment,<sup>11</sup> and a general power to borrow money includes authority to give the lender the ordinary securities for the sum borrowed.<sup>12</sup>

*To Mortgage.*—A power to mortgage does not authorize the agent to mortgage the property for his own benefit,<sup>13</sup> nor that of third

1. Beckman v. Wilson, 61 Cal. 335.

2. Ward v. Thrustin, 40 Ohio St. 347.

3. Smith v. Stephenson, 45 Iowa, 645; Holbrook v. Oberne, 56 Iowa, 324; McNamee v. Kelf, 52 Miss. 426.

Nor to employ counsel in a case concerning property belonging to another person. Perry v. Jones, 18 Kans. 552.

Nor to confess a general judgment for his principal where an attachment is issued against the property, the owner being a non-resident. Howell v. Gordon, 40 Ga. 302.

Neither does authority to locate and survey land give authority to sell. Moore v. Lockett, 2 Bibb. (Ky.) 67; s. c., 4 Am. Dec. 683.

Nor a power to collect rent to employ an engineer. Crozier v. Reins, 4 Ill. App. 564.

4. White v. Madison, 26 N. Y. 117.

5. Berkey v. Judd, 22 Minn. 287.

6. State v. Banks, 48 Md. 513.

7. Renwick v. Wheeler, 4 McCrary (U. S.), 119.

8. Sprague v. Gillett, 9 Metc. (Mass.) 91. See Ruffin v. Mebane, 6 Ired. Eq. (N. Car.) 507.

But when he is supplied with funds he cannot do so unless it is the usage of the

trade. Komorowski v. Krumdick, 56 Wis. 23; Jaques v. Todd, 3 Wend. (N. Y.) 83; Fraser v. McPherson, 3 Desaur (S. Car.), 393.

The fact that the agent is supplied with money to pay for purchases does not imply that he is not authorized to buy on credit. Adams v. Boies, 24 Iowa, 96; Paine v. Tillinghast, 52 Conn. 532.

A purchasing agent may make representations as to the solvency of his principal. Hunter v. Hudson River Co., 20 Barb. (N. Y.) 493.

9. Proctor v. Tows, 3 N. East. R. Ill. 569.

10. Bentley v. Doggett, 51 Wis. 224; s. c., 37 Am. Rep. 827. See Huntley v. Mathias, 90 N. Car. 101; s. c., 47 Am. Rep. 516. Compare Sampson v. Singer Manuf. Co., 5 S. Car. 465; Howe Machine Co. v. Ashley, 60 Ala. 496.

11. Hurd v. Marple, 2 Ill. App. 402.

But not to receive usury. Gokey v. Knapp, 44 Iowa, 32. Compare Stevens v. Meers, 11 Ill. App. 138.

12. Hatch v. Coddington, 5 Otto (U. S.), 48.

13. Nippel v. Hammond, 4 Colo. 211; Wolfley v. Rising, 8 Kan. 297.

parties;<sup>1</sup> nor to give a note in the principal's name;<sup>2</sup> nor to insert a provision for payment of attorney's fee.<sup>3</sup> Nor does a power to mortgage farm stock to a certain amount authorize a second mortgage.<sup>4</sup>

An authority to foreclose a mortgage is not implied by the power to take a mortgage to secure a deferred payment.<sup>5</sup>

*To Settle.*—Authority to "cite and appear" empowers an agent to prosecute and defend suits which may be brought by or against his principal;<sup>6</sup> an absolute power to settle a suit implies authority to raise money by note, where the money is to be used in procuring a settlement.<sup>7</sup>

*To Examine Accounts.*—Authority to investigate the affairs and accounts of a corporation implies power to employ expert assistance.<sup>8</sup>

*To Perform Contracts.*—But authority to perform and carry out a contract does not imply a power to change it;<sup>9</sup> nor does authority to sue and execute releases imply a power to release without payment;<sup>10</sup> nor to assign the claim to a third person.<sup>11</sup>

A power to manage an estate and prosecute suits does not authorize an agent to assign a cause of action for trespass;<sup>12</sup> neither does authority to issue policies for life insurance and to receive

1. *Greenwood v. Spring*, 54 Barb. (N. Y.) 375.

2. *Mylius v. Copes*, 23 Kan. 617.

3. *Pacific, etc., Co. v. Dayton, etc., R. Co.*, 7 Sawy. (U. S.) 61; s. c., 5 Fed. Repr. 582.

4. *Skaggs v. Murchison*, 63 Tex. 348.

B. and E. executed to F. a power of attorney to borrow money for the use of the firm, "and to sign and indorse all notes representing the sum or sums thus borrowed or to be borrowed, and to secure the payment and reimbursement thereof by granting a special mortgage on the whole or a part of the real estate, lands, and tenements belonging to our said firm or standing in its name." F. then procured S. to give notes as accommodation makers, payable to the order of B. & Co., who negotiated the same with several banks. In order to procure the renewal of such accommodation paper, F. for himself, and as the attorney in fact of B. and E., gave to S. B. & Co. their promissory notes for the amount of such renewals, and executed a mortgage on certain real estate to secure the payment of the notes to S. Held, that under the power of attorney, F. was authorized to borrow money, and the mortgage given to secure S. to be good in equity. *Burnet v. Boyd*, 60 Miss. 627.

5. *Aultman v. Jones*, 1 Woolw. (U. S.) 99.

But where the owner authorized an

agent to procure additional security for a real-estate mortgage, leaving it to his judgment to make the best arrangement he could for that purpose, held, that the agent was authorized to make an agreement for a reasonable extension of time of payment. Also held, that the owner by taking, holding, and foreclosing a chattel mortgage given in consideration of the agreement to extend the time of payment must be deemed to have ratified the same, even if the agent had not authority to make it. *Kane v. Cortesy*, 100 N. Y. 132.

6. *Miller v. Marmiche*, 24 La. Ann. 30.

And to make a suit effective by attachment. *De Poret v. Gusman*, 30 La. Ann. pt. ii. 930.

But not to advise with counsel relative to the principal's interests; it only authorizes the employment of counsel so far as may be necessary to prepare such instruments as may be necessary under the power of attorney. *Harrett v. Garvey*, 35 N. Y. Super. Ct. 327.

7. *Tanner v. Hastings*, 2 Ill. App. 283.

8. *Star Line v. Van Vliet*, 43 Mich. 364.

9. *Gerrish v. Maher*, 70 Ill. 470; *Godman v. Meixsel*, 53 Ind. 11.

10. *De Mets v. Dagron*, 53 N. Y. 635.

11. *Garrigue v. Loescher*, 3 Bosw. (N. Y.) 578.

12. *Geiger v. Bolles*, 1 Th. & C. (N. Y.)

premiums imply a power to waive conditions in the policy as to payment of premiums.<sup>1</sup>

- **Duties of Agents.—To Perform the Duties Undertaken.**—When an agent has undertaken to execute a commission for a valuable consideration, he binds himself to perform it, and will be liable for its performance in the absence of a fresh contract releasing him, unless the agreement is either illegal, immoral, or absolutely impossible.<sup>2</sup>

**To Act in the Name of his Principal.**—In so far as he undertakes to act as agent, he undertakes to represent the principal only.<sup>3</sup>

**To Act in Person.**—An agent who has a bare power or authority must execute it himself and cannot delegate his authority to another.<sup>4</sup>

1. *Mersereaux v. Phoenix M. L. Ins. Co.*, 66 N. Y. 274.

2. *Evans on Agency* (Ewell's Ed.), 212; *Le Guen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 437; s. c., 1 Am. Dec. 121; *Bell v. Palmer*, 6 Cow. (N. Y.) 128; *La Farge v. Kneeland*, 7 Cow. (N. Y.) 456; *Allen v. Suydam*, 20 Wend. (N. Y.) 321; 32 Am. Dec. 555; *Ralston v. Barclay*, 6 Martin (La.), 653; s. c., 12 Am. Dec. 483; *Berthond v. Gordon*, 6 La. 583; *Williamsburgh, etc., Ins. Co. v. Frothingham*, 122 Mass. 391; *Morris v. Summerl*; 2 Wash. (U. S.) 203; *De Tastett v. Cronsillatt*, 2 Wash. (U. S.) 132.

3. *Evans on Ag.* (Ewell's Ed.) 212, 213; *Sullivan v. Ross*, 39 Mich. 511.

4. *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 37; *Haven v. Winnissimmet Co.*, 11 Allen (Mass.), 377; *Tippets v. Walker*, 4 Mass. 506; *Brewster v. Hobart*, 15 Pick. (Mass.) 302; *Stoughton v. Baker*, 4 Mass. 522; s. c., 3 Am. Dec. 236; *Connor v. Parker*, 114 Mass. 331; *Lewis v. Ingersoll*, 3 Abb. App. Dec. (N. Y.) 55; *Commercial Bank v. Norton*, 1 Hill (N. Y.), 501; *Hawley v. James*, 5 Paige (N. Y.), 318; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485; s. c., 37 Am. Dec. 271; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; *Bocock v. Pavey*, 8 Ohio St. 270; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520; *Warner v. Martin*, 11 How. (U. S.) 209, 223; *Ex-p. Winsor*, 3 Story (U. S.), 411; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; *Gillis v. Bailey*, 1 Fost. (N. H.) 149; *Andover v. Grafton*, 7 N. H. 304; *Mayer v. McLure*, 36 Miss. 389; s. c., 72 Am. Dec. 190; *Bissell v. Roden*, 34 Mo. 63; *McClure v. Miss. Valley Ins. Co.*, 4 Mo. App. 148; *Crozier v. Reins*, 4 Ill. App. 564; *Mason v. Waite*, 4 Scam. (Ill.) 127; *Locke's Appeal*, 72 Pa. St. 491; *McCormick v. Bush*, 38 Tex. 314; *Smith v. Sublett*, 28 Tex. 163; *Entz v.*

*Mills*, 1 McM. (S. Car.) 453; *Wilson v. York, etc., R. Co.*, 11 Gill. & J. (Md.) 58, 74; *Hunt v. Douglass*, 22 Vt. 128; *Loomis v. Simpson*, 13 Iowa, 532; *Furnas v. Frankman*, 6 Nebr. 429.

Except where a known usage of trade justifies, or necessity requires, the employment of sub-agents, an agent whose powers and duties involve personal trust and confidence and the exercise of judgment and discretion cannot, without authority from his principal, delegate to another the confidence and discretion reposed in him. Having, by his own judgment and discretion, determined what should be done, he may authorize another to perform the ministerial acts necessary to carry into effect the purposes of his employment, but he cannot turn his principal's business over to the judgment and discretion of another, and bind his principal by the acts and conduct of the latter. *Titus & Scudder v. Cairo & F. R. Co.*, 46 N. J. L. 393.

An agent to sell cannot bind his principal by an agreement to pay another commissions for making sales. *Atlee v. Fink*, 75 Mo. 100; s. c., 42 Am. Rep. 385.

The governing board of a municipal corporation cannot delegate its authority to an inferior board or other officers or agents. *Richardson v. Heydenfeldt*, 46 Cal. 68; *Thompson v. Schermerhorn*, 6 N. Y. 92; s. c., 4 Am. Dec. 385; *Ruggles v. Collier*, 43 Mo. 353; *Sheehan v. Gleeson*, 46 Mo. 100; *Foss v. Chicago*, 56 Ill. 354; *East St. Louis v. Wehrung*, 50 Ill. 28; *State v. Jersey City*, 26 N. J. L. 444; *State v. Paterson*, 34 N. J. L. 163; *White v. Mayor*, 2 Swan (Tenn.), 364.

A broker cannot delegate his authority. *Henderson v. Barnwell*, 1 Y. & Jerv. 387; *Locke's Appeal*, 72 Pa. St. 491.

Nor a factor. *Loomis v. Simpson*, 13 Iowa, 532; *Warner v. Martin*, 11 How. (U. S.) 209

*Power of Substitution.*—The principal may, however, give the agent the power of substitution, either expressly with the appointment, or by ratification or acquiescence when the agent has delegated his power without authority.<sup>1</sup>

*To Obey Instructions, and Observe the Terms of the Authority.*—An agent is bound to follow faithfully the instructions of his principal, and to act within the scope of his authority.<sup>2</sup> This rule is, however, subject to the following exceptions:

Neither can an attorney-at-law. *In re Bleakly*, 5 Paige (N. Y.), 311; *Hitchcock v. McGehee*, 7 Port. (Ala.) 556; *Johnson v. Cunningham*, 1 Ala. 249; *Ratcliff v. Baird*, 14 Tex. 43; *Rolland v. Rowland*, 2 Blackf. (Ind.) 22.

Nor an auctioneer. *Stone v. State*, 12 Mo. 400.

Merely ministerial acts may, however, be delegated by the agent. *Williams v. Woods*, 16 Md. 220; *Bodine v. Ins. Co.*, 51 N. Y. 117; *Commercial Bank v. Norton*, 1 Hill (N. Y.), 501; *Com. v. Harneden*, 19 Pick. (Mass.) 482; *Poree v. Bonneval*, 6 La. Ann. 386; *Norwich University v. Denny*, 47 Vt. 13; *Grady v. Am. Cent. Ins. Co.*, 60 Mo. 116; *Newell v. Smith*, 49 Vt. 255; *Star Line v. Van Vliet*, 43 Mich. 364.

A tax list made up by one who is not a member of the taxing body, but who acts under its direction and as its agent, is not thereby made invalid. *Covington v. Rockingham*, 93 N. Car. 134.

1. *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167, 178; *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Smith v. Lipscomb*, 13 Tex. 532; *Johnson v. Cunningham*, 1 Ala. 249; *King v. Pope*, 28 Ala. 601; *Doe v. Robinson*, 3 Bing. (N. C.) 677; *Mason v. Joseph*, 1 Smith, 406.

The power of substitution is impliedly given to an agent when the object of the agency is of such a character that it cannot be attained without a substitution; as where a draft payable at a distant place was left with a bank for collection. *Planters, etc., Bank v. First Nat. Bank*, 75 N. Car. 534; *Dorchester, etc., Bank v. New Engl. Bank*, 1 Cush. (Mass.) 177; *Appleton Bank v. McGilvray*, 4 Gray (Mass.), 522; s. c., 64 Am. Dec. 92; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *Fabens v. Mercantile Bank*, 23 Pick. (Mass.) 330; s. c., 34 Am. Dec. 59; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Johnson v. Cunningham*, 1 Ala. 249; *Laussatt v. Lippincott*, 6 S. & R. (Pa.) 386; *Franklin v. Ezell*, 1 Sneed (Tenn.), 497; *Strong v. Stewart*, 9 Heisk. (Tenn.) 147; *Gillis v. Bailey*, 21 N. H. 149; *Jackson v. Union Bank*, 6 Harr. & J. (Md.) 146; *Bellimire v. Bank of U. S.*,

4 Whart. (Pa.) 105; s. c., 33 Am. Dec. 46; *Warner v. Martin*, 11 How. (U. S.) 209; *Bank of Washington v. Triplett*, 1 Pet. (U. S.) 25.

Or where by well-known custom of trade it is so understood by the parties. *Bodine v. Exch. Fire Ins. Co.*, 51 N. Y. 117; *Bilsborrow v. James*, 25 Hun (N. Y.), 18; *Commercial Bank v. Norton*, 1 Hill (N. Y.), 501; *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167, 178; *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Grady v. Am. Cen. Ins. Co.*, 60 Mo. 116; *Norwich University v. Denny*, 47 Vt. 13; *Peterson v. Christensen*, 26 Minn. 581; *Williams v. Woods*, 16 Md. 220; *Rosenstock v. Tormey*, 32 Md. 169; *Chase v. Ostrom*, 50 Wis. 640; *Saveland v. Green*, 40 Wis. 431, 442; *Darling v. Stanwood*, 14 Allen (Mass.), 504; *Buckland v. Conway*, 16 Mass. 396; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *Ledoux v. Goza*, 4 La. Ann. 160; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Harralson v. Stein*, 50 Ala. 347.

Where an agent is authorized to sell land, exercising his discretion as to price and terms, he may properly employ a sub-agent. *Renwick v. Bancroft*, 56 Iowa, 527.

Or where the interests of the principal may be better served by a substitution. *Briggs v. Georgia*, 10 Vt. 68; *Fenno v. English*, 22 Ark. 170; *Saveland v. Green*, 40 Wis. 431.

Where the principal ratifies the acts of a sub-agent, as by accepting the benefits of his transactions, he thereby ratifies the appointment of the sub-agent. *Willinks v. Hollingworth*, 6 Wheat. (U. S.) 259; *Strickland v. Hudson*, 55 Miss. 255. See SUB-AGENTS, *post*.

2. *Adams v. Robinson*, 65 Ala. 586; *Rundle v. Moore*, 3 Johns. Cas. (N. Y.) 36; *Loeb v. Hellman*, 45 N. Y. Super Ct. 336; *Blot v. Boiceau*, 1 Sandf. Sup. Ct. (N. Y.) 111; *Johnson v. N. Y. Cent. R. Co.*, 31 Barb. (N. Y.) 196; *Williams v. Littlefield*, 12 Wend. (N. Y.) 362; *Scott v. Rogers*, 31 N. Y. 676; *Laverty v. Snethen*, 68 N. Y. 522; *Wilts v. Morrell*, 66 Barb. (N. Y.) 511; *Le Guen v.*

Where the authority or instructions require the agent to do an illegal or immoral act.<sup>1</sup>

Where a deviation from the strict performance of his authority

Gouverneur, 1 Johns. Cas. (N. Y.) 437 n.; Allen v. Suydam, 20 Wend. (N. Y.) 321; s. c., 32 Am. Dec. 555; Bennett v. Austin, 81 N. Y. 308; Leverick v. Meigs, 1 Cow. (N. Y.) 645; Chavanne v. Frizola, 25 La. Ann. 77; Nesbit v. Burry, 25 Pa. 208; Persch v. Quiggle, 57 Pa. St. 247; Dodge v. Tileston, 12 Pick. (Mass.) 328; Rommel v. Wingate, 103 Mass. 327; Wilson Sewing M. Co. v. Louisville, etc., R. Co., 71 Mo. 203; Butts v. Phelps, 79 Mo. 302; Fowler v. Colt, 25 N. J. Eq. 202; Loehnberg v. Atherton, 6 N. East. R. (Mass.) 768; Godman v. Meixsel, 53 Ind. 11; Osborne v. Rider, 62 Wis. 235; Williams v. Higgins, 30 Md. 404; Lee v. Clements, 48 Ga. 128; Sawyer v. Mayhew, 51 Me. 398; Ferguson v. Porter, 3 Fla. 27; Robinson Mach. Works v. Vorse, 52 Iowa, 207; Clark v. Roberts, 26 Mich. 506; Bank of Owensboro v. Western Bank, 13 Bush (Ky.), 526; Nicolai v. Lyon, 8 Oregon, 56; Thornton v. Boyden, 31 Ill. 200; Brown v. McGrau, 14 Pet. (U. S.) 480; Walker v. Smith, 4 Dall. (U. S.), 389. Compare Milbank v. Dennistoun, 21 N. Y. 386.

Where an agent was instructed to send an amount of money by express and he instead bought a check and sent it by mail, and before the check could be collected the drawer failed, the agent was held liable. Walker v. Walker, 5 Heisk. (Tenn.) 425.

W., being authorized to sell certain land of defendant, subject to a certain lease, made a written contract of sale to plaintiff, by which he assumed to bind his principal to convey the land "in fee-simple, and with a perfect title free from all incumbrances." Held, that the contract is unauthorized, and not enforceable. Thomas v. Joslin, 30 Minn. 388.

A principal directed an agent to send him \$300 in bills of \$50 or \$100 each. He sent it in bills of smaller amount, and the money was lost. The court held that the agent did not follow his instruction and was liable to the principal for the loss. Wilson v. Wilson, 26 Pa. St. 394; Butts v. Phelps, 79 Mo. 302.

An agent was employed to sell for a specific sum. His agreement to sell for a sum less than that nominated in his authority, and to pay taxes, was therefore of no binding force upon his principal. Holbrook v. McCarthy, 61 Cal. 216.

The mere fact that the agent in disobeying instructions intended to promote the principal's interests will not exonerate him. Rechtscherd v. Accommodation Bank, 47 Mo. 181; Courcier v. Ritter, 4 Wash. C. C. (U. S.) 549; Coker v. Ropes, 125 Mass. 577.

Where an agent acts against his instructions, and the principal afterward either expressly or impliedly ratifies the act, the principal will be bound. Bray v. Gunn, 53 Ga. 144; Joslin v. Cowee, 52 N. Y. 90. See RATIFICATION, post.

1. Elmore v. Brooks, 6 Heisk. (Tenn.) 45; Brown v. Howard, 14 Johns. (N. Y.), 119; Davis v. Barger, 57 Ind. 54; Greenwood v. Curtis, 6 Mass., 58; s. c., 4 Am. Dec. 145; Brookover v. Hurst, 1 Metc. (Ky.) 665; Smith v. Godfrey, 8 Fost. (N. H.) 382; s. c., 61 Am. Dec. 617; Bibb v. Bibb, 17 B. Monr. (Ky.) 292; Marksbury v. Taylor, 10 Bush (Ky.), 519.

Where an agent was appointed to influence members of a legislature as a lobbyist, the contract was held to be illegal and void. Trist v. Child, 21 Wall. (U. S.) 441; Clippinger v. Hepbaugh, 5 W. & S. (Pa.) 315; s. c., 40 Am. Dec. 519; Harris v. Roof, 10 Barb. (N. Y.) 489; Rose v. Truax, 21 Barb. (N. Y.) 361; Marshall v. Baltimore, etc., R. Co., 16 How. (U. S.) 314.

While the courts will not enforce an illegal contract between the parties, yet if an agent of one of the parties has, in the prosecution of the illegal enterprise for his principal, received money or other property belonging to his principal, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction. Norton v. Blinn, 39 Ohio St. 145; Church v. Stegner, 21 Ohio St. 488; Baldwin v. Potter, 46 Vt. 402; Evans v. Trenton, 4 Zab. (N. J.) 764; Brooks v. Martin, 2 Wall. (U. S.) 70; Tenant v. Elliott, 1 B. & P. 2; Pointer v. Smith, 7 Heisk. (Tenn.) 137; Murray v. Vanderbilt, 39 Barb. (N. Y.) 140; Daniels v. Barney, 22 Ind. 207; Wood's Mas. and Ser. § 202.

The burden of proof of the illegality of an order of a principal is upon the agent. He must show that he has a legal reason to refuse to execute the order. Chicago & N. W. R. Co. v. Bay Field, 37 Mich. 205. See also LIABILITY OF PRINCIPAL FOR TORTS OF AGENTS.

is due to necessity or to unforeseen emergencies which are themselves not due to the agent's default.<sup>1</sup>

Where the terms of the authority have been substantially performed, a circumstantial variance will be held to be immaterial.<sup>2</sup>

*In the Absence of Instructions, to Conform to Usage or Recognized Mode of Dealing.*—Where an agent is commissioned to do any act, nothing being said as to the mode of performance, he will have an implied power to perform his duties in accordance with any recognized usage or mode of dealing.<sup>3</sup>

*To Use Reasonable Skill and Ordinary Diligence.*—The agent is understood to contract for reasonable skill and ordinary diligence, and he is consequently liable to his employer for injuries occasioned by the want of reasonable skill, and also for ordinary negligence. By reasonable skill we are to understand such as is, and no more than is, ordinarily possessed and employed by persons of common capacity engaged in the same trade, business, or employment; by ordinary diligence, that degree of diligence which persons of common prudence are accustomed to use about their own business and affairs.<sup>4</sup>

1. *Judson v. Sturges*, 5 Day (Conn.), 556; *Drummond v. Wood*, 2 Cai. (N. Y.) 310; *Liotard v. Graves*, 3 Cai. (N. Y.) 226; *Lawler v. Keaquick*, 1 Johns. Cas. (N. Y.) 174; *Forrestier v. Bordman*, 1 Story (U. S.) 43; *Dusar v. Perit*, 4 Binn. (Pa.) 361; *Greenleaf v. Moody*, 13 Allen (Mass.), 363; *Bernard v. Maury*, 20 Gratt. (Va.) 434; *Harter v. Blanchard*, 64 Barb. (N. Y.) 617; *Wood v. Cooper*, 2 Over. (Tenn.) 441. See also SHIPMASTERS.

Emergencies may arise in which a factor or agent may from the necessities of the case be justified in assuming extraordinary power and his acts fairly done under such circumstances bind the principal. Acts done in the *bona fide* efforts to save perishing property come within the rule. *Jervis v. Hoyt*, 2 Hun. (N. Y.) 637; *Greenleaf v. Moody*, 13 Allen (Mass.) 363; *Goodwillie v. McCarthy*, 45 Ill. 186.

And especially is this the case when not only the principal's interests are endangered, but also the interests of the agent. *Brown v. M'Grau*, 14 Pet. (U. S.) 480; *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Stall v. Meek*, 70 Pa. St. 181; *Milbank v. Dennistoun*, 21 N. Y. 386; *Frothingham v. Everton*, 12 N. H. 239.

2. *Parkhill v. Imlay*, 15 Wend. (N. Y.) 431.

3. *Lovejoy v. Middlesex R. Co.*, 128 Mass. 480; *Grant v. Ludlow*, 8 Ohio St. 54; *Bailey v. Bensley*, 87 Ill. 566; *Walker v. Walker*, 5 Heisk. (Tenn.) 425; *Wanless v. McCandless*, 38 Iowa, 20; *De Lazardi v. Hewitt*, 7 B. Mon. (Ky.) 697; *Byrne v. Schwing*, 6 B. Mon. (Ky.) 199;

*Lausatt v. Lippincott*, 6 S. & R. (Pa.) 392; *Le Roy v. Beard*, 8 How. (U. S.) 451; *Delafield v. State of Ill.*, 26 Wend. (N. Y.) 192; *Smedes v. Utica Bank*, 20 Johns. (N. Y.) 372; *White v. Fuller*, 67 Barb. (N. Y.) 267; *Miranda v. City Bank*, 6 La. 740.

A factor without special instruction to sell for cash only may sell on credit for a period established by the usage of trade in his line of business. *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 69; *Robertson v. Livingston*, 5 Cow. (N. Y.) 473; *Burrill v. Phillips*, 1 Gall. (U. S.) 360; *Forrestier v. Bordman*, 1 Story (U. S.), 43; *Greely v. Bartlett*, 1 Greenl. (Me.) 172; s. c., 10 Am. Dec. 54.

Or take a negotiable note in payment. *Goodenow v. Tyler*, 7 Mass. 36; *Tarlton v. M'Whorter*, 5 Stew. & Port. (Ala.) 284; *Kidd v. King*, 5 Ala. 84; *Rogers v. White*, 6 Greenl. (Me.) 193; *Dwight v. Whitney*, 15 Pick. (Mass.) 179.

4. Story on Agency, § 183; *Whitney v. Martine*, 88 N. Y. 535; *First Nat. Bank of Meadville v. Fourth Nat. Bank of N. Y.*, 77 N. Y. 320; *Heineman v. Heard*, 50 N. Y. 27; *Gleason v. Clark*, 9 Cow. (N. Y.) 57; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Lawler v. Keaquick*, 1 Johns. Cas. (N. Y.) 174; *Bigelow v. Walker*, 24 Vt. 149; s. c., 58 Am. Dec. 156; *Wilmot v. Howard*, 39 Vt. 447; *Gheen v. Johnson*, 90 Pa. St. 38; *Fowler v. Sergeant*, 1 Grant Cas. (Pa.) 355; *Deshler v. Beers*, 32 Ill. 368; *Gettins v. Scudder*, 71 Ill. 86; *Fay v. Strawn*, 32 Ill. 295; *Gilson v. Collins*, 66 Ill. 136; *Matthews v. Fuller*, 123 Mass. 446; *Savage v. Birkhead*, 20



*To Make a Full Disclosure where he has an Adverse Interest.*—An agent will not be allowed to place himself in a position in which his duty and interest conflict, or be permitted to make a secret profit out of his agency.<sup>1</sup>

Pick. (Mass.) 167; Varnum v. Martin, 15 Pick. (Mass.) 440; Harriman v. Stowe, 57 Mo. 93; Williams v. Higgins, 30 Md. 404; Myles v. Myles, 6 Bush (Ky.), 237; Evans v. Watrous, 2 Port. (Ala.) 205; Webster v. Whitworth, 49 Ala. 201; New Orleans R. Co. v. Albritton, 38 Miss. 242; s. c., 75 Am. Dec. 98; Long v. Morrison, 14 Ind. 595; Babcock v. Orison, 25 Ind. 75; Wood v. Clapp, 4 Sneed (Tenn.), 65; Patten v. Wiggins, 51 Me. 594; Howard v. Grover, 28 Me. 97; s. c., 48 Am. Dec. 478; Leighton v. Sargent, 7 Fost. (N. H.) 460; s. c., 59 Am. Dec. 388; Marsh v. Whitmore, 21 Wall. (U. S.) 178; Holliday v. Kennard, 12 Wall. (U. S.) 254; Trinidad Nat. Bank v. Demean Nat. Bank, 4 Dill. (U. S.) 290; Milwaukee Bank v. City Bank, 103 U. S. 668.

He must give his principal timely notice of every fact coming to his knowledge necessary for the latter's security. Moore v. Thompson, 9 Phil. (Pa.) 164. Compare Pierce v. Chicago, etc., R. Co., 36 Wis. 283.

Where the agent of a commissioner for the sale of county property delivered the commissioner's deed to the purchaser without receiving the purchase-money, he thereby assumes the payment of it himself. Jacks v. State, 44 Ark. 61.

An agent who, by neglect and want of diligence, fails to collect money of his principal loaned by him is liable for the loss. Rochester v. Levering, 104 Ind. 562. See Dickson v. Screven, 23 S. Car. 212.

And it does not matter whether the services of the agent are rendered gratuitously or for a consideration. Thorne v. Deas, 4 Johns. (N. Y.) 84; Benden v. Manning, 2 N. H. 289; Gill v. Middleton, 105 Mass. 477; Bank of New Hanover v. Kenan, 76 N. Car. 340; Williams v. Higgins, 30 Md. 404.

But he will not be liable if the exercise of reasonable care on the part of the principal could have prevented the loss. Sioux City, etc., R. Co. v. Walker, 49 Iowa, 273.

The agent is not liable for such accidental losses as may occur in the course of his employment, and which could not be prevented by the exercise of reasonable skill and ordinary diligence. Lake, etc., Co. v. McVean, 32 Minn. 301; Page v. Wells, 37 Mich. 415; Fick v. Runnels, 48

Mich. 302; James v. Borgois, 4 Baxt. (Tenn.) 345; Bannon v. Warfield, 42 Md. 22; Weakley v. Pearce, 5 Heisk. (Tenn.) 401; Hale v. Wall, 22 Gratt. (Va.) 424.

A trustee is bound to make safe investments, such as will yield a reasonable income, and a return of the principal when desired; and he ought not, as a general rule, to invest in second mortgages; but he will not be held personally liable simply because he has done so, in the absence of proof that loss has ensued or will probably ensue. Porter v. Woodruff, 36 N. J. Eq. 174. See Whitney v. Martine, 6 Abb. N. Cas. (N. Y.) 72.

A. was employed as bookkeeper of a firm composed of B. and C., upon the dissolution of which B. bought the interest of C. therein, and continued A. in his employ for a short time. A. was authorized by C. to settle with B. in his behalf. After the dissolution, A. and B. looked over the partnership accounts together, and B. had the books for examination for the purpose of ascertaining how the accounts stood, and what amount was due to each partner. A statement of the partnership accounts was made by A., showing a certain sum due to C., which B. paid to A. as C.'s agent. This statement was in fact erroneous, and the sum paid by B. was in excess of the sum due C. on the settlement. A. said to B., at the time of the settlement, that, if it was not right, it should be made right. There was no intentional fraud or misrepresentation on A.'s part, and he had no personal interest in the settlement, and only acted as agent of the partners. Held, on a bill in equity by B. against A. and C., that A. was not liable to B. in any form of action. Richardson v. Taylor, 136 Mass. 143.

An agent is not responsible for damages caused by his mistake in a doubtful matter of law. Mechanics' Bank v. Merch. Bank, 6 Metc. (Mass.) 13; Howe v. Dewing, 2 Gray (Mass.), 476; Hicks v. Minturn, 19 Wend. (N. Y.) 550; Watson v. Rickard, 25 Kans. 662; Rice v. Melendy, 41 Iowa, 395.

In case of the death of the agent, his estate will be liable to his principal for losses occasioned by his negligence or lack of skill. Robinson Mach. Works v. Vorse, 52 Iowa, 207.

1. White v. Ward, 26 Ark. 445; Schoellkopf v. Leonard, 6 Pac. Repr.

*Officers of Corporations.*—The same rule holds good for officers of a corporation, although representing a majority of the stock ;

(Colo.) 209; *Watson v. Union, etc., Co.*, 15 Ill. App. 509; *Bowman v. Officer*, 53 Iowa, 640; *Persch v. Quiggle*, 57 Pa. St. 247; *Pratt v. Patterson*, 3 Cent. Repr. (Pa.) 120; *Everhardt v. Searle*, 71 Pa. St. 256; *Audenreid v. Walker*, 11 Phila. (Pa.) 183; *Krutz v. Fisher*, 8 Kans. 90, 9 Kans. 501; *Neilson v. Bouman*, 29 Gratt. (Va.) 732; *Bell v. Bell*, 3 W. Va. 183; *Cook v. Berlin Woolen Mills Co.*, 43 Wis. 433; *McMahon v. McGraw*, 26 Wis. 614; *Meyer v. Hanchett*, 39 Wis. 419; s. c., 43 Wis. 246; *Draughen v. Quillen*, 23 La Ann. 237; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Farnsworth v. Hemmer*, 1 Allen (Mass.), 494; s. c., 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348; *Rice v. Wood*, 113 Mass. 133; s. c., 18 Am. Rep. 459; *Holcomb v. Weaver*, 136 Mass. 265; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Young v. Hughes*, 32 N. J. Eq. 372; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Van Epps v. Van Epps*, 9 Paige Ch. (N. Y.) 237; *Marvin v. Buchanan*, 62 Barb. (N. Y.) 468; *Moore v. Moore*, 5 N. Y. 256; N. Y., etc., *Ins. Co. v. Nat., etc., Ins. Co.*, 14 N. Y. 85; *McMillan v. Arthur*, 98 N. Y. 167; *Bennett v. Austin*, 81 N. Y. 308; *Dutton v. Willner*, 52 N. Y. 312; *Wilson v. Wilson*, 4 Abb. App. Dec. (N. Y.) 621; *Greenwood v. Spring*, 54 Barb. (N. Y.) 375; *Dunlop v. Richards*, 2 E. D. Smith (N. Y.), 181; *Pugsley v. Murray*, 4 E. D. Smith (N. Y.), 245; *Lafferty v. Jelly*, 22 Ind. 471; *Ackenburgh v. McCool*, 36 Ind. 473; *Love v. Hoss*, 62 Ind. 255; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Bell v. McConnell*, 137 Ohio St. 396; s. c., 41 Am. Rep. 528; *Capener v. Hogan*, 40 Ohio St. 203; *Sunderland v. Kilbourn*, 3 Mack. (D. C.) 506; *Hinckley v. Arey*, 27 Me. 362; *Raisin v. Clark*, 41 Md. 158; s. c., 20 Am. Rep. 66; *Bollman v. Loomis*, 41 Conn. 581; *Lynch v. Fallon*, 11 R. I. 311; s. c., 23 Am. Rep. 458; *Atlee v. Fink*, 75 Mo. 100; s. c., 42 Am. Rep. 385; *Adams Mining Co. v. Senter*, 26 Mich. 73; *Colwell v. Keystone Co.*, 36 Mich. 51; *Sumner v. Charlotte, etc., R. Co.*, 78 N. Car. 289; *Lloyd v. Colston*, 5 Bush (Ky.), 587; *Northern Pac. R. Co. v. Kindred*, 3 McCrary (U. S.), 627; s. c., 14 Fed. Repr. 77; *Ferguson v. Dent*, 24 Fed. Repr. 412; *Oscanyon v. Arms Co.*, 103 U. S. 261.

Plaintiff, station agent of a railroad company, sues the company in damages for breach of an alleged contract in failing to furnish a train for an excursion. Upon correspondence had, the company

supposed the train was intended for a third party and agreed to supply it on certain terms, but afterwards refused on discovering that plaintiff was attempting to procure it for his own benefit. *Held*, that plaintiff could not from his fiduciary relation towards the company enter into a binding contract with it for such purpose, unless it agreed thereto after being fully advised of all the circumstances. *Pegram v. R. Co.*, 6 Am. & Eng. R. R. Cas. 470; s. c., 84 N. Car. 696; s. c., 37 Am. Rep. 639.

The most open, ingenuous, and disinterested dealing is required of a confidential agent, and there must be an unambiguous relinquishment of his agency before he can acquire a personal interest in the subject of it. *Bartholomew v. Leech*, 7 Watts (Pa.), 472.

In the employment of an agent the principal bargains for the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. There rests upon one becoming agent the duty of fidelity to his employer's interest, and of acting for the furtherance and advancement of the business in which he engages, and not in its injury. Where a confidential agent of one having a lease of a theatre, who, from his position, was well acquainted with the profits of his principal in the use of the building, and who knew, some months before the old lease expired, that the latter was desirous of renewing his lease, offered privately to lease the theatre of the owner, proposing to give a larger rental than was reserved in the old lease, and denied to his principal that he was competing with him for the lease, but in fact did procure a lease to be made to himself, it was *held*, that the benefit of such lease a court of equity would hold to inure to his principal, and that the agent would be held to hold the same as a trustee for his principal. *Davis v. Hamlin*, 108 Ill. 39; s. c., 48 Am. Rep. 541; *Gower v. Andrew*, 59 Cal. 119; s. c., 43 Am. Rep. 242.

A authorized B to manage her lands, and, while he was thus acting, wrote asking him what he would give for the property. He offered her \$6000, and she accepted the offer and conveyed the property to him. Before he made the offer C had talked of purchasing a part of the land for \$6000, and, before B sent the money to A, had offered to pay him that amount, and \$250 for his trouble in the matter. C told B that if he did not accept the offer he would give \$3000 for

they may not deal with themselves to the detriment of the other stockholders for whom they are acting.<sup>1</sup>

the whole property. B never informed A of the offer. *Held*, that A could rescind the sale to B. *Savage v. Savage*, 12 Oregon, 459. See *Mason v. Bauman*, 62 Ill. 76; *Bain v. Brown*, 56 N. Y. 285.

If an agent discovers a defect in a title of his principal to land, he cannot misuse the discovery to acquire a title for himself; and if he does he will be held as a trustee holding for his principal. *Ringo v. Binns*, 10 Pet. (U. S.) 269; *Fisher v. Krutz*, 9 Kans. 501; *Galbraith v. Elder*, 8 Watts (Pa.), 281; *Cleavinger v. Reimar*, 3 W. & S. (Pa.) 486; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Rogers v. Lockett*, 28 Ark. 290.

Plaintiff, a timber broker in New York, having learned that a company required a large number of piles and were about to advertise for bids from timber merchants to supply them, visited the several dealers therein in New York and Brooklyn, among them the defendants, obtained prices, and, under the inducement that he would act for them respectively in procuring a sale, obtained a promise from each that if he secured a sale for such dealer he should receive an agreed commission. Plaintiff did not inform the dealers of the name of the intended purchaser, or that a contract could be obtained only by competitive bidding, or that he had effected a similar understanding with other dealers. The company issued proposals, and sent to said dealers, including defendants, invitations to compete for the contract. Plaintiff, defendants, and other dealers submitted bids for the contract, which was awarded to defendants. In an action to recover the agreed commission wherein the above facts appeared, *held*, that plaintiff was properly nonsuited; that there was no consideration for the agreement; also that there was a suppression of material facts on the part of plaintiff in making the contract; and that it was against good morals, as plaintiff owed duties to different principals, which were conflict and incapable of faithful performance by the same person; also *held*, that the proof failed to show any service rendered by plaintiff to defendant in effecting the sale. *Murray v. Beard*, 102 N. Y. 505.

Where an agent of a railroad company is charged with the duty of selecting a route or line of railway, he cannot in disregard of the interests of the company select a particular route for a commission received from third parties. *Holliday v. Davis*, 5 Oregon, 40.

A person who is acting as agent for a woman, being intrusted by her with moneys to lend out, and with the general management of her business; and who, being financially embarrassed and on the eve of bankruptcy, without informing her of his pecuniary condition, procures from her a new power of attorney, which she signs without reading it, and without knowledge of its purpose, nature and extent, authorizing him to foreclose a mortgage which he had taken to secure her money loaned, "or to extend the time of payment, or to negotiate or leave the same as collateral security, to enable him to raise money for the purpose of putting the same in his business, or any other purpose he may see proper to use said money so raised,"—is guilty of an abuse of the confidence reposed in him; the general terms employed in the power of attorney, so far from conferring any advantage on him, or protecting his subsequent acts as agent, rather cast suspicion on them; and if those acts are prejudicial to his principal, a court of equity will not hesitate to grant relief against them. *Whelan v. McCreary*, 64 Ala. 319.

1. *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433; *Robinson v. Smith*, 3 Paige, 222; s. c., 24 Am. Dec. 212; *Percy v. Millaudon*, 3 La. 568; *Hodges v. New England Screw Co.*, 1 R. I. 312. *Parker v. Nickerson*, 112 Mass. 195; *Gardner v. Butler*, 30 N. J. Eq. 702; *Brewster v. Stratman*, 4 Mo. App. 41. See also *Bent v. Priest*, 10 Mo. App. 543; *Parker v. Nickerson*, 112 Mass. 195; *Chamberlain v. Pacific Wool Growing Co.*, 54 Cal. 103. Compare *Beatty v. Northwestern Transportation Co.*, 6 Am. & Eng. Corp. Cas. 315, and note, where all the authorities are collected, and also s. c.; reversed on appeal, 10 Am. & Eng. Corp. Cas. 263.

Officers of corporations cannot act for themselves and for the corporation they represent. So an officer of a bank empowered to certify checks cannot certify his own checks. *Claffin v. Farmers' Bank*, 25 N. Y. 293; *Titus v. Great Western Turnpike*, 5 Lans. (N. Y.) 250; *N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co.*, 20 Barb. (N. Y.) 468; *People v. Overysse*, 11 Mich. 222; *Lloyd v. Colston*, 5 Bush (Ky.) 587; *Mullen v. Keetzleb*, 7 Bush. (Ky.) 253.

But the president of a company, knowing that the stock of his company is worth more than market price, may buy such

**Fiduciary Relations.**—Whenever one person is placed in such relation to another by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.<sup>1</sup>

**Purchasing Agent may not Buy his own Property.**—A person acting as purchasing agent for another cannot buy his own property for his principal.<sup>2</sup>

**Selling Agent cannot Buy himself.**—An agent with power to sell cannot himself become the purchaser of his principal's property.

stock of a stockholder who has no such knowledge at market price, without disclosing the facts. There is no such fiduciary relation between them as to make the sale void in the absence of fraud. *Commissioners of Tippecanoe v. Reynolds*, 44 Ind. 509.

1. *Devall v. Burbridge*, 4 Watts & S. (Pa.) 305; *Hill v. Frazier*, 22 Pa. St. 320; *Bennett v. Van Syckel*, 4 Duer (N. Y.), 462; *Case v. Carroll*, 35 N. Y. 385; *Smeltzer v. Lombard*, 57 Iowa, 294; *Fairman v. Bavin*, 29 Ill. 75; *Gilman, etc., R. Co. v. Kelly*, 77 Ill. 426; *Davis v. Hamlin*, 108 Ill. 39; s. c., 48 Am. Rep. 541; *Eldridge v. Walker*, 60 Ill. 230; *Freeman v. Hartman*, 45 Ill. 57; *Gillenwaters v. Miller*, 49 Miss. 150; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Grumley v. Webb*, 44 Mo. 444; *Cadwallader v. West*, 48 Mo. 483; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Haynie v. Johnston*, 71 Ind. 394; *Dieringer v. Meyer*, 42 Wis. 311; s. c., 24 Am. Rep. 415; *Wilber v. Hough*, 49 Cal. 290.

An executor, assignee, or guardian cannot purchase at private sale the property of his *cestui que trust*; but in the absence of fraud a purchase by him at an auction sale will be valid. *Chorpening's Appeal*, 32 Pa. St. 315; *Fisher's Appeal*, 34 Pa. St. 29.

And where there are two trustees, one cannot sell and the other buy such property. *Davone v. Fanning*, 2 Johns. Ch. (N. Y.) 261; *Gaines v. Allen*, 58 Mo. 537; *Wade v. Harper*, 3 Yerg. 353.

Where persons have formed an association, or are dealing in contemplation of one, then they stand in a confidential relation to each other and to all who may subsequently become members, and they cannot purchase any property and sell it to the company at an advance without a full disclosure of all the facts. If they do so, the company may compel them to account for the profit. *Densmore Oil Co.*

*v. Densmore*, 64 Pa. St. 43; *Short v. Stevenson*, 63 Pa. St. 95; and see *Wilson v. Wilson*, 4 Abb. App. Dec. (N. Y.) 621; *Colt v. Clapp*, 127 Mass. 476; *Uhler v. Semple*, 5 C. E. Green, 288. See also FIDUCIARY RELATIONS.

2. *Story's Eq. Jur.* §§ 315, 316; *Story on Agency*, § 9; *Conkey v. Bond*, 36 N. Y. 427; *Taussig v. Hart*, 58 N. Y. 425; *Tewksbury v. Spruance*, 75 Ill. 187; *Ely v. Hanford*, 65 Ill. 267; *Beal v. McKiernan*, 6 La. (O. S.) 407; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; s. c., 71 Am. Dec. 600; *Bischoffsheim v. Baltzer*, 20 Fed. Repr. 890.

A factor who has been intrusted to insure cannot be himself the insurer. If he insures himself he can recover no premiums, but will be liable in case of loss for not obeying instructions. *Keane v. Branden*, 12 La. Ann. 20.

3. *Eldredge v. Walker*, 60 Ill. 230; *Kerfoot v. Hyman*, 52 Ill. 512; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Remick v. Butterfield*, 31 N. H. 70; *Martin v. Moulton*, 8 N. H. 504; *Bank v. Farmers' L. & T. Co.*, 16 Wis. 609; *Cook v. Berlin Woolen Mills Co.*, 43 Wis. 433; *Stewart v. Mather*, 32 Wis. 344; *Taussig v. Hart*, 49 N. Y. 301, 58 N. Y. 425; *Bain v. Brown*, 56 N. Y. 285; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Tynes v. Grimstead*, 1 Tenn. Ch. 508; *Parker v. Vose*, 45 Me. 54; *White v. Ward*, 26 Ark. 445; *Clute v. Barron*, 2 Mich. 192; *Ames v. Port Huron, etc., Co.*, 11 Mich. 146; *Scott v. Mann*, 36 Tex. 257; *Ingle v. Hartmann*, 37 Iowa, 274; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; s. c., 71 Am. Dec. 600; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Jeffries v. Wiester*, 2 Sawy. (U. S.) 135.

An agent having charge of lands cannot by a purchase of a tax-sale certificate from the county for those lands make himself the owner of the land as against

*May Buy Direct from Principal.*—An agent may, however, buy directly from a principal who acts with full knowledge, and

his principal. *Fisher v. Krutz*, 9 Kans. 501; *Murdoch v. Milner*, 84 Mo. 96; *Bartholomew v. Leech*, 7 Watts (Pa.), 172. See also *Oldhams v. Jones*, 5 B. Mon. (Ky.) 458; *Schedda v. Sawyer*, 4 McLean (U. S.), 181; *Morris v. Joseph*, 1 W. Va. 256; *Grumley v. Webb*, 44 Mo. 444.

The rule also applies to public officers. *People v. Township Board*, 11 Mich. 222.

An agent having control of real estate, renting it out, collecting the rents, paying taxes and insurance, and having power to sell, cannot himself become the purchaser of the property at a sale under a mortgage, and hold it against his principal; especially where, by private agreement with the mortgagee, he induces the latter not to bid against him. *Adams v. Sayre*, 70 Ala. 318.

An agent employed to take care of and manage his principal's property cannot acquire any title thereto by purchase at sheriff's sale, as against his principal, while such relation exists. *Fountain Coal Co. v. Phelps*, 95 Ind. 271; *Fisher v. Krutz*, 9 Kans. 501; *Bowman v. Officer*, 53 Iowa, 640; *Rogers v. Lockett*, 28 Ark. 290.

The clerk of an agent to sell lands, who is employed or concerned in the affairs of the seller relating to the property, is alike with the agent prohibited from purchasing; and if he does so, the seller may compel him to reconvey the lands or account for their proceeds. *Gardner v. Ogden*, 22 N. Y. 327; s. c., 78 Am. Dec. 192; *Lingke v. Wilkinson*, 57 N. Y. 445; *Cheeseman v. Sturges*, 9 Bosw. (N. Y.) 246; *Levy v. Brush*, 8 Abb. Pr. N. S. (N. Y.) 418; *Newcomb v. Brooks*, 16 W. Va. 32.

An executor charged with the sale of lands to pay a debt may not purchase such lands for himself on execution sale against the testator. *Marshall v. Carson*, 38 N. J. Eq. 250; s. c., 48 Am. Rep. 319. See *Lytle v. Beveridge*, 58 N. Y. 592; *Fulton v. Whitney*, 66 N. Y. 548; *Parkhurst v. Alexander*, 1 Johns. Ch. (N. Y.) 394; *Davone v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Moore v. Moore*, 5 N. Y. 256; *Gardner v. Ogden*, 22 N. Y. 327; s. c., 78 Am. Dec. 192; *People v. Open Board of S. B. B. Co.*, 92 N. Y. 98; *Ives v. Ashley*, 97 Mass. 198; *Greene v. Haskell*, 5 R. I. 447; *Kruse v. Stefens*, 47 Ill. 112; *Walker v. Palmer*, 24 Ala. 358; *Shannon v. Marmaduke*, 14 Tex. 247; *Staats v. Bergen*, 17 N. J. Eq. 297, 554; *Piatt v. Longworth*, 27 Ohio

St. 159; *Massie v. Watts*, 6 Cranch. (U. S.) 148; *Baker v. Whiting*, 3 Sumner (U. S.), 475; *Bradley v. Tarwell*, 1 Holmes (U. S.), 433; *Michoud v. Girod*, 4 How. (U. S.) 503; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178.

A purchase by the selling agent, although made at auction, for full value and by perfectly fair means, will be set aside upon application of the principal if made promptly. *Scott v. Freeland*, 15 Miss. 409; s. c., 45 Am. Dec. 310; *Brothers v. Brothers*, 7 Ired. Eq. (N. Car.) 150; *Patton v. Thompson*, 2 Jones Eq. (N. Car.) 285; *Mason v. Martin*, 4 Md. 124; *Martin v. Martin*, 12 Ind. 266; *Newcomb v. Brooks*, 16 W. Va. 32.

Even where he is empowered to sell at a stipulated price. *Ruckman v. Bergholz*, 37 N. J. L. 437; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100.

And where he sells to himself for the minimum price fixed by the principal he will be liable for the difference between market value and value paid by him. *Greenfield Sav. Bank v. Simons*, 133 Mass. 415.

The principal, seeking to set aside the agent's purchase at the mortgage sale, will be required, at least, to refund the purchase-money paid, with interest, moneys expended in repairs and permanent improvements, taxes, and other lawful charges, with interest thereon; while the agent will be required to account for rents and profits, or, if in possession, for use and occupation, as of the value of the property when he took possession, not estimating the increased value by reason of his improvements. The agent having become the purchaser at a mortgage sale, and claiming to hold possession in his own right, he is not entitled, as against his principal seeking to set aside the sale and to redeem, to compensation for his management of the property during such possession, nor for attorney's fees and costs incurred in ejecting a defaulting tenant. *Adams v. Sayre*, 76 Ala. 509.

An agent cannot in general be allowed to purchase an interest in property where he has a duty to perform which is inconsistent with the character of a purchaser. *Grumley v. Webb*, 44 Mo. 444.

Where the owner of certain real estate gives authority to an agent to sell the same, and such agent, without the knowledge or consent of his principal, enters into a contract with a person who is a

where there is no concealment or deception on the part of the agent.<sup>1</sup>

partner of the agent in the purchase and sale of such property to sell the property to such person, *held*, that such contract of purchase and sale will not be specifically enforced as against the owner of the land. *Fry v. Platt*, 32 Kans. 62; *Francis v. Kerker*, 85 Ill. 190. See *Reimers v. Richter*, 2 Rob. (N. Y.) 11.

Where an agent to sell enters into a contract with one desiring to buy, that he will introduce him to the vendor and promote the sale if he will subsequently sell him part of the property at an agreed price, such contract is invalid and cannot be enforced. *Smith v. Townsend*, 109 Mass. 500; *Hughes v. Washington*, 72 Ill. 84.

When an agent having control of his principal's property, with power to rent or sell, becomes the purchaser at a sale under a mortgage, his purchase is not void, but, like a purchase by a mortgagee at his own sale, is voidable merely at the option of his principal, seasonably expressed; and when the principal seeks to set it aside, he will be required to do equity. *Adams v. Sayre*, 76 Ala. 509; *Eastern Bank v. Taylor*, 41 Ala. 93; *Bassett v. Brown*, 105 Mass. 551; *Wadsworth v. Gay*, 118 Mass. 44; *Uhlich v. Muhlke*, 61 Ill. 499; *Leach v. Fowler*, 22 Ark. 143; *Greenwood v. Spring*, 54 Barb. (N. Y.) 375; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178.

The agent of a bank selling property which had been pledged to the bank for a loan may purchase such property if he pays a sufficient sum to discharge the lien; and he will not be held responsible to the bank for any profit he may make out of the sale. *Smith v. Lansing*, 22 N. Y. 520; *Cumberland Co. v. Sherman*, 30 Barb. (N. Y.) 553.

1. *Uhlich v. Muhlke*, 61 Ill. 499; *Buell v. Buckingham*, 16 Iowa, 284; *Ingle v. Hartman*, 37 Iowa, 274; *Michoud v. Girod*, 4 How. (U. S.) 503; *Jeffries v. Wiester*, 2 Sawy. (U. S.) 135; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; s. c., 71 Am. Dec. 600; *Fisher's Appeal*, 34 Pa. St. 29. See *Jenkins v. Einstein*, 3 Biss. (U. S.) 128.

The agent is required not only to state to the principal that he has an interest in the purchase, but must disclose all facts concerning it; and under such circumstances the burden of proof for perfect fairness is upon the agent, and in the absence of such proof courts of equity will treat the case as one of constructive fraud. *Brock v. Barnes*, 40 Barb. (N.

Y.) 521; *Brown v. Post*, 1 Hun (N. Y.), 304; *Nesbitt v. Lockman*, 34 N. Y. 167; *Holdridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 30; *Reed v. Warner*, 5 Paige (N. Y.), 650; *Lawrence v. Maxwell*, 6 Lans. (N. Y.) 469; *Taussig v. Hart*, 49 N. Y. 301; *Conditt v. Blackwell*, 22 N. J. Eq. 481; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433; *Collins v. Case*, 23 Wis. 230; *Stewart v. Mather*, 32 Wis. 344; *Ingle v. Hartman*, 37 Iowa, 274; *Persch v. Quiggle*, 57 Pa. St. 247; *Beeson v. Beeson*, 9 Pa. St. 279; *Bartholomew v. Leach*, 7 Watts (Pa.), 472; *Uhlich v. Muhlke*, 61 Ill. 499; *Rubidoux v. Parks*, 48 Cal. 215; *Mott v. Harrington*, 12 Vt. 199; *Smith v. Townsend*, 109 Mass. 500; *Mills v. Mills*, 26 Conn. 213; *Armstrong v. Elliott*, 29 Mich. 485; *Lafferty v. Jelly*, 22 Ind. 471; *Ackenburgh v. McCool*, 36 Ind. 473; *Leake v. Sutherland*, 25 Ark. 219; *White v. Ward*, 26 Ark. 445; *Grumley v. Webb*, 44 Mo. 444; *Gaines v. Allen*, 58 Mo. 537; *Provost v. Gratz*, 6 Wheat. (U. S.) 481; *Baker v. Whiting*, 3 Sumner (U. S.), 475; *Comstock v. Ames*, 1 Abb. App. Dec. (N. Y.) 411; *Dunne v. English*, L. R. 18 Eq. 524.

Where one, while occupying the relation of general confidential business agent of another, is requested by the latter to find a purchaser at a fixed price for certain land, but being unable to do so proposes to buy the property himself at that price, at the same time communicating to his principal all the facts within his knowledge about the land and its value, misrepresenting or concealing nothing, and a sale is accordingly made to him, the price paid being at the time a fair one, such sale is valid. *Rochester v. Levering*, 104 Ind. 562.

And where he buys himself with knowledge of the principal, and it appeared that the price paid was grossly inadequate, it was held that a court of equity will conclusively presume undue influence and imposition, and will set aside the sale. *Ferguson v. Dent*, 24 Fed. R. 412.

A principal cannot acquiesce in the purchase of his property by his agent until he knows that such purchase has been made, and the onus of showing it is upon the agent. *Fountain Coal Co. v. Phelps*, 95 Ind. 271.

But if A and B own a mine and authorize C to sell it for them, or bring them a purchaser at a fixed price, with the understanding that C is to have all he can get above that price, C may make the best bargain he can with any one; he

*Agent to Buy may not Buy for himself.*—An agent with power to buy may not purchase for himself. A purchase by an agent in his own name, in matters within the purposes of his agency, creates a constructive trust for the principal. Such a trust is not within the statute of frauds, but may be proven by parol.<sup>1</sup>

may purchase it himself, and is under no obligation to disclose to A and B anything that he may have discovered concerning the mine after such arrangement is made. *Synnott v. Shaughnessey*, 7 Pac. Repr. (Idaho) 82.

A gift from a principal to an agent is subject to the same principle. The agent will be held to prove that his principal acted with full knowledge of facts and due deliberation, and under the advice of others than that of the grantee. *Uhlich v. Muhlike*, 61 Ill. 499; *Neilson v. Bowman*, 29 Gratt. (Va.) 732; *Rubidoux v. Parks*, 48 Cal. 215.

1. *McMurry v. Mobley*, 39 Ark. 309; *Wellford v. Chancellor*, 5 Gratt. (Va.) 39; *Reed v. Warner*, 5 Paige (N. Y.), 650; *Church v. Sterling*, 16 Conn. 388; *Matthews v. Light*, 32 Me. 305; *Firestone v. Firestone*, 49 Ala. 128; *Switzer v. Skiles*, 8 Ill. 529; s. c., 44 Am. Dec. 723; *Von Hurter v. Spengeman*, 17 N. J. Eq. 185; *Wolford v. Herrington*, 74 Pa. St. 311; *Eshleman v. Lewis*, 49 Pa. St. 410; *Rose v. Hayden*, 35 Kans. 106; *Fisher v. Krutz*, 9 Kans. 501; *Ringo v. Binns*, 10 Pet. (U. S.) 269; *Barziza v. Story*, 39 Tex. 354.

Where an agent, under the instructions of his principal, purchases property in his own name, the principal is entitled to all the profit arising from the transaction. *Nat. Bank v. Seward*, 106 Ind. 264.

Where one acting as agent of the owner purchases a tax certificate for land sold at tax sale, and afterward receives the tax deed in his own name, he will be held a trustee for the owner and compelled to account for net rents and profits received, and the deed will be cancelled on payment of his outlay. *Collins v. Rainey*, 42 Ark. 531; *Continental L. Ins. Co. v. Perry*, 65 Iowa, 709; *Woodman v. Davis*, 32 Kans. 344.

A party charged with the payment of the taxes on land, as agent, cannot acquire a tax title to his principal's land, either by purchasing the land himself at tax sale, or by the assignment to him of a certificate of purchase obtained by another; nor can he, by assigning his certificates, confer upon his assignee any greater rights than he himself has. *Ellsworth v. Cordrey*, 63 Iowa, 675; *Bowman v. Officer*, 53 Iowa, 640; *Franks v. Morris*, 9 W. Va. 664; *Barton v. Moss*, 32

Ill. 50; *Matthews v. Light*, 32 Me. 305; *Huzzard v. Trego*, 35 Pa. St. 9; *Bartholomew v. Leech*, 7 Watts (Pa.), 472; *Curtis v. Cisna*, 7 Biss. (U. S.) 260.

When an attorney at law buys in a title outstanding or adverse to land as to which he has been consulted or employed, he buys for his client, if the client elect to take it. *Smith v. Brotherline*, 62 Pa. St. 461.

Authority to an agent to purchase a certain mare for his principal at limited price will not justify the agent in sending a third person to buy it, and then buying it of him at an advance, though within the prescribed limit. *Armstrong v. Elliott*, 29 Mich. 485.

But he must be actually employed to buy. Ascertaining the amount of taxes due upon a certain piece of land by request of the owner does not make one an agent so as to charge him with fraud in buying the same for himself for less than half value. *Collar v. Ford*, 45 Iowa, 331.

A, for a sum of money to be paid him by B, agreed to assist in finding a person who would advance money to enable B to buy land which he had formerly owned, but which had passed into the hands of the mortgagee by the foreclosure of a mortgage thereon. B, relying upon A's agreement, abstained to some extent, though not entirely, from trying to get the money elsewhere. A also dissuaded him from seeking such other assistance, with the secret intent to get the land himself; and bought the land on his own behalf with his own money, and took a conveyance of it to himself. *Held*, that these facts did not disclose enough to make A a trustee for B, on the grounds either of agency or of fraud. *Collins v. Sullivan*, 135 Mass. 461.

Where a man employs an agent by parol to buy land, and the agent buys it for himself and denies the trust, and no part of the purchase-money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the land to him. *Kendall v. Mann*, 11 Allen (Mass.), 15; *Davis v. Wetherell*, 11 Allen (Mass.), 19; *Barnard v. Jewett*, 97 Mass. 87; *Fickett v. Durham*, 109 Mass. 419; *Parsons v. Phelan*, 134 Mass. 109; *Collins v. Sullivan*, 135 Mass. 461. Compare *McMurry v. Mobley*, 39 Ark. 309.

*All Profits belong to Principal.*—All the profits an agent may make out of the subject-matter of the agency belong to the principal. So where he invests property of the principal in his own name.<sup>1</sup>

An agent to buy or sell may make no profits out of the purchases or sales.<sup>2</sup>

1. *Nat. Bank v. Seward*, 106 Ind. 264; *Lafferty v. Jelly*, 22 Ind. 471; *Ack-enburgh v. McCool*, 36 Ind. 473; *Love v. Hoss*, 62 Ind. 255; *Dutton v. Willner*, 52 N. Y. 312; *Wilson v. Wilson*, 4 Abb. App. Dec. (N. Y.) 621; *Bain v. Brown*, 56 N. Y. 285; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Dodd v. Wakeman*, 26 N. J. Eq., 484; *Oliver v. Piatt*, 3 How. (U. S.) 333; *Jeffries v. Wiester*, 2 Sawy. (U. S.) 135; *Stoner v. Weiser*, 24 Iowa, 434; *Smith v. Stephenson*, 45 Iowa, 645; *Bell v. Bell*, 3 W. Va. 183; *Moore v. Mandlebaum*, 8 Mich. 433; *Segar v. Edwards*, 11 Leigh. (Va.) 213; *Kerfoot v. Hyman*, 52 Ill. 512; *Barton v. Moss*, 32 Ill. 50; *Mason v. Bauman*, 62 Ill. 76; *Byrd v. Hughes*, 84 Ill. 174; *Ely v. Hanford*, 65 Ill. 267; *Judevine v. Hardwick*, 49 Vt. 180; *Campbell v. Penna. Life Ins. Co.*, 2 Whart. (Pa.) 53; *Bartholomew v. Leach*, 7 Watts (Pa.), 472; *Norris' Appeal*, 71 Pa. St. 106; *Coursin's Appeal*, 79 Pa. St. 220; *Leake v. Sutherland*, 25 Ark. 219; *Rhea v. Puryear*, 26 Ark. 344; *White v. Ward*, 26 Ark. 445; *Greenfield Savings Bank v. Simons*, 133 Mass. 415; *Whelan v. McCreary*, 64 Ala. 319; *Clark v. Anderson*, 10 Bush (Ky.), 99; *Krutz v. Fisher*, 8 Kans. 90; *Moinett v. Day*, 57 Tenn. 431; *Kent v. Priest*, 86 Mo. 476; *Northern Pac. R. Co. v. Kindred*, 14 Fed. Repr. 77.

An agent cannot exact from his principal any advantage growing out of a contract made by the agent in his principal's name, unless the principal has expressly authorized or ratified it, with knowledge that such advantage would accrue. *Vreeland v. Van Blarcom*, 35 N. J. Eq. 530.

Even though the agent may have contributed his own funds and responsibility in producing the result, and the principal had run no risk. *Dutton v. Willner*, 52 N. Y. 312.

Where an agent, who in the course of his dealings with his principal had frequently made advances to him, took up some outstanding notes of his principal, it was held that he was not entitled to the benefit of a mortgage securing these and other notes, because these notes must be considered as having been paid at maturity by the maker. *Turnbull v. Thomas*, 1 Hugh (U. S.), 172.

Where an agent, in violation of his trust, uses the money of his principal in the purchase of property, the law implies a trust in favor of the principal, and equity will subject such property to the latter's claim as against either a volunteer or a fraudulent grantee. *Riehl v. Evansville F. Assoc.*, 104 Ind. 70.

Where a trustee speculates with trust funds, the profits will belong to the *cestui que trust*. *Norris' Appeal*, 71 Pa. St. 106; *Bond v. Lockwood*, 33 Ill. 212; *Bank of America v. Pollock*, 4 Edw. Ch. N. Y. 215; *Pugh v. Pugh*, 9 Ind. 132; *Newton v. Porter*, 69 N. Y. 133; s. c., 25 Am. R. 152; *Bent v. Priest*, 86 Mo. 476; *Taylor v. Plumer*, 3 M. & S. 562. See also TRUSTEES.

2. *Ely v. Hanford*, 65 Ill. 267; *Cotton v. Holliday*, 59 Ill. 176; *Mason v. Bauman*, 62 Ill. 76; *Collins v. Case*, 23 Wis. 230.

As by selling for a higher price than he accounts for to the principal. *Schoellkopf v. Leonard*, 6 Pac. Repr. (Colo.) 209.

Where a broker sold stock for his principal and remitted a smaller amount than he had actually received for it, although the principal, under the impression that the smaller amount was the highest market price, had consented to sell for that amount, it was held that he could recover from the broker the price actually received by him. *Cutter v. Demmon*, 111 Mass. 474.

An owner of real estate appointed an agent to sell it at not less than a certain price, agreeing that if during a certain period the agent would furnish a buyer at such price, he should be paid by said owner a certain per cent commission on the amount for which the property should be sold. The agent sold for a better price. In a suit by the principal against the agent to recover a portion of the price retained by the agent in addition to such commission, *held*, that if said agent, acting under such appointment, received a more advantageous offer than he was so authorized to accept, it was his duty to communicate the offer so received to his principal, and not to purposely conceal it from him; and that if, so acting as agent, he effected a better trade than he was so authorized to make, said owner was entitled to the benefit of the trade,



*Cannot Act for Both Parties.*—An agent cannot make a valid contract where in the same transaction he acts as agent for both parties.<sup>1</sup>

and was bound to the agent only for his commission, and not for any surplus of the price received above the amount which the agent was so authorized to accept. *Blanchard v. Jones*, 101 Ind. 542; *Kerfoot v. Hyman*, 52 Ill. 512; *Merryman v. David*, 31 Ill. 404; *Bain v. Brown*, 56 N. Y. 285.

Where an agent who has purchased property for his principal, as authorized, defrauds the latter by representing that he paid a greater price than he in fact did pay, this does not entitle the principal to surrender the property to the agent and recover of him the whole purchase-price; he can simply recover the damages sustained by reason of the fraud. So also where an agent, in violation of his duty, knowingly pays a greater price than the property could have been purchased for, he is liable only for the enhanced price so paid, or, in case he received from the vendor a compensation for effecting the sale, for the amount so received. *McMillan v. Arthur*, 98 N. Y. 167.

But where a principal employs an agent to buy certain property, promising to give him a specified price for it, no matter what the agent pays for it, the agent is entitled to the profits when he buys for less. *Anderson v. Weiser*, 24 Iowa, 428.

1. *New York Cent. Ins. Co. v. Nat. Prot. Ins. Co.* 20 Barb. (N. Y.) 468; *Watkins v. Cousall*, 1 E. D. Smith (N. Y.), 65; *Price v. Keyes*, 62 N. Y. 378; *Pugsley v. Murray*, 4 E. D. Smith (N. Y.), 245; *Levy v. Loeb*, 85 N. Y. 365; *Bennett v. Kidder*, 5 Daly (N. Y.), 512; *Raisin v. Clark*, 41 Md. 158; s. c. 20 Am. Rep. 66; *Hinckley v. Arey*, 27 Me. 362; *Meyer v. Hanchett*, 39 Wis. 419; s. c., 43 Wis. 246; *Walworth v. Farmers' Co.*, 16 Wis. 629; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Everhart v. Searle*, 71 Pa. St. 256; *Lloyd v. Colston*, 5 Bush (Ky.), 587; *Farnsworth v. Heimert*, 1 Allen (Mass.), 494; s. c., 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348; *Rice v. Wood*, 113 Mass. 133; *Lynch v. Fallon*, 11 R. I. 311; *Summer v. Charlotte, etc., R. Co.*, 78 N. Car. 289; *Mercantile Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408.

He cannot act for himself and for his principal in the same transaction, as by signing as agent a receipt for money due his principal individually. *Neuendorff v. World, etc., L. I. Co.*, 69 N. Y. 389.

Such a contract will not be absolutely void, but voidable. *Greenwood v. Spring*, 54 Barb. (N. Y.) 375.

And it will not be a defence for the agent in an action by one of the parties that he also was agent for the other party. *Cotton v. Holliday*, 59 Ill. 176.

An agreement between the agent of one party and another party, desiring to enter into a contract with the first party, to pay the agent a commission if he induces his principal to enter into the contract is void, although the agent acted fairly toward his principal. *Bollman v. Loomis*, 41 Conn. 581; *Atlee v. Fink*, 75 Mo. 100; *Byrd v. Hughes*, 84 Ill. 174; *Holcomb v. Weaver*, 136 Mass. 265.

Purchasers obtaining a contract for the sale of land through a real-estate broker who with their knowledge and in collusion with them has concealed material facts from his principal, or exerted his skill in the negotiation against his principal, cannot in equity enforce the contract; and such contract will be set aside. *Young v. Hughes*, 32 N. J. Eq. 372.

And in cases of doubt the courts will always assume that only one principal is responsible for the acts of the agent. So where an express company receives goods directed to the express care of its agent at a specified place, it will be assumed that the shipper intended to make such agent his own agent for receiving the goods; and the express company is discharged from responsibility in delivering the goods to such agent. *Fitzsimmons v. Southern Expr. Co.*, 40 Ga. 330; s. c., 2 Am. Rep. 577.

A priest had some money to loan. A owned some property mortgaged for \$2700. Wishing to borrow some more, he applied to a banker, who negotiated a loan from the priest of \$3500, with which the existing mortgages should be paid off, and which should be secured by a first mortgage. All the mortgages were paid off except one for \$556 when the banker failed. *Held*, that the loss fell on A, the banker being A's agent, not the priest's. *Engleman v. Reuse*, 28 N. Western Repr. (Mich.) 149.

When the act of the agent is merely to bring the parties together and he takes no part in the negotiations, he may accept a commission of both. *Rupp v. Sampson*, 16 Gray (Mass.), 398; *Siegel v. Gould*, 7 Lans. (N. Y.) 177; *Mullen v. Keetzleb*, 7

*Consent of Both Parties.*—But where each of the principals consents or has notice that the agent acts in a dual capacity, the disability will be waived.<sup>1</sup>

Bush (Ky.), 253; Collins v. Fowler, 8 Mo. App. 588; Orton v. Scofield, 61 Wis. 382; Barry v. Schmidt, 57 Wis. 172; Meyer v. Hanchett, 39 Wis. 419; s. c., 43 Wis. 246.

The maxim that "no man shall serve two masters" does not prevent the same person from acting as agent, for certain purposes, of two or more parties to the same transaction when their interests do not conflict, and where loyalty to the one is not a breach of duty to the other. Nolte v. Hulbert, 37 Ohio St. 445.

An agent merely for the care and custody of property may act as agent for an insurance company in issuing a policy of insurance on the property. The two capacities are not necessarily inconsistent. Northrop v. German F. Ins. Co., 48 Wis. 420; s. c., 33 Am. Rep. 815.

Where a contract between a coal company and a railroad company provided that the latter should transfer the coal of the former and deliver it on board boats according to orders given by the coal company to persons for whom the coal was intended, but which orders were directed to the agent of the railroad, held, that such agent was not the agent of the coal company so as to bind the latter by his acts and declarations in the delivery of the coal. Kelly v. Lehigh Valley Coal Co., 8 Daly (N. Y.), 291.

Where parties sign an application for a loan, agreeing to pay all expenses, the person employed to negotiate the loan is the agent of the borrower, and notice to him of defects in the title is not notice to the lender. Thomas v. Desney, 57 Iowa, 58.

Where a note is made payable at a bank and the money deposited to pay it this does not make the bank the agent of the payee so as to make the bank liable to pay when the maker for any reason refuses to allow the officers to pay it over. Pease v. Warren, 29 Mich. 9.

But where the debtor has deposited a sum of money in a bank in payment of notes held by the bank for collection and the bank misappropriated the money, the bank was held to be the creditor's agent, and not the debtor's. Worley v. Moore, 77 Ind. 567.

1. Pugsley v. Murray, 4 E. D. Smith (N. Y.), 245; Rowe v. Stevens, 53 N. Y. 621; Joslin v. Cowee, 52 N. Y. 90; Bell v. McConnell, 37 Ohio St. 396; Capiner

v. Hogan, 40 Ohio St. 203; Rolling Stock Co. v. Railroad, 34 Ohio St. 450; Alexander v. Northwestern, etc., University, 57 Ind. 466; Barry v. Schmidt, 57 Wis. 172; s. c., 46 Am. Rep. 35; Meyer v. Hanchett, 39 Wis. 419; s. c., 43 Am. Rep. 246; Stewart v. Mather, 32 Wis. 344; Colwell v. Keystone Iron Co., 36 Mich. 51; Adams M. Co. v. Senter, 26 Mich. 73; Helmer v. Krollick, 36 Mich. 371; Fitzsimmons v. Southern Ex. Co., 40 Ga. 330; White v. Ward, 26 Ark. 445; Smith v. Townsend, 109 Mass. 500;

A person who voluntarily employs the agent of another knowing the fact of such existing agency is estopped from pleading the rule that the same person cannot be the agent of two principals having conflicting interests. Fitzsimmons v. Southern Ex. Co., 40 Ga. 330; s. c., 2 Am. Rep. 577.

If a principal, in authorizing an agent to make a purchase, also authorizes him to contract with the seller for a commission sufficient to pay him for his services, and the seller, knowing his relation to the purchaser, contracts to pay him a commission, he cannot afterwards avoid paying it on the ground that the contract was void, as being in violation of the good faith which an agent owes his principal. Leekins v. The Nordyke, etc., M. Co., 66 Iowa, 471.

When a professional land agent acts as agent for both the seller and the buyer, and that is known to them, the law exacts the most perfect good faith, honesty, and fairness on his part, and will not adjudge the specific performance of a contract thus made unless it has been entered into with perfect fairness and without misapprehension or misrepresentation. Morgan v. Hardy, 16 Neb. 427.

Where the general business agent of another is also the agent of an insurance company, and in the latter capacity writes insurance upon the property of his principal, but with such knowledge on the part of the company as would make the policies valid, or at most merely voidable, he is entitled to be reimbursed for the premiums paid by him. Rochester v. Levering, 104 Ind. 562.

An auctioneer is considered the agent of both parties, so as to bind either the buyer or seller by his memorandum. Johnson v. Buck, 35 N. J. L. 338; Morton v. Dean, 13 Metc. (Mass.) 385; Pike v. Balch, 38 Me. 302; s. c., 61 Am. Dec.

*After Termination of Agency.*—The rule that an agent cannot buy his principal's property does not apply where the agent acquires an interest in the property, after the termination of his agency, by subsequent contract with the purchaser at his sale. But when an agent is found, recently after his sale, to have acquired a beneficial interest in the property under the purchaser, a strong presumption of indirection and attempted evasion arises, which he is required to remove by good and convincing evidence.<sup>1</sup>

*To Render Full Accounts of Receipts and Disbursements.*—An agent is bound to account to his principal for money received by him in the course of his agency for goods sold by his principal on orders obtained by him as such agent on commission, although such sales as between the principal and purchaser be illegal and void.<sup>2</sup>

248; *O'Donnell v. Leeman*, 43 Me. 158; s. c., 69 Am. Dec. 54; *McComb v. Wright*, 4 Johns Ch. (N. Y.) 659; *Pugh v. Chisseldine*, 11 Ohio, 109; s. c., 37 Am. Dec. 414.

And he may lawfully enter a bid for the property he is selling in behalf of a third party. *Scott v. Mann*, 36 Tex. 157. See also AUCTIONS AND AUCTIONEERS.

A broker for the purpose of signing the memoranda of the sale is the agent of both parties to the contract which he makes; but in other respects he is only the agent of the party originally employing him. *Schlesinger v. Texas, etc., R. Co.*, 87 Mo. 146.

Where a travelling agent sells a bill of goods to a customer and ordered the goods from his principal by letter he was held not to be the agent of the customer so as to comply with the requirements of the statute of frauds. *Strong v. Dodds*, 47 Vt. 348.

1. *McGar v. Adams*, 65 Ala. 106; *Fountain Coal Co. v. Phelps*, 95 Ind. 271; *Bucher v. Bucher*, 86 Ill. 377; *Walker v. Carrington*, 74 Ill. 446; *Walker v. Derby*, 5 Biss. (U. S.) 134; *First Bank v. Bissell*, 2 McCrary (U. S.), 73.

A mere formal surrender of the agency is not sufficient to give the agent a right to purchase. *Fountain Coal Co. v. Phelps*, 95 Ind. 271.

In *Bartholomew v. Leech*, 7 Watts, 472, it is said: "The most open, ingenuous, and disinterested dealing is required of a confidential agent while he consents to act as such; and there must be an unambiguous relinquishment of his agency before he can acquire a personal interest in the subject of it. To leave a doubt of his position in this respect is to turn himself into a trustee. It is unnecessary to recur to authority for a principle so fa-

miliar or so accordant with common honesty." *Bowman v. Officer*, 53 Iowa, 640.

The owner employed an agent to sell a tract of land, agreeing that if he would find a purchaser at a fixed price to pay him \$500. The agent found a purchaser. Held, that as soon as the agent procured the purchaser his agency ceased, and his taking a retainer from the purchaser to see that the papers were properly prepared and executed presented no ground for defeating a recovery of the price agreed to be paid to him. *Short v. Millard*, 68 Ill. 292.

2. *Baldwin v. Potter*, 46 Vt. 402; *Greentree v. Rosenstock*, 61 N. Y. 583; *Coit v. Stewart*, 50 N. Y. 17; *Whelan v. Lynch*, 60 N. Y. 469; *Terwilliger v. Beals*, 6 Lans. (N. Y.) 403; *Jackson v. Baker*, 6 Cow. (N. Y.) 183, note a; *Coleman v. Pearce*, 26 Minn. 123; *Taul v. Edmondson*, 37 Tex. 556; *Monitor Mut. F. Ins. Co. v. Young*, 111 Mass. 537; *Heddens v. Younglove*, 46 Ind. 212; *Eaton v. Welton*, 32 N. H. 352; *Hemenway v. Hemenway*, 5 Pick. (Mass.) 389; *McVeigh v. Bank*, 26 Gratt. (Va.) 188.

Where one receives money as the agent of another, the burden is on him, in an action to account therefor, to show that he repaid it to his principal, or otherwise disposed of it by the latter's direction. *Young v. Powell*, 87 Mo. 128.

Neither an agent nor a partner has any implied power to apply partnership moneys on private debts; and one who deals with an agent cannot, without the principal's authority or acquiescence, apply money due to the principal upon a private account with the agent. *Chase v. Buhl Iron Works*, 55 Mich. 139; *Greenwood v. Burns*, 50 Mo. 52.

A power to act for another, however general its terms or wide its scope, can-

*Must Keep Regular Accounts.*—And it is his duty to keep regular accounts of all his transactions, with suitable vouchers.<sup>1</sup>

*Demand.*—As a rule, a demand by the principal is necessary before he can bring suit against the agent for an accounting.<sup>2</sup>

not be enlarged into a power to pervert funds coming into the agent's hands, without clear approval or ratification by the principal. *Williams v. Whiting*, 92 N. Car. 683.

Where a person is employed as an agent in the conduct of the financial part of the business of his principal, the relation is a fiduciary one in its character; and if the agent appropriates the property of his principal to his own use, or makes any profit to himself by virtue of his position, he must account therefor as for a trust. Upon bill in chancery by a principal against his agent to compel an accounting by the latter in respect of the business of his employment, and a surrender of property in his hands, it appeared there was an agreement whereby the defendant was to act as manager of the office part of the complainant's business (milling), except the running of the mill; to purchase grain, ship the product, make sale thereof, and do the banking and financial business,—all in defendant's name, but in fact taking no interest therein; to account therefor to the complainant, and upon a discontinuance of the employment to turn over and surrender to the principal all the money and other property, of every kind and nature, in his possession or under his control, belonging to the principal. It was *held*, this arrangement created a trust in the money and property of the principal or employer, of which the defendant became possessed under and by virtue of his employment. *Weaver v. Fisher*, 110 Ill. 146.

L. leased a number of machines, using (though not compelled to do so) a form of lease furnished by the plaintiff which provided that the machines should remain the property of the plaintiff until fully paid for by the lessee, and that all payments thereon should be made at the plaintiff's office in Milwaukee. After so leasing each machine, L. gave his notes therefor as provided by the contract. Upon ceasing to do business under the contract he delivered all leases then held by him to the plaintiff. Subsequently the plaintiff returned a part of such leases to him, requesting him to make collections thereon, which he was unable to do. Afterwards he offered to redeliver said leases to the plaintiff upon cancellation of his notes, but the plaintiff re-

fused such offer. *Held*, that L. remained liable under the contract and on his notes for the leased machines, except so far as the plaintiff accepted any of the leases in discharge of the notes, and except that all collections made by the plaintiff on the leases would be available to L. by way of recoupment on the notes. *Wheeler & W. Mfg. Co. v. Laus*, 62 Wis. 635.

A principal furnished his agent with a certificate of membership of a board of trade to enable him to conduct the principal's business advantageously. The agent on the dissolution of the agency refused to transfer the certificate to his principal. *Held*, that equity would compel him to assign the certificate in blank and deliver the same to the principal. *Weaver v. Fisher*, 110 Ill. 146. See *Western R. Co. v. Bayne*, 75 N. Y. 1.

1. *Zetelle v. Myers*, 19 Gratt. (Va.) 62; *Kerfoot v. Hyman*, 52 Ill. 512; *Chinn v. Chinn*, 22 La. Ann. 599; *Riley v. State*, 32 Tex. 763; *Peterson v. Poignard*, 8 B. Mon. (Ky.) 309; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; s.c., 71 Am. Dec. 600; 1 Story on Eq. Jur. 468.

He is generally accountable only to his principal directly. 1 Pars. on Contr. 89; *Evans on Agency* (Ewell's Ed.), 248; *Lake Erie R. Co. v. Eckler*, 13 Ind. 67.

But in case of the death of the principal, to the administrator. *Simmons v. Simmons*, 33 Gratt. (Va.) 451.

And in case of joint principals the demand for an accounting must be made by them jointly; no one of them has a right to compel the agent to render a separate account to himself. *Louisiana Trustees, etc., v. Dupuy*, 31 La. Ann. 305.

2. *Bedell v. Janney*, 4 Gilm. (Ill.) 193; *Armstrong v. Smith*, 3 Blackf. (Ind.) 251; *Hamilton v. Elkins*, 46 Ind. 212; *Heddens v. Younglove*, 46 Ind. 212; *Jett v. Hempstead*, 25 Ark. 462; *Whitehead v. Wells*, 29 Ark. 462; *Haas v. Damon*, 9 Iowa, 589; *Alexander v. Jones*, 64 Iowa, 207; *Cooley v. Betts*, 24 Wend. (N. Y.) 203; *Taylor v. Bates*, 5 Cow. (N. Y.) 376; *Sally v. Capps*, 1 Ala. (N. S.) 121; *Potter v. Sturges*, 1 Dev. (N. Car.) 79; *Waring v. Richardson*, 11 Ired. L. (N. Car.) 77; *Hutchins v. Gilman*, 9 N. H. 359; *Hall v. Pecks*, 10 Vt. 474; *Cockrill v. Kirkpatrick*, 9 Mo. 697. *Compare* *Leake v. Sutherland*, 25 Ark. 219.

*Interest.*—Where the relation between agent and principal is of such a character that the agent will be bound to pay over the principal's money without previous demand, as where after the receipt of the money he fails to inform his principal, or where he uses it for his own profit, he will be liable for interest.<sup>1</sup>

*To keep the Goods and Money of the Principal separate from his Own.*—In all cases it is the duty of an agent to keep the property of his principal separate from his own and not to mix it with the latter; and if he does not keep it separate from his own and afterwards is unable to distinguish between the one and the other, the whole will be adjudged to belong to the principal.<sup>2</sup>

Where an agency is denied or repudiated, no demand upon the agent is necessary before suit brought. *King v. Foscue*, 91 N. Car. 116; *Waddell v. Swann*, 91 N. Car. 108; *Tillotson v. McCrillis*, 11 Vt. 477.

Or where the agent refuses or neglects to return an account. *Haas v. Damon*, 9 Iowa, 589; *Clark v. Moody*, 17 Mass. 145; *Hill v. Hunt*, 9 Gray (Mass.), 66; *Wait v. Gibbs*, 7 Pick. (Mass.) 146; *Harvey v. Turner*, 4 Rawle (Pa.), 223; *Brown v. Arrott*, 1 Miles (Pa.), 139; *Witherup v. Hill*, 9 S. & R. (Pa.) 11; *Chapman v. Shaw*, 5 Greenl. (Me.) 59; *Cooley v. Betts*, 24 Wend. (N. Y.) 203.

Nor is a demand necessary upon a foreign agent. *Eaton v. Welton*, 32 N. H. 352.

If a demand is required by the appointment, the demand must be conformed to the terms of the appointment.

Where, by the terms of a written contract, one P. constituted T. his agent to loan money and take securities for the payment of the same, and expressly provided that the authority could be revoked, at the request of P. in writing, held, that a demand for the securities in writing, signed by a party claiming to be an attorney of P. without an order in writing, or proof of his authority, was not sufficient to authorize P. to maintain an action for the face value of the securities. *Tingley v. Parshall*, 11 Neb. 443.

1. *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Clark v. Moody*, 17 Mass. 145; *Anderson v. State*, 2 Kelly (Ga.), 370; *Bedell v. Janney*, 4 Gilm. (Ill.) 193; *Tuers v. Tuers*, 100 N. Y. 196; *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353; s. c., 10 Am. Dec. 340; *Reid v. Renselaer Glass Factory*, 3 Cow. (N. Y.) 387; 5 Cow. (N. Y.) 527; *Comegys v. State*, 10 Gill. & J. (Md.) 175; *Leake v. Sutherland*, 25 Ark. 219; *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171.

Where, in order to meet the calls, in

uncertain amounts, of his principal upon him, it is necessary that an agent—who, as it is received, mixes his principal's money with his own and uses it in his business—shall keep money available, he is not chargeable with the highest obtainable rate of interest on the sums remaining in his hands, but legal interest only. *Rochester v. Levering*, 104 Ind. 562.

Exemplary damages may be allowed where an agent by false and fraudulent representations to his principal obtains possession of his principal's goods and converts them to his own use. *Peckham Iron Co. v. Harper*, 41 Ohio St. 100.

The agent is entitled to a set-off for his commissions as well as for advances made or expenses incurred by him in the course of his agency. 2 Chitty on Contr. 917.

An agent or attorney who by virtue of a special authority has received money cannot, when sued by his principal, set off a debt due to himself in a matter not arising out of his agency. *Tagg v. Bowman*, 108 Pa. St. 273.

2. Story on Agency, § 205; *Pinckney v. Dunn*, 2 S. Car. 314; *Cartmell v. Allard*, 7 Bush (Ky.), 482; *Norris v. Hero*, 22 La. Ann. 605; *Webster v. Pierce*, 35 Ill. 158; *School Dist. v. First Nat. Bank*, 102 Mass. 174; *Greene v. Haskell*, 5 R. I. 447; *Mass. Life Ins. Co. v. Carpenter*, 2 Sweeney (N. Y.), 734; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *De Peyster v. Clarkson*, 2 Wend. (N. Y.) 77; *Van Alen v. Am. Bank*, 52 N. Y. 1; *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 527; *Nat. Bank v. Ins. Co.*, 104 U. S. 54; *Farmers', etc., Bank v. King*, 57 Pa. St. 202; *Dyott's Est.*, 2 W. & S. (Pa.) 565; *Graver's Est.*, 50 Pa. St. 189; *Williams v. White*, 70 Me. 138; *Bartlett v. Hamilton*, 46 Me. 435; *Kerr v. Laird*, 27 Miss. 544; *Atkinson v. Ward*, 2 South W. Repr. (Ark.) 77.

It will belong to the principal until the agent puts the subject-matter under such circumstances that it may be dis-

**8. Signatures by Agents.—Instruments under Seal.**—No particular form of words is necessary for an agent to bind his principal, if he expresses in the instrument the capacity in which he acts. Where this intent appears, the signature may be "A" as agent for "B." <sup>1</sup>

tinguished as satisfactorily as it might have been before the unauthorized mixture on his part. *Story Eq. Jur.* § 463.

A bank in Chicago received from a New York bank notes for collection. The Chicago bank collected the amount in currency, which was then depreciated ten per cent, and used it in its business. When called upon to remit, said currency had depreciated fifty per cent. *Held*, that the New York bank was entitled to the value of the currency as collected, and that the Chicago bank had to bear the loss. *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252.

And where an agent deposits the principal's money in his own name and together with his own funds, he will be liable for a loss caused by a subsequent failure of the bank. *Com. v. M'Alister*, 28 Pa. St. 480; *Shuford v. Ramsour*, 63 N. Car. 622; *Cartmell v. Allard*, 7 Bush (Ky.), 482; *Norris v. Hero*, 22 La. Ann. 605.

Where a factor kept the funds arising from his business, as such, separate from his individual funds, by depositing in bank to a separate "brokerage account" the drafts received for goods sold, the fact that these drafts included his commissions on such sales is not a mingling of his own with the trust fund. *Richardson v. St. Louis Nat. Bank*, 10 Mo. App. 246.

1. *Dean v. Roesler*, 1 Hill (N. Y.), 420; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; s. c., 10 Am. Dec. 193; *Many v. Beekman Iron Co.*, 9 Paige (N. Y.), 188; *Dubois v. Canal Co.*, 12 Wend. (N. Y.) 334; *Stone v. Wood*, 7 Cow. (N. Y.) 453; s. c., 17 Am. Dec. 529; *Townsend v. Corning*, 23 Wend. (N. Y.) 435; *Haight v. Sahler*, 30 Barb. (N. Y.) 218; *Briggs v. Partridge*, 64 N. Y. 358; s. c., 21 Am. Rep. 617; *Chouteau v. Suydam*, 21 N. Y. 179; *Bogart v. De Bussy*, 6 Johns. (N. Y.) 94; *Taft v. Brewster*, 9 Johns. (N. Y.) 54; *Magill v. Hinsdale*, 6 Conn. 464; s. c., 16 Am. Dec. 70; *Johnson v. Smith*, 21 Conn. 627; *Reed v. Latham*, 40 Conn. 452; *Hovey v. Magill*, 2 Conn. 680; *Butterfield v. Beall*, 3 Ind. 203; *Wilburn v. Larkin*, 3 Blackf. (Ind.) 55; *Hancock v. Yunker*, 83 Ill. 208; *Mears v. Morrison*, 1 Breese (Ill.), 172; *Echols v. Cheney*, 28 Cal. 157; *Morrison v. Bowman*, 29 Cal. 337; *Grubbs v. Wiley*, 17 Miss. 29;

*Einstein v. Holt*, 52 Mo. 340; *Martin v. Almond*, 25 Mo. 313; *Stinchfield v. Little*, 1 Greenl. (Me.) 231; s. c., 10 Am. Dec. 65; *Dyer v. Burnham*, 25 Me. 9; *Elwell v. Shaw*, 16 Mass. 42; *Brinley v. Mann*, 2 Cush. (Mass.) 337; s. c., 48 Am. Dec. 669; *Mussey v. Scott*, 7 Cush. (Mass.) 216; s. c., 54 Am. Dec. 719; *Fullam v. West Brookfield*, 9 Allen (Mass.), 1; *Stackpole v. Arnold*, 11 Mass. 27; *Bradlee v. Boston Glass Mfy.*, 16 Pick. (Mass.) 347; *Taber v. Cannon*, 8 Metc. (Mass.) 456; *Bedford Ins. Co. v. Covell*, 8 Metc. (Mass.) 442; *Brown v. Parker*, 7 Allen (Mass.), 337; *Hale v. Woods*, 10 N. H. 470; s. c., 34 Am. Dec. 176; *Savage v. Rix*, 9 N. H. 263; *Morse v. Green*, 13 N. H. 32; s. c., 38 Am. Dec. 471; *Hopkins v. Mehaffy*, 11 S. & R. (Pa.) 126; *Hefferman v. Addams*, 7 Watts (Pa.), 116; *Devinney v. Reynolds*, 1 W. & S. (Pa.) 328; *Bradstreet v. Baker*, 14 R. I. 546; *Providence v. Miller*, 11 R. I. 272; *Webster v. Brown*, 2 Rich. L. N. S. (S. Car.) 428; *Daniels v. Burnham*, 2 La. 243; *Materne v. Lion*, 35 La. Ann. 988; *Key v. Parnham*, 6 Har. & J. (Md.) 418; *Hunter v. Miller*, 6 B. Mon. (Ky.) 612. *Compare Franklin Ave., etc., Sav. Inst. v. Board of Education*, 75 Mo. 408; *Washington Mut. F. Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480.

The granting clause of a deed, the record of which was offered in evidence, was as follows: "Know all men by these presents, that the W. K. Land Company, by S. H., president, and T. S. C., secretary, has granted," etc. The attestation clause and signatures were as follows: "In witness whereof, we hereunto subscribe our names and affix our seals." (Signed) "S. H., president" (scroll); "T. S. C., secretary" (scroll); "W. K. Land Company" (scroll). The certificate of acknowledgment stated that S. H., president, and T. S. C., secretary, "acknowledged that they executed and delivered the same as their voluntary act and deed." *Held*, that the deed was the deed of the corporation. The form of signature did not make it the individual deed of S. H. and T. S. C.; and one of the seals appearing on the record would be presumed to be the seal of the corporation. *Kansas City v. Hannibal, etc., R. Co.*, 77 Mo. 180.

*Signed and Sealed in Name of Principal.*—A deed will bind the principal if signed and sealed in his name and on his behalf. The seal must be the seal of the principal, not the seal of the agent, to make the principal liable, whether the principal be a corporation or an individual. Where the agent signs his own name and uses his own seal the principal will not be bound.<sup>1</sup>

1. *Townsend v. Hubbard*, 4 Hill (N. Y.), 351; *Stanton v. Camp*, 4 Barb. (N. Y.) 274; *Minard v. Mead*, 7 Wend. (N. Y.) 68; *Kiersted v. Orange & A. R. Co.*, 69 N. Y. 343; s. c., 25 Am. Rep. 199; *Townsend v. Corning*, 23 Wend. (N. Y.) 435; *Stone v. Wood*, 7 Cow. (N. Y.) 453; *Briggs v. Partridge*, 64 N. Y. 358; *Damon v. Granby*, 2 Pick. (Mass.) 345; *Tippets v. Walker*, 4 Mass. 595; *Brinley v. Mann*, 2 Cush. (Mass.) 337; s. c., 48 Am. Dec. 669; *Fowler v. Shearer*, 7 Mass. 14; *Elwell v. Shaw*, 16 Mass. 42; *Mussey v. Scott*, 7 Cush. (Mass.) 216; s. c., 54 Am. Dec. 719; *Bartlett v. Tucker*, 104 Mass. 336; s. c., 6 Am. Rep. 240; *Fullam v. West Brookfield*, 9 Allen (Mass.), 1; *Stinchfield v. Little*, 1 Greenl. (Me.) 231; *Savings Bank v. Davis*, 8 Conn. 191; *Reed v. Latham*, 40 Conn. 452; *Shanks v. Lancaster*, 5 Gratt. (Va.) 110; s. c., 1 Am. Dec. 108; *Martin v. Flowers*, 8 Leigh. (Va.) 158; *McDonald v. Bear River Co.*, 13 Cal. 220; *Meagher v. Thompson*, 49 Cal. 189; *Echols v. Cheney*, 28 Cal. 157; *Morrison v. Bowman*, 29 Cal. 337; *Carter v. Chandron*, 21 Ala. 72; *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Providence v. Miller*, 11 R. I. 272; s. c., 23 Am. Rep. 453; *Martin v. Almond*, 25 Mo. 313; *Einstein v. Holt*, 52 Mo. 340; *McClure v. Herring*, 70 Mo. 18; s. c., 35 Am. Rep. 404; *Hale v. Woods*, 10 N. H. 470; s. c., 34 Am. Dec. 176; *Northwestern Distr. Co. v. Brant*, 69 Ill. 658; s. c., 18 Am. Rep. 631; *Hancock v. Yunker*, 83 Ill. 208; *Sheldon v. Dunlap*, 1 Harr. (N. J.) 245; *Grubbs v. Wiley*, 17 Miss. 29; *Webster v. Brown*, 2 Rich. N. S. (S. Car.) 428; *Clark v. Courtney*, 5 Pet. (U. S.) 319, 340; *Bank of Columbia v. Patterson*, 7 Cranch. (U. S.) 299, 308; *Barger v. Miller*, 4 Wash. (U. S.) 280; *Phil.*, etc., R. Co. v. Howard, 13 How. (U. S.) 307, 337. *Compare* *State v. Spartansburgh*, etc., R. Co., 8 Rich. N. S. (S. Car.) 129; *Beardsley v. Duntley*, 69 N. Y. 577.

A contract by a corporation signed by the president as president and sealed with a simple scroll because there was no corporate seal, *held*, neither the contract of the president individually nor of the corporation. *McCaulley v. Jenney*, 5 Del. 32.

Where an agent acts for several principals it is not necessary that a separate seal should be attached by each. One seal will be sufficient if it appears to be the seal of all. *Townsend v. Hubbard*, 4 Hill (N. Y.), 351; *Harper v. Hampton*, 1 Harr. & J. (Md.) 709.

A verbal ratification by the principal of a deed executed under the hand and seal of the agent will not make it valid. *Smith v. Dickinson*, 6 Humph. (Tenn.) 261; s. c., 44 Am. Dec. 306; *Tappan v. Redfield*, 1 Halst. Ch. N. J. 399; *Rhode v. Louthain*, 8 Blackf. (Ind.) 413.

But where a person whose name has been subscribed to a deed in his absence appears before a magistrate and duly acknowledges the execution of the deed, he thereby adopts the signature as his own. *Bartlett v. Drake*, 100 Mass. 174; s. c., 1 Am. Rep. 101.

But see *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; s. c., 10 Am. Dec. 193; *Whitford v. Laidler*, 94 N. Y. 145; s. c., 46 Am. Rep. 131, where it was held that while the principal was sufficiently described in the body of the instrument and it was executed not under his hand and seal, but under the seal of the agent, covenant would not lie against him, but that an action of *assumpsit* could be maintained. And *Robbins v. Butler*, 24 Ill. 387, where it was held that the signature of a deed by an attorney in his own name confers an equitable although not a legal title. *Yerby v. Grisby*, 9 Leigh. (Va.) 387; *McNaughten v. Partridge*, 11 Ohio, 223; s. c., 38 Am. Dec. 731; *Van Reinsdyk v. Kane*, 1 Gall. (U. S.) 630; *Devinney v. Reynolds*, 1 W. & S. (Pa.) 828.

Public agents acting in their official capacity may sign their own names and bind their principals. *Ward v. Bartholomew*, 6 Pick. (Mass.) 409; *Freeman v. Otis*, 9 Mass. 272; s. c., 6 Am. Dec. 66; *Thompson v. Carr*, 5 N. H. 510; *Magill v. Hinsdale*, 6 Conn. 464; *Stinchfield v. Little*, 1 Greenl. (Me.) 231; *Providence v. Miller*, 11 R. I. 272; *Walker v. Swartwout*, 12 Johns. (N. Y.) 444; *Hodgson v. Dexter*, 1 Cranch. (U. S.) 345; *Sheets v. Seldon*, 2 Wall. (U. S.) 177. *Compare* *Simonds v. Heard*, 23 Pick. (Mass.) 120; s. c., 34 Am. Dec. 41; *Hall v. Cockrell*, 28 Ala. 507.

*Intention Appearing on Face of Instrument.*—In some States it has been held that where it appears from the instrument that the agent acted for the principal, the signature of the agent's name alone, without any expression of his agency, will not make it his instrument, but bind the principal.<sup>1</sup>

*Intention Not Appearing.*—If it does not appear from the instrument that it is intended to be the act of the principal, the agent will be personally liable, and the addition to his name of his title of office, or his representative character, will not shield him from liability.<sup>2</sup>

1. *McDonough v. Templeman*, 1 Harr. & J. (Md.) 156; s. c., 2 Am. Dec. 510; *Key v. Parnham*, 6 Harr. & J. (Md.) 418; *Warner v. Mower*, 11 Vt. 385; *Hopkins v. Mehaffy*, 11 S. & R. (Pa.) 126; *Abrams v. Musgrove*, 12 Pa. St. 295; *Purinton v. Security, etc., Co.*, 72 Me. 22; *Nobleboro v. Clark*, 68 Me. 87; s. c., 28 Am. Rep. 22; *Daughtrey v. Knolle*, 44 Tex. 450.

Where a deed stated that it was made by a corporation, and no agency mentioned, it was held that the signature by the president of the corporation, as president, did not make it his deed. *Hopkins v. Mehaffy*, 11 Serg. & R. (Pa.) 126; *Gottfried v. Miller*, 104 U. S. 521.

2. *Tippets v. Walker*, 4 Mass. 595; *Elwell v. Shaw*, 16 Mass. 42; s. c., 8 Am. Dec. 126; *Fullam v. West Brookfield*, 9 Allen (Mass.), 1; *Dusenbury v. Ellis*, 3 Johns. Cas. (N. Y.) 70; s. c., 51 Am. Dec. 144; *Taft v. Brewster*, 9 Johns. (N. Y.) 334; s. c., 6 Am. Dec. 280; *Briggs v. Partridge*, 64 N. Y. 357; s. c., 21 Am. Rep. 617; *White v. Skinner*, 13 Johns. (N. Y.) 307; s. c., 7 Am. Dec. 381; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; s. c., 10 Am. Dec. 193; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *Stone v. Wood*, 7 Cow. (N. Y.) 453; s. c., 17 Am. Dec. 529; *Palmer v. Stephens*, 1 Denio (N. Y.), 471; *Whitford v. Laidler*, 94 N. Y. 145; s. c., 46 Am. Rep. 131; *Kiersted v. Orange, etc., R. Co.*, 69 N. Y. 343; *Buffalo, etc., Inst. v. Bitter*, 87 N. Y. 250; *Bay v. Cook*, 22 N. J. L. 343; *Dayton v. Warne*, 43 N. J. L. 659; *Borcheling v. Katz*, 37 N. J. Eq. 150; *Kansas City v. Hannibal, etc., R. Co.*, 77 Mo. 180; *Shewalter v. Pirner*, 55 Mo. 218; *Denning v. Bullitt*, 1 Blackf. (Ind.) 241; *Stinchfield v. Little*, 1 Greenl. (Me.) 231; s. c., 10 Am. Dec. 65; *Mahoney v. McLean*, 26 Minn. 415; *Menard v. Crowe*, 20 Minn. 448; *Scott v. McAlpin*, N. Car. Term, 155; s. c., 7 Am. Dec. 703; *Locke v. Alexander*, 2 Hawkes (N. Car.), 155; s. c., 11 Am. Dec. 750; *Quigley v. De Hass*, 82 Pa. St. 267; *Taylor v. Agricul-*

*tural, etc., Assoc.*, 68 Ala. 229; *Providence v. Miller*, 11 R. I. 272; *Hancock v. Yunker*, 83 Ill. 208; *Grau v. McVicker*, 8 Biss. (U. S.) 13; *Lutz v. Linthicum*, 8 Pet. (U. S.) 155; *Duvall v. Craig*, 2 Wheat. (U. S.) 45.

But such instrument may be enforced in equity. *Taylor v. Agricultural, etc., Assoc.*, 68 Ala. 229.

An action upon a covenant in a deed on the part of the grantee by which he assumes an incumbence, cannot be maintained against a third person upon proof outside of the instrument that the grantee was, in fact, acting as agent and dealing for such a third person. *Tuthill v. Wilson*, 90 N. Y. 423.

A bond which read, "I promise to pay," etc., omitting the obligor's name, and executed by the agent as follows: "Witness my hand and seal, H. S. Lucas [Seal], for Chas. Callender, president of the Chester Mica and Porcelain Co.," imposed a personal liability on the agent. *Bryson v. Lucas*, 84 N. Car. 680; s. c., 37 Am. Rep. 634.

A bond made as follows: "Know all men by these presents, that we, A, B, C, D, trustees of the Methodist Episcopal Church of Jacksonville, their successors and assigns," etc., and signed and sealed by the trustees, as individuals, is a personal bond of the individuals named. *Dayton v. Warne*, 43 N. J. L. 659.

The owner of a building executed a lease of it, under seal, for a term of years, to T., who was the general agent and treasurer of a corporation, which was not named or referred to in the lease, and which had authorized T. "to hire and pay for all necessary stores and warehouses." T. took the lease with the intention that the building should be occupied by the corporation, and his agency and purpose were known to the lessor. The corporation did not do business in the name of T. and use that name as describing itself in the lease. The corporation occupied the demised premises, and paid rent therefor on bills ren-



**Bills and Notes.**—The same general rule applies also to the signatures of agents to negotiable instruments. The fact that the agent signs as such should appear upon the face of the instrument. If the name of the principal does not appear, the mere signing as "agent," "trustee," or "president" is regarded as simply descriptive of the person so signing; and he will be held personally liable.<sup>1</sup>

dered to it by the lessor. T. underlet a portion of the building, for which the sub-tenants paid rent to the corporation. T. had almost the entire management of the affairs of the corporation, and mingled his own accounts and cash with those of the corporation. T. became bankrupt, and his assignees in bankruptcy elected not to assume the lease. *Held*, that the lessor could not maintain a bill in equity to charge the corporation on the covenants of the lease; that the rent due from the sub-lessees at the time of T.'s bankruptcy belonged to his assignees; and that the lessor was entitled to a decree for the rent accruing subsequently to T.'s bankruptcy. *Haley v. Boston B. Co.*, 140 Mass. 73.

A lease under seal, executed by an agent as lessee in his individual name, and which does not purport to be executed on behalf of the principal, is not binding on the latter, although the fact of the agency is recited therein, and although it appears by extrinsic evidence that the lessee acted as agent; the instrument can only be enforced against the party who appears upon the face of it to be the covenantor. *Kiersted v. Orange, etc., R. Co.*, 69 N. Y. 343. *Compare Tidd v. Rines*, 26 Minn. 201.

1. *Edwards on Bills and Notes*, 83; *Byles on Bills*, 6th Am. Ed., 60; *Story on Prom. Notes*, § 68; *Story on Agency*, §§ 155, 275; *Watson on Agency*, 290; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271; s. c., 25 Am. Dec. 558; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.), 402; s. c., 43 Am. Dec. 681; *Joynson v. Richard*, 12 Jones & S. (N. Y.) 20; *Hills v. Bannister*, 8 Cow. (N. Y.) 31; *Schmittler v. Simon*, 101 N. Y. 554; *Mann v. Chandler*, 9 Mass. 335; *Davis v. England*, 6 N. East. Repr. (Mass.) 731; *Stackpole v. Arnold*, 11 Mass. 27; s. c., 6 Am. Dec. 150; *Firke v. Eldridge*, 12 Gray (Mass.), 404; *Bank of British N. A. v. Hooper*, 5 Gray (Mass.), 567; *Williams v. Robbins*, 16 Gray (Mass.), 77; s. c., 77 Am. Dec. 396; *Seaver v. Coburn*, 10 Cush. (Mass.) 324; *Morell v. Codding*, 4 Allen (Mass.), 403; *Sturdivant v. Hull*, 59 Me. 172; s. c., 8 Am. Rep. 409; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Towne v.*

*Rice*, 122 Mass. 67; *Hays v. Crutcher*, 54 Ind. 261; *Williams v. Lafayette Bank*, 83 Ind. 237; *Winship v. Smith*, 61 Me. 118; *Rendell v. Harriman*, 75 Me. 497; s. c., 46 Am. Rep. 421; *Castle v. Belfast F. Co.*, 72 Me. 167; *Walker v. Christian*, 21 Gratt. (Va.) 291; *Early v. Wilkinson*, 9 Gratt. (Va.) 68; *Shaver v. Ocean M. Co.*, 21 Cal. 45; *Blanchard v. Kaull*, 44 Cal. 440; *Chamberlain v. Pac. Wool G. Co.*, 54 Cal. 106; *Scott v. Baker*, 3 W. Va. 285; *Rand v. Hale*, 3 W. Va. 495; *Devendorf v. W. Va., etc., Co.*, 17 W. Va. 135; *Collins v. Buckeye Ins. Co.*, 17 Ohio St. 215; *Bank v. Cook*, 38 Ohio St. 442; *Am. Ins. Co. v. Stratton*, 59 Iowa 696; *Harkins v. Edwards*, 1 Iowa, 426; *Tilden v. Barnard*, 43 Mich. 376; s. c., 38 Am. Rep. 197; *Cahokia School Trustees, etc., v. Rautenberg*, 88 Ill. 220; *Chadsee v. McCreery*, 27 Ill. 253; *Bickford v. Bank*, 42 Ill. 238; *Burlingame v. Brewster*, 79 Ill. 515; s. c., 22 Am. Rep. 177; *Powers v. Briggs*, 79 Ill. 493; s. c., 22 Am. Rep. 175; *Hypes v. Griffin*, 89 Ill. 134; s. c., 31 Am. Rep. 71; *New Market Sav. Bank v. Gillet*, 100 Ill. 254; s. c., 39 Am. Rep. 39; *Scanlan v. Keith*, 102 Ill. 640; *Woodbury v. Blair*, 18 Iowa, 572; *Am. Ins. Co. v. Stratton*, 13 N. Western Repr. (Iowa) 763; *Roberts v. Austin*, 5 Whart. (Pa.) 313; *Arnold v. Sprague*, 34 Vt. 402; *Rittenhouse v. Ammerman*, 64 Mo. 197; *Savage v. Rix*, 9 N. H. 263; *Dow v. Moore*, 47 N. H. 419; *Fowler v. Atkinson*, 6 Minn. 578; *Fitch v. Lawton*, 6 How. (Miss.) 371; *Burbank v. Posey*, 7 Bush (Ky.), 373; *Gregory v. Leigh*, 33 Tex. 813; *Graham v. Campbell*, 56 Ga. 258; *Rawlins v. Robson*, 70 Ga. 595; *Faw v. Neals*, 55 Ga. 711; *Tannatt v. Nat. Bank*, 1 Colo. 279; *Drake v. Flewellen*, 33 Ala. 106; *Anderson v. Pearce*, 36 Ark. 293; s. c., 38 Am. Rep. 39; *Guthrie v. Imbrie*, 10 Am. & Eng. Corp. Cas. 333; s. c., 12 Oreg. 182; *Lockwood v. Coley*, 22 Fed. Rep. 192; *Downman v. Jones*, 4 Q. B. 235; *Dutton v. Maroh*, L. R. 6 Q. B. 361. *Compare Metcalf v. Williams*, 104 U. S. 93; *Parsons on Bills and Notes*, 168.

"*Marietta, Ga.*, January 21st, 1869. Received of Mrs. Julia B. Meals, by the hands of Mrs. Mary W. Phillips, nine

*Name of Principal appearing on Face of Instrument.*—Where the name of the principal appears on the face of the instrument, an indorsement by an authorized agent with the descriptive words "Treasurer," "President," "Agent," etc., will be a sufficient indorsement to bind the principal.<sup>1</sup>

hundred dollars, which said sum of money I obligate myself to use in running capital of the Marietta mill, and keep the same in money, stock, material or paper, not subject to the debts of the mill. I further obligate myself to pay Mrs. Meals twelve per cent interest on the same, payable monthly. I further obligate myself and promise to pay her as much as five hundred dollars of the principal sum on or before the first day of May next, if called upon, the remainder due and payable twelve months after date, at which time and date I promise to pay Mrs. Meals, or bearer, whatever of said principal sum and interest which may be due and unpaid." (Signed) "E. Faw, Agent for the Marietta Paper Mill Company." *Held*, to be the personal undertaking of Faw. *Faw v. Meals*, 65 Ga. 711.

The drawee of a bill of exchange, drawn by the "K. & O. Coal Co.," was described in the bill as "John A. R., Agt.," and it was accepted by him as "John A. R., Agent K. & O. C. Co." *Held*, that the acceptance so made was the personal obligation of John A. R., and that in a suit upon the acceptance by an indorsee against him parol evidence was not admissible, in the absence of fraud, accident, or mistake, to show that the defendant so accepted the bill intending to bind the drawer as his principal, and that this fact was known to the plaintiff at the time it became the owner and holder of it. *Robinson v. Kanawha Valley Bank*, 8 N. East. Repr. (Ohio) 583.

A promissory note saying "We promise to pay" and signed "D. B. L., Treas'r Hallowell Gas Light Co.," is the note of the individual. *McClure v. Livermore*, 7 East. Repr. (Me.) 258.

In *Scott v. Baker*, 3 W. Va. 285, a note in the following form was held to be the individual note of the parties signing it:

§345.25. December 19, 1866.  
Sixty days after date, we promise to pay to the order of J. W. Baker, three hundred and forty-two  $\frac{00}{100}$  dollars, at Second National Bank of Parkersburg; value received.

WILLIAM SCOTT,  
President Blannerhasset Oil Co.  
W. H. HOMER, Treasurer.

A note in the form "I promise to

pay," etc., and signed "John T. Hull, Treas., St. Paul's Parish," *held* to be the note of Hull. *Sturdivant v. Hull*, 59 Me. 172; s. c., 8 Am. Rep. 409; *Tilden v. Barnard*, 43 Mich. 376; s. c., 38 Am. Rep. 197.

A draft concluding "and charge the same to account of proprietors Pembroke Iron Works, Your humble servant, Joseph Barrell," without otherwise naming a principal or disclosing the signer's agency, was held to bind him only. *Bank of British N. A. v. Hooper*, 5 Gray (Mass.) 567.

A note drawn "We, the trustees of the Methodist Episcopal Church in Lebanon," etc., and signed by them as individuals, held to be the note of the signers as individuals. *Hypes v. Griffin*, 89 Ill. 134; s. c., 31 Am. Rep. 71. See also *Pack v. White*, 78 Ky. 243; *Hayes v. Brubaker*, 65 Ind. 27.

A similar note was signed by the trustees, with the addition of word "trustees" after their names collectively. *Held*, that they were individually liable. *Powers v. Briggs*, 79 Ill. 493; s. c., 22 Am. Rep. 175. See also *Burlingame v. Brewster*, 79 Ill. 515; s. c., 22 Am. Rep. 177; *Mears v. Graham*, 8 Blackf. (Ind.) 144; *McClure v. Bennett*, 1 Blackf. (Ind.) 189; s. c., 12 Am. Dec. 223; *Hills v. Banister*, 8 Cow. (N. Y.) 31; *McClellan v. Robe*, 93 Ind. 298; *Williams v. Lafayette Bank*, 83 Ind. 237. Compare *New Market Sav. Bank v. Gillett*, 100 Ill. 254; s. c., 39 Am. Rep. 39.

1. *Russell v. Folsom*, 72 Me. 436; *Chase v. Hathorn*, 61 Me. 505; *Dunn v. Weston*, 71 Me. 275; *Farmers & Mechs. Bank v. Colby*, 64 Cal. 352; *Nicholas v. Oliver*, 36 N. H. 219; *Folger v. Chase*, 18 Pick. (Mass.) 63; *McIntyre v. Preston*, 5 Gilm. (Ill.) 48; s. c., 48 Am. Dec. 321; *Milligan v. Lyle*, 24 La. Ann. 144; *New Market Savings Bank v. Gillet*, 100 Ill. 254; *Gerber v. Stuart*, 1 Montana, 172; *Wallis v. Johnson*, 75 Ind. 368.

In *Slawson v. Loring*, 5 Allen (Mass.), 340, a draft having the words "Office of Portage Lake Manufacturing Company, Hancock, Michigan," printed at the top and signed "J. R. Jackson, Agent," was held to disclose the principal, and the agent was not liable.

A bank check with the words "Ætna Mills" printed on the margin, and signed

**Corporate Seal.**—Although a corporate seal impressed upon a promissory note is no part of the note itself, yet if it contain the name of the corporation in full it may be taken, with other facts, to explain the intent of the makers of the note who, in signing, have affixed to their names the words "President" and "Sec. G. M. Co.," respectively.<sup>1</sup>

**Agents in the Habit of Signing Negotiable Paper.**—But adding the title "Agent" to the signature of the drawer of a bill, is notice that the party does not mean to be personally liable, and where the principal is known he alone is liable. This is especially the case where the agent has been in the constant habit of signing negotiable paper for his principal in this manner, and this fact is known to the parties holding the paper.<sup>2</sup>

"J. D. Farnsworth, Treasurer," *Held* to be the check of the *Ætna Mills*. *Carpenter v. Farnsworth*, 106 Mass. 561; s. c., 8 Am. Rep. 360.

In *Tripp v. Swanzy Paper Co.*, 13 Pick. (Mass.) 291, a draft not naming the principal otherwise than by concluding, "and charge the same to the Swanzy Paper Co. Yours respectfully, Joseph Hooper, Agent," was held to be the draft of the company.

In *Fuller v. Hooper*, 3 Gray (Mass.), 334, a draft with the words "Pompton Iron Works" printed in the margin and concluding, "which place to the account of Pompton Iron Works. W. Burtt, Agent," was held to bind the proprietor of the Pompton Iron Works. See also *Slawson v. Loring*, 5 Allen (Mass.), 340; *Hitchcock v. Buchanan*, 15 Otto (U. S.), 416.

In *Simpson v. Garland*, 72 Me. 40; s. c., 39 Am. Rep. 297, it was held that a note drawn as follows, "We, the subscribers for the Carmel Cheese Mfg. Co.," etc., and signed by the subscribers, who were directors of the company, without any official description, was held to be the note of the company.

Note phrased "We, as trustees," and signed by the trustees as individuals, was held not to be the personal note of the trustees. *Sanborn v. Neal*, 4 Minn. 126; s. c., 77 Am. Dec. 502. See also *Blanchard v. Kaull*, 44 Cal. 440. *Compare* *Ross v. Brown*, 74 Me. 352.

A note drawn "I promise, for the use of N. E. P. Union Store," etc., and signed "A., Treasurer," did not bind the agent. *Dow v. Moore*, 47 N. H. 419.

A note drawn "I promise to pay," etc., and signed "Pro. C. D., A. B.," is the note of the principal. *Long v. Coburn*, 11 Mass. 97; s. c., 6 Am. Dec. 160.

A note signed "J. A. Robson, Agent for his Wife," is the note of the wife. *Rawlins v. Robson*, 70 Ga. 595.

A note reading "The Howard County Agricultural Association, who execute this note by her directors, do promise," etc; signed by "A., Secretary," and others followed by the words "Directors Howard County Agricultural Association," was held to be the note of the association. *Armstrong v. Kirkpatrick*, 79 Ind. 527.

The word "as" prefixed to the descriptive part of the signature has been held to charge the principal. *Price v. Taylor*, 5 Hurl. & N. 540.

1. *Guthrie v. Imbrie*, 10 Am. & Eng. Corp. Cas. 333; s. c., 12 Oregon, 182; *Means v. Swormstedt*, 32 Ind. 87; *Scanlan v. Keith*, 102 Ill. 640. But see opinion of Waldo, C. J., in *Guthrie v. Imbrie*, *infra*, and *Dutton v. Marsh*, L. R. 6 Q. B. 361.

2. *Metcalf v. Williams*, 104 U. S. 93; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *Mott v. Hicks*, 1 Cow. (N. Y.) 513; s. c., 13 Am. Dec. 550; *Mech. Bank v. Bank of Columbia*, 5 Wheat. (U. S.) 326; *Blanchard v. Kaull*, 44 Cal. 440; *Lander v. Castro*, 43 Cal. 497; *Hall v. Crandall*, 29 Cal. 568; *Bean v. Pioneer Min. Co.*, 66 Cal. 451; *Haile v. Peirce*, 32 Md. 327; *Houghton v. First Nat. Bank*, 26 Wis. 663; *Lacy v. Dubuque Lumber Co.*, 43 Iowa, 510. *Compare* *Towne v. Rice*, 122 Mass. 67.

No party can be charged as principal upon a negotiable note or bill of exchange unless his name is thereon disclosed. An exception to this rule arises where officers or clerks in banking-houses, or other persons who are permitted to act as such, receive money or securities over the bank counter, and issue therefor drafts, bills, or negotiable certificates of deposit. In all such cases the banking-house is ultimately liable, although such draft, bill, or certificate may be signed by such officer, clerk, or person without

**Ambiguous Instruments.**—Where the instrument is ambiguous or the principal has by usage authorized the signature, parol evidence is admissible to prove that the party signing has done so for and as the authorized agent of the principal.<sup>1</sup>

**Credit of Parties whose Names appear.**—In general it may be said that persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon parol proof that the ostensible party signed or indorsed as his agent.<sup>2</sup>

disclosing the name of the banking-house. *Webster v. Wray*, 27 N. Western Repr. (Neb.) 644.

A note made to the order of "A. B., cashier," and indorsed by him in like manner, is not his individual indorsement. *Babcock v. Beman*, 11 N. Y. 200; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Bank of N. Y. v. Bank of Ohio*, 29 N. Y. 619.

So an indorsement of a note to the cashier of a moneyed corporation, by adding the word "cashier" to his name in the indorsement, is a transfer to the corporation when that was the design of the transaction. *Watervliet Bank v. White*, 1 Denio (N. Y.), 608.

A., being the authorized agent of a manufacturing company, gave B. a note, in the body of which were these words: "I promise to pay," etc., the signature being "A., agent for the M. M. Company." It appeared that A. had been in the constant habit of signing notes in this manner with the knowledge of the company. *Held*, that he was not personally liable. *Hovey v. Magill*, 2 Conn. 680.

If the name of the principal precedes or follows the name of agent signing, as "John Smith by John Brown, agent," or "John Brown for John Smith," then the principal will be liable, and not the agent. *Simpson v. Garland*, 72 Me. 40; s. c., 39 Am. Rep. 297; *Sturdivant v. Hull*, 59 Me. 172; s. c., 8 Am. Rep. 704; *Atkins v. Brown*, 59 Me. 90; *Sheridan v. Carpenter*, 61 Me. 83; *Winship v. Smith*, 61 Me. 118; *Ballou v. Talbot*, 16 Mass. 461; *Tucker Manuf. Co. v. Fairbanks*, 98 Mass. 101; *Morrell v. Coddington*, 4 Allen (Mass.), 403; *Draper v. Mass. Steam H. Co.*, 5 Allen (Mass.), 338; *Rice v. Grove*, 22 Pick. (Mass.) 158; s. c., 33 Am. Dec. 724; *Emerson v. Providence, etc., Co.*, 12 Mass. 237; *Rawlins v. Robson*, 70 Ga. 595.

A note reading "We promise," etc., and signed Burlington & Southwestern Ry. Co., V. R. Moore, A. Tr.; *held*, that it was the note of the railroad. *Turner v. Potter*, 56 Iowa, 251.

A note signed "Belfast Foundry Co., W. W. Castle, President," is the note of the company. *Castle v. Belfast F. Co.* 72 Me. 167.

But where a note was drawn "We, jointly and severally," and signed "for the Boston Glass Manufactory, A. B. & C.," it was held that the joint and several promise and the omission of any designation of official character made it an individual note of the signers. *Bradlee v. Boston Glass Man'f'y*, 16 Pick. (Mass.) 347.

1. 1 Daniel's Neg. Instr. § 418; *Weeks v. Fox*, 3 Thomp. & C. (N. Y.) 355; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.), 402; s. c., 43 Am. Dec. 681; *Brockway v. Allen*, 17 Wend. (N. Y.) 40; *Rogers v. Coit*, 6 Hill (N. Y.), 322; *Beers v. Phoenix Glass Co.*, 14 Barb. (N. Y.) 358; *Hood v. Hallenbeck*, 7 Hun (N. Y.), 367; *Stearns v. Allen*, 25 Hun (N. Y.), 558; *Whitford v. Laidler*, 94 N. Y. 145; *Kean v. Davis*, 1 Zab. (N. J.) 683; s. c., 47 Am. Dec. 182; *Hovey v. Magill*, 2 Conn. 680; *Medway Mfy. v. Adams*, 10 Mass. 360; *Fuller v. Hooper*, 3 Gray (Mass.), 334; *Bradlee v. Boston Glass Mfy.*, 16 Pick. (Mass.) 347; *Bryant v. Eastman*, 7 Cush. (Mass.) 111; *Markley v. Quay*, 14 Phila. (Pa.) 164; *Hardy v. Pilcher*, 57 Miss. 18; s. c., 34 Am. Rep. 432; *Devendorf v. West Va., etc., Co.*, 17 W. Va. 135; *Richmond, etc., R. Co. v. Snead*, 19 Gratt. (Va.) 354; *Walker v. Christian*, 21 Gratt. (Va.) 291; *Haile v. Peirce*, 32 Md. 327; *Rendell v. Harri-man*, 75 Me. 497; s. c., 46 Am. Rep. 421; *Hager v. Rice*, 4 Colo. 90; *McClelland v. Reynolds*, 49 Mo. 312; *Klostermann v. Loos*, 58 Mo. 290; *Pratt v. Beaupre*, 13 Minn. 187; *Scanlan v. Keith*, 102 Ill. 640; *Lazarus v. Shearer*, 2 Ala. 718; *Bean v. Pioneer Min. Co.*, 66 Cal. 451; *Metcalf v. Williams*, 104 U. S. 93; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. (U. S.) 326; *Baldwin v. Bank of Newbury*, 1 Wall. (U. S.) 234. See *Morris v. Faurot*, 21 Ohio St. 155; s. c., 8 Am. Rep. 45.

2. Am. Lead. Cas. (5th Ed.) 763, 764;

*Simple Contracts.*—Where a simple contract, other than a bill or note, is made by an agent in his own name, whether he describes himself to be an agent or not, whether the principal be known or unknown, he, the agent, will be liable to be sued, and entitled to sue thereon; and his principal also will be liable to be sued and be entitled to sue thereon in all cases; and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal.<sup>1</sup>

*Barker v. Mechanics' Ins. Co.*, 3 Wend. (N. Y.) 94; s. c., 20 Am. Dec. 664; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271; s. c., 25 Am. Dec. 558; *Snelling v. Howard*, 51 N. Y. 373; *Bank of Utica v. Magher*, 18 Johns. (N. Y.) 341; *De Witt v. Walton* 9 N. Y. 570; *Briggs v. Partridge*, 64 N. Y. 358; s. c., 21 Am. Rep. 617; *Finan v. Babcock*, 58 Mich. 301; *Tannatt v. Rocky Mountain Nat. Bank*, 1 Colo. 278; *Kean v. Davis*, 1 Zab. (N. J.) 583; s. c., 47 Am. Dec. 182; *Arnold v. Sprague*, 34 Vt. 402; *Barlow v. Congr. Soc.* 8 Allen (Mass.), 460; *Brown v. Parker*, 7 Allen (Mass.), 337; *Stackpole v. Arnold*, 11 Mass. 27; s. c., 6 Am. Dec. 150; *Eastern R. Co. v. Benedict*, 5 Gray (Mass.), 561; *Bank of Brit. N. Amer. v. Hooper*, 5 Gray (Mass.), 567; *Bass v. O'Brien*, 12 Gray (Mass.), 481; *Slawson v. Loring*, 5 Allen (Mass.), 340; *Davis v. England*, 141 Mass. 587; *Devendorf v. West Va.*, etc., Co., 17 W. Va. 135; *Anderton v. Shoup*, 17 Ohio St. 125; *Bank v. Cook*, 38 Ohio St. 442; *Sturdivant v. Hull*, 59 Me. 172; s. c., 8 Am. Rep. 409; *Rendell v. Harriman*, 75 Me. 497; *Hypes v. Griffen*, 89 Ill. 134; s. c., 31 Am. Rep. 71; *Powers v. Briggs*, 79 Ill. 493; s. c., 22 Am. Rep. 175; *Baker v. Chamblis*, 4 G. Gr. (Iowa) 429; *Wing v. Gluck*, 56 Iowa, 473; s. c., 37 Am. Rep. 142, note; *Mechanics' Bank v. Bank*, 5 Wheat. (U. S.) 326.

A promissory note signed "W. H. England, President and Treasurer Chelsea Iron Foundry Company," is England's individual note and not the note of the company. Oral testimony is inadmissible to show that at the time the note was given it was understood and agreed by the parties that it was to be the note of the company. *Davis v. England*, 141 Mass. 587.

A note reciting "We promise to pay," etc., was signed by four individuals, adding "President and Directors of the Prospect and Stockton Cheese Co." *Held*, that evidence that it was the obligation of the company was inadmissible. *Rendell v. Harriman*, 75 Me. 497; s. c., 46 Am. Rep. 421. See also **BILLS AND**

**NOTES.** For "Bought and sold notes," see **BROKERS.** For Charter-parties, see **SHIPPING.**

1. *Story on Contr.*, § 160; *Nash v. Towne*, 5 Wall. (U. S.) 689; *New Jersey, etc., Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Ford v. Williams*, 21 How. (U. S.) 287; *Oelrichs v. Ford*, 23 How. (U. S.) 63; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. (U. S.) 326; *Clarke v. Van Reimsdyk*, 9 Cranch. (U. S.) 153; *Post v. Pearson*, 108 U. S. 418; *Taylor v. Guest*, 45 How. Pr. (N. Y.) 277; *Nicoll v. Burke*, 78 N. Y. 581; *Shaefer v. Henkel*, 7 Abb. N. C. (N. Y.) 1; *Tucker v. Woolsey*, 64 Barb. (N. Y.) 142; s. c., 6 Lans. N. Y. 482; *Green v. Skeel*, 2 Hun (N. Y.), 485; *Beebee v. Roberts*, 12 Wend. (N. Y.) 413; s. c., 27 Am. Dec. 132; *Taintor v. Prendergast*, 3 Hill. (N. Y.) 72; *Coleman v. Nat. Bank*, 53 N. Y. 388; *Dykers v. Townsend*, 24 N. Y. 57; *Nicoll v. Burke*, 45 N. Y. Super. Ct. 75; *Davis v. England*, 141 Mass. 587; *Byington v. Simpson*, 134 Mass. 169; s. c., 45 Am. Rep. 314; *Nat. Ins. Co. v. Allen*, 116 Mass. 398; *Commercial Bank v. French*, 21 Pick. (Mass.) 486; s. c., 32 Am. Dec. 280; *James v. Bixby*, 11 Mass. 34; *Exchange Bank v. Rice*, 107 Mass. 37; s. c., 9 Am. Rep. 1; *Hunter v. Giddings*, 97 Mass. 41; *Lerned v. Johns*, 9 Allen (Mass.), 419; *Eastern R. Co. v. Benedict*, 5 Gray (Mass.), 561; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Slawson v. Loring*, 5 Allen (Mass.), 340; *Brown v. Parker*, 7 Allen (Mass.), 337; *Taunton, etc., Turnpike v. Whiting*, 10 Mass. 327; *Steamship Bulgarian Co. v. Merchants' Desp. Co.*, 135 Mass. 421; *Potter v. Yale College*, 8 Conn. 52; *Jones v. Ins. Co.*, 14 Conn. 501; *York Co. Bank v. Stein*, 24 Md. 447; *King v. Handy*, 2 Ill. App. 212; *Fowle v. Kerchner*, 87 N. Car. 49; *Dupont v. Mount Pleasant F. Co.*, 9 Rich. (S. Car.) 255; *Deering v. Thom*, 29 Minn. 120; *Chandler v. Coe*, 54 N. H. 561; *Violet v. Powell*, 10 B. Monr. (Ky.) 347; *Borchertling v. Katz*, 37 N. J. Eq. 150; *Edwards v. Golding*, 20 Vt. 30; *Rutland, etc., R. Co. v. Cole*, 24 Vt. 33; *Vermont, etc., R.*

**Must Sign His Name Also.**—It has been held that an agent signing for his principal cannot merely sign the principal's name, but that he must add some words indicating that the signature was not executed by the principal personally, but by his agent.<sup>1</sup> But it does not seem that the weight of authority deems such an addition absolutely necessary.<sup>2</sup>

Co. v. Claves, 21 Vt. 30; Texas L. & C. Co. v. Carroll, 63 Tex. 48; Ferris v. Thaw, 72 Mo. 446; Garland v. Reynolds, 20 Me. 45; Trustees, etc., v. Parks, 1 Fairf. (Me.) 441; State v. Boies, 2 Fairf. (Me.) 474; Hopkins v. Lacouture, 4 Miller (La.) 64; Hyde v. Wolf, 4 La. 234; s. c., 23 Am. Dec. 484; Butler v. Kaulback, 8 Kans. 668; Wolfley v. Rising, 12 Kans. 535; Railroad Co. v. Thacher, 13 Kans. 564; Hays v. Lynn, 7 Watts (Pa.) 524; Merrick's Est., 5 Watts & S. (Pa.) 9; McDonald v. Bear River Co., 13 Cal. 220; Brewster v. Baxter, 2 Wash. Ter. 135. Compare Rowell v. Olson, 32 Minn. 288.

Such evidence does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another. Nash v. Towne, 5 Wall. (U. S.) 689; Bryan v. Brazil, 52 Iowa, 350.

The unnecessary addition of seals may be treated as surplusage, and disregarded. Cook v. Gray, 133 Mass. 106. See also Blanchard v. Blackstone, 102 Mass. 343; Schmertz v. Shreeve, 62 Pa. St. 457; Purviance v. Sutherland, 2 Ohio St. 478; Human v. Cuniffe, 32 Mo. 316; Stowell v. Eldrid, 39 Wis. 614; Evans v. Wells, 22 Wend. (N. Y.) 324; Dubois v. Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285; Dickerman v. Ashton, 21 Minn. 538.

In an action against a third person on a simple non-negotiable contract, it being alleged in the petition that one of the parties to the contract acted as the agent of the defendant in making said contract, although he did not sign the same as agent, or name the defendant as his principal, evidence will be received to show that such nominal party to the contract was authorized to make the same for the defendant; that he in fact did make the same for him; and upon such proof the defendant will be held. Webster v. Wray, 27 N. W. Repr. (Neb.) 644.

The following note was the basis of a suit: "Corpus Christi, Texas, June 8, 1883. The Texas Land and Cattle Company, Limited: Pay to the order of Carroll & Her, eighteen hundred and five 06-100 dollars in current funds. On account of building and repairs. Payment in

full. Charge \$1805.06 to Rancho. Thos. Beynon, Superintendent. To Underwood, Clark & Co., 15 West Mo. Ave., Kansas City, Mo. No. 15086." Held—(1) The term "current funds" destroys the negotiability of the paper (citing Lindsay v. McClellan, 18 Wis. 508; Hadlock v. Woods, 46 Iowa, 435). (2) The instrument being given in full of an account for building and repairs for the company, performed by the drawees, and it being the mode adopted for payment of similar liabilities, created an obligation binding on the company. Texas, etc., Co. v. Carroll, 63 Tex. 48.

The trustees of an association entered into a contract "as trustees of the B. Company" and signed "as trustees." Held, that it was the contract of the company. Cook v. Gray, 133 Mass. 106; Goodenough v. Thayer, 132 Mass. 152.

A written contract, not under seal, purporting to be made by A, was signed "A, agent," A was in fact contracting for his wife, and the plaintiff knew it. Held, that the plaintiff might recover against the wife. Byington v. Simpson, 134 Mass. 169; s. c., 45 Am. Rep. 314.

A contract saying, "If the Marsh harvester don't work to his satisfaction, he, W. Thom, can return the machine to me, and I will return his notes for the same. A. M. Schnell, agent," held, to bind the principal. Deering v. Thom, 29 Minn. 120.

An insurer's written assent to an assignment of the policy is properly signed by D. & Son, "Agents," who are authorized sub-agents for that purpose, although their sub-agency does not appear in the writing. Chauncey v. German Am. Ins. Co., 60 N. H. 428.

Where a contract was signed by the defendants as township trustees, but in the body of the instrument the obligation purported to be a personal one, and the contract was such as the township could not legally make, held, that the signers were bound in their individual capacity, and not as trustees. Revolving Scraper Co. v. Tuttle, 61 Iowa, 423; s. c., 47 Am. Rep. 816.

1. Wood v. Goodridge, 6 Cush. (Mass.) 117; Butterfield v. Beall, 3 Ind. 203.

2. Forsyth v. Day, 41 Me. 382; Hun-

**9. Sub-Agents.—Agent: How Liable for Acts of Sub-Agents.**—When an agent has authority to employ sub-agents,<sup>1</sup> he will not be liable for the negligence or misconduct of his sub-agent; he will be liable, however, for negligence or fraud in the appointment.<sup>2</sup>

*ter v. Giddings*, 97 Mass. 41; *Devinney v. Reynolds*, 1 Watts & S. (Pa.) 328. And see *Squire v. Norris*, 1 Lans. (N. Y.) 282; *Webster v. Brown*, 2 S. Car. 428.

Where the agent signs in the presence of and upon request of the principal it will be sufficient if he simply signs the principal's name. *Gardner v. Gardner*, 5 Cush. (Mass.) 483; *Wood v. Goodridge*, 6 Cush. (Mass.) 117; *Burns v. Lynde*, 6 Allen (Mass.), 305; *Frost v. Deering*, 21 Me. 156; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Kime v. Brooks*, 9 Ired. (N. Car.) 219. And see *Weaver v. Carnall*, 35 Ark. 198; s. c., 37 Am. Rep. 22.

1. See page 364.

2. *Louisville, etc., R. Co. v. Blair*, 4 Baxt. (Tenn.) 407; *Johnson v. Memphis*, 9 Lea (Tenn.), 125; *Campbell v. Reeves*, 3 Head. (Tenn.) 226; *California Bank v. Western U. Tel. Co.*, 52 Cal. 280; *Porter v. Peckham*, 44 Cal. 204; *Lavery v. Snethen*, 68 N. Y. 522; *Foster v. Preston*, 8 Cowen (N. Y.), 198; *Smedes v. Utica Bank*, 20 Johns. (N. Y.) 372; *Watson v. Muirhead*, 57 Pa. St. 161; *Pownall v. Bair*, 78 Pa. St. 403; *Whitlock v. Hicks*, 74 Ill. 460; *McCants v. Wells*, 4 S. Car. 381; *Williamsburg Fire Ins. Co. v. Frothingham*, 122 Mass. 391; *Darling v. Stanwood*, 14 Allen (Mass.), 504; *Buckland v. Conway*, 16 Mass. 396; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *Fabens v. Mercantile Bank*, 23 Pick. (Mass.) 330; *Dorchester, etc., Bank v. New Engl. Bank*, 1 Cush. (Mass.) 177; *University of Mich. v. Rose*, 45 Mich. 284; *Bath v. Caton*, 37 Mich. 199; *Com. Bank of New Orleans v. Martin*, 1 La. Ann. 344; *Taber v. Perrott*, 2 Gall (U. S.), 565; *Kent v. Dawson Bank*, 13 Blatch. (U. S.) 237. Compare *Bromley v. Coxwell*, 2 Bos. & Pull. 428.

Where a sub-agent is employed by an agent to receive money for the principal, the principal may treat the sub-agent as his agent, and sue him for the money received by him. *Miller v. Farmers', etc., Bank*, 30 Md. 392; *Wicks v. Hatch*, 62 N. Y. 535; *Strong v. Stewart*, 9 Heisk (Tenn.), 137.

A sub-agent agreed, by written contract, that notes taken by him on sales made for the principal should be notes of persons of well-known responsibility, and that if the principal should find at any

time within six months after any settlement that any notes taken and passed upon at such settlement were doubtful or worthless at the time of sale, he (the sub-agent) would replace them with cash or good notes. *Held*, statements made by the general agent at the time of a settlement that certain notes were all right and satisfactory would not relieve the sub-agent from his liability to replace them if within six months they were found to have been worthless at the time of sale. Nor would previous statements by the general agent as to the responsibility of the maker of the notes, upon which the sub-agent claimed to have relied, and therefore to have omitted further investigation, estop the principal from insisting upon the liability of the sub-agent. *Osborne v. Rider*, 62 Wis. 235.

Common carriers, however, are responsible for all negligence or misconduct of the sub-agents they employ. *Bank of Ky. v. Adams Expr.*, 93 U. S. 174; *Hooper v. Wells*, 27 Cal. 11; *Christenson v. Am. Expr. Co.*, 15 Minn. 270.

See also COMMON CARRIERS.

An attorney employed by an agent for his principal is the principal's attorney and not the agent's. *Porter v. Peckham*, 44 Cal. 204. See also ATTORNEYS.

Where an agent employed to collect a claim employs an attorney by whose misconduct it is lost, the agent is held liable. *Morgan v. Tener*, 83 Pa. St. 305; *Krause v. Dorrance*, 10 Pa. St. 462; *Bradstreet v. Everson*, 72 Pa. St. 124; *Swett v. Southworth*, 125 Mass. 417; *Dyas v. Hanson*, 14 Mo. App. 363; *Weyerhauser v. Dun*, 100 N. Y. 150; *Taber v. Perrott*, 2 Gall (U. S.), 565; *Kent v. Dawson Bank*, 13 Blatch. (U. S.) 237.

In cases where the agent is responsible for the negligent acts of his sub-agent and has to pay damages to his principal, he may recover from the sub-agent. *Pownall v. Bair*, 78 Pa. St. 403.

If an agent undertakes to do the work of his principal, and employs a sub-agent to assist him, on his own account, he is answerable to the principal for the wrongdoing of the sub-agent, although the principal has knowledge of the fact of the employment of the sub-agent. *Barnard v. Coffin*, 141 Mass. 37.

See *Lindsay v. Singer Mfg. Co.*, 4 Mo. App. 570.

**Public Agents not Liable.**—Public officers are exempt from liability for the acts of persons employed under but not by them to assist in the performance of their official duties, both on considerations of public policy and on the ground that such persons are acting, not as the private agents of their superiors, but as public agents; but where the subordinates are acting, not under a public employment, but as the agents and servants of the officers individually in the discharge of their duties, the exemption from liability ceases, and the doctrine of *respondet superior* applies.<sup>1</sup>

**Sub-agents must Account to Immediate Principal.**—The rule that agents must account to their principals for all moneys received by them for their principals applies to sub-agents. They are, however, exclusively accountable to their immediate principal, the agent.<sup>2</sup>

**Look to him for Compensation.**—The sub-agent can look for his compensation only to his immediate employer.<sup>3</sup>

1. *Railroad & Banking Co. v. Lamp-ley*, 76 Ala. 357; *Richmond v. Long*, 17 Gratt. (Va.) 375; *Sawyer v. Corse*, 17 Gratt. (Va.) 230; *Bailey v. Mayor of N. Y.*, 3 Hill (N. Y.), 531; *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632; *Franklin v. Low*, 1 Johns. (N. Y.) 396; *Seymour v. Van Slyck*, 8 Wend. (N. Y.) 403; *Tracy v. Cloyd*, 10 W. Va. 19; *Schroyer v. Lynch*, 8 Watts (Pa.), 453; *Conwell v. Voorhees*, 13 Ohio, 523; *Hutchins v. Brackett*, 22 N. H. 252; *McMillan v. Eastman*, 4 Mass. 378; *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *Dunlop v. Monroe*, 7 Cranch. (U. S.) 242.

Such sub-agents are personally liable to third parties. *Maxwell & McIlvoy*, 2 Bibb. (Ky.) 211; *Ford v. Parker*, 4 Ohio St. 576; *Dox v. Postmaster-Gen'l*, 1 Pet. (U. S.) 318.

They are not exempt, however, from liability for the acts of their private agents and servants. So are a sheriff and a collector of a port liable for the acts of their deputies. *McIntyre v. Trumbell*, 7 Johns. (N. Y.) 35; *Gorham v. Gale*, 7 Cow. (N. Y.) 739; *Bishop v. Williamson*, 11 Me. 495; *Ogden v. Maxwell*, 3 Blatchf. (U. S.) 319. *Compare* *Grimshaw v. Paul*, 76 Ill. 164.

The contractor for carrying the mails, and not the carrier employed by him, is the public agent, if such contract constitutes an agency; and as to his liability for the acts and defaults of subordinates employed in the transmission, the court holds that they are liable for their acts as those of private agents. *Railroad & B. Co. v. Lampley*, 76 Ala. 357; *Sawyer v. Corse*, 17 Gratt. (Va.) 230. *Compare* *Hutchins v. Brackett*, 22 N. H. 252; *Conwell v. Voorhees*, 13 Ohio, 523.

2. *Reid v. Humber*, 49 Ga. 207; *Jack-*

*son Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *Stephens v. Badcock*, 3 B. & Ad. 354.

But see *Turner v. Turner*, 36 Tex. 41, where it was held that where an agent of the guardian of a minor collected money for his principal belonging to the minor, he was liable not only as agent to his principal, but also as trustee to the minor. *Compare* *Myler v. Fitzpatrick*, 6 Madd. 360; *Attorney-Gen'l v. Earl of Chesterfield*, 18 Beav. 596.

3. *Cleaves v. Stockwell*, 33 Me. 341; *Hill v. Morris*, 15 Mo. App. 322; *Foster v. Hoyt*, 2 Johns. Cas. (N. Y.) 327; *Fearn v. Mayers*, 53 Miss. 458.

The members of a band of musicians must look for their pay to the leader who made a contract to furnish the music for a fair. He only can sue for a breach of the contract. *Corbett v. Schumaker*, 83 Ill. 403.

Where the sub-agent has been appointed without authority, and his acts are afterward ratified, he can recover no compensation from the principal, but must look to the agent. *Homan v. Brooklyn Life Ins. Co.*, 7 Mo. App. 22; *Grace v. Am. Cent. Ins. Co.*, 16 Blatchf. (U. S.) 433. See *Loomis v. Simpson*, 13 Iowa, 532; *Bissell v. Roden*, 34 Miss. 63. And *compare* *Chamberlin v. Collinson*, 45 Iowa, 429.

Where, however, the understanding of the parties is that the sub-agent should look to the principal for his compensation, and the principal has either expressly or impliedly, as under a usage of trade, consented to such employment, the principal will be bound. *Cotton States Life Ins. Co. v. Mallard*, 57 Ga. 64; *United States Life Ins. Co. v. Hesseberg*, 27 Ohio St. 393; *Laussatt v. Lip-*



**10. Duties of Principal as to Agent.—*Compensation of Agent.***—Ordinarily an agent performing services for his principal is entitled to a compensation therefor, unless he is a mere gratuitous agent or mandatary.<sup>1</sup>

***Salary or Commission.***—The compensation may consist of a fixed sum for a specific period of time (salary), which sum cannot be increased by proof of extra work; or of a sum varying with the amount of the services rendered (commission).<sup>2</sup>

***A Del Credere Commission*** is an additional commission paid to an agent who undertakes to guarantee to his principal the payment of the debt due by the buyer.<sup>3</sup>

pincott, 6 S. & R. (Pa.) 386; Gray v. Murray, 3 Johns. Ch. (N. Y.) 167. *Compare* Lincoln v. Battelle, 6 Wend. (N. Y.) 475.

1. Story on Agency, § 324.

To entitle an agent to compensation for his services, the relation of principal and agent must exist. He must either expressly or impliedly have been appointed. Services rendered as a mere volunteer, without any employment express or implied, will give no right to commissions. Hinds v. Henry, 36 N. J. L. 328; Earp v. Cummins, 54 Pa. St. 394; Cook v. Welch, 9 Allen (Mass.), 350; Montgomery v. Pickering, 116 Mass. 227; Sussdorff v. Schmidt, 55 N. Y. 319; Keys v. Johnson, 68 Pa. St. 42; Hill v. Williams, 6 Jones Eq. (N. Car.) 242; Atwater v. Lockwood, 39 Conn. 45; Glenn v. Davidson, 37 Md. 365; Low v. Conn., etc., R. Co., 46 N. H. 284.

If he acts as agent without authority, and his acts are ratified, he is entitled to compensation as if he had been duly authorized. Wilson v. Dame, 58 N. H. 392.

The S. M. Co. employed D. as its agent to take charge of its office and business at L. The contract of employment, which was in writing, provided that the company should place to the credit of the L. office fifteen per cent of the amount of money collected by the agent thus employed on contracts made by former agents. Held, that M. was entitled to the per cent on such claims collected by him. Singer Mfg. Co. v. Doggett, 16 Neb. 609.

2. Wharton on Agency, § 322.

Where the compensation consists of salary, custom may authorize extra allowance for extra work. United States v. MacDaniel, 7 Pet. (U. S.) 1; United States v. Fillebrown, 7 Pet. (U. S.) 28; Perkins v. Hart, 11 Wheat. (U. S.) 237. *Compare* Moreau v. Dumagene, 20 La. Ann. 230; Decatur v. Vermillion, 77 Ill. 315.

Salary continues though no work happens to be completed; commissions, on the other hand, are not due until the work is complete. McGavock v. Woodlief, 20 How. (U. S.) 221; Walker v. Tirrell, 101 Mass. 257; Bornstein v. Laus, 104 Mass. 214; Newhall v. Pierce, 115 Mass. 457; Trundy v. Hartford Steam Co., 6 Rob. (N. Y.) 312; Briggs v. Boyd, 56 N. Y. 289; Earp v. Cummins, 54 Pa. St. 394; Keys v. Johnson, 68 Pa. St. 42; Tinges v. Moale, 25 Md. 480.

The agent is generally only entitled to commissions when his authority has been duly executed; but where the agent has done his part of the transaction, and through interference of the principal it is not completed, the agent will be entitled to his commission. Gillespie v. Wilder, 99 Mass. 170; Newhall v. Pierce, 115 Mass. 457; Chapin v. Bridges, 116 Mass. 105; Thomas v. Lincoln, 71 Ind. 41; Kock v. Emmerling, 22 How. (U. S.) 69; Briggs v. Boyd, 56 N. Y. 289; Wight v. Wood, 85 N. Y. 402; Keys v. Johnson, 68 Pa. St. 42; Phelan v. Gardner, 43 Cal. 306; Budd v. Zoller, 52 Mo. 238; Lincoln v. McClatchie, 36 Conn. 136; Jones v. Adler, 34 Md. 440; Winpenny v. French, 18 Ohio St. 469; Gillett v. Corum, 7 Kans. 156; Walton v. New Orleans, 23 La. Ann. 398; Stewart v. Mather, 32 Wis. 344; Schmidt v. Baumann, 30 N. Western Repr. (Minn.) 765; Arrington v. Cary, 5 Baxt. (Tenn.) 609.

Where payment is made to a principal in consequence of the efforts of a collecting agent, the agent is entitled to his commission. Saubert v. Conley, 10 Oreg. 488.

To entitle an agent to his commissions he must be the procuring cause of the consummation of the transaction. Attrill v. Patterson, 58 Md. 226.

As to when commissions are earned by brokers, etc., see BROKERS; COMMISSION MERCHANTS.

3. Story on Agency, § 33; Holbrook v. Wright, 24 Wend. (N. Y.) 169; s. c.,

*May be Fixed by Jury.*—Where no agreement has been made in regard to compensation, the amount may be fixed by a jury according to the usage of trade; or, in the absence of usage, on the principle of *quantum meruit*.<sup>1</sup>

*After Termination of Agency.*—After the termination of the agency no more commissions can be earned.<sup>2</sup>

*No Compensation for Illegal Services.*—An agent will not be allowed to enforce compensation for services of an illegal character; as where they are against good morals, public policy, or law.<sup>3</sup>

*Where Agent Unfaithful.*—Where an agent is unfaithful to his trust and abuses the confidence reposed in him by his principal, or where he misconducts himself in the business of his agency, he may be deprived of commission and compensation.<sup>4</sup> Also where

35 Am. Dec. 607; *Smock v. Brush*, 62 Ind. 156, 176; *Lewis v. Brehme*, 33 Md. 412.

An agent employed for a season to sell agricultural machinery of the principal was required by his contract of agency to sell to responsible parties only. He was to have a stated commission only upon sales to responsible parties. His commission was to be paid proportionately in cash and in notes taken for property sold. Notes taken by the agent for sales which, upon examination, should prove to be doubtful were to be taken by the agent as part of his commission, or should be satisfactorily secured by him. He was to make final settlement with the principal after harvest. Upon the final settlement the agent delivered to the principal, without fraud, notes of an insolvent maker, taken in the course of the agency. *Held*, the agent was entitled to have his commission settled and paid at the time of the stipulated final settlement, and the principal must then determine whether he would retain the notes surrendered by the agent, or, if found of doubtful value, put the agent to his election to take them as part of his commission, or to secure them. *Plano Mfg. Co. v. Buxton*, 30 N. Western Repr. (Minn.) 668. See also COMMISSION AGENTS.

1. *Briggs v. Boyd*, 56 N. Y. 289; *Suydam v. Bartle*, 10 Paige (N. Y.), 94; *Sinclair v. Galland*, 8 Daly (N. Y.), 508; *Ruckman v. Bergholz*, 38 N. J. L. 531; *Glenn v. Salter*, 50 Ga. 170; *Mangum v. Ball*, 43 Miss. 288; *Wood v. M'Cranie*, 21 La. Ann. 557. See *O'Sullivan v. Roberts*, 42 N. Y. Super. Ct. 282.

2. So where an insurance agent was to receive a certain per cent on all renewals it was held that after the termination of the agency the agent was not entitled to commissions on renewals of policies procured by him while he was agent.

*Spaulding v. New York Ins. Co.*, 61 Me. 329. See also INSURANCE AGENTS.

An agent under a contract for selling books informed his principal that he had determined to sell out and give up the business, and that if the principal wanted it, to come or send. *Held*, that the principal was justified in treating the agency as abandoned and in appointing another agent, and that a sale of the list of subscribers afterwards by the former agent or an attempt on his part to release them was invalid. *Stoddart v. Key*, 62 How. Pr. (N. Y.) 137.

3. *Trist v. Child*, 21 Wall. (U. S.) 441; *Marshall v. Baltimore, etc., R. Co.*, 16 How. (U. S.) 314; *Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258; *Blanchard v. Russell*, 13 Mass. 1; *Stebbins v. Leowolf*, 3 Cush. (Mass.) 137; *Fuller v. Daine*, 18 Pick. (Mass.) 472; *Paine v. France*, 26 Md. 46; *Brua's App.*, 55 Pa. St. 294; *Clippenger v. Hepbaugh*, 5 W. & S. (Pa.) 315; s. c., 40 Am. Dec. 519; *Hatzfield v. Gulden*, 7 Watts (Pa.), 152; s. c., 31 Am. Dec. 750; *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Gray v. Hook*, 4 Comst. (N. Y.) 449; *Dunham v. Dey*, 13 Johns. (N. Y.) 40; *Eddy v. Capron*, 4 R. I. 395; s. c., 67 Am. Dec. 541; *McBratney v. Chandler*, 22 Kans. 692.

But where he is simply employed to bring the parties together, and takes no part in the illegal transaction, he may recover. *Ormes v. Danchy*, 45 N. Y. Super. Ct. 85; *Crane v. Whittemore*, 4 Mo. App. 510.

4. *Sea v. Carpenter*, 16 Ohio, 412; *Vennum v. Gregory*, 21 Iowa, 326; *Cleveland, etc., R. Co. v. Pattison*, 15 Ind. 70; *Porter v. Silvers*, 35 Ind. 295; *Fisher v. Dynes*, 62 Ind. 348; *Sumner v. Reicheniker*, 9 Kans. 320; *Segar v. Parrish*, 20 Gratt. (Va.) 672; *Brannan v. Strauss*, 75 Ill. 234; *Myers*

he engages in transactions by which he acquires interests or employment adverse to the interests of his principal;<sup>1</sup> or fails to

*v. Walker*, 31 Ill. 353; *Henderson v. Hydraulic Works*, 9 Phil. (Pa.) 100.

Or where he violates his instructions. *Hoyt v. Shipperd*, 70 Ill. 309; *Jones v. Hoyt*, 25 Conn. 374; *Sawyer v. Mayhew*, 51 Me. 398.

Or where he executes his duties in such a manner that his services are of no use. *Dodge v. Tileston*, 12 Pick. (Mass.) 328; *Williams v. Littlefield*, 12 Wend. (N. Y.) 362.

An agent employed to make a contract in his own name for the purchase of grain to be delivered at a future day for his principal, and to whom his principal has advanced the required margins to protect him from loss, and who, after receiving all the margins required, closes out the deal and thereby sells at a loss, in violation of his contract, will lose his lien on the margins in his hands, and his commissions; and the principal may, under the common counts in *assumpsit*, recover of him all the margins so advanced by him to the agent. *Larminie v. Carley*, 114 Ill. 196.

On an issue as to the plaintiff's right to recover for services as general manager of defendants' business in the carrying on of a foundry and machine-shop, in which damages are sought to be recouped for mismanagement and neglect of duty on the part of the plaintiff, the burden of proof to establish the defence is upon the defendants, and the particular acts of misconduct or omissions of duty should be specifically pointed out, so as to enable the plaintiff to meet the same by direct proof. Evidence of the reputation of the work done is not admissible to establish such defence, as it might arise from other causes not attributable to the plaintiff. *Schmidt v. Pfau*, 114 Ill. 495.

Mere errors of judgment on the part of an agent while managing his principal's business, or omissions which do not amount to misconduct or culpable negligence, do not work a forfeiture of the agent's right to compensation for services. *Rochester v. Levering*, 104 Ind. 562.

Where an agent complains to his principal about the terms of his agency and seeks to acquire more favorable terms, the utmost good faith is required of him in such negotiations. Upon proof of any misrepresentation the court will set aside the new arrangement and decide according to the original contract. *Neilson v. Bowman*, 29 Gratt. (Va.) 732.

But where the principal sustains damages by the negligence of the agent he may set off such damages against the agent's commission. *Kelly v. Smith*, 1 Blatch. (U. S.) 290; *Storer v. Eaton*, 50 Me. 219; *Dodge v. Tiletson*, 12 Pick. (Mass.) 328; *Savage v. Birkhead*, 20 Pick. (Mass.) 167; *Williams v. Littlefield*, 12 Wend. (N. Y.) 362; *McEwen v. Kerfoot*, 37 Ill. 530; *Lee v. Clements*, 48 Ga. 128; *Godman v. Meixsel*, 65 Ind. 32.

1. *Audenried v. Betteley*, 8 Allen (Mass.), 302; *Walker v. Osgood*, 98 Mass. 348; *Rice v. Wood*, 113 Mass. 133; *Follansbee v. O'Reilly*, 135 Mass. 80; *Parker v. Vose*, 45 Me. 54; *Jones v. Hoyt*, 25 Conn. 374; *Bensley v. Moon*, 7 Ill. App. 415; *Myers v. Walker*, 31 Ill. 353; *Kerfoot v. Hyman*, 52 Ill. 512; *Alexander v. N. W. C. University*, 57 Ind. 466; *Porter v. Silvers*, 35 Ind. 295; *Brown v. Clayton*, 12 Ga. 564; *Sumner v. Reicheniker*, 9 Kans. 320; *Rosenthal v. Myers*, 25 La. Ann. 463; *Hunsaker v. Sturgis*, 29 Cal. 142; *Everhart v. Searle*, 71 Pa. St. 256; *Scribner v. Collar*, 40 Mich. 375; *Finnerty v. Fritz*, 5 Colo. 174; *Meyer v. Hanchett*, 43 Wis. 246; *Capener v. Hogan*, 40 Ohio St. 203; *Adams Expr. Co. v. Trego*, 35 Md. 47.

B employed A to find a purchaser for land. C offered \$135,000, but this was refused. A stating the limit to be \$140,000. C then agreed to buy at the latter sum, with the understanding that A was to offer B first \$135,000 and then \$137,500, and only to close when these two offers had been rejected. Fearing, however, that the price might be advanced if his name was mentioned, C had his clerk D sign the agreement of sale. *Held*, that the concealment of the agreement and the efforts by the agent to induce the owner to sell at a lower sum showed such lack of good faith that the agent was not entitled to commissions from the vendor. *Pratt v. Patterson*, 3 Atl. Repr. (Pa.) 858.

During the pendency of an action to set aside a sale made on credit by plaintiff's agents to a corporation of which they were the managing officers, the agents, as such officers, sold the property to a third party; subsequently plaintiff obtained judgment setting aside the sale and directing the delivery of the property to it. *Held*, that after perfecting judgment therein, an assignor of the plaintiff was entitled to bring an action to recover the proceeds of the sale re-

render accounts as directed;<sup>1</sup> or mixes his principal's property with his own, so that it cannot be distinguished.<sup>2</sup>

*When Agency Prematurely Ended.*—Where an agency is prematurely terminated by the act of the principal, his right of recovering compensation for the unexpired term of his agency depends on the terms of the agreement.<sup>3</sup>

*Agent to be Indemnified.*—A rule of law which pervades the whole law of principal and agent is that the principal is bound to indemnify the agent against the consequences of all acts done by him in pursuance of the authority conferred upon him. Generally it is the right of an agent to be reimbursed for all his advances, expenses, and disbursements made, in the course of the agency, on

ceived by said agents from the corporation; and that, as the sale was tortious, defendants were not entitled to retain commissions. *Avila v. Lockwood*, 98 N. Y. 32.

An agent cannot recover from either principal unless both assented to his double agency; *Capener v. Hogan*, 40 Ohio St. 203; *Barry v. Schmidt*, 57 Wis. 172; s. c., 46 Am. Rep. 35; *Wright v. Welch*, 3 McArth. (D. C.) 479; *Bell v. McConnell*, 37 Ohio St. 396; s. c., 41 Am. Rep. 528.

The policy of the law forbids that a person acting as the friend and confidential adviser of a purchaser should at the same time be secretly receiving compensation from the seller for effecting the sale, and a contract for such compensation is void. *Bollman v. Loomis*, 41 Conn. 581.

1. *Smith v. Crews*, 2 Mo. App. 269. Compare *Sampson v. Somerset Iron Works*, 6 Gray (Mass.), 120; *Jones v. Hoyt*, 25 Conn. 374; *Gallup v. Merrill*, 40 Vt. 133.

2. *Bartlett v. Hamilton*, 46 Me. 435; *Farmers and Mechanics' Bank v. King*, 57 Pa. St. 202; *Cartmell v. Allard*, 7 Bush (Ky.), 482; *Pinckney v. Dunn*, 2 Rich. (S. Car.) 314; *Mass. Life Ins. Co. v. Carpenter*, 2 Sweeney (N. Y.), 734.

3. *Evans on Ag.* (Ewell's Ed.) 349; *Kirk v. Hartman*, 63 Pa. St. 97.

In an action by an agent against an insurance company for damages resulting from his discharge during the term of his engagement, his measure of damages is the amount he has lost in consequence, and the testimony of actuaries as to the probable value of renewals for the remainder of his term on policies already obtained is important in arriving at the result. But an estimate of his probable earnings thereafter, derived from proof of the amount of his collections and commissions before the breach, without other proof relating thereto, would be too spec-

ulative to be admissible. In such action the defendant may show in mitigation of the damages that the plaintiff was employed elsewhere after the breach, and the amount of compensation received by him while so engaged. *Lewis v. Atlas L. I. Co.*, 61 Mo. 534; *Ætna Life Ins. Co. v. Nexsen*, 84 Ind. 347; s. c., 43 Am. Rep. 91. See *McCormick v. Bush*, 47 Tex. 191.

But in *Orr v. Ward*, 73 Ill. 318, it was held that a principal, in making a contract with a salesman that the latter should for two years devote his whole time to his employer's business at a stated salary, did not agree to continue in business for two years, and that when he went into bankruptcy during the first year the salesman could not recover salary for the unexpired term.

Defendant was a member of the firm of S. & W.; in 1854 he sold out his interest to his copartners, and thereafter, as he proposed going West to live, he received certain shares of stock of a Western corporation, which had belonged to the firm, giving a receipt therefor which stated that he had received it from the firm; that he was to do the best he could with the stock, and to "have one half of the proceeds." The stock at that time was not considered of any market value. Defendant retained the stock, as it was increasing in value, and received dividends thereon. In 1862 a demand was made upon him for the stock and dividends, and upon his refusal this action was brought to recover the same. At the time of this demand the stock was of greater market value than at any other time. No demand or request was made that defendant should sell. Held, that as no improper management or needless delay in selling was shown, or any act injurious to the interests of the owner, defendant was entitled to retain one half the stock and one half of the dividends collected. *Wight v. Wood*, 85 N. Y. 402.

account of or for the benefit of his principal, when the advances, expenses, and disbursements have been properly incurred, are reasonable and paid in good faith without any default on the part of the agent.<sup>1</sup>

When, in obeying the orders of his principal, an agent commits acts which he does not know at the time to be illegal, the principal is bound to indemnify him not only for expenses incurred, but also for damages which he may be compelled to pay to third parties.<sup>2</sup>

1. *Ruffner v. Hewitt*, 7 W. Va. 585; *Heard v. Russell*, 59 Ga. 25; *Beach v. Branch*, 57 Ga. 362; *Glenn v. Salter*, 50 Ga. 170; *Searing v. Butler*, 69 Ill. 575; *Elliott v. Walker*, 1 Rawle (Pa.), 126; *Maitland v. Martin*, 86 Pa. St. 120; *Fowler v. N. Y. Gold Exch. Bank*, 67 N. Y. 138; *Robinson v. Norris*, 51 How. Pr. (N. Y.) 442; *Knapp v. Simon*, 86 N. Y. 311; *Ramsey v. Gardner*, 11 Johns. (N. Y.) 439; *Van Dyke v. Brown*, 8 N. J. Eq. 655; *White v. Nat. Bank*, 102 U. S. 658; *Duncan v. Mobile, etc., R. Co.*, 3 Woods (U. S.), 567.

Where a principal has no claim in a suit brought by his agent, but where the agent's right to continue his agency is involved in it, the agent has no right to expend the principal's money in litigating the question. *Henley v. Clover*, 6 Mo. App. 181.

Where one through his agent sells goods to another, and they are shipped to the purchaser, the agent has no right to stop the goods *in transitu* because his principal owes him on account of money advanced in the purchase of the goods. *Gwyn v. Richmond, etc., R. Co.*, 85 N. Car. 429; s. c., 39 Am. Rep. 708.

The expenses must have been incurred according to his authority. So held where an agent employed to subscribe for stock in the principal's name bought and paid for calls in his own name and then tendered a transfer to the principal, who refused to accept. He could not recover. *Shrack v. McKnight*, 84 Pa. St. 26. See *Ranger v. Harwood*, 39 Tex. 139.

The agent will not be entitled to reimbursements of expenses incurred in doing acts which he knew to be illegal, or when from the nature of the employment he must be taken to have been conscious of the illegality of the act. *Coventry v. Barton*, 17 Johns. (N. Y.) 142; s. c., 8 Am. Dec. 376; *Atkins v. Johnson*, 43 Vt. 78; *Nelson v. Cook*, 17 Ill. 443; *Fareira v. Gabell*, 89 Pa. St. 89; *Arnold v. Clifford*, 2 Sumn. (U. S.) 238. Compare *Warren v. Hewitt*, 45 Ga. 501.

Interest on such advances will be allowed where the nature of the business

or the usage of trade or a direct agreement justify it. *Meech v. Smith*, 7 Wend. (N. Y.) 314; *Liotard v. Graves*, 3 Cal. (N. Y.) 226; *Delaware Ins. Co. v. Delaunie*, 3 Binn. (Pa.) 295; *Whitlock v. Hicks*, 75 Ill. 460; *Howard v. Smith*, 56 Mo. 314; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Daniel v. Swift*, 54 Ga. 113.

An agent authorized to draw upon his employer for money becoming due to him for expenses can maintain an action against his principal for maliciously refusing to honor drafts so drawn. *Levy v. Curtis*, 1 Abb. N. Cas. (N. Y.) 189.

2. *Coventry v. Barton*, 17 Johns. (N. Y.) 142; s. c., 8 Am. Dec. 376; *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Ramsey v. Gardner*, 11 Johns. (N. Y.) 439; *Powell v. Newburgh*, 19 Johns. (N. Y.) 284; *Howe v. Buffalo, etc., R. Co.*, 37 N. Y. 297; *Chamberlain v. Beller*, 18 N. Y. 115; *Rogers v. Kneeland*, 10 Wend. (N. Y.) 218; *Allaire v. Onland*, 2 Johns. Cas. (N. Y.) 52; *Armstrong v. Clarion Co.*, 66 Pa. St. 218; *Spangler v. Com.*, 16 S. & R. (Pa.) 68; s. c., 16 Am. Dec. 548; *Com. v. Van Dyke*, 57 Pa. St. 34; *D'Arcy v. Lyle*, 5 Binn. (Pa.) 441; *Elliott v. Walker*, 1 Rawle (Pa.), 126; *Maitland v. Martin*, 86 Pa. St. 120; *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Greene v. Goddard*, 9 Metc. (Mass.) 212; *Bond v. Ward*, 7 Mass. 123; *Moore v. Appleton*, 26 Ala. 633; *Drummond v. Humphreys*, 39 Me. 347; *Tarr v. Northy*, 17 Me. 113; *Howard v. Clark*, 43 Mo. 344; *Yeatman v. Corder*, 38 Mo. 337; *Nelson v. Cook*, 17 Ill. 443; *Long v. Neville*, 36 Cal. 455; *Grace v. Mitchell*, 31 Wis. 533; *Stocking v. Sage*, 1 Day (Conn.), 519.

So where an agent sold cotton and was obliged to refund the purchase-money to the purchaser on account of false packing by the principal, he could recover from the principal. *Beach v. Branch*, 57 Ga. 362.

And the agent may pay the damages to the third party without waiting to be sued, and maintain an action against the principal for reimbursement. *Saveland v. Green*, 36 Wis. 612.

As to the right of agents to liens on the principal's property, see LIENS.

**11. Liability of Agents to Third Parties.**—A duly authorized agent acting in behalf of his principal is not personally responsible on the contract when the third party knows that he acts in the name and in behalf of the principal. But whenever a party undertakes to do an act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal.<sup>1</sup>

As to the right of agent to *Stoppage in transitu*, see that title.

1. Story on Ag. § 264; *Bonyage v. Field*, 81 N. Y. 159; *Meech v. Smith*, 7 Wend. N. Y. 314; *Am. Bank v. Wheelock*, 82 N. Y. 118; *Dusenbury v. Ellis*, 3 Johns. Cas. (N. Y.) 70; *McDougall v. Travis*, 24 Hun (N. Y.), 590; *Palmer v. Stephens*, 1 Denio (N. Y.), 471; *Buck v. Amadore*, 4 Daly (N. Y.), 27; *Pitman v. Kintner*, 5 Blackf. (Ind.) 250; s. c., 33 Am. Dec. 469; *Silliman v. Fredericksburg R. Co.*, 27 Gratt. (Va.) 119; *Brazelton v. Colyar*, 58 Tenn. 34; *Hawks v. Locke*, 139 Mass. 205; s. c., 52 Am. Rep. 702; *Brainard v. Turner*, 4 Ill. App. 61; *Ware v. Morgan*, 67 Ala. 461; *McClerman v. Hall*, 33 Md. 293; *Whitney v. Wyman*, 101 U. S. 392; *Worthington v. Cowles*, 112 Mass. 30.

Where in a chancery suit to require money to be paid on a contract it appears that one of the parties who signed the contract had no interest in the subject, but was acting as agent merely, and the other contracting party knew that he was acting as agent for others, no personal decree can be had against such person for the repayment of moneys paid on such contract. *Smith v. Bond*, 25 W. Va. 387.

Where a party discounts a note given by the president of a bank, with the indorsement of the bank thereon, supposing that he is dealing with and advancing the money to the bank and not the president personally, the bank will be held liable for the payment of such note. *Central Trust Co. v. Cook Co. Nat. Bank*, 15 Fed. Rep. 885. *Compare Claflin v. Farmers' Loan & Trust Co.*, 25 N. Y. 293.

A. obtained from B and others a lease of certain coal lands at a certain royalty per bushel of coal. This lease was, by an amicable arrangement, subsequently forfeited, and a lease made to C, a partnership of which A was agent. B and others knew of the existence of the partnership, and dealt with it. They afterwards filed a bill against A for an account. Held, that having recognized C, they could not recover from A. *Reed's App.*, 7 Atl. Rep. (Pa.) 174.

Whether such party acts fraudulently or under a *bona-fide* belief that he has authority, as he impliedly warrants his authority, he may be sued on the implied warranty for damages resulting from his failure to bind his principal; or in damages for the loss occasioned by his fraud. *Noyes v. Loring*, 55 Me. 408; *Coit v. Sheldon*, 1 Tyler (Vt.), 301; *Sheffield v. Ladue*, 16 Minn. 388; *Johnson v. Smith*, 21 Conn. 627; *Long v. Colburn*, 11 Mass. 97; *Ballou v. Talbot*, 16 Mass. 461; *Smith v. Bowditch*, 7 Pick. (Mass.) 137; *Jefts v. York*, 4 Cush. (Mass.) 371, 10 Cush. (Mass.) 392; *Bartlett v. Tucker*, 104 Mass. 336; *Noe v. Gregory*, 7 Daly (N. Y.), 283; *Bartholomae v. Kauffmann*, 47 N. Y. Super. Ct. 552; *White v. Madison*, 26 N. Y. 117; *Baltzen v. Nicolay*, 53 N. Y. 467; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494; s. c., 24 Am. Dec. 62; *Mumikuyson v. Dorsett*, 2 Har. & G. (Md.) 374; *Campbell v. Hillman*, 15 B. Mon. (Ky.) 515; *McCurdy v. Rogers*, 21 Wis. 197; *Lauder v. Castro*, 43 Cal. 497; *Mahurin v. Harding*, 28 N. H. 128; s. c., 59 Am. Dec. 401.

But the bare want of authority in an agent or trustee to bind the persons or estates for which he assumes to be acting does not render him individually liable, where the facts and circumstances indicate that no such liability was intended by either of the parties. Where all the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent with liability. *Michael v. Jones*, 84 Mo. 578; *Western Cement Co. v. Jones*, 8 Mo. App. 373; *Humphrey v. Jones*, 71 Mo. 62.

It must, however, be a contract on which the principal could have been held had the agent been authorized. *Baltzen v. Nicolay*, 53 N. Y. 467; *Dung v. Parker*, 52 N. Y. 494.

Where the agent originally had the authority to make contracts for his principal, but his authority was revoked by the death of the principal, unknown to the agent, the agent will not be liable for con-

*Agent Acting in his own Name.*—Where an agent in his dealings with third parties does not disclose his principal, he will be personally liable on the contract.<sup>1</sup>

tracts made by him in the name of his principal after his death, but before tidings of his death reached him. *Smout v. Ilberry*, 10 Mees. & W. 1; *Rapp v. Phoenix Ins. Co.*, 113 Ill. 390; *Carriger v. Whittington*, 26 Mo. 311.

Where the fact that the agent has no authority was known or could be known to a third party, the agent will not be responsible for any contracts so entered into. *Hall v. Lauderdale*, 46 N. Y. 70; *Aspinwall v. Torrance*, 1 Lans. (N. Y.) 381; *Tiller v. Spradley*, 39 Ga. 35; *Newman v. Sylvester*, 42 Ind. 106; *McCubbin v. Graham*, 4 Kans. 397.

So held in the case of a public agent whose authority is determined by a public statute. The extent of his authority is supposed to be known by the party contracting with him. *McCurdy v. Rogers*, 21 Wis. 197; *Southworth v. Flanders*, 33 La. Ann. 190. See also *AUTHORITY OF SPECIAL AGENTS*.

Although an unauthorized agent is liable to an action for damages on a contract entered into without authority, he is not liable on the contract itself. *Bartlett v. Tucker*, 104 Mass. 336; *Northampton Bank v. Pepoon*, 11 Mass. 292; *Jefts v. York*, 4 Cush. (Mass.) 371, 10 Cush. (Mass.) 392; *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Draper v. Mass. Steam Heat Co.*, 5 Allen (Mass.), 338; *Ogden v. Raymond*, 22 Conn. 379; s. c., 58 Am. Dec. 429; *Taylor v. Shelton*, 30 Conn. 122; *Baltzen v. Nicolay*, 53 N. Y. 467; *White v. Madison*, 26 N. Y. 117, 124; *Hampton v. Specknagle*, 9 S. & R. (Pa.) 212; s. c., 11 Am. Dec. 704; *Hopkins v. Mehaffy*, 11 S. & R. (Pa.) 126; *Lazarus v. Shearer*, 2 Ala. 718; *Duncan v. Niles*, 32 Ill. 532. Compare *Grafton Bank v. Flanders*, 4 N. H. 239; *Weare v. Gove*, 44 N. H. 196.

1. *Baldwin v. Leonard*, 39 Vt. 260; *Upton v. Gray*, 2 Greenl. (Me.) 373; *Keen v. Sprague*, 3 Greenl. (Me.) 77; *Newman v. Greef*, 101 N. Y. 663; *Mauri v. Heffermann*, 13 Johns. (N. Y.) 58; *Brockway v. Allen*, 17 Wend. (N. Y.) 40; *Baltzen v. Nicolay*, 53 N. Y. 467; *Taintor v. Prendergast*, 3 Hill (N. Y.), 72; *Corlies v. Cumming*, 6 Cow. (N. Y.) 181; *Rathbone v. Budlong*, 15 Johns. (N. Y.) 1; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Mills v. Hunt*, 20 Wend. (N. Y.) 431; *Ruhsing v. Sebre*, 12 Bush (Ky.), 198; *James v. Bixby*, 11 Mass. 34; *French v. Price*, 24 Pick. (Mass.) 13; *Raymond v.*

*Crown E. Mills*, 2 Metc. (Mass.) 319; *Paige v. Stone*, 10 Metc. (Mass.) 160; *Southard v. Sturtevant*, 109 Mass. 390; *Stackpole v. Arnold*, 11 Mass. 27; *Welch v. Goodwin*, 123 Mass. 71; *Hyde v. Wolf*, 4 Miller (La.), 234; *Bedford v. Jacobs*, 16 Martin (La.), 530; *Siré v. Faures*, 15 La. Ann. 189; *Jones v. Ins. Co.*, 14 Conn. 501; *Hall v. Bradbury*, 40 Conn. 32; *Wolfley v. Rising*, 8 Kans. 297; *Einstein v. Holt*, 52 Mo. 340; *McClellan v. Parker*, 27 Mo. 162; *Meyer v. Barker*, 6 Binn. (Pa.) 228; *Parker v. Donaldson*, 2 Watts. & S. (Pa.) 9; *Youghiogheny Iron Co. v. Smith*, 66 Pa. St. 340; *York Co. Bank v. Stein*, 24 Md. 447; *Wheeler v. Reed*, 36 Ill. 81; *Farrell v. Campbell*, 3 Ben. (U. S.) 8; *Tiernan v. Andrews*, 4 Wash. (U. S.) 567; *McGraw v. Godfrey*, 14 Abb. Pr. (N. Y.) 397.

When one purchases property, orders and accepts it, he binds himself, as a matter of course, unless he discloses a principal whom he can and does bind; thus, the defendant bought powder of the plaintiff to celebrate the Fourth of July, and not binding the "executive committee," his liability follows. *Button v. Winslow*, 53 Vt. 430.

The effect of a contract by an agent in which he does not disclose his principal is not to exonerate the principal if discovered. He merely adds his own personal responsibility to that of the principal, who may be sued by the party contracting with the agent. *Hopkins v. Lacouture*, 4 La. 64; *Hyde v. Wolf*, 4 La. 234; *Beebe v. Robert*, 12 Wend. (N. Y.) 413; s. c., 27 Am. Dec. 132; *Mech. Bank v. Bank of Columbia*, 5 Wheat. (U. S.) 326; *Jessup v. Steurer*, 75 N. Y. 613.

The agent will be liable on a contract entered into for an undisclosed principal even if it is well known to the third party that he acts only as agent, as in the case of auctioneers and brokers. *Winsor v. Griggs*, 5 Cush. (Mass.) 210; *Cabot Bank v. Morton*, 4 Gray (Mass.), 156; *Raymond v. Crown E. Mills*, 2 Metc. (Mass.) 319; *Wilder v. Cowles*, 100 Mass. 487; *Sumner v. Williams*, 8 Mass. 162; *Falkenburg v. Clark*, 11 R. I. 278; *Keen v. Sprague*, 3 Greenl. (Me.) 77; *Scott v. Mesick*, 4 T. B. Mon. (Ky.) 535; *Wilkins v. Duncan*, 2 Litt. (Ky.) 168; *Cunningham v. Soules*, 7 Wend. (N. Y.) 106; *Beebe v. Robert*, 12 Wend. (N. Y.) 413; s. c., 27 Am. Dec. 132; *Mauri v. Hefferman*, 13 Johns. (N. Y.) 58; *Canal Bank*

*Pledging his own Credit.*—Where an agent pledges his own credit either expressly or impliedly, he will be bound himself.<sup>1</sup>

Although in simple contracts, made by a third party on the credit of the agent, parol evidence on the part of such third party is admissible that the agent acted in behalf of the principal in order to bind the principal, such evidence is not admissible on the part of the agent.<sup>2</sup>

*v. Bank of Albany*, 1 Hill (N. Y.), 287; *Taintor v. Prendergast*, 3 Hill (N. Y.), 72; *Allen v. Rostain*, 11 S. & R. (Pa.) 362; *Bacon v. Sondley*, 3 Strobb. (S. Car.) 542; *Merrill v. Wilson*, 6 Ind. 426; *Royce v. Allen*, 28 Vt. 234.

And it does not matter whether the third party has the means to discover the principal or not. *Cobb v. Knapp*, 71 N. Y. 348. *Baldwin v. Leonard*, 39 Vt. 260; *Nixon v. Downey*, 49 Iowa, 166. *Compare Wright v. Cabot*, 89 N. Y. 570.

In an action against R. for goods sold and delivered, it appeared that R. was a clerk in a shop, the business of which was carried on by another person in the name of R. & Company, which name appeared on the sign over the shop door; that the seller made the bargain for the sale of the goods with R., supposing him to be the principal; and that R. did not disclose the fact that he was only an agent. *Held*, that these facts would warrant a finding for the plaintiff. *Bartlett v. Raymond*, 139 Mass. 275.

Where a party contracts as "agent" without disclosing his principal, *quare* whether it is not his personal undertaking and to be so construed, although a jury find that he contracted as agent and not as principal. *Stamps v. Cooley*, 91 N. C. 316.

Where a third party elects to sue an undisclosed principal he must take the account between the principal and the agent as he finds it when he first discovers the principal. If then the agent has been paid in full, the creditor can have no claim on the principal. *Paine v. Tillinghast*, 52 Conn. 532, 538; *McCullough v. Thompson*, 45 N. Y. Super. Ct. 449; *Johnson v. Cleaves*, 15 N. H. 332. See *Emerson v. Patch*, 123 Mass. 541; *Armstrong v. Stokes*, L. R. 7 Q. B. 598; *Thomson v. Davenport*, 9 B. & C. 78. *Compare Irvine v. Watson*, Q. B. Div. 27 W. R. 353.

2. *Taintor v. Prendergast*, 3 Hill (N. Y.), 72; *Maryland Coal Co. v. Edwards*, 4 Hun (N. Y.), 432; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271; s. c., 25 Am. Dec. 558; *Fellows v. Northrup*, 39 N. Y. 117; *Goodwin v. Bowden*, 54 Me. 424; *Bell v. Mason*, 10 Vt. 509; *Savage v. Rix*, 9 N.

H. 263; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; s. c., 37 Am. Dec. 203; *Towle v. Hatch*, 43 N. H. 270; *Silver v. Jordan*, 136 Mass. 319; *Simonds v. Heard*, 23 Pick. (Mass.) 120; *Ballou v. Talbot*, 16 Mass. 461; *Bridge v. Butler*, 2 Gray (Mass.), 130; *Gay v. Bates*, 99 Mass. 263; *Wilder v. Cowles*, 100 Mass. 487; *Southard v. Sturtevant*, 109 Mass. 390; *Evans v. Dunbar*, 117 Mass. 546; *Strider v. Winchester*, etc., R. Co., 21 Gratt. (Va.) 440; *Hovey v. Magill*, 2 Conn. 680; *Reed v. Latham*, 40 Conn. 452; *Hall v. Bradbury*, 40 Conn. 32; *Meyer v. Barker*, 6 Binn. (Pa.) 228; *Campbell v. Baker*, 2 Watts (Pa.), 83; *Harper v. Hampton*, 1 Harr. & J. (Md.) 622; *York Co. Bank v. Stein*, 24 Md. 447; *Deming v. Bullitt*, 1 Blackf. (Ind.) 241; *Rosenthal v. Myers*, 25 La. Ann. 463; *McClellan v. Parker*, 27 Mo. 162; *McCurdy v. Rogers*, 21 Wis. 197; *Saveland v. Green*, 36 Wis. 612; *Fisher v. Haggerty*, 36 Ill. 128; *Etna Ins. Co. v. Church*, 21 Ohio St. 492. See *Fleming v. Hill*, 62 Ga. 751; *Scoby v. Woods*, 59 Tenn. 66.

An agent may bind himself personally, although the consideration move to his principal, and the agent's want of interest in the transaction, except as agent, be known to the other contracting party. *Crum v. Boyd*, 9 Ind. 289.

Where an agent selling goods for his principal orally warrants their quality for himself, and as agent procures the making of a contract of purchase in writing, containing a warranty of his principal, the former warranty is not merged in the latter, but is a separate contract, binding the agent personally; and in an action on one of the notes given in payment of the articles sold, payable to the agent, evidence of the oral warranty is admissible. *Shordan v. Kyle*, 87 Ind. 38.

3. *Bradlee v. Glass Co.*, 16 Pick. (Mass.) 347; *Bank of North Am. v. Hooper*, 5 Gray (Mass.), 567; *James v. Bixby*, 11 Mass. 34; *Lauder v. Castro*, 43 Cal. 497; *Jones v. Ins. Co.*, 14 Conn. 501; *Wolfley v. Rising*, 12 Kans. 535.

The presumption is, however, that credit is given to the principal where the agent acted in his name. To hold the agent liable there must be satisfactory proof that the



*Public Officers.*—A public officer acting for his government and within the scope of his authority is not personally liable on contracts entered into with third parties.<sup>1</sup>

*Foreign Principals.*—It seems to be unsettled in how far and on what grounds agents for foreign principals are responsible for contracts entered into with third parties. Story in his work on Agency states that "agents or factors acting for merchants resident in a foreign country (as for example in France or Germany) are held personally liable upon all contracts made by them for their employers; and this without any distinction, whether they describe themselves in the contract as agents or not. In such cases the ordinary presumption is that credit is given to the agents or factors; and not only that credit is given to the agents or factors, but that it is exclusively given them to the exoneration of their employers."<sup>2</sup>

vendor sold upon the credit of the agent alone. *Ferris v. Kilmer*, 48 N. Y. 300.

1. *Lee v. Munroe*, 7 Cranch. (U. S.) 366; *Hodgson v. Dexter*, 1 Cranch. (U. S. C. C.) 109; *Parks v. Ross*, 11 How. (U. S.) 362. *Pierce v. U. S.*, 1 N. & H. (U. S.) 270; *Brown v. Austin*, 1 Mass. 208; s. c., 2 Am. Dec. 11; *Simonds v. Heard*, 23 Pick. (Mass.) 120; *Ogden v. Raymond*, 22 Conn. 379; s. c., 58 Am. Dec. 429; *Rathbon v. Budlong*, 15 Johns. (N. Y.) 1; *Walker v. Swartwout*, 12 Johns. (N. Y.) 444; s. c., 7 Am. Dec. 334; *Fox v. Drake*, 8 Cow. (N. Y.) 191; *Crowell v. Crispin*, 4 Daly (N. Y.), 100; *Yealy v. Fink*, 43 Pa. St. 212; *Baltimore v. Reynolds*, 20 Md. 1; *Enloe v. Hall*, 1 Humph. (Tenn.) 303; *Amison v. Ewing*, 2 Cold. (Tenn.) 366; *Houston v. Clay*, 18 Ind. 396; *Mann v. Richardson*, 66 Ill. 481; *Tutt v. Hobbs*, 17 Mo. 486; *Hodges v. Runyan*, 30 Mo. 491; *Dwinelle v. Henriquez*, 1 Cal. 379; *Ghent v. Adams*, 2 Kelly (Ga.), 214; *Yulee v. Canova*, 11 Fla. 9. See also MUNICIPAL CORPORATIONS.

2. Story on Ag. § 268. This principle seems not to meet with general approval. Senator Verplanck in *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244, 259, uses the following language: "I am satisfied that Judge Story has stated the doctrine in too strong and unqualified terms, as if this presumption were a universal inference of law applicable everywhere. I think, on the contrary, that this is a presumption founded altogether upon usage and the particular course of trade, and arises only when and where that usage is known or proved to exist; of course, then, that it is not an unvarying legal presumption to be applied to any contract, made anywhere by a factor or agent representing a person or commercial house in some foreign country." And see the opinion of

Chanc. Walworth in the same case, p. 253, who upholds Story's doctrine.

The editor of the ninth edition of Story's work on Agency, in a note on page 326, gives as his opinion that "the true rule seems to be that an agent of a foreign principal is not as a matter of law personally liable on such contracts, but it is a question of fact for the jury in each case to be decided by the peculiar circumstances, whether he is liable on the particular contract in each case. This has been so held in England. *Green v. Kopke*, 18 C. B. 549; *Wilson v. Zulueta*, 14 Q. B. 603; *Paice v. Walker*, L. R. 5 Exch. 173; *Armstrong v. Stokes*, L. R. 7 Q. B. 603; *Elbinger Co. v. Claye*, L. R. 8 Q. B. 313; *Hutton v. Bulloch*, L. R. 8 Q. B. 331. And in this country, *Oelricks v. Ford*, 23 How. (U. S.) 49; *Rogers v. March*, 33 Me. 106; *Goldsmith v. Mannheim*, 109 Mass. 187."

See also Wharton on Agency, § 791, who says: "Where a foreign principal is disclosed and there is evidence to indicate that credit was given to the factor, the usage is to treat the factor as personally liable, and this usage is sanctioned by law;" citing *Houghton v. Matthews*, 3 Bos. & P. 485; *Thomson v. Davenport*, 9 B. & Cress. 98; *Wilson v. Zulueta*, 14 Q. B. 405; *Gillett v. Offor*, 18 C. B. 917; *Hutton v. Bulloch*, L. R. 8 Q. B. 331; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244; *Merrick's Est.*, 5 W. & S. (Pa.) 9, 2 Ashmead, 485; *Rogers v. March*, 33 Me. 106; *Smyth v. Anderson*, 7 C. B. 21; *Paterson v. Gandasequi*, 15 East. 62; *Peterson v. Ayre*, 13 C. B. 353; *De Gaillon v. L'Aigle*, 1 Bos. & P. 358; *Addison v. Gandasequi*, 4 Taunt. 574; *Tiernan v. Andrews*, 4 Wash. (U. S.) 567; *Paley's Agency*, 248; *New Castle Man. Co. v. Red River R. Co.*, 1 Rob-

*Mispaid Money.*—An agent to whom money has been mispaid for the use of his principal is not personally liable to the person who makes the payment, where he has paid over the money to his principal without notice. But where he has received notice not to pay it over, or where it is yet in his hands, he is responsible.<sup>1</sup>

ins (La.) 145; *Müller v. Lea*, 35 Md. 396.

See also *Bray v. Kettell*, 1 Allen (Mass.), 80; *Taintor v. Prendergast*, 3 Hill (N. Y.), 72; *Barry v. Page*, 10 Gray (Mass.), 398; *McKenzie v. Nevins*, 22 Me. 138; *Mahoney v. Kekuli*, 14 C. B. 390; *Price v. Walker*, L. R. 5 Ex. 173; *Trueman v. Loder*, 11 Ad. & El. 589; *Kaulback v. Churchill*, 59 N. H. 296.

In regard to this principle parties residing in different States of the Union are not considered to be foreign to each other. *Barry v. Page*, 10 Gray (Mass.), 398; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244, per Walworth, Ch.; *Taintor v. Prendergast*, 3 Hill (N. Y.), 72; *Sawter v. Baker*, 23 Ind. 63; *Thomson v. Davenport*, 9 B. Cressw. 78.

1. *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *Bend v. Hoyt*, 13 Pet. (U. S.) 263; *Granger v. Hathaway*, 17 Mich. 500; *Mowatt v. McLelan*, 1 Wend. (N. Y.) 173; *Bixby v. Drexel*, 56 How. Pr. (N. Y.) 478; *Carew v. Otis*, 1 Johns. (N. Y.) 418; *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566; *Morrison v. Currie*, 4 Duer (N. Y.) 79; *Duffy v. Buchanan*, 1 Paige (N. Y.) 453; *Hearsey v. Pruyn*, 7 Johns. (N. Y.) 179; *Galbraith v. Gaines*, 10 Lea (Tenn.), 568; *Metcalf v. Denson*, 4 J. Baxter (Tenn.), 565; *Dobson v. Jordan*, 125 Mass. 542; *Smith v. Moore*, 134 Mass. 405; *Garland v. Salem Bank*, 9 Mass. 408; *Jefts v. York*, 12 Cush. (Mass.) 196; *McDonald v. Napier*, 14 Ga. 89; *Upchurch v. Norsworthy*, 15 Ala. 55; *O'Connor v. Clopton*, 60 Miss. 349.

Neither will he be liable where, upon the assumption that the payment was good, he has done something equivalent to it which has altered his situation. *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566; *La Farge v. Kneeland*, 7 Cow. (N. Y.) 456.

Where the mispayment has been made under compulsion or extortion and not expressly for the use of the principal, no notice to the agent is necessary to make him liable. *Ripley v. Gelston*, 9 Johns. (N. Y.) 204; s. c., 6 Am. Dec. 271; *Frye v. Lockwood*, 4 Cow. (N. Y.) 454.

An agent to whom the amount due on a judgment is paid under notice that it is the intention of the debtor to sue out

a writ of error is not liable if afterward the judgment is reversed. This is not such a notice which will make it unlawful for him to pay the amount over to his principal. *Bank of U. S. v. Bank of Washington*, 6 Pet. (U. S.) 8.

Where an agent being a stakeholder receives a deposit, which he pays over before the conditions upon which it is to be paid are fulfilled, he will be held personally responsible. *Carew v. Otis*, 1 Johns. (N. Y.) 418; *Edwards v. Hodding*, 5 Taunt. 815.

An agent who retains money paid in satisfaction of an illegal claim and pays it over to his principal will be personally liable unless the maxim *in pari delicto* applies. *Wright v. Eaton*, 7 Wis. 595; *Edgerly v. Whalen*, 106 Mass. 307; *Josselyn v. McAllister*, 22 Mich. 300; *Richardson v. Kimball*, 28 Me. 463; *Shepherd v. Underwood*, 55 Ill. 475; *La Farge v. Kneeland*, 7 Cow. (N. Y.) 456; *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566; *Mowatt v. McLelan*, 1 Wend. (N. Y.) 173; *McDonald v. Napier*, 14 Ga. 89; *Seidell v. Peckworth*, 10 S. & R. (Pa.) 443.

An agent will not be responsible to the payor for money paid to him for the use of his principal. He is bound to pay it over to him and has no right to return it to the person from whom he received it. He cannot dispute the title of his principal by setting up an adverse title in a stranger. *Hancock v. Gomez*, 58 Barb. (N. Y.) 490; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Colvin v. Holbrook*, 2 N. Y. 126.

A public agent who collects money illegally and which is paid under protest, will be held personally liable to the payor; as where a U. S. collector collects excessive duties, which are paid under protest to get possession of the goods, with formal notice not to pay over to the U. S. treasury, as measures will be taken to recover the excessive payment. But in such a case protest in due form must precede the payment. *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *Bend v. Hoyt*, 13 Pet. (U. S.) 263; *Schlesinger v. U. S.*, 1 N. & H. (U. S.) 16; *Crocker v. Redfield*, 4 Blatchf. (U. S.) 379; *Reimer v. Schell*, 4 Blatchf. (U. S.)

*Contract only Effective in Agent's Name.*—An agent will be personally liable on a contract where it is of such a character that it can be made effective only by making the agent liable; unless it clearly appears by the contract that he did not intend to be bound.<sup>1</sup>

*Not Liable for Negligence.*—An agent is in general not liable to third parties for acts of negligence, nor for non-performance of duty. As such he is only responsible to his principal, and the principal to the third party.<sup>2</sup>

328; Beatty v. U. S. Dev. Ct. of Cl. 231; Greeley v. Thompson, 10 How. (U. S.) 225; Lawrence v. Caswell, 13 How. (U. S.) 488. And see Fitzgerald v. Burrell, 106 Mass. 446.

1. Edings v. Brown, 1 Rich. (S. Car.) 255; Bank v. Wray, 4 Strobb. (S. Car.) 87; Hills v. Bannister, 8 Cow. (N. Y.) 31; Mann. v. Richardson, 66 Ill. 481; Dunton v. Chamberlain, 1 Ill. App. 361; Tacher v. Dinsmore, 5 Mass. 299; Forster v. Fuller, 6 Mass. 58; Sumner v. Williams, 8 Mass. 162; Welch v. Goodwin, 123 Mass. 71; Murphy v. Lowell, 124 Mass. 564; Tassey v. Church, 4 W. & S. (Pa.) 141; s. c., 39 Am. Dec. 65; Cruse v. Jones, 3 Lea (Tenn.), 66; Blakely v. Bennecke, 59 Mo. 193.

But agents of charitable, religious, or political and kindred societies are as a rule not responsible on contracts made with third parties, when the third party knows that they are acting for such societies; unless it be distinctly understood that such third party is dealing with the agent on his personal credit. Devoss v. Gray, 22 Ohio St. 159; Tobey v. Claffin, 3 Sumner (U. S.), 379; Stevenson v. Mathers, 67 Ill. 123; Ridgeley v. Dobson, 3 W. & S. (Pa.) 118; Eichbaum v. Irons, 6 W. & S. (Pa.) 67; s. c., 40 Am. Dec. 540.

2. Reid v. Humber, 49 Ga. 207; Colvin v. Holbrook, 2 N. Y. 126; Montgomery Bank v. Albany Bank, 7 N. Y. 459; Denny v. Manhattan Co., 2 Denio (N. Y.), 115; s. c., 5 Denio (N. Y.), 639; Phinney v. Phinney, 17 How. Pr. (N. Y.) 197; Hall v. Lauderdale, 46 N. Y. 70; Foot v. Wiswall, 14 Johns. (N. Y.) 304; Townsend v. Susquehanna, etc., R., 6 Johns. (N. Y.) 90; Guernsey v. Cook, 117 Mass. 548; Brown Paper Co. v. Dean, 123 Mass. 267; Savage v. Birkhead, 20 Pick. (Mass.) 167; Salem Bank v. Gloucester Bank, 17 Mass. 1; Henshaw v. Noble, 7 Ohio St. 231; Dayton v. Pease, 4 Ohio St. 80; Goodloe v. Cincinnati, 4 Ohio 500; s. c., 22 Am. Dec. 764; Stephens v. Bacon, 7 N. J. L. 1; Delaney v. Rochereau, 34 La. Ann. 1123; s. c., 44 Am. Rep. 456; Rabassa v. Orleans Nav. Co., 5

Miller (La.) 463; Labadie v. Hawley, 61 Tex. 177; s. c., 48 Am. Rep. 278; Lyon v. Tevis, 8 Iowa, 79; Ayres v. Wright, 8 Ired. Eq. (N. Car.) 229; United States v. Halberstadt, 1 Gilp. (U. S.) 262; Bradford v. Eastburn, 2 Wash. (U. S.) 219; Carey v. Rochereau, 16 Fed. Repr. 87.

An agent is liable to no one except his principal for damage resulting from an omission or neglect of duty in respect to the business of his agency, even though such omission be with a malicious intent to injure a third person and have that effect. Upon this principle, an agent in charge of a plantation is not liable to the owner of an adjoining plantation for damage resulting from the malicious neglect and refusal of the agent to keep open a drain which it was his duty, as such agent, to keep open. Feltus v. Swan, 62 Miss. 415.

The plaintiff contracted with the defendant to keep some portion of its highways in "good repair for public travel" for four years; and also, in the same contract, agreed to build a new bridge and road. The plaintiff failed to build the bridge and road according to the contract; and, also, to keep the highways in good repair; and the defendant was compelled to pay damages caused by the insufficiency of said highways; and, also, pay for repairing them. Held, that what the defendant paid to settle a suit brought against it for injuries received on the highway, and the incidental expenses of the suit; also, for injuries received by another party without suit; also, for repairing the highway; and the damage for not completing the new road and bridge, are available in defence under the general issue. Wilson v. Greensboro, 54 Vt. 533.

This refers only to acts done within the scope of the agent's business. For negligence in duties devolving on him in his individual character he will be personally liable. Phelps v. Wait, 30 N. Y. 78; Wright v. Wilcox, 19 Wend. (N. Y.) 343; s. c., 32 Am. Dec. 507; Montfort v. Hughs, 3 E. D. Smith (N. Y.), 591. See also CORPORATIONS; MASTER AND SERVANT.

*Liabie for Misfeasance.*—But he is personally liable to third parties for misfeasance; for doing something which he ought not to have done.<sup>1</sup>

*Liabie when in Full Control.*—Where a principal engages an agent to do a certain work and to take entire control over it, while the principal does not interfere, but leaves it entirely with the agent, the agent and not the principal will be liable to third parties for injuries or damages sustained by the negligence or unskilful manner in which the work is done.<sup>2</sup>

*Liabie for Fraud and Malice.*—Agents are always personally liable to injured third parties for fraudulent or malicious acts done in their principal's service, or for wilful deceit.<sup>3</sup>

1. *Horner v. Lawrence*, 37 N. J. L. 46; *Bell v. Josselyn*, 3 Gray (Mass.), 309; s. c., 63 Am. Dec. 741; *Harriman v. Stowe*, 57 Mo. 93; *Crane v. Onderdonk*, 67 Barb. (N. Y.) 47; *Bliss v. Schaub*, 48 Barb. (N. Y.) 339; *Richardson v. Kimball*, 28 Me. 464; *Elmore v. Brooks*, 6 Heisk. (Tenn.) 45; *Berghoff v. McDonald*, 87 Ind. 549; *Roberts v. State*, 7 Coldw. (Tenn.) 359.

Where the owner of land had leased the same to a tenant in possession for a term not yet expired, and had authorized his agent to sell the same subject to the lease, and the agent, knowing of the lease, represented to the plaintiff that he had authority to sell and give immediate possession of the land, and so negotiated a sale to plaintiff, taking \$200 from him as a cash payment, held, that plaintiff, after learning of the lease, was not bound to accept from the agent a warranty deed from the owner, but that he might reject the deed and recover from the agent the \$200 paid him in the transaction. *Maichen v. Clay*, 62 Iowa, 452.

Public officers are liable to the same extent as private agents for misfeasance. *Erwin v. Davenport*, 9 Heisk. (Tenn.) 44.

2. *Hilliard v. Richardson*, 3 Gray (Mass.), 349; s. c., 63 Am. Dec. 743; *Linton v. Smith*, 8 Gray (Mass.), 147; *Lowell v. Boston*, etc., R. Co., 23 Pick. (Mass.) 24; *Forsyth v. Hooper*, 1 Allen (Mass.), 419; *Barry v. St. Louis*, 17 Mo. 121; *McCafferty v. Spuyten Duyvil*, etc., R. Co., 61 N. Y. 178; *King v. N. Y.*, etc., R. Co., 66 N. Y. 181; *Kelly v. Mayor of N. Y.*, 11 N. Y. 432; *Blake v. Ferris*, 5 N. Y. 48; s. c., 55 Am. Dec. 304; *Bissell v. Torrey*, 65 Barb. (N. Y.) 188; *Foster v. Preston*, 8 Cow. (N. Y.) 198; *Hale v. Johnson*, 80 Ill. 185; *Schwartz v. Gilmore*, 45 Ill. 455; *Scammon v. Chicago*, 25 Ill. 424; s. c., 79 Am. Dec. 334; *Pfau v. Williamson*, 63 Ill. 16; *Clark v. Vermont*, etc., R. Co., 28 Vt. 103; *Felton v. Deall*, 22 Vt. 171; s. c., 54

Am. Dec. 61; *Brown v. Lent*, 20 Vt. 529; *Burke v. Norwich*, etc., Railroad, 34 Conn. 474; *Salmon v. Richardson*, 30 Conn. 360; s. c., 79 Am. Dec. 255; *De Forest v. Wright*, 2 Mich. 368; *Clark v. Craig*, 29 Mich. 398; *Darmstaetter v. Moynahan*, 27 Mich. 188; *United Society of Shakers v. Underwood*, 9 Bush (Ky.), 609; *Cincinnati v. Stone*, 5 Ohio St. 38; *Hughes v. Cincinnati*, etc., R. Co., 39 Ohio St. 461; *Conant v. Bank*, 1 Ohio St. 310; *Hodges v. New Engl. Trust Co.*, 1 R. I. 312; s. c., 53 Am. Dec. 624; *Miller v. Mechanics' Bank*, 30 Md. 392; *McCants v. Wells*, 3 S. Car. 569; *Taber v. Perrott*, 2 Gall. (U. S.) 565; *Holt v. Whatley*, 51 Ala. 569; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146. *Compare* *Lowell v. Boston*, etc., R. Co., 23 Pick. (Mass.) 24; *McGuire v. Grant*, 24 N. J. L. 356; *Stone v. Cheshire R. Co.*, 19 N. H. 427; s. c., 51 Am. Dec. 192.

The rule will be different where the principal retains a general supervision of the work and controls the manner in which it should be done. *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Painter v. Mayor*, 46 Pa. St. 213; *Luttrell v. Hazen*, 3 Sneed (Tenn.), 20; *Chicago v. Joney*, 60 Ill. 383; *Chicago v. Dermody*, 61 Ill. 431.

A special receiver or assignee of the property of a railroad company appointed involuntarily on its part is not an agent or servant of the corporation, and it is not liable for damages occasioned by his negligence. *Metz v. Buffalo*, etc., R. Co., 58 N. Y. 61.

3. *Hardrop v. Gallagher*, 2 E. D. Smith (N. Y.), 523; *Brown v. Howard*, 14 Johns. (N. Y.) 118; *People v. Johnson*, 12 Johns. (N. Y.) 292; *Wright v. Wilcox*, 19 Wend. (N. Y.) 343; s. c., 32 Am. Dec. 507; *Ford v. Williams*, 24 N. Y. 359; *Thorpe v. Burling*, 11 Johns. (N. Y.) 285; *Nussbaum v. Heilbron*, 63 Ga. 312; *Burnap v. Marsh*, 13 Ill. 535; *Johnson v. Barber*, 5 Gilm. (Ill.) 425; s. c., 1 Am.

*When in Control Liable for Torts of Employees.*—Agents who have taken control of a certain work for their principals, and have engaged to finish it, are liable to third parties for torts committed by those they employ.<sup>1</sup>

**12. Rights of Agents against Third Parties—Cannot Sue when Acting in Principal's Name.**—Ordinarily an agent contracting in the name of his principal and not in his own name is not entitled to sue; nor can he be sued on such contracts.<sup>2</sup>

Dec. 416; Knight v. Luce, 116 Mass. 586; McIntyre v. Parks, 3 Metc. (Mass.) 207; Blanchard v. Russell, 13 Mass. 1; McPartland v. Read, 11 Allen (Mass.), 231; Edgerly v. Whalen, 106 Mass. 307; Bell v. Josselyn, 3 Gray (Mass.), 309; s. c., 63 Am. Dec. 741; Ballou v. Talbott, 16 Mass. 461; Jeffs v. York, 4 Cush. (Mass.) 371; s. c., 10 Cush. (Mass.) 392; Bartlett v. Tucker, 104 Mass. 336; Com. v. Whitcomb, 107 Mass. 486; Com. v. Drew, 19 Pick. (Mass.) 179; Wright v. Eaton, 7 Wis. 595; McCurdy v. Rogers, 21 Wis. 197; Campbell v. Hillman, 15 B. Mon. (Ky.) 508; Josselyn v. McAllister, 22 Mich. 300; Repsher v. Wattson, 17 Pa. St. 365; New York Tel. Co. v. Dryburg, 35 Pa. St. 298; s. c., 78 Am. Dec. 338; Elmore v. Brooks, 6 Heisk. (Tenn.) 45; Childress v. Ford, 1 Heisk. (Tenn.) 463; Luttrell v. Hazen, 3 Sneed (Tenn.), 20; Scruggs v. Davis, 5 Sneed (Tenn.), 261; Gaines v. Briggs, 9 Ark. 46; Holt v. Whatley, 51 Ala. 569; Perminter v. Kelly, 18 Ala. 716; s. c., 54 Am. Dec. 177; Richardson v. Kimball, 28 Me. 463; Noyes v. Loring, 55 Me. 408; Lauder v. Castro, 43 Cal. 497; Wallace v. Finberg, 46 Tex. 35.

If an agent of a trustee acts fraudulently and collusively, he may himself be treated as a trustee by construction, and as such held accountable to the *cestui que trust*. If he secures to himself any benefit by a breach of trust, he will be responsible for the property to the party entitled to the beneficial interest. If by an abuse of his power as simple agent he obtains possession of trust property, the *cestui que trust* may proceed against him as a trustee. *Lehmann et al. v. Rothbarth*, 111 Ill. 185.

Where the principal receives and accepts a benefit acquired by the tort of his agent, he will also be held liable. *Hewett v. Swift*, 3 Allen (Mass.), 420; *Bryant v. Rich*, 106 Mass. 180; *Atlantic Co. v. Merchants' Co.*, 10 Gray (Mass.), 532; *Evansville v. Baum*, 26 Ind. 70; *Wallace v. Morgan*, 23 Ind. 399; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518; s. c., 28 Am. Dec. 476; *Griswold v. Haven*, 25 N. Y. 595; *Smith v. Tracy*, 36 N. Y. 79; *Durst*

*v. Burton*, 47 N. Y. 167; *Hunter v. Hudson River Iron Co.*, 20 Barb. (N. Y.) 494; *Weed v. Panama R. Co.*, 17 N. Y. 362; *Allerton v. Allerton*, 50 N. Y. 670; *Exum v. Brister*, 35 Miss. 391; *Bank v. Bank of the State*, 13 Rich. (S. Car.) 291; *Priester v. Angley*, 5 Rich. (S. Car.) 44; *Woodward v. Webb*, 65 Pa. St. 254; *Reeves v. State Bank*, 8 Ohio St. 465.

If a debtor pays money in fraud of the insolvent law to an agent of his creditor, the assignee may recover it of the agent, although he has paid it to his principal, and no demand was made. *Larkin v. Hapgood*, 56 Vt. 597.

1. *Chamberlain v. Chandler*, 3 Mason (U. S.), 242; *Nieto v. Clark*, 1 Cliff (U. S.), 145; *Taber v. Parrott*, 2 Gall. (U. S.) 565; *Simmons v. Steam Co.*, 97 Mass. 361; s. c., 100 Mass. 34; *Ramsden v. Railr.*, 104 Mass. 117; *Hilliard v. Richardson*, 3 Gray (Mass.), 349; s. c., 63 Am. Dec. 743; *Bryant v. Rich*, 106 Mass. 180; Com. v. Power, 7 Metc. (Mass.) 596; *Bell v. Josselyn*, 3 Gray (Mass.), 309; s. c., 63 Am. Dec. 741; *Bradstreet v. Everson*, 72 Pa. St. 124; *N. Y. Tel. Co. v. Dryburg*, 35 Pa. St. 298; s. c., 78 Am. Dec. 338; *Bank of Ky. v. Schuylkill Bank*, 1 Pars. Eq. Cas. (Pa.) 180, 226; *Clark v. Bank*, 17 Pa. St. 322; *Pittsburg, etc., R. Co. v. Hinds*, 53 Pa. St. 512; *Goddard v. Railr.*, 57 Me. 202; *Ray v. Bank*, 10 Bush (Ky.), 344; *Shevley v. Billings*, 8 Bush (Ky.), 147; *Baltimore R. Co. v. Blocher*, 27 Md. 277; *Craker v. R. Co.*, 36 Wis. 657; *Day v. Owen*, 5 Mich. 520; s. c., 72 Am. Dec. 62; *Blake v. Ferris*, 5 N. Y. 48; s. c., 55 Am. Dec. 304; *Weed v. Railr. Co.*, 17 N. Y. 362; *New Orleans R. Co. v. Allbritton*, 38 Miss. 242; s. c., 75 Am. Dec. 98; *Holt v. Whatley*, 51 Ala. 569; *Cincinnati v. Stone*, 5 Ohio St. 38; *Chicago v. Joney*, 60 Ill. 383; *Schwartz v. Gilmore*, 45 Ill. 455; *Chicago v. Dermody*, 61 Ill. 431; *Sewall v. St. Paul*, 20 Minn. 511. Compare *Clapp v. Kemp*, 122 Mass. 481. See also NEGLIGENCE, TORTS. For liabilities of shipmasters, see SHIPPING. For liability in tort of public officers for acts of their subalterns, see MUNICIPAL CORPORATIONS.

2. Story on Ag. § 391; *Gunn v. Can-*

*When Acting in his Own Name.*—But where the agent acts in his own name without disclosing his principal, being personally liable on the contract, it is evident that he can sue on it, although the principal also may be sued if discovered.<sup>1</sup>

Where an agent, although acting as agent, makes a contract in his own name, and the contract shows on its face to have been made personally with him, he will have a right to sue on it; as where a promissory note for the benefit of the principal is expressly made payable to the agent.<sup>2</sup>

*When Doubtful.*—Where it is not clear from the face of the writing who the party is contracted with, the courts will gather from the whole instrument the intention of the parties.<sup>3</sup>

time, 10 Johns. (N. Y.) 387; Oakey v. Bend, 3 Edw. Ch. (N. Y.) 482; Taintor v. Prendergast, 3 Hill (N. Y.), 72; Kent v. Bornstein, 12 Allen (Mass.), 342; Eastern R. Co. v. Benedict, 5 Gray (Mass.), 561; Whitehead v. Potter, 4 Ired. L. (N. Car.) 257; Jones v. Hart, 1 Hen. & Munf. (Va.) 470.

1. Leeds v. Marine Ins. Co., 6 Wheat. (U. S.) 565; Groover v. Warfield, 50 Ga. 644; Winchester v. Howard, 97 Mass. 303; Tyler v. Freeman, 3 Cush. (Mass.) 261; Huntington v. Knox, 7 Cush. (Mass.) 371; Willard v. Lugenbuhl, 24 La. Ann. 18; Merrick's Est., 2 Ashm. (Pa.) 485; Hovey v. Pitcher, 13 Miss. 191; Beebe v. Robert, 12 Wend. (N. Y.) 413; s. c., 27 Am. Dec. 132; Pentz v. Stanton, 10 Wend. (N. Y.) 271; s. c., 25 Am. Dec. 558; Evritt v. Bancroft, 22 Ohio St. 172; Woodstock Bank v. Downer, 27 Vt. 482; s. c., 65 Am. Dec. 210; Saladin v. Mitchell, 45 Ill. 79; Culver v. Bigelow, 43 Vt. 249; Chandler v. Coe, 54 N. H. 561; Brewster v. Saul, 8 La. 296.

2. Commercial Bank v. French, 21 Pick. (Mass.) 486; Fairfield v. Adams, 16 Pick. (Mass.) 381; Fisher v. Ellis, 3 Pick. (Mass.) 322; Buffum v. Chadwick, 8 Mass. 103; Van Staphorst v. Pearce, 4 Mass. 258; Norcross v. Pease, 5 Allen (Mass.), 331; Binney v. Plumley, 5 Vt. 500; s. c., 26 Am. Dec. 313; Johnson v. Catlin, 27 Vt. 89; s. c., 62 Am. Dec. 622; Wheelock v. Wheelock, 5 Vt. 433; Boardman v. Roger, 17 Vt. 589; McHenry v. Ridgely, 2 Scam. (Ill.) 309; s. c. 35 Am. Dec. 49; McConnell v. Thomas, 2 Scam. (Ill.) 313; Porter v. Nekervis, 4 Rand. (Va.) 359; Doe v. Thompson, 2 Fost. (N. H.) 217; Lum v. Robertson, 6 Wall. (U. S.) 277; Orr v. Lacy, 4 McLean (U. S.), 243; Bradford v. Bucknam, 12 Me. 15; Bragg v. Greenleaf, 14 Me. 395; Fish v. Jacobson, 2 Abb. App. Dec. (N. Y.) 132; Hodge v. Comly, 2 Miles (Pa.) 286; Sater v. Hendershott, 1 Morris (Iowa),

118; Barbee v. Williams, 4 Heisk. (Tenn.) 522; Cocke v. Dickens, 4 Yerg. (Tenn.) 29; s. c., 26 Am. Dec. 214; Shepherd v. Evans, 9 Ind. 260; Grist v. Backhouse, 4 Dev. & Bat. L. (N. Car.) 362; Jackson v. Heath, 1 Bailey (S. Car.), 355; Moore v. Penn, 5 Ala. 135; Groce v. Herndon, 2 Tex. 410. Compare Garland v. Reynolds, 20 Me. 45; Irish v. Webster, 5 Greenl. (Me.) 171; Gunn v. Cantine, 10 Johns. (N. Y.) 387; Taintor v. Prendergast, 3 Hill (N. Y.), 72.

Or where a negotiable bill indorsed in blank is delivered to an agent for collection, he may sue on it in his own name. Little v. O'Brien, 9 Mass. 423; Brigham v. Mareau, 7 Pick. (Mass.) 40; Banks v. Eastin, 15 Mart. (La.) 291; Guernsey v. Burns, 25 Wend. (N. Y.) 411; Maurau v. Lamb, 7 Cow. (N. Y.) 174; Coddington v. Bay, 5 Johns. Ch. (N. Y.) 54; s. c., 20 Johns. (N. Y.) 637; 11 Am. Dec. 342; Ferguson v. Hamilton, 35 Barb. (N. Y.) 427; Welch v. Sage, 47 N. Y. 143; Hodge v. Comly, 2 Miles (Pa.), 286; Pearce v. Austin, 4 Whart. (Pa.) 489; s. c., 34 Am. Dec. 533; Phelan v. Moss, 67 Pa. St. 59; Hamilton v. Vought, 34 N. J. L. 187; McConnell v. Thomas, 2 Scam. (Ill.) 313; Dugan v. U. S., 3 Wheat. (U. S.) 172, 180; Murray v. Lardner, 2 Wall. (U. S.) 110. Compare Thatcher v. Winslow, 5 Mason (U. S.), 58; Sherwood v. Roys, 14 Pick. (Mass.) 172.

Or where a policy of insurance is issued in the name of the agent, but for the benefit of his principal. Story on Ag. § 394. Compare Finney v. Bedford Ins. Co., 8 Metc. (Mass.) 348; Spencer v. Field, 10 Wend. (N. Y.) 87.

3. Gilmore v. Pope, 5 Mass. 491; Commercial Bank v. French, 21 Pick. (Mass.) 486; Eastern R. Co. v. Benedict, 5 Gray (Mass.), 561; Taunton, etc., Turnpike Co. v. Whiting, 10 Mass. 327; Medway Cotton Man. v. Adams, 10

*When Agent has an Interest.*—Where the agent has an interest in the subject-matter of the agency, as where he has a lien on the proceeds of a sale, he may sue on the contract whether he professed to act in his own name or in the name of his principal.<sup>1</sup>

**13. Liabilities of Principals to Third Parties.**—*Liable for all Acts of Agent.*—A principal is liable to third parties for whatever the agent does or says; whatever contracts, representations, or admissions he makes; whatever negligence he is guilty of, and whatever fraud or wrong he commits; provided the agent acts within the scope of his apparent authority, and provided a liability would attach to the principal if he was in the place of the agent.<sup>2</sup>

Mass. 360; Buffum v. Chadwick, 8 Mass. 103; Barney v. Newcomb, 9 Cush. (Mass.) 46; Garland v. Reynolds, 20 Me. 45; Irish v. Webster, 5 Greenl. (Me.) 171; Horah v. Long, 4 Dev. & B. L. (N. Car.) 274; Grist v. Backhouse, 4 Dev. & B. L. (N. Car.) 362; Linn v. Holland, 12 Mo. 127; Hinds v. Stone, Brayton (Vt.), 230; Arlington v. Hinds, D. Chipman (Vt.), 431; s. c., 12 Am. Dec. 704; Middlebury v. Case, 6 Vt. 165; Bank v. Slason, 13 Vt. 334; Bank of U. S. v. Lyman, 20 Vt. 666.

And in case of doubt give both principal and agent a right to sue. Lum v. Robertson, 6 Wall. (U. S.) 277; Herndon v. Taylor, 6 Ala. 461; Lewis v. Hodgdon, 17 Me. 267; Rutland R. Co. v. Cole, 24 Vt. 33; Beebe v. Robert, 12 Wend. (N. Y.) 413; s. c., 27 Am. Dec. 132; Griffith v. Ingleden, 6 S. & R. (Pa.) 429; s. c., 9 Am. Dec. 444; Dupont v. Mt. Pleasant Co., 9 Rich. (S. Car.) 255.

1. Whitehead v. Potter, 4 Ired. L. (N. Car.) 357; Murray v. Toland, 3 Johns. Ch. (N. Y.) 569; Toland v. Murray, 18 Johns. (N. Y.) 24; Ladd v. Arkell, 5 Jones & Sp. (N. Y.) 35; Bogart v. O'Regan, 1 E. D. Smith (N. Y.), 590; Hulse v. Young, 16 Johns. (N. Y.) 1; Minturn v. Main, 7 N. Y. 220; De Forest v. Fulton Ins. Co., 1 Hall (N. Y.) 84; White v. Chouteau, 10 Barb. (N. Y.) 202; Bleecker v. Franklin, 2 E. D. Smith (N. Y.), 93; Graham v. Duckwall, 8 Bush (Ky.), 12; Evritt v. Bancroft, 22 Ohio St. 172; Beller v. Block, 19 Ark. 566; Girard v. Taggart, 5 S. & R. (Pa.) 27; s. c., 19 Am. Dec. 327; Thompson v. Kelly, 101 Mass. 291. See also FACTORS; AUCTIONEERS.

Or where he is responsible to the principal for the proceeds of sales as under a *del credere* commission. Lum v. Robertson, 6 Wall. (U. S.) 277; Kent v. Bornstein, 12 Allen (Mass.), 342; Hodge v. Comly, 2 Miles (Pa.), 286; Whitehead v. Potter, 4 Ired. (N. Car.) 257.

Where money has been paid by an

agent by mistake or without authority. Kent v. Bornstein, 12 Allen (Mass.), 342.

An agreement made by an agent entirely on his principal's behalf, but wholly for his own benefit, is without consideration, and will not sustain an action by the agent in his own name. Graham v. Taggart, 44 Mich. 383.

Where an agent brings suit in his own name he is bound to disclose the name of his principal. Willard v. Lugenbuhl, 24 La. Ann. 18.

2. N. Y. Life Ins. Co. v. McGowan, 18 Kan. 300; Gifford v. Landrine, 37 N. J. Eq. 127; Borchering v. Katz, 37 N. J. Eq. 150; Morton v. Scull, 23 Ark. 289; Gasway v. Atlanta, etc., R. Co., 58 Ga. 216; City Bank of Macon v. Kent, 57 Ga. 283; Forrester v. Georgia, 63 Ga. 349; Mass. Life Ins. Co. v. Eshelmann, 30 Ohio St. 647; Fatman v. Leet, 41 Ind. 133; Tagg v. Tennessee Nat. Bank, 9 Heisk. (Tenn.) 479; Planters' Ins. Co. v. Sorrells, 57 Tenn. 352; Prickett v. Madison Co., 14 Ill. App. 454; Noble v. Cunningham, 74 Ill. 51; Sacalaris v. Eureka, etc., R. Co., 1 Pac. Repr. (Nev.) 835; Bass v. C. & N. W. R. Co., 42 Wis. 654; Golding v. Merchant, 43 Ala. 705; Swaine v. Maryatt, 28 N. J. Eq. 589; Tripp v. New Metallic Packing Co., 137 Mass. 499; Caswell v. Cross, 120 Mass., 545; Bronson v. Coffin, 118 Mass. 156; Fletcher v. Sibley, 124 Mass. 220; Lane v. Boston, etc., R. Co., 112 Mass. 455; Tozier v. Crafts, 123 Mass. 480; Putnam v. Home Ins. Co., 123 Mass. 324; Knight v. Luce, 116 Mass. 586; Newman v. British, etc., S. Co., 113 Mass. 362; Philadelphia, etc., R. Co. v. Weaver, 34 Md. 431; Lamm v. Port Deposit, etc. Assoc., 49 Md. 233; Knox v. Barnett, 18 Fla. 594; Slater v. Irwin, 38 Iowa, 261; Deer Lodge Bank v. Hope Mining Co., 3 Montana, 146; s. c., 35 Am. Rep. 458; Kerslake v. Schoonmaker, 3 Th. & C. (N. Y.) 524; Marsh v. Gilbert, 4 Th. & C. (N. Y.) 259; Armour v. Mich., etc., Centr. R. Co., 65 N. Y. 111; Cosgrove

*v. Ogden*, 49 N. Y. 255; *Ritch v. Smith*, 82 N. Y. 627; *Morey v. Webb*, 65 Barb. (N. Y.) 22; *Manning v. Keenan*, 73 N. Y. 45; *Meiggs v. Meiggs*, 15 Hun (N. Y.), 453; *Gallup v. Lederer*, 1 Hun (N. Y.), 282; *Engh v. Greenebaum*, 4 Th. & C. (N. Y.) 426; *Tice v. Gallup*, 5 Th. & C. (N. Y.) 51; *Skelton v. Manchester*, 12 R. I. 326; *Beecher v. Venn*, 35 Mich. 466; *Silliman v. Fredericksburg, etc.*, R. Co., 27 Gratt. (Va.) 179; *Rice v. Groffman*, 56 Mo. 434; *Webster v. Wray*, 24 N. W. Repr. (Neb.) 207; *Eskridge v. Farrar*, 34 La. Ann. 709; *Plummer v. Buck*, 16 Neb. 322; *St. Louis, etc., Packet Co. v. Parker*, 59 Ill. 23; *Dewar v. Bank of Montreal*, 3 N. Eastern Repr. (Ill.) 746; *Silverman v. Bullock*, 98 Ill. 11; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Wider v. Branch*, 12 Ill. App. 358; *Bronson v. Chappell*, 12 Wall. (U. S.) 681; *Dickman v. Williams*, 50 Miss. 500.

The scope of an agent's employment is to be determined, not only from what the principal may have told the agent to do, but from what he knows, or in the exercise of ordinary care and prudence ought to know, the agent is doing in the transaction. *Kingsley v. Fitts*, 51 Vt. 414.

If a vendor sells goods to an agent for his principal, and takes the promissory note of the agent for the amount of the purchase-price, this, without more, will not operate as payment of the debt of the principal; and on failure of payment by the agent, the principal will be liable to an action founded on the original consideration. *Keller v. Singleton*, 69 Ga. 703.

When a person deals with an agent within the scope of his known authority, he may safely presume that he is dealing with the principal, and the principal will be bound by the contract, unless he shows affirmatively that the person dealing with the agent knew that the agent in that instance was contracting for himself alone. *Brett v. Bassett*, 63 Iowa, 340.

A. delivered a number of books to B. & Co., auctioneers, for sale. C., though not a member of the firm of B. & Co., was their agent in charge of the book department of their business. Part of the books were sold, and the remainder held for future disposition. At the instance of C. these books were left on the premises of B. & Co. A. offered to have them insured, but was deterred from this by the allegations of C. that B. & Co. carried sufficient insurance to cover all the goods in the establishment, including these books. B. & Co. actually had at this time two policies aggregating \$12,-

500, and which, by their terms, were on goods owned by B. & Co. and on those held by them in trust or on consignment. While A.'s books were thus in B. & Co.'s store, the same was destroyed by fire, with all its contents; and as the loss was in excess of \$12,500, this entire sum was paid them by the companies. After the fire B. & Co. offered A. \$199. They denied legal liability to pay him any insurance, but claimed that they were willing to apportion it and give him this sum. A. refused their offer, and brought suit for the value of the books. *Held*, that the policies of insurance covered A.'s books, and when B. & Co. received the \$12,500 they held it in trust and were bound to account for its distribution. A. was not obliged to show that after paying all other claims there was enough left to cover his books; but it was B. & Co.'s duty to show, in detail, the application of the fund. Upon their neglect to do this, they were properly held accountable to A. for the full amount of his loss. *Thomas v. Cumiskey*, 108 Pa. St. 354.

Complainant gave to an agent written authority "to assign, satisfy, or discharge all mortgages made to him." The agent, thereunder, assigned to the defendant a mortgage of \$10,000, declaring that the assignment was for the benefit of complainant. The agent applied the \$10,000 to his own use. *Held*, that complainant was bound by the assignment and the agent's concomitant declarations; the defendant testifying that he had no knowledge of the agent's fraud. *Chetwood v. Berrian*, 39 N. J. Eq. 203.

Where a party, through a third person, procures another to sign a contract upon consideration that the first will abandon a threatened prosecution for a felony, the acts of such third person are the acts of the first, and the contract is void. *McCoy v. Green*, 83 Mo. 626.

A small boy, finding a dynamite cartridge in a common packing-box among the saw-dust, proceeded to crack it on a stone, and maimed himself for life. The boy was rightfully on the premises, and his father was at work hard by. The packing-box was on the ground under a rude shed, and was marked "Powder," but neither the boy nor his father could read. It had been left exposed by the agent of the landlord. *Held*, that an action would lie against the landlord for the injury; and that neither the child nor his father could be said to be guilty of contributory negligence. *Powers v. Harlow*, 53 Mich. 507.

If a principal holds out an agent as possessing authority to control a shop or



place of business, and a third person acts upon the faith of the appearances so created, the principal may be bound by the acts of such agent within the scope of such ostensible authority, although, as between the agent and his employer, no such authority in fact existed. *Over v. Schiffing*, 102 Ind. 191; *Banks v. Everest*, 35 Kan. 687.

An agent's right to defend his principal's possession of premises is not affected by what he has said in the latter's absence about the latter's title, so long as he did not speak as agent, and has given no license to occupy the premises. *Taylor v. Adams*, 58 Mich. 187.

Where a railroad company employs an agent to detect, arrest, and prosecute persons who unlawfully obstruct its track, and the agent, acting in the scope of his employment, arrests an innocent person, the railroad company is liable therefor. *Evansville, etc., R. Co. v. McKee*, 22 Am. & Eng. R. R. Cas. 366; s. c., 99 Ind. 519.

But where an agent of a railroad company having and exercising supervision over the lands of the company and in charge of such lands, making leases, collecting rents and stumpage, and negotiating sales of the lands, invokes the criminal law by bringing a charge of grand larceny against a party for spoliation of the timber lands of the company, he is not in so doing acting within the scope of his agency or in the course of his employment, and the company is therefore not to be held responsible for such actions done maliciously by him. *Pressley v. Mobile, etc., R. Co.*, 15 Fed. Rep. 199.

Where a person acts as agent or agent of another in selling intoxicating liquors for him, with his knowledge and consent, in violation of law, the principal may be prosecuted and punished for such unlawful sales by his clerk or agent; and in such a case, where it is admitted that the principal has no permit to sell intoxicating liquors, it is not necessary for the State in the first instance, in order to convict the principal, to show that his clerk or agent had no permit, if the sales were made by the clerk or agent for the principal, in the ordinary line of his duty. *State v. Skinner*, 34 Kans. 256; *Seaman v. Com.*, 21 Am. Law Reg. (Pa.) 245; *State v. McGrath*, 73 Mo. 181; *State v. Baker*, 71 Mo. 475; *Com. v. Gillespie*, 7 S. & R. (Pa.) 469; s. c., 10 Am. Dec. 475; *Forrester v. Georgia*, 63 Ga. 349.

One who expressly sanctions a payment to another person as his agent, and who knows that his debtor regards such person as the person to whom payments

should be made, will be bound by subsequent payments to such agent. *Phillips v. McGrath*, 62 Wis. 124.

A subscription to the stock of an incorporated railroad company, procured by the fraud of the company's agent soliciting subscriptions, may be defeated on the plea of fraud when the company attempts to enforce it by suit. *Montgomery Southern R. Co. v. Matthews*, 77 Ala. 357.

A depot agent in the employment of a railroad company being notified by the superintendent to report for instructions to the assistant superintendent, and, on so reporting, being informed that the latter desired to transfer him to another station on the road,—the transfer being made, and the depot agent afterwards suing the railroad company for increased compensation, as promised by the assistant superintendent,—*held*, that the statements and declarations of the assistant superintendent, while negotiating for the transfer, and up to the completion of the contract, were competent evidence against the railroad company. *Ala. Gr. So. R. Co. v. Hill*, 76 Ala. 303.

Where the duly authorized agent of a railroad company receives personal property to be transported as baggage, the railroad company must account for such property as baggage, although in strict language it might not be baggage. *Chicago, etc., R. Co. v. Conklin*, 32 Kans. 55; *Lake Shore, etc., R. Co. v. Foster*, 104 Ind. 293.

Where a railway shipping-clerk, colluding with the consignor, issues a fictitious bill of lading, the goods represented by it not having been received, the railway company is liable to an innocent third person deceived thereby. As between a railway company and third persons the true limit of a railway agent's authority to bind his company is the apparent authority with which he is invested. *Brooke v. New York, L. E. & W. R. Co.*, 21 Am. & Eng. R. R. Cas. 64; s. c., 108 Pa. St. 530; *Sioux City, etc., R. Co. v. First Nat. Bank*, 1 Am. & Eng. R. R. Cas. 278; s. c., 10 Neb. 556; *Armour v. Mich. Cent. R. Co.*, 65 N. Y. 111; *Wichita Sav. Bank v. Atchison, etc., R. Co.* 20 Kans. 519; *St. Louis, etc., R. Co. v. Larned*, 6 Am. & Eng. R. R. Cas. 436; s. c., 103 Ill. 239.

In an action against a railroad company, where it was in evidence that S., the regular agent of the defendant at a certain depot, lived three miles from the depot and that T. lived at the depot for two years prior to the bringing of the action and discharged the duties of agent

in receiving and forwarding freight, selling tickets, etc., all of which was done in the name of S. and with the knowledge and acquiescence of defendant; it was held that T. was the agent of defendant, and that defendant was bound by any act of his within the scope of the authority impliedly given. *Katzenstein v. R. R. Co.*, 6 Am. & Eng. R. R. Cas. 464; s. c., 84 N. Car. 688. *Compare Williams v. Wilmington, etc., R. Co.*, 93 N. Car. 42; *Robinson v. Memphis*, 6 Am. & Eng. R. R. Cas. 592; s. c., 9 Fed. Rep. 129.

A railroad corporation is liable for the erroneous advice and directions given by its agent in charge. *S. & N. R. Co. v. Huffman*, 76 Ala. 492, and cases cited in opinion.

Where the receiving clerk of a telegraph company, at the request or with the consent of the sender, attempted to correct a mistake in the message, and in so doing made a mistake himself, *held*, that the company was not liable, for the correcting of the message was not within the scope of the receiving clerk's authority or duty and was not authorized by the company. *Western U. Tel. Co. v. Foster*, 64 Tex. 220.

Where a principal authorizes an agent to effect an exchange of lands with a third person, he is answerable for and is bound by the acts and representations of the agent, and the instrumentalities employed by him in accomplishing that end, even though the agent is guilty of fraud which the principal did not direct, and of which he did not have knowledge. *Wolfe v. Pugh*, 101 Ind. 203.

If the owner of land deliver to his agent a deed thereof, executed in blank as to the grantee, with express or implied authority to insert the name of a purchaser and perfect the conveyance, and if, with such authority, the agent make a fraudulent use of the deed, as by inserting the name of a grantee and delivering it to him without consideration, for his own benefit, such grantee can convey a good title to an innocent purchaser. *Garland v. Wells*, 15 Neb. 298.

G. authorized T. to make a loan for him and take a mortgage to secure it in G.'s name. T. took the mortgage and put it on record, but did not inform G. T. then sold the notes and mortgage to the plaintiffs. G. afterwards, upon a representation made to him that the mortgage debt was paid, gave a quitclaim to the mortgagor; it being found that he did it in good faith and in the belief that the mortgage debt was paid. *Held*, that the prior authority was sufficient to constitute the acceptance by T. his accept-

ance, even though he was not informed that the mortgage had been made. *Lewis v. Farrell*, 51 Conn. 216.

Defendants owned a half-interest in the business of a firm, one S. owning the other half. Defendants, through the fraudulent representations of S. as to the assets and liabilities of the firm, induced plaintiff to purchase their half interest, paying a certain sum in cash and agreeing to pay the firm's indebtedness. The assets being much less, and the liabilities much more, than represented, *held* that defendants were bound by the fraudulent representations made by S. as their agent whether authorized by them or not, and that plaintiff was entitled to recover what he had lost by reason of the fraud, and to be relieved of all obligation to perform the contract. *Lindmeier v. Monahan*, 64 Iowa, 24; *Hornish v. Peck*, 53 Iowa, 157.

Where plaintiffs' agent, who was authorized to take orders for wagons and carriages and transmit them to plaintiffs, took defendants' order, but defendants, not being content with plaintiffs' printed and published warranty, demanded a further warranty, whereupon a warranty was written out by the agent in duplicate, one copy of which was left with the defendants, and the other of which the agent agreed to forward with the order to his principals, for their acceptance or rejection; and he sent the order, but failed to send the warranty, and plaintiffs forwarded the wagons and carriages without any knowledge of the written warranty, and the goods did not fulfil the conditions thereof,—*held*, that plaintiffs were liable to the same extent as if the goods had been sold by them upon that warranty. *Davis v. Danforth*, 65 Iowa, 601.

One who has authority to receive and take property from a "landing" has authority to receive and take it from a wharf-boat stationed and used at a particular wharf, and constituting one of the landing facilities, and for the negligence of his agents in removing the property from the boat, resulting in the loss of such property, the owner of the wharf-boat is not liable. *Davis v. Reamer*, 105 Ind. 318.

A. was the owner of a wharf at Newark, on the Passaic River, and the consignee of a cargo of coal shipped on board a barge belonging to libellant. When the barge arrived at the wharf the master found M. in charge, directing the moving of vessels, etc., and in obedience to his direction moored the barge alongside the docks, and when the tide went

out the barge grounded, and was seriously injured by piling that had been negligently left standing under the water. After mooring, but before the grounding of the barge, the master reported to the clerk of the libellant the arrival of the barge, and was referred to M. as his representative. *Held*, that the master had a right to assume that M. was the agent of the owner of the wharf, and that he was liable for the injury. *Pennsylvania R. Co. v. Atha*, 22 Fed. Repr 920.

The principal is not relieved from liability for the acts of his agent by a delay of a third party in giving him notice of the failure of the agent to pay for goods purchased. *Stapp v. Spurlin*, 32 Ind. 442.

Even though the authority of the agent is restricted by instructions from his principal, he will be bound by a warranty attending a sale made by the agent, unless the purchaser knew of the restriction. *Murray v. Brooks*, 41 Iowa, 45.

The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions unknown to the persons dealing with him. *Jacobson v. Poindexter*, 42 Ark. 97.

Where it appeared that the grantee in a deed, containing a covenant on the part of the grantee to pay a mortgage on the premises, had given to another, by whom the purchase of the land was made, general authority to deal in real estate in his name, *held*, that he was bound by the covenant, although he permitted the ostensible agent to reap the benefits of his dealing, and although he did not know that the clause was in the deed, and never specially authorized its assertion. *Schley v. Fryer*, 100 N. Y. 71.

A mortgage of land, securing a promissory note, was conditioned for the payment of a certain sum in two months, "with interest as specified in the note." The rate of interest expressed in the note was three per cent a month for the two months, and five per cent a month for such further time as any part of the principal should remain unpaid. An agent of the mortgagee had the custody of the mortgage and note, and knew their contents, and had full authority to receive payment of the note at any time, and to dispose of it as he saw fit. A creditor of the mortgagor brought an action against him, attached his interest in the land, recovered judgment, levied his execution upon the debtor's equity of redemption, and became the purchaser thereof at a sale. Before the maturity of the note,

and while his action was pending, the creditor informed the mortgagee's agent that he had attached the land and wished to pay off the mortgage, and asked him what amount was due. The agent, by falsehood and evasive answers, intentionally misled him, so that no payment was made. Subsequently, the creditor obtained a decree entitling him to redeem the land from the mortgage. *Held*, that the mortgagee was estopped, by his agent's conduct, to receive from such creditor interest at a higher rate than six per cent per annum after the maturity of the mortgage debt; and that, as the creditor made no offer to pay any sum to the mortgagee, he must pay the expenses incurred in proceedings to foreclose the mortgage before the service of an injunction restraining them. *May v. Gates*, 137 Mass. 389.

Where a U. S. timber agent has made a compromise with a trespasser on public lands, who has cut timber without authority, the government is not bound by such compromise unless the agent has regularly pursued his authority. *Nickles v. Wells*, 2 Utah, 167.

The declarations of an agent are admissible as evidence against his principal only when made while transacting the business of the principal and as a part of the transaction which is the subject of inquiry. Hence, where the baggage-master of a railroad company, while away from the baggage-room of the company and engaged in the transaction of his private business on his own premises, gave directions to a stranger with reference to the delivery of baggage, *held*, that they were not binding on the company. *Chillicothe v. Raymond*, 80 Mo. 185; *Danner L. & L. Co. v. Stonewall Ins. Co.*, 77 Ala. 184; *Wolf v. Des Moines, etc., R. Co.*, 64 Iowa, 380; *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285.

A bookkeeper who had some discretion in small sales was directed to collect a balance due upon a particular sale or to get the goods. *Held*, that this did not give him such standing as an agent that his employer would be bound by his neglect to warn a third person, to whom the purchaser sold the goods, that there was an unpaid claim upon them. *Weaver v. Bechtel*, 53 Mich. 516.

Presentation of a bill by a merchant's employee does not warrant the debtor thereon in paying it to him unless it is within the scope of his employment to receive payment; and his mere statement that he is authorized to receive it is not enough, nor is it enough that the bill is

*Agency must Exist.*—The existence of the agency must, however, be clearly shown to make the principal liable.<sup>1</sup>

*When Agent exceeds Authority.*—It does not matter that the agent exceeds his authority.<sup>2</sup>

*When Agent Contracts in his own Name.*—Where an agent contracts in his own name and does not disclose his principal, the

in the merchant's handwriting and on one of his billheads. *Hirshfield v. Waldron*, 54 Mich. 649.

When one carries on a butcher-shop through an agent, and that agent sells the hides of the slaughtered animals, it should be left to the jury to decide upon the evidence in a suit for the hides between the principal and the purchaser whether the selling of the hides by the agent was within the fair scope of the business. *Jacobson v. Poindexter*, 42 Ark. 97.

A builder made a written contract to furnish the materials and build a house for the defendant according to definite plans and specifications and for a fixed sum, all the materials and work to be accepted by an architect named, who was to superintend the construction. The builder, under the direction of the architect, did certain work variant from and in addition to the specifications, which increased the cost and value of the house. *Held*, that the ordering of this work was beyond the scope of the architect's agency, and that the defendant was not liable to the builder for it. *Starkweather v. Goodman*, 48 Conn. 101; s. c., 40 Am. Rep. 152.

The presumption is that one known to be an agent is acting within the scope of his authority. *Brett v. Bassett*, 63 Iowa, 340.

1. *Campbell v. Sherman*, 49 Mich. 534; *Coon v. Gurley*, 49 Ind. 199.

If a debtor pays money to a third party as the agent of his creditor, and afterward, under protest, pays again to the creditor, he cannot recover of the creditor that which he paid the supposed agent; for if he was really the agent, it was but a payment of his debt; if he was not the agent, the creditor is of course not liable. *Clowdis v. Hannibal*, etc., R. Co., 1 Am. & Eng. R. R. Cas. 614; s. c., 71 Mo. 510.

Declarations made by an agent subsequently to his agency as to any acts done by him within the scope thereof before its termination, are inadmissible to prove the transaction, although competent by way of contradicting his denial thereof. *McComb v. N. C. R. Co.*, 70 N. Car. 178; *Stenhouse v. Charl.*, etc., R. Co., 70 N. Car. 542.

2. *Kerslake v. Schoonmaker*, 3 Th. & C. (N. Y.) 524; *Armour v. Mich. Centr. R. Co.*, 65 (N. Y.) 111; *Engl v. Greenebaum*, 4 Th. & C. (N. Y.) 426; *Beecher v. Venn*, 35 Mich. 466; *Tozier v. Crafts*, 123 Mass. 480; *Putnam v. Home Ins. Co.*, 123 Mass. 324; *Knight v. Luce*, 116 Mass. 586; *Newman v. British*, etc., S. Co., 113 Mass. 362; *Rice v. Groffman*, 56 Mo. 434; *Meyer v. Hehner*, 96 Ill. 400; *St. Louis*, etc., *Packet Co. v. Parker*, 59 Ill. 23; *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *Fatman v. Leet*, 41 Ind. 133.

M., the travelling salesman of a sewing-machine company, visited Lawrence to solicit purchasers for sewing-machines. He represented that the machines he was selling were superior to sewing-machines in the sale of which defendant was then engaged. He obtained an order from defendant. In the order signed by defendant it was provided "that the only condition under which this order is given is as stated herein, and that no agreement different from this can be made except it be in writing and is signed by the general manager of the Victor Sewing-machine Company." The machines were not superior, and the defendant offered to return the property and cancel the contract. M., the salesman, took back the goods and released the defendant from the order. *Held*, that the company was bound by the declarations of its agent, and that, the representations not being true, the company was not entitled to recover upon the order after such return of the goods. *Victor S. M. Co. v. Rheinschild*, 25 Kans. 534. See AUTHORITY OF AGENTS, *infra*.

But the act of an agent in excess of his authority never binds the principal unless a third party, having a right to believe that the agent was acting within his authority, would sustain a loss if the act was not considered that of his principal. *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5.

Nor when a third party is proved to have known that the agent exceeded his authority. *Broadway Sav. Bank v. Vorster*, 30 La. Ann. pt. 1, 587.

Nor where the transaction is of such a character as to put the third party on his guard. *Merchants' Mut. Ins. Co. v. Excelsior Ins. Co.*, 4 Mo. App. 578.

principal, having a right to sue, is also, when discovered, liable to a third party on the contract. The third party may elect whom he will sue. And the same rule holds good when the agent discloses his principal at the time.<sup>1</sup>

After a third party has elected whom to sue, and has sued either the agent or the principal to judgment, he cannot after that sue the other; and it does not matter whether the suit has been successful or not.<sup>2</sup>

*Exclusive Credit given to Agent.*—Where a third party, knowing that the agent acts for his principal, elects at the time of the making of the contract to give exclusive credit to the agent, he cannot afterward sue the principal.<sup>3</sup>

1. *McGraw v. Godfrey*, 14 Abb. Pr. N. S. (N. Y.) 397; s. c., 56 N. Y. 610; *Meeker v. Claghorn*, 44 N. Y. 349; *Duval v. Wood*, 3 Lans. (N. Y.) 489; *Inglehart v. Thousand Isl. Hot. Co.*, 7 Hun (N. Y.), 547; *Allen v. Coit*, 6 Hill (N. Y.), 318; *Poole v. Rice*, 9 W. Va. 73; *Chandler v. Coe*, 54 N. H. 561; *Upton v. Gray*, 2 Me. 372; *Jones v. Aetna Ins. Co.*, 14 Conn. 501; *Merrill v. Kenyon*, 48 Conn. 314; s. c., 40 Am. Rep. 174; *York Co. Bank v. Stein*, 24 Md. 447; *Parker v. Donaldson*, 2 W. & S. (Pa.) 9; *Youghiogeny Iron Co. v. Smith*, 66 Pa. St. 340; *Beymer v. Bonsal*, 79 Pa. St. 298; *Barker v. Garvey*, 83 Ill. 184; *Wheeler v. Reed*, 36 Ill. 81; *Kerchner v. Reilly*, 72 N. Car. 171; *Lovell v. Williams*, 125 Mass. 439; *Carroll v. St. John's Soc.*, 125 Mass. 565; *Gilmore v. Pope*, 5 Mass. 491; *James v. Bixby*, 11 Mass. 34; *Southard v. Sturtevant*, 109 Mass. 390; *Vermont R. Co. v. Claves*, 21 Vt. 30; *Baldwin v. Leonard*, 39 Vt. 260; *Borcherling v. Katz*, 37 N. J. Eq. 150; *Thomas v. Atkinson*, 38 Ind. 248; *Clark v. Van Riemsdyk*, 9 Cranch. (U. S.) 153; *Ford v. Williams*, 21 How. (U. S.) 288; *Pope v. Meadow Spring Dist. Co.*, 20 Fed. Repr. 35. Compare *Yenni v. Ocean Nat. Bank*, 5 Daly (N. Y.), 421.

The responsibility of an undisclosed principal, when discovered, cannot be defeated by a private contract between the principal and the agent that the agent alone will be held liable. *Richardson v. Farmer*, 36 Mo. 35; *Mitchell v. Dall*, 2 H. & G. (Md.) 159.

But the rule that an unnamed and unknown principal shall stand liable for the contract of his agent, does not apply to a demise under seal. The relation between the owner of land and those who occupy it of a purely legal character; and the fact that a lessee takes a lease for an unnamed principal, but in his own name, will not render the unnamed prin-

cipal liable for the rent. *Borcherling v. Katz*, 37 N. J. Eq. 150; *Kiersted v. Orange*, etc., R. Co., 69 N. Y. 343; *Durand v. Curtis*, 56 N. Y. 7; *Sanders v. Partridge*, 108 Mass. 556.

2. *Gerrard v. Moody*, 48 Ga. 96; *Cobb v. Knapp*, 71 N. Y. 348; *McGraw v. Godfrey*, 14 Abb. Pr. N. S. (N. Y.) 397; s. c., 56 N. Y. 610; *Jones v. Aetna Ins. Co.*, 14 Conn. 501; *Kingsley v. Davis*, 104 Mass. 178; *Priestley v. Ferney*, 3 H. & C. 977; 34 L. J. Ex. 172.

It seems that where an agent contracts for the purchase of property in his own name without disclosing his principal, and the contract is such as may be enforced against the principal when discovered, the vendor cannot enforce it against both principal and agent, but is put to his election, and having after such discovery brought an action and recovered judgment against the agent, he is estopped from charging the principal. *Tuthill v. Wilson*, 90 N. Y. 423.

The commencement of an action against the principal, though proper to be considered by the jury, is, however, not conclusive of an election to hold the principal only responsible. The creditor may discontinue his action against one of the parties before judgment, and take fresh proceedings against the other. *Cobb v. Knapp*, 71 N. Y. 348; *Raymond v. Crown E. Mills*, 2 Metc. (Mass.) 319; *Mattlage v. Poole*, 15 Hun (N. Y.), 556; *McGraw v. Moody*, 14 Abb. Pr. (N. Y.) 397; *Gerrard v. Moody*, 48 Ga. 96.

In *Beymer v. Bonsal*, 79 Pa. St. 298, it was held that neither principal nor agent could be discharged short of satisfaction.

3. *Silver v. Jordan*, 136 Mass. 319; *Raymond v. Crown E. Mills*, 2 Metc. (Mass.) 319; *James v. Bixby*, 11 Mass. 34; *Winchester v. Howard*, 97 Mass. 303; *Paige v. Stone*, 10 Metc. (Mass.) 160; *French v. Price*, 24 Pick. (Mass.) 13;

*Liab. for Fraud and Deceit of Agent.*—Principals, whether individuals or corporations, are as a rule, although not *criminaliter*, yet *civiliter*, liable to third parties for the fraud and deceit of their agents when committed in the course of the principals' business. For, since somebody must be the loser by the deceit, it is more reasonable that he who employs and puts confidence in the deceiver should be a loser than a stranger.<sup>1</sup>

Mauri v. Hefferman, 13 Johns. (N. Y.) 58; Coleman v. First Nat. Bank, 53 N. Y. 388; Cunningham v. Soules, 7 Wend. (N. Y.) 106; Cheever v. Smith, 15 Johns. (N. Y.) 276; Jones v. Ins. Co., 14 Conn. 501; Johnson v. Cleves, 15 N. H. 332; Priestley v. Fernie, 3 H. & C. 977; Kymer v. Suwercroft, 1 Camp. 112.

The legal presumption is, however, that the principal is liable although entries in the books of the third party may charge the agent. Meeker v. Claghorn, 44 N. Y. 349; Foster v. Persch, 68 N. Y. 400.

Where a seller takes the promissory note of the buyer for the goods, with knowledge that he is an agent, but without knowledge who is the principal, he is not debarred thereby from electing to make the principal his debtor. Merrill v. Kenyon, 48 Conn. 314; s. c., 40 Am. Rep. 174.

See also LIABILITY OF AGENTS TO THIRD PARTIES; also AUTHORITY OF AGENTS, which see also for liability of principal when agent exceeds his authority.

1. Hern v. Nichols, 1 Salk. 289; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518; s. c., 28 Am. Dec. 476; Davis v. Bemis, 40 N. Y. 453; Sandford v. Handy, 23 Wend. (N. Y.) 260; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Nat. Life Ins. Co. v. Minch., 5 Th. & C. (N. Y.) 545; Elwell v. Chamberlin, 31 N. Y. 611, 619; Weed v. Panama R. Co., 17 N. Y. 362; Griswold v. Haven, 25 N. Y. 595; Allerton v. Allerton, 50 N. Y. 670; Bennett v. Judson, 21 N. Y. 238; Crans v. Hunter, 28 N. Y. 389; Locke v. Stearns, 1 Metc. (Mass.) 560; White v. Sawyer, 16 Gray (Mass.), 586; Concord Bank v. Gregg, 14 N. H. 331; Scofield Rolling Mill Co. v. State, 54 Ga. 635; Lynn v. Baltimore, etc., R. Co., 60 Md. 404; s. c., 45 Am. Rep. 741; Tome v. Parkesburgh, etc., R. Co., 39 Md. 36; Peebles v. Patapsco Guano Co., 77 N. Car. 233; Reynolds v. Witte, 13 S. Car. 5; s. c., 36 Am. Rep. 678; Bowers v. Johnson, 18 Miss. 169; Lawrence v. Hand, 23 Miss. 103; Mundorff v. Wickersham, 63 Pa. St. 87; Eilenberger v. Prot. Mut. F. Ins. Co., 89 Pa. St. 464; Taggs v. Tenn.

Nat. Bank, 9 Heisk. (Tenn.) 479; Wolfe v. Pugh, 101 Ind. 293; Madison R. v. Norwich, 24 Ind. 457; Haskit v. Elliott, 58 Ind. 493; Law v. Grant, 37 Wis. 548; Crump v. U. S. Mining Co., 7 Gratt. (Va.) 352; s. c., 56 Am. Dec. 116; Reeves v. State Bank, 8 Ohio St. 465, 476; Bristol Knife Co. v. First Nat. Bank, 41 Conn. 421; Brokaw v. N. J. R. Co., 32 N. J. L. 328; Vance v. Erie R. Co., 32 N. J. L. 334; Upton v. Tribilcock, 91 U. S. 45; White v. Wabash, etc., R. Co., 64 Iowa, 281; Dougherty v. Wells, 7 Nev. 368.

An innocent vendor cannot be sued in tort for the fraud of his agent in effecting a sale. In such a case the vendee may rescind the contract and reclaim the money paid, and if not repaid may sue the vendor in *assumpsit* for it, or he may sue the agent for the deceit. Kennedy v. McKay, 43 N. J. L. 288; s. c., 39 Am. Rep. 581.

If an agent effects a sale by false representations or other fraud, without authority or knowledge of the principal, the latter is chargeable with such fraud in the same manner as if he had known or authorized it. Lynch v. Mercantile Trust Co., 18 Fed. Rep. 486; Law v. Grant, 37 Wis. 548; Bennett v. Judson, 21 N. Y. 238; Elwell v. Chamberlin, 31 N. Y. 611, 619; Rhoda v. Annis, 75 Me. 17; s. c., 46 Am. Rep. 354. Compare Bridges v. McClendon, 56 Ala. 327.

A person is not bound by a contract which he is induced to sign by representations of an agent made, while acting within the scope of his agency, as true of his own knowledge, but which prove to be false, although not known by the agent to be so; and the principal is bound by such representations, although he does not expressly authorize them or know that the agent is to make them. Jewett v. Carter, 132 Mass. 335; Locke v. Stearns, 1 Metc. (Mass.) 560; Kibbe v. Hamilton Ins. Co., 11 Gray (Mass.), 163.

*A fortiori* where the fraud or deceit was authorized by the principal. Peebles v. Patapsco Guano Co., 77 N. Car. 233; Brokaw v. N. J. R. Co., 32 N. J. L. 328; Vance v. Erie R. Co., 32 N. J. L. 334; Hunter v. Hudson River Iron & Machine Co., 20 Barb. (N. Y.) 493; Phelps

*Committed in Course of Employment.*—The deceit or fraud, to make the principal liable on it, must have been committed in the course of the agent's employment.<sup>1</sup>

*v. Wait*, 30 N. Y. 78; *Gass v. Coblens*, 43 Mo. 377; *Fogg v. Griffin*, 2 Allen (Mass.), 1; *Hewett v. Swift*, 2 Allen (Mass.), 420; *Severin v. Eddy*, 52 Ill. 189; *Carman v. Railr. Co.*, 4 Ohio St. 399; *Galena R. Co. v. Rac*, 18 Ill. 488; s. c., 68 Am. Dec. 574; *Hynes v. Jungren*, 8 Kans. 391.

Or where the principal has received a benefit from the fraudulent transaction. *Hewett v. Swift*, 3 Allen (Mass.), 420; *Bryant v. Rich*, 106 Mass. 180; *Atlantic Co. v. Merchants' Co.*, 10 Gray (Mass.), 532; *Cook v. Castner*, 9 Cush. (Mass.) 266; *Kibbe v. Ins. Co.*, 11 Gray (Mass.), 163; *Lane v. Black*, 21 W. Va. 617; *Morton v. Scull*, 23 Ark. 289; *Durst v. Burton*, 47 N. Y. 167; s. c., 2 Lans. (N. Y.) 137; *Smith v. Tracy*, 36 N. Y. 79; *Griswold v. Haven*, 25 N. Y. 595; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518; s. c., 28 Am. Dec. 476; *Woodward v. Webb*, 65 Pa. St. 254; *Fox v. N. Lib.*, 3 W. & S. (Pa.) 103; *Priester v. Angley*, 5 Rich. (S. Car.) 44; *Bank v. Bank of the State*, 13 Rich. (S. Car.) 291; *Exum v. Brister*, 35 Miss. 391; *Wallace v. Morgan*, 23 Ind. 399; *Evansville v. Baum*, 26 Ind. 70; *Veazie v. Williams*, 8 How. (U. S.) 138; *Doggett v. Emerson*, 3 Story (U. S.), 700; *Nicoll v. Am. Co.*, 3 Wood & M. (U. S.) 529.

Where one is induced to become surety on a promissory note by the representations of the secretary of a building association, the association cannot allege a want of authority in the secretary to make such representations when the surety makes defence on the terms of the agreement. The association cannot have the benefit of the security and at the same time repudiate the contract by means of which they obtained it. *Jones v. Nat. Building Assoc.*, 94 Pa. St. 215.

In a suit for damages against the principal for the tort of an agent, the plaintiff alleged, and testified, that he hired a horse to the agent, who was travelling about the country selling steam-engines in the interest of his principal (a manufacturing company), and that the horse was injured by misuse and overdriving. The defendant admitted the agency, but asked the court to instruct the jury that there was no evidence the agent had authority from the principal to hire horses, which was refused; *held*, no error. *Huntley v. Mathias*, 90 N. Car. 101; s. c., 47 Am. Rep. 516.

Where a member of a firm makes a settlement with an insurance company for loss by fire, which was procured by the fraud of an agent of the company, the firm must restore what was received under the settlement before bringing suit upon the policy. *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479.

Even where a principal takes no advantage of a fraud he cannot sue on a contract based on it. *Concord Bank v. Gregg*, 14 N. H. 331; *Wright v. Calhoun*, 19 Tex. 412; *Robinson v. Bealle*, 20 Ga. 275; *Cassard v. Hinmann*, 6 Bosw. (N. Y.) 8.

H., the owner of chattels, relying on the representations of R. that he was the agent of L., agreed to sell the same to L. on credit, and H., in the belief that R. was such agent, delivered the chattels to him, when in fact he was not such agent, nor had he authority to purchase for L., as he well knew. *Held*, that the property in the chattels did not pass from H., and that L., who bought the chattels of R. and converted them to his own use, without knowledge of the fraud, was liable to H. for their value; and the fact that R., at the time the chattels were delivered to him, paid H. part of the price agreed on, will make no difference, except as to the amount of recovery against L. *Hamet v. Letcher*, 37 Ohio St. 356; s. c., 41 Am. Rep. 519; citing *Moody v. Blake*, 117 Mass. 23; *Barker v. Dinsmore*, 72 Pa. St. 427; *Salts v. Everett*, 20 Wend. (N. Y.) 267; *Fawcett v. Osborn*, 32 Ill. 411; *Hardman v. Booth*, 1 H. & C. 803; *Higsons v. Burton*, 26 L. J. Ex. 342; *Kingsford v. Merry*, 1 H. & N. 503; *Hollins v. Fowler*, L. R. 7 Q. B. 616; affirmed, L. R. 7 App. 757; *In re Reed*, 3 Ch. D. 123; *Lickbarrow v. Mason*, 1 Smith's L. C. 2 pt. 1195; *Cundy v. Lindsay*, 3 App. Cas. 459; *Sanders v. Miller*, 28 Ohio St. 630. See *Benjamin on Sales*, §§ 433 *et seq.*

But one who obtains possession of property by deceit from one whom he is bound to know not to be the owner's agent cannot hold it as against the owner. *Rafferty v. Haldron*, 81\* Pa. St. 438.

1. *Wilson v. Peverly*, 2 N. H. 548; *Harris v. Nicholas*, 5 Munf. (Va.) 483; *McClenaghan v. Brock*, 5 Rich. L. (S. Car.) 17; *Brown v. Purviance*, 2 H. & G. (Md.) 316; *Fiske v. Framingham Co.*, 14 Pick. (Mass.) 491; *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274; *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122; *Rich-*

*Liable for Negligence of Agent.*—As a rule a principal is liable for the result of acts of negligence of his agents, when he is acting within the scope of his authority; but not when he is not acting within the scope of his employment.<sup>1</sup>

**14. Notice to Agent is Notice to Principal.**—In the relation of the principal to a third party the undisputed rule exists that notice to the agent is notice to the principal, if the agent comes to the knowledge of facts while he is acting for the principal.<sup>2</sup>

mond St. Co. v. Vanderbilt, 1 Hill (N. Y.), 480; Kerns v. Piper, 4 Watts (Pa.), 222; Repohar v. Wattson, 17 Pa. St. 365; Hannibal, etc., R. Co. v. Green, 68 Mo. 169; Dally v. Young, 3 Ill. App. 39.

The plaintiffs, who were engaged in business in the city of O. in this State, wrote a letter to one N., their salesman at Ogden, Utah Territory, authorizing him to draw on them for \$75. He placed a figure "1" before the figures "75," whereby the letter was changed to show authority to draw for \$175. The letter, as changed, he showed to one B., the hotel-keeper with whom he was stopping, and thereby induced him to indorse a draft on the plaintiff for \$150. The draft having been protested for non-acceptance, and paid by the indorsee, *held*, that he could recover against the plaintiffs to the extent of the authority of their salesman to draw on them. *Wilson v. Beardsley*, 30 N. Western Repr. (Neb.) 529.

So are the representations of a solicitor of subscriptions to the stock of a gravel-road company made before the organization of the company concerning the location of the road, and that the stock would not have to be paid for, not binding on the company; and their falsity is no defence as a failure of consideration or otherwise in an action by the company on the subscription of a person to whom such representations were made. *Miller v. Wildcat Gravel Road Co.*, 52 Ind. 51.

An agent intrusted with money to invest exacted usury, in the way of a *bonus* to himself, without knowledge of the principal. *Held*, that this did not constitute usury in the principal. *Condit v. Baldwin*, 21 N. Y. 219; s. c., 78 Am. Dec. 137. See *Smith v. Tracy*, 36 N. Y. 79; *Estevez v. Purdy*, 66 N. Y. 446; *Boylston v. Bain*, 90 Ill. 283. Compare *Olmosted v. New Engl. Mortgage, etc., Co.*, 11 Neb. 487.

The right of an agent to enter into an illegal contract will not ordinarily be presumed, and the contract is not obligatory on the principal and he may disaffirm it. *Arnot v. Pittston, etc., R. Co.*, 5 Th. & C. (N. Y.) 143.

Where a son had been in the habit of

receiving goods consigned to his father, and he orders goods to be shipped and charged to his father, and receives them from the carrier, the father will not be liable if the seller had any reason to believe that the son ordered the goods for his own use. *Stephenson v. Grim*, 100 Pa. St. 70.

1. *Weed v. Panama R. Co.*, 17 N. Y. 362; *Blackstock v. N. Y. & Erie R. Co.*, 20 N. Y. 48; *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill (N. Y.), 480; *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122; *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Chicago, etc., R. Co. v. Hallock*, 13 Ill. App. 643; *Marsh v. S. Car. R. Co.*, 56 Ga. 274; *Southwick v. Estes*, 7 Cush. (Mass.) 385; *Montague v. Boston, etc., R. Co.*, 124 Mass. 242; *Richoux v. Mayer*, 29 La. Ann. 828; *Brown v. Purviance*, 2 H. & G. (Md.) 316; *Penn., etc., Nav. Co. v. Hungerford*, 6 G. & J. (Md.) 291; *Pickens v. Diecker*, 21 Ohio St. 212; *Barber v. Britton*, 26 Vt. 112; *Harris v. Nicholas*, 5 Munf. (Vt.) 483; *Petersburgh v. Applegarth*, 28 Gratt. (Va.) 321; *Oliver v. Northern, etc., Trans. Co.*, 3 Oreg. 84; *Kerns v. Piper*, 4 Watts (Pa.), 222; *McClenaghan v. Brock*, 5 Rich. L. (S. Car.) 17; *Eastman v. Meredith*, 36 N. H. 284; s. c., 72 Am. Dec. 302; *Edgerly v. Concord*, 59 N. H. 341; *Wakefield v. Newport*, 60 N. H. 374; *Wilson v. Peverly*, 2 N. H. 548; *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468. See also MASTER AND SERVANT.

2. *Bank of U. S. v. Davis*, 2 Hill (N. Y.), 451; *Jackson v. Sharp*, 9 Johns. (N. Y.) 163; s. c., 6 Am. Dec. 267; *Jackson v. Winslow*, 9 Cow. (N. Y.) 13; *Hier v. Odell*, 18 Hun (N. Y.), 314; *Jackson v. Leek*, 19 Wend. (N. Y.) 339; *Fulton Bank v. Canal Co.*, 4 Paige (N. Y.), 127; *Nat. Life Ins. Co. v. Minch*, 53 N. Y. 144; *Miaghan v. Hartford Ins. Co.*, 24 Hun (N. Y.), 59; *Ward v. Warren*, 82 N. Y. 265; *Ingalls v. Morgan*, 10 N. Y. 178; *Bracken v. Miller*, 4 W. & S. (Pa.) 102; *Reed's Appeal*, 34 Pa. St. 207; *Philadelphia v. Lockhardt*, 73 Pa. St. 211; *Houseman v. Girard Assoc.*, 8 Pa. St. 286; *Sterling Bridge Co. v. Baker*, 75 Ill. 139; *Williams*



*v. Tatnall*, 29 Ill. 553; *Flower v. Ellwood*, 66 Ill. 438; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Mobile, etc., R. Co. v. Thomas*, 42 Ala. 672; *Farmer v. Willard*, 71 N. Car. 284; *Monroe v. Stulte*, 9 Ired. (N. Car.) 281; *Grandy v. Ferebee*, 68 N. Car. 356; *Owens v. Roberts*, 36 Wis. 258; *Gans v. St. Paul, etc., Ins. Co.*, 43 Wis. 108; *Union Gold Mining Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565; *Whitehead v. Wells*, 29 Ark. 99; *Suit v. Woodhall*, 113 Mass. 391; *Allen v. Poole*, 54 Miss. 323; *Saulsbury v. Wimberly*, 60 Ga. 78; *Memphis, etc., R. Co. v. Koch*, 28 Kans. 565; *Ross v. Houston*, 25 Miss. 591; s. c., 59 Am. Dec. 231; *Mass. L. Ins. Co. v. Eshelman*, 30 Ohio St. 647; *Slater v. Irwin*, 38 Iowa, 261; *Hovey v. Blanchard*, 13 N. H. 145; *Smith v. Water Com'rs*, 38 Conn. 208; *Pritchett v. Sessions*, 10 Rich. (S. Car.) 293; *Hill v. North*, 34 Vt. 604; *Sooy v. State*, 41 N. J. L. 394; *Covey v. Hannibal, etc., R. Co.*, 86 Mo. 635; *Chouteau v. Allen*, 70 Mo. 290; *Taylor v. Young*, 56 Mich. 285; *Grace v. Am. Cent. Ins. Co.*, 16 Blatch. (U. S.) 433; *Rogers v. Palmer*, 102 U. S. 263; *Hoover v. Wise*, 91 U. S. 308; *Flagg v. Mann*, 2 Sumn. (U. S.) 486; *Bowman v. Wathen*, 1 How. (U. S.) 196; *Astor v. Wells*, 4 Wheat. (U. S.) 466; *Mech. Bank v. Seton*, 1 Pet. (U. S.) 299.

The plaintiff signed an application for insurance, which was written by B., "an insurance broker," in the office of the defendant's agent. The defendant returned the application to its agent for further information as to the occupancy and ownership of the property insured. The agent handed it to B., requesting him "to go and get the reply." B. took it, saw the assured, and although he learned from him that he was only a conditional vendee in possession of the personal property, and the vendor the tenant of the store in which it was situated, wrote in it that the assured was both the owner and tenant. B. was neither appointed nor recognized as agent by the company, nor by its agent. *Held*, that the writing of the false statements, in legal significance, was the act of the agent; that the knowledge of B. was the knowledge of the company, and that it was estopped from claiming a forfeiture; that the defendant could not avoid its responsibilities by repudiating the acts of its agent, though done in part by a person employed by him. *Mullin v. Mut. Fire Ins. Co.*, 58 Vt. 113.

Where the statements made in an application for insurance were by the contract made a warranty by the assured,

but the company, by its agent, who had authority to take the risk, was on the premises when the application was made, and then viewed the property, and himself filled out the application, writing therein statements which he knew were not true, *held*, that the agent's knowledge should be imputed to the company, and that it was estopped from claiming that the representations in the application were not true. *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308.

If an agent has notice, at the time of his purchase for his principal, of the equitable rights of another, and of the claim of the latter to have previously purchased the subject-matter of the sale, this will be notice to the principal. *Whitney v. Burr*, 115 Ill. 289.

He who takes with notice of an equity takes subject to the equity. Notice is not necessarily positive information brought directly home, but any fact that would put an ordinarily prudent man on inquiry; and a party will be as much bound by notice given to his agent as if it was given to himself personally; and the fact that the agent may be unable to read and write will be immaterial. *Meier v. Blume*, 80 Mo. 179.

A policy of fire insurance upon a building was issued by defendant, loss if any payable to a mortgagee named. The policy contained a condition avoiding it in case of "increase of hazard" by the erection of neighboring buildings, but in a "mortgage clause" it was declared that the interest of the mortgagee would not be invalidated by any act or neglect of the mortgagor. The mortgagee, however, was required to notify the company of any increase of hazard which shall come to his knowledge. The policy provided for a renewal, but declared that "in case there shall have been any increase of hazard it must be made known to the company by the assured at the time of renewal, otherwise this policy shall be void." During the life of the original policy the insured erected a building near the one insured which increased the hazard. A loss occurred after the expiration of the original policy. In an action thereon a renewal was claimed by plaintiff. It appeared that the broker who acted on behalf of the insured, and the mortgagee, in making the alleged renewal agreement with the company, had knowledge at the time of the erection of the new building, but did not disclose the same. *Held*, that the knowledge of the agent was imputable to his principal, the mortgagee, and that his failure to disclose it avoided the policy, conceding

But notice to the agent to bind the principal must be within the scope of the agent's employment.<sup>1</sup>

Notice to an agent of any fact outside the scope of his agency will not affect the principal.<sup>2</sup>

**Corporations.**—The rule that a notice to the agent to bind the principal must be within the scope of his employment, and while

there was a valid renewal agreement. *Cole v. Germania Ins. Co.*, 99 N. Y. 36.

Notice to an agent before the agency is begun, or after it has terminated, will not ordinarily affect the principal. *Anderson v. Volmer*, 83 Mo. 403; *Hayward v. Nat. F. Ins. Co.*, 52 Mo. 188; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Houseman v. Building Assoc.*, 81 Pa. St. 256; *Hood v. Fahnestock*, 8 Watts (Pa.), 489; s. c., 34 Am. Dec. 489; *Smith's Appeal*, 47 Pa. St. 128; *Plympton v. Preston*, 4 La. Ann. 356; *Ben Franklin's Ins. Co. v. Weary*, 4 Ill. App. 74; *Day v. Wamsley*, 33 Ind. 145; *Blumenthal v. Brainerd*, 38 Vt. 402; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; *Boardman v. Taylor*, 66 Ga. 638; *Verger v. Barz*, 56 Iowa, 77; *McCormick v. Wheeler*, 36 Ill. 114; *Pepper v. George*, 51 Ala. 190; *Pringle v. Dunn*, 37 Wis. 451; *Crane v. City Ins. Co.*, 3 Fed. Repr. 558; s. c., 2 Flipp. (U. S.) 576.

A notice to a principal cannot be established by the declarations of an agent after the transactions in which he was agent have been closed and completed. *Greer v. Higgins*, 8 Kans. 519.

1. *Nat. Life Ins. Co. v. Minch*, 53 N. Y. 144; *Ward v. Warren*, 82 N. Y. 265; *Hier v. Odell*, 18 Hun (N. Y.), 314; *Greentree v. Rosenstock*, 61 N. Y. 583; *Owens v. Roberts*, 36 Wis. 258; *Congar v. Chicago, etc.*, R. Co., 24 Wis. 157; *Pringle v. Dunn*, 37 Wis. 449; *Suit v. Woodhall*, 113 Mass. 391; *Foster v. Boston*, 127 Mass. 290; *Farrington v. Woodward*, 82 Pa. St. 259; *Bracken v. Miller*, 4 W. & S. (Pa.) 102; *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 342; *Tagg v. Tenn. Nat. Bank*, 9 Heisk. (Tenn.) 479; *Hovey v. Blanchard*, 13 N. H. 145; *Ross v. Houston*, 25 Miss. 591; s. c., 59 Am. Dec. 231; *Adam's Expr. Co. v. Trego*, 35 Md. 47; *Mobile, etc., R. Co. v. Thomas*, 42 Ala. 672; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Smith v. Water Com'rs*, 38 Conn. 208; *Flower v. Elwood*, 66 Ill. 438; *Slater v. Irwin*, 38 Iowa, 261; *The Distilled Spirits*, 11 Wall. (U. S.) 356; *Rogers v. Palmer*, 102 U. S. 263.

Notice to a son that his father's cattle has been seized is notice to the father

where the son has authority to institute an action of replevin. *Campan v. Konan*, 39 Mich. 362.

Where an agent is clothed with ample powers to buy and sell real estate, institute and defend suits in the name of his principal, actual notice to him in relation to the subject-matter of the agency is actual notice to the principal, and is a valid defence on a motion to set aside a judgment rendered by default cancelling a tax deed. *Merriam v. Calhoun*, 15 Neb. 569.

Notice to an agent of a bank intrusted with the management of its business is notice to the corporation in transactions conducted by such agent acting for the corporation, in the scope of his authority, whether the knowledge of the agent was acquired in the course of the particular dealing or on some prior occasion. *Cragie v. Hadley*, 99 N. Y. 131.

Notice to the agent is notice to the principal when the latter if acting for himself would have received notice of the matters known to the agent. *Sovy v. State*, 41 N. J. L. 394.

2. *Roach v. Karr*, 18 Kans. 329; *Mound City L. I. Co. v. Twining*, 19 Kans. 349; *Adams Expr. Co. v. Trego*, 35 Md. 47; *Congar v. Chicago, etc., R. Co.*, 24 Wis. 157; *Wells v. Am. Expr. Co.*, 44 Wis. 342; *Smith v. Water Com'rs*, 38 Conn. 208.

Notice to a depot agent of an assignment of a chose of action is not notice to the company. *Lambreth v. Clarke*, 10 Heisk. (Tenn.) 32.

Notice of an auctioneer of the pendency of a suit against his principal respecting the property to be sold by him is not notice to the principal. *Hinton v. Citizens' Ins. Co.*, 63 Ala. 488.

The collection of a judgment which a third party had obtained against the agent was not a matter pertaining to the agency; and upon execution on such judgment, notice served upon the agent only, in proceedings whereby it was sought to hold the principal as garnishee, was no notice to the principal. *Upton Mfg. Co. v. Stewart*, 61 Iowa, 209.

Knowledge acquired by an attorney while acting for one client will not affect another client for whom he is acting a.

acting within the range of his authority, applies specially to agents of corporations.<sup>1</sup>

*To whom Notice must be given.*—In the case of notice to directors of a bank it has been held that the notice must have been given officially to the whole board or to a majority of them acting in the transaction affected by the notice; but it has also been held that notice of facts to one director acting in such a transaction is notice to the corporation.<sup>2</sup>

*When Notice must be given to Agent to bind Principal.*—Some authorities hold that a notice which will bind the principal must have been given to the agent in the particular transaction to which the notice relates;<sup>3</sup> others, that knowledge of the agent is knowledge of the principal, no matter when and how the knowledge came to the agent, as long as it was in the agent's mind at the time of the transaction affected by it.<sup>4</sup>

the same time in a different case. *Ford v. French*, 72 Mo. 250.

1. *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299; *Lyman v. Bank*, 12 How. (U. S.) 225; *Porter v. Bank of Rutland*, 19 Vt. 410; *New Hampshire Sav. Bank v. Downing*, 16 N. H. 187; *Housatonic Bank v. Martin*, 1 Metc. (Mass.) 294; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24, 31; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; *Frost v. Belmont*, 6 Allen (Mass.), 152; *Weld v. Gorham*, 10 Mass 366; *West Boston Sav. Bank v. Thompson*, 124 Mass. 506; *Farmers' Bank v. Payne*, 25 Conn. 444; s. c., 68 Am. Dec. 362; *Bank of New Milford v. Milford*, 36 Conn. 93; *Smith v. Water Com'rs*, 38 Conn. 208; *Willard v. Buckingham*, 36 Conn. 395; *Trenton Bank v. Woodruff*, 2 N. J. Eq. 117; *Custer v. Bank*, 9 Pa. St. 27; *Bank v. Whitehead*, 10 Watts (Pa.), 397; *Bank of U. S. v. Davis*, 2 Hill (N. Y.), 451; *Fulton Bank v. Canal Co.*, 4 Paige (N. Y.), 127; *New Hope Bridge Co. v. Phoenix Bank*, 3 N. Y. 156; *Westfield Bank v. Cornen*, 37 N. Y. 320; *Atlantic Bank v. Savery*, 82 N. Y. 291; *Second Nat. Bank v. Curren*, 36 Iowa, 555; *Louisiana Bank v. Senecal*, 13 La. 525; *Branch Bank v. Steele*, 10 Ala. 915; *Goodloe v. Godley*, 21 Miss. 233; s. c., 51 Am. Dec. 159; *Harriman v. Queen Ins. Co.*, 49 Wis. 71.

Knowledge of a person occupying two positions,—one the treasurer of a company, and the other the cashier of a bank,—which knowledge he acquires in the capacity of treasurer, cannot be imputed to the bank, unless revealed by him to some of the officers thereof. *Wilson v. Second Nat. Bank*, 7 Atl. Repr. (Pa.) 145.

Where a bank bought a note upon the representations of an attorney who in-

formed the bank of all facts essential to its knowledge, and who knew that the note was not held by his principal in his own right but only in trust, the bank was presumed to have known what it could so easily have ascertained. *Smith v. Ayer*, 101 U. S. 320.

2. *Louisiana State Bank v. Senecal*, 13 La. 525; *Housatonic Bank v. Martin*, 1 Metc. (Mass.) 294; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; *Hal-lowell, etc., Bank v. Hamlin*, 14 Mass. 180; *Nat. Sec. Bank v. Cushman*, 121 Mass. 490; *Nat. Bank v. Norton*, 1 Hill (N. Y.), 572; *Bank of U. S. v. Davis*, 2 Hill (N. Y.), 451; *North River Bank v. Aymar*, 3 Hill (N. Y.), 262; *Davis Improved, etc., Co. v. Davis Wrought Iron, etc., Co.*, 20 Fed. Repr. 699; *Fairfield Sav. Bank v. Chase*, 72 Me. 226; s. c., 39 Am. Rep. 319.

3. *Farmers' Bank v. Payne*, 25 Conn. 444; s. c., 68 Am. Dec. 362; *Bank of U. S. v. Davis*, 2 Hill (N. Y.), 451; *Westfield Bank v. Cornen*, 37 N. Y. 320; *Jackson v. Sharp*, 9 Johns. (N. Y.) 163; s. c., 6 Am. Dec. 267; *Hood v. Fahnestock*, 8 Watts (Pa.), 489; *Bracken v. Miller*, 4 W. & S. (Pa.) 102; *Winchester v. Railroad*, 4 Md. 231; *Keenan v. Ins. Co.*, 12 Iowa, 126; *Second Nat. Bank v. Curren*, 36 Iowa, 555; *McCormick v. Wheeler*, 36 Ill. 114; *Congar v. Chicago, etc., R. Co.*, 24 Wis. 157; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160. And see *Lawrence v. Tucker*, 7 Greenl. (Me.) 195.

4. *The Distilled Spirits*, 11 Wall. (U. S.) 356; *Blumenthal v. Brainerd*, 38 Vt. 402; *Hart v. Farmers' Bank*, 33 Vt. 252; *Hayward v. Nat. Ins. Co.*, 52 Mo. 181; *Chouteau v. Allen*, 70 Mo. 290; *Hovey v. Blanchard*, 13 N. H. 145; *Patten v. Ins. Co.*, 40 N. H. 375; *Mullin v. Mut. Fire Ins. Co.*, 58 Vt. 113; *Lebanon Sav.*

**Collusion.**—If an agent should collude with a third party to defraud the principal, the latter will not be responsible for knowledge of the agent in relation to such fraud.<sup>1</sup>

While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating.<sup>2</sup>

**15. Rights of Principals against Third Parties.**—*May Sue Third Parties on Contracts of Agent.*—Those acts or contracts of an agent which render the principal liable to third parties impose on the third parties themselves a reciprocal obligation to the principal; and as the principal is liable to the burden of such acts or contracts, whether the agent had authority originally or his acts have been duly ratified, so he is entitled to the rights and benefits arising from such contracts, and may enforce these rights by action. And it does not matter whether the principal is disclosed or not,

*Bank v. Hollenbeck*, 29 Minn. 322; *Fuller v. Atwood*, 14 R. I. 293; *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Ingalls v. Morgan*, 10 N. Y. 178; *Flower v. Elwood*, 66 Ill. 438; *Williams v. Tattall*, 29 Ind. 553; *Wiley v. Knight*, 27 Ala. 336; *Dunlap v. Wilson*, 32 Ill. 517; *Pritchett v. Sessions*, 10 Rich. (S. Car.) 293; *Tagg v. Tenn. Nat. Bank*, 9 Heisk. (Tenn.) 479; *Fairfield Sav. Bank v. Chase*, 72 Me. 226; s. c., 39 Am. Rep. 319; *Curtis v. Cisna*, 7 Biss. (U. S.) 260; *Dresser v. Norwood*, 17 C. B. N. S. 466; 32 L. J. C. P. 201.

1. *Nat. Life Ins. Co. v. Minch*, 53 N. Y. 144.

And where an officer of a corporation in his private capacity sells land to the corporation, he must be held not to represent them in the transaction so as to charge the corporation with the knowledge he may possess of facts derogatory to the title of the land and which he has not communicated to them. As such he is a stranger to the corporation. *Barnes v. Trenton Gas-light Co.*, 27 N. J. Eq. 33.

Where the same person is an officer of two corporations, and he transfers securities issued by one to the other, with knowledge that the securities are subject to an infirmity which renders them invalid in any hands but those of a *bona-fide* holder for value, his knowledge is not the knowledge of the transferee. *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158.

2. *Kennedy v. Green*, 3 Myl. & K. 699; *Cave v. Cave*, 15 Ch. D. 639; *In re European Bank*, L. R. 5 Ch. 358; *In re Marseilles Extension Railway*, L. R. 7 Ch. 161; *Atlantic National Bank v. Harris*, 118 Mass. 147; *Loring v. Brodie*, 134 Mass. 453.

A, to whom B was indebted, advised C to lend money to B on the security of a mortgage of personal property, and acted as C's agent in completing the transaction. With the money thus obtained B paid A the debt he owed him. Both A and B acted in fraud, but C had no knowledge of the fraud. It was held that the knowledge of A was not in law imputable to C, although A had acted for C in the negotiation. *Dillaway v. Butler*, 135 Mass. 479.

A shipped a cargo of sugar to B, and gave him authority to sell the same. The bill of lading recited that the shipment was by order of B, and that the sugar was deliverable to his order, and made no mention of any agency. B indorsed the bill of lading, and delivered it to a bank of which he was a director, and pledged the cargo to the bank as security for a loan by the bank to him. This loan was approved by the board of directors, at a meeting at which B was present. *Held*, that B's knowledge of the fraud was not imputable to the bank; and that an action by A against the bank, for the conversion of the sugar, could not be maintained. *Innerarity v. Merchants' National Bank*, 139 Mass. 332.

nor that the agent in the transaction was considered to be the principal.<sup>1</sup>

1. Conklin v. Leeds, 58 Ill. 178; War-  
der v. White, 14 Ill. App. 50; Machias  
Hotel Co. v. Coyle, 35 Me. 405; Frazier  
v. Erie Bank, 8 W. & S. (Pa.) 18; Chil-  
ders v. Bowen, 68 Ala. 221; Kelley v.  
Munson, 7 Mass. 319; Bird v. Daggett,  
97 Mass. 494; Nat. Life Ins. Co. v. Allen,  
116 Mass. 398; Lamson Mfg. Co. v. Rus-  
sell, 112 Mass. 387; Everett v. Drew, 129  
Mass. 150; Stoddard v. Ham, 129 Mass.  
383; Willard v. Buckingham, 36 Conn.  
395; Weed v. Saratoga, etc., R. Co., 19  
Wend. (N. Y.) 534; Leverick v. Meigs, 1  
Cow. (N. Y.) 648; Taintor v. Prender-  
gast, 3 Hill (N. Y.), 72; Elwell v. Cham-  
berlin, 31 N. Y. 611; New York & N. H.  
R. Co. v. Schuyler, 34 N. Y. 30; Bridge  
v. Niagara Ins. Co., 1 Hill (N. Y.) 247;  
Hicks v. Whitmore, 12 Wend. (N. Y.) 548;  
Nicoll v. Burke, 78 N. Y. 581; Bryant v.  
Wells, 56 N. H. 153; State of Wisconsin  
v. Torinus, 26 Minn. 1; Williams v.  
Winchester, 19 Martin (La.), 22; Brewster  
v. Saul, 8 La. 296; De Voss v. Richmond,  
18 Gratt. (Va.) 338; Gage v. Stimson, 26  
Minn. 64; Stonewall Mfg. Co. v. Peek,  
63 Miss. 342; Walter v. Ross, 2 Wash.  
(U. S.) 283; United States v. Parmele, 1  
Paine (U. S.), 252; Wilson v. Codman, 3  
Cranch. (U. S.) 193.

Where a public officer knowingly makes  
a false record, and a person is injured in  
a transaction by reason of the fact that  
his agent, charged with the whole busi-  
ness pertaining to the transaction, is de-  
ceived by the record, the law will, in the  
absence of any evidence to the contrary,  
treat the principal as deceived, and allow  
him to recover his damages in an action  
upon the official bond of the officer. Per-  
kins v. Evans, 61 Iowa, 35.

As a party is liable for the acts of his  
agent, so he is entitled to the benefit of  
his agent's knowledge of facts justifying  
the bringing of suit. Stansell v. Cleve-  
land, 64 Tex. 660.

When an agent makes a contract for  
the benefit of his principal, whose name  
is not disclosed, the principal may sue on  
it in his own name. Bell v. Reynolds, 78  
Ala. 511; Baltimore Coal-tar, etc., Co. v.  
Fletcher, 61 Md. 288.

Although a third party, as by giving  
exclusive credit to or receiving exclusive  
credit from the agent, may estop himself  
from suing the principal, this does not  
prevent the principal from suing on con-  
tracts so entered into. Graham v. Duck-  
well, 8 Bush (Ky.), 12; Woodruff v.  
McGehee, 30 Ga. 158; Foster v. Smith, 2

Cold. (Tenn.) 474; Conklin v. Leeds, 58  
Ill. 178; Barry v. Page, 10 Gray (Mass.).  
398; White v. Owen, 12 Vt. 361. *Com-  
pare* Roosevelt v. Doherty, 129 Mass.  
301; s. c., 37 Am. Rep. 356, where it was  
held that if a factor, under an entire con-  
tract for a gross sum, sells goods some  
of which belong to himself and some to  
his principal, the principal cannot main-  
tain an action against the purchaser for  
the value of his goods.

A broker, who was not intrusted with  
the possession of the property con-  
tracted in his own name to sell the same  
to a vendee, who had no knowledge that  
the broker was not the real owner, but  
dealt with him as such. The owners,  
without any knowledge that the broker  
had contracted, in his own name, and  
without any conduct on their part cloth-  
ing the broker with authority to receive  
payment for them, or any possession,  
actual or constructive, of the property,  
delivered the same to the vendee. *Held*,  
payment by the purchaser to the broker,  
under such circumstances, is not a bar to  
the right of recovery by the owner.  
Crosby v. Hill, 39 Ohio St. 100.

Notes payable to the order of an agent  
in the transaction, or transferred to him,  
and mortgages to secure them, are the  
property of the principal, and are trans-  
ferable by delivery of the principal with-  
out indorsement of the agent; and the  
transferee may sue in equity in his own  
name to foreclose the mortgage and col-  
lect the debts. Caldwell v. Meshew, 44  
Ark. 564.

Where an authorized agent settles an  
account and gives an order on third par-  
ties, acceptance and payment by them  
binds the party liable on the account;  
but if it was not authorized and was not  
made with a view of enabling the creditor  
to get his pay or a promise to pay from  
the debtor, he is not bound by it. Mink  
v. Morrison, 42 Mich. 567.

In cases where either the principal or  
the agent may sue on a contract entered  
into by the agent, the right of the prin-  
cipal is paramount to the right of the  
agent. Sadler v. Leigh, 4 Camp. 195;  
Taintor v. Prendergast, 3 Hill (N. Y.),  
72.

Agents and principals are not in privity  
with each other in respect to property  
rights, and the principal is not concluded  
in that regard by the judgment in a suit  
brought against his agent. Nor does it  
make any difference that in such suit the

*How Modified.*—This right of the principal is affected and modified to the extent of his responsibility for the acts of his agent, as for declarations, misrepresentations, concealments, and fraud generally of the agent while acting within the scope of his authority.<sup>1</sup>

*Subject to Equities.*—And it is also modified in cases where the agent has been allowed to contract as principal with the third party without notice. In such a case a principal when he takes advantage of the agent's contract must do so subject to all equities and rights of which the other contracting party might avail himself in the transaction as against the agent, assuming the latter to have been a principal. The buyer is to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the real contracting party; and is entitled to the same defence, payment, or set-off as he was entitled to at that time against the agent, the apparent principal, notwithstanding that the agent, though intrusted with the goods, was under an agreement with his principal not to sell in his own name.<sup>2</sup>

principal was the agent's attorney. *Warner v. Comstock*, 55 Mich. 615.

But when in a contract of sale the agent has a lien upon the subject-matter of the contract or its proceeds, exceeding or equal to the value, the right of the agent will be paramount to the right of the principal. *Hudson v. Granger*, 5 B. & Ald. 27.

This rule does not apply to contracts under seal or negotiable instruments signed by the agent in his own name, although acting for a principal. *Briggs v. Partridge*, 64 N. Y. 357; *Spencer v. Field*, 10 Wend. (N. Y.) 57; *Dubois v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68; s. c., 24 Am. Dec. 121; *Mahoney v. McLean*, 26 Minn. 415; *Potts v. Rider*, 3 Ohio, 70; *Hopkins v. Mehaffy*, 11 S. & R. (Pa.) 126; *New Eng. Mar. Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56; *Andrews v. Estes*, 11 Me. 267; *Chandler v. Coe*, 54 N. H. 561; *Clarke v. Courtney*, 5 Pet. (U. S.) 319; *Beckham v. Drake*, 9 M. & W. 79. Compare *Beardsley v. Duntley*, 69 N. Y. 577.

1. *Morton v. Scull*, 23 Ark. 289; *Demeritt v. Meserne*, 39 N. H. 521; *Madison, etc., R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457; *Mutual Benefit Ins. Co. v. Cannon*, 48 Ind. 264; *Southern Expr. Co. v. Palmer*, 48 Ga. 85; *Brown v. Hartford F. Ins. Co.*, 117 Mass. 479; *Law v. Grant*, 37 Wis. 548; *Barber v. Britton*, 26 Vt. 112; *Crump v. U. S. Mining Co.*, 7 Gratt. (Va.) 352; s. c., 56 Am. Dec. 116; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Elwell v. Chamberlin*, 31 N. Y. 611, 619; *Craus v. Hunter*, 28 N. Y. 389;

*Bennett v. Judson*, 21 N. Y. 238; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *North River Bank v. Aymar*, 3 Hill (N. Y.), 262.

An agent's talk with strangers concerning past transactions of his employer is not *res gestæ* either in point of time or in relation to parties, and, being of no account as proof, cannot affect his principal's rights under a contract on which the transactions were based. *Benner v. Feige*, 51 Mich. 568.

Where the circumstances are, however, of such a character as to put a third party on the inquiry about the representations of the agent, the principal will not be held liable for such representations, and the burden of proof is on the third party to show that he acted in entire good faith and had no reason to doubt the representations of the agent. *Wheelan v. McCreary*, 64 Ala. 319; *Citizens' Sav. Bank v. Hart*, 32 La. Ann. 22.

2. *Traub v. Milliken*, 57 Me. 63; *Koch v. Willi*, 63 Ill. 144; *Conklin v. Leeds*, 58 Ill. 178; *Saladin v. Mitchell*, 45 Ill. 79; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Locke v. Lewis*, 124 Mass. 1, 7; *Kingsley v. Davis*, 104 Mass. 178; *Lime Rock Bank v. Plimpton*, 17 Pick. (Mass.) 159; *Bryant v. Wells*, 56 N. H. 152; *Foster v. Smith*, 2 Cold. (Tenn.) 474; *Roach v. Turk*, 9 Heisk. (Tenn.) 708; *Miller v. Sullivan*, 39 Ohio St. 79; *Woodruff v. McGehee*, 30 Ga. 158; *Peel v. Shepherd*, 58 Ga. 365; *Stewart v. Woodward*, 50 Vt. 78; *Culver v. Bigelow*, 43 Vt. 249; *Miller v. Lea*, 35 Md. 396; s. c., 6 Am. Rep. 417; *Merrick's Est.*, 5 W. & S. (Pa.) 9; *Lock's Appeal*, 72 Pa. St. 491; *Taintor v. Pren-*

Where an agent is known to act in behalf of a principal no such claim can be set off.<sup>1</sup>

dergast, 3 Hill (N. Y.), 72; Wheeler & W. Mfg. Co. v. Givan, 65 Mo. 89; Leeds v. Mar. Ins. Co. 6 Wheat. (U. S.) 565; Fisher v. Kempton, 7 M. G. & S. 687; George v. Claggett, 7 T. Rep. 359; Isberg v. Bowden, 8 Exch. 852.

Where a third party acts under a misapprehension, not brought about by the principal, the principle does not apply. Brown v. Morris, 83 N. Car. 251.

Property purchased by an agent in his own name for an undisclosed principal cannot be seized for the debt of the agent unless his creditor has been misled by appearances or the conduct of the parties into giving him credit upon a false basis. Reed v. McIlroy, 44 Ark. 346. See Loomis v. Barker, 69 Ill. 360.

Where a purchaser of property from the agent of an undisclosed principal treats the agent as owner, having no good reason to know that he is acting as agent, and pays the whole or part of the purchase-money to him, this will be a good defence to an action by the principal. Eclipse Wind Mill Co. v. Thorson, 46 Iowa, 181; Renard v. Turner, 42 Ala. 117.

Unless such payments are made after notice by the principal not to pay the agent. Frazier v. Erie Bank, 8 W. & S. (Pa.) 18; Corlies v. Cumming, 6 Cow. (N. Y.) 181; Clark v. Smith, 88 Ill. 298; O'Connor v. Arnold, 53 Ind. 203.

Where a principal allowed a clerk who had entire control of the store to hold himself out as the owner, this will not give a creditor of the clerk a right to attach and sell the store for a debt contracted before the commencement of the agency. Benner v. Michel, 23 La. Ann. 489.

1. Ladd v. Arkell, 40 N. Y. Super. Ct. 150; Wright v. Cabot, 47 N. Y. Super. Ct. 229; Miller v. Lea, 35 Md. 396; s. c., 6 Am. Rep. 417; Ilsey v. Merriam, 7 Cush. (Mass.) 242; Graham v. Duckwall, 8 Bush (Ky.), 12; Frame v. William Penn Coal Co., 97 Pa. St. 309; Saladin v. Mitchell, 45 Ill. 79; Hurlburt v. Pac. Ins. Co., 2 Sumner (U. S.), 471; Semenza v. Brinsley, 18 C. B. N. S. 467.

If an agent appointed to collect a debt is indebted to the debtor, the latter cannot offset against the debt due from him to the principal claims against the agent. Wilson v. Codman, 3 Cranch. (U. S.) 193, 204.

Where a broker sells goods without disclosing the name of his principal, inas-

much as he acts beyond the scope of his authority, the buyer cannot set off a debt due from the broker to him against the demand for the goods made by the principal. Evans v. Waln, 71 Pa. St. 69; Graham v. Duckwall, 8 Bush (Ky.), 12; Baring v. Corrie, 2 B. & Ald. 143.

A party who is authorized to sell goods for another under a written contract not recorded, and is bound by the terms thereof to turn over the proceeds, whether in cash or in notes, to his principal, and who is after certain specified dates to become liable for any unsold goods, does not prior to that date hold the goods under a conditional sale; nor can a purchaser insist upon an offset of any claim he may hold against the agent. Conable v. Lynch, 45 Iowa, 84.

A woman doing business, with her husband as agent, authorized him to sell certain notes belonging to her in order to raise money to use in the business. He indorsed the notes as agent, and then sold them to a customer to whom he was individually indebted, and without his wife's permission he allowed the purchaser to apply part of the purchase-price upon his debt. Held, (1) that the indorsement was notice enough to put the purchaser on inquiry as to his authority to make such application; (2) that in an action by the wife against the purchaser to recover back the money so applied, a contract between the husband and the purchaser, with which the wife was not shown to be connected and which provided for the payment of the husband's debt by allowances in transactions with him in the course of the wife's business, was wholly irrelevant to the issue. The agent could not charge his wife's business with this debt without showing her assent to this arrangement; and if he could, this application of money was not an allowance within the terms of the contract. McBain v. Seligman, 58 Mich. 204.

From 1871 until April 1, 1875, P. was engaged in manufacturing glassware under the name of the L. Glass Co. April 1, 1875, T. took possession of the glassworks under a mortgage from P., and appointed him his agent. From that time T. carried on the business under the name of the L. Glass Co. In 1877 P. told one S., the plaintiff's agent, that if he would secure an order for the manufacture of bottles by the L. Glass Co., the plaintiff's note against him should be paid out of the pro-

If the character of the agent is equivocal, if he is known to be in the habit of selling sometimes as principal and sometimes as agent, a purchaser of the agent is bound to inquire in what character he acts in the transaction; and if he makes no inquiry and it should turn out that he has bought of an undisclosed principal, he will be denied the benefit of a set-off.<sup>1</sup>

*May Recover Mispaid Money.*—Where a man pays money by his agent which ought not to have been paid, either the agent or the principal may bring an action to recover it back.<sup>2</sup>

*Principal may Follow his Property.*—Where a principal has been defrauded by his agent, as by an illegal sale, the principal may follow and recover his property or the proceeds thereof, even in the hands of third parties, unless such party be a *bona-fide* purchaser for value and without notice.<sup>3</sup>

ceeds of the order. S. did not know that T. was carrying on the business, and he did not know of P.'s promise to the plaintiff, and had never authorized P. to pay his private debts from the proceeds of the business. One W. claimed the funds by virtue of a draft from P. as agent of T. *Held*, the fact that P. agreed to pay this debt from the proceeds of goods sold the trustees can make no difference. T., to whom the goods belonged, gave P. no authority to make such an agreement, and he had no knowledge that he did so. P.'s unauthorized agreement could not change the title to the goods which he sold the trustees. *Rice v. Glass Co.*, 60 N. H. 195.

1. *Miller v. Lea*, 35 Md. 396; s. c., 6 Am. Rep. 417; *Stewart v. Woodward*, 50 Vt. 78; and see *Mitchell v. Dall*, 2 Harris. & G. (Md.) 159; *Evans v. Waln*, 71 Pa. St. 69; *Voss v. Robertson*, 46 Ala. 483; *Richardson v. Farmer*, 36 Mo. 35; *Hurlbut v. Pac. Ins. Co.*, 2 Sumn. (U. S.) 471; *Boyson v. Coles*, 6 M. & S. 14.

2. *Farmers', etc., Bank v. King*, 57 Pa. St. 202; *Sheffer v. Montgomery*, 65 Pa. St. 329; *United States v. Bartlett*, Dav. (U. S.) 9.

3. *Conard v. Atl. Ins. Co.*, 1 Pet. (U. S.) 386; *Hourquebie v. Girard*, 2 Wash. (U. S.) 212; *Dow v. Berry*, 18 Fed. Repr. 121; *Ill. Trust & Sav. Bank v. First Nat. Bank*, 15 Fed. Repr. 858; *South Park Comm'rs. v. Kerr*, 13 Fed. Repr. 502; *German Sav. Inst. v. Adae*, 8 Fed. Repr. 106; *In re Jordan*, 2 Fed. Repr. 319; *Veil v. Mitchell*, 4 Wash. (U. S.) 105; *United States v. State Bank*, 96 U. S. 30; *Riley v. Wheeler*, 44 Vt. 189; *Thompson v. Perkins*, 3 Mason (U. S.), 232; *Le Breton v. Pierce*, 2 Allen (Mass.), 8; *Chesterfield Man. Co. v. Dehon*, 5 Pick. (Mass.) 7; *Kelley v. Munson*,

7 Mass. 319; *Kingman v. Pierce*, 17 Mass. 247; *Farmers', etc., Bank v. King*, 57 Pa. St. 202; *Sheffer v. Montgomery*, 65 Pa. St. 329; *Frazier v. Erie Bank*, 8 W. & S. (Pa.) 18; *Green v. Haskell*, 5 R. I. 447; *Thompson v. Barnum*, 49 Iowa, 392; *Bertholf v. Quinlan*, 68 Ill. 297; *Norris v. Taylor*, 49 Ill. 17; *Hall v. Sprigg*, 7 Martin (La.), 245; *Boyd v. McLean*, 1 John Ch. (N. Y.) 582; *Meiggs v. Meiggs*, 15 Hun (N. Y.), 453; *Burnham v. Holt*, 14 N. H. 367; *Hill v. Coolidge*, 33 Ark. 621; *Atkinson v. Ward*, 2 South W. Repr. (Ark.) 77; *Arnold v. Robins*, 5 Atl. Repr. (N. J.) 173; *Riehl v. Evansville Foundry Co.*, 3 N. E. Repr. (Ind.) 633; *Third Nat. Bank v. Stillwater Gas Co.*, 30 N. W. Repr. (Minn.) 440; *Neely v. Rood*, 19 N. W. Repr. (Mich.) 920; *Peak v. Ellicott*, 1 Pac. Repr. (Kans.) 499.

Or unless it is so mixed with other property that it can no more be distinguished. *Conard v. Atl. Ins. Co.*, 1 Pet. (U. S.) 386.

The relation between a commission agent for the sale of goods and his principal is fiduciary; and in the absence of an express agreement or one implied by the course of business or dealing between them, giving the former the right to appropriate to his own use the proceeds of sales of his principal's goods, such proceeds belong to the principal, subject to the lien of the agent for commissions, advances, and other charges, and the principal may follow and reclaim them so long as the identity is not lost, subject to the rights of a *bona-fide* purchaser for value.

Where a firm of commission merchants which was insolvent, for the purpose of protecting its principals opened a bank account in the name of the firm, with the word "agent" added, the bank



*For Torts.*—A principal has a right of action against third parties for torts committed either alone or in collusion with the agent.<sup>1</sup>

**16. Rights of Agent against Principal.—Lien.**—In cases of agency there generally exists a particular right of lien in the agent for all his commissions, expenditures, advances, and services in and about the property or thing intrusted to his agency, whenever they were proper or necessary or incident thereto.<sup>2</sup>

having knowledge of such purpose, and deposited to the credit of that account the proceeds of sales of goods of a principal, and on settlement gave to him a check for the balance belonging to him, *held*, that the bank had no right to charge against the account an individual debt of the firm, even with its consent. Also *held*, that the right of the principal was not affected by the fact that the agents used the specific proceeds of the sales and deposited other moneys to make up the amount so used; that such deposits, being substituted for the original proceeds, became impressed with the trust, and subject to the same equities. Also *held*, it was immaterial that the proceeds of sales of goods belonging to other principals were deposited in the same account; that, in the absence of proof to the contrary, the presumption was that the fund was adequate to protect all interests, and the check operated as a setting apart of so much to satisfy the claim of the principal to whom it was delivered. *Baker v. N. Y. Nat. Exch. Bank*, 100 N. Y. 31.

It can make no difference whether the conversion is made at the time of the contract of purchase or afterwards. So long as the rights of innocent purchasers have not intervened, the only question is the identity of the trust fund. *Preston v. McMillan*, 58 Ala. 84; *Lehman v. Lewis*, 62 Ala. 129; *Burks v. Burks*, 7 Baxt. (Tenn.) 353; *Turner v. Pettigrew*, 6 Humph. (Tenn.) 438; *Haines v. Haines*, 54 Ill. 74; *Dyer v. Jacoway*, 42 Ark. 186.

Where a factor keeps the funds arising from his business, as such, separate from his individual funds, by depositing in bank to a separate "brokerage account" the drafts received for goods sold for his customers, that these drafts include his commissions on such sales is not such a mingling of his own with the trust fund as will prevent the owner of the goods sold from following the fund, nor such as will enable the factor's general creditors to reach it by attachment. *Richardson v. St. Louis Nat. Bank*, 10 Mo. App. 246.

The principal may recover the proceeds

of his property, as a bill of exchange indorsed to a purchasing broker and discounted by him shortly before his death; but the burden of identification is upon him. *Boisblanc's Succession*, 32 La. Ann. 109.

1. *Proudfoot v. Wightman*, 78 Ill. 553; *Mackintosh v. Eliot Bank*, 123 Mass. 393; *White v. Dolliver*, 113 Mass. 400; *Southern Exp. Co. v. Palmer*, 48 Ga. 85. Compare *Mason v. Bauman*, 62 Ill. 76.

2. *Story on Agency*, § 373; *Lovett v. Brown*, 40 N. H. 511; *Wilson v. Martin*, 40 N. H. 88; *Muller v. Pondir*, 55 N. Y. 326; *Gregory v. Stryker*, 2 Denio (N. Y.), 638; *Moore v. Hitchcock*, 4 Wend. (N. Y.) 292; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268; s. c., 24 Am. Dec. 143; *Morgan v. Congdon*, 4 N. Y. 551; *Farrington v. Meek*, 30 Miss. 578; s. c., 77 Am. Dec. 627; *Nevan v. Roup*, 8 Iowa, 207; *U. S. Exp. Co. v. Haines*, 67 Ill. 140; *McIntyre v. Carver*, 2 W. & S. (Pa.) 392; s. c., 37 Am. Dec. 519; *Basstable v. Denegree*, 22 La. Ann. 124.

Unless he waives his right to it. *Chandler v. Belden*, 18 Johns. (N. Y.) 157; s. c., 9 Am. Dec. 193; *Fieldings v. Mills*, 2 Bosw. (N. Y.) 489; *Trust v. Pirson*, 1 Hilt. (N. Y.) 293; s. c., 3 Abb. Pr. (N. Y.) 84; *Oakley v. Crenshaw*, 4 Cow. (N. Y.) 250; *Bailey v. Adams*, 14 Wend. (N. Y.) 201; *Williams v. Littlefield*, 12 Wend. (N. Y.) 362; *Ferguson v. Furnace Co.*, 9 Wend. (N. Y.) 345; *Look v. Comstock*, 15 Wend. (N. Y.) 244; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467; *Grinnell v. Cook*, 3 Hill (N. Y.), 485; s. c., 38 Am. Dec. 663; *Sawyer v. Lorillard*, 48 Ala. 332; *Pickett v. Bullock*, 52 N. H. 354; *Woollen Mfg. Co. v. Huntley*, 8 N. H. 441; *Bowman v. Hilton*, 11 Ohio, 303; *Harkness v. Toulmin*, 25 Mich. 80; *Perkins v. Boardman*, 14 Gray (Mass.), 481; *Way v. Davidson*, 12 Gray (Mass.), 465; *Holly v. Huggeford*, 8 Pick. (Mass.) 76; *Sears v. Wills*, 4 Allen (Mass.), 212; *Jarvis v. Rogers*, 15 Mass. 389; *Hapgood v. Batchellor*, 4 Metc. (Mass.) 573; *Bower's Appeal*, 68 Pa. St. 126; *McDevitt v. Hays*, 70 Pa. St. 373; *Downer v. Bank, Wright (Ohio)*, 477; *Eastman v. Avery*, 23 Me. 248; *Collins v. Buck*, 63 Me. 459; *Robinson v. Larra-*

*Does not Impair Right to Sue.*—The agent's right to a lien on the goods of his principal in his possession does not impair his right of action against the principal for commissions, expenditures, advances, and services, and an action against the principal will not invalidate the lien.<sup>1</sup>

**17. Ratification.**—*Ratified Acts have Same Effect as those duly Authorized.*—An unauthorized act by one assuming to be an agent for another may be ratified by the principal, and such ratification gives to the act the same effect as if it were previously duly authorized. This applies to corporations as well as individuals.<sup>2</sup>

bee, 63 Me. 116; Foltz v. Peters, 16 Ind. 244; Jones v. Vantress, 23 Ind. 533; Gaines v. Casey, 10 Bush (Ky.), 92; Ducker v. Gray, 3 J. J. Marsh (Ky.), 163; Kirkham v. Boston, 67 Ill. 599; Randel v. Brown, 2 How. (U. S.) 406; Gilman v. Brown, 1 Mason (U. S.), 191.

To entitle the agent to a lien the agent must have received the goods on which the lien is supposed to attach by consent of the principal. Possession acquired by a mere voluntary service rendered gives no lien. Van Buskirk v. Purinton, 2 Hall (N. Y.), 561; Robinson v. Baker, 5 Cush. (Mass.) 137; Clark v. R. R., 9 Gray (Mass.), 231; Briggs v. R. R., 6 Allen (Mass.), 246; Jarvis v. Rogers, 15 Mass. 389; Preston v. Neale, 12 Gray (Mass.), 222; Pearce v. Roberts, 27 Mo. 179.

1. Consequa v. Fanning, 3 Johns. Ch. (N. Y.) 587; Hoy v. Reade, 1 Sweeney (N. Y.) 626; Corlies v. Cummings, 6 Cow. (N. Y.) 181; Colley v. Merrill, 6 Greenl. (Me.) 50; Stocking v. Page, 1 Day (Conn.), 519; Upham v. Lefavour, 11 Metc. (Mass.) 174; Beckwith v. Sibley, 11 Pick. (Mass.) 482; Burrill v. Phillips, 1 Gall. (U. S.) 360; Peisch v. Dickson, 1 Mason (U. S.), 10.

For liens in general, see LIENS; for special liens see ATTORNEYS, AUCTIONEERS; BANKERS; BROKERS; CARRIERS; COMMISSION AGENTS; SHIPPING.

2. Sentell v. Kennedy, 29 La. Ann. 679; Oliver v. Johnson, 24 La. Ann. 460; Rich v. State Nat. Bank, 7 Neb. 201; Lee v. West, 47 Ga. 311; Bray v. Gunn, 53 Ga. 144; Weaver v. Ogletree, 39 Ga. 536; Cairnes v. Bleeker, 12 Johns. (N. Y.) 300; Peterson v. Mayor of New York, 17 N. Y. 449; Rogers v. Kneeland, 10 Wend. (N. Y.) 218; Watson v. Gray, 4 Abb. App. Dec. (N. Y.) 540; Woodward v. Suydam, 11 Ohio, 360; Kelsey v. Nat. Bank of Crawford, 69 Pa. St. 426; Salem Bank v. Gloucester Bank, 17 Mass. 1; Frothingham v. Haley, 3 Mass. 68; Lent v. Padleford, 10 Mass.

230; Fisher v. Willard, 13 Mass. 270; Bulkley v. Derby Fishing Co., 2 Conn. 252; s. c., 7 Am. Dec. 271; Church v. Sterling, 16 Conn. 388; Baker v. Cotter, 45 Me. 236; Wilson v. Dame, 58 N. H. 392; Despatch Line v. Belamy Mfg. Co., 12 N. H. 205; s. c., 37 Am. Dec. 203; Brooks v. Fletcher, 56 Vt. 624; Whitwell v. Warner, 20 Vt. 425; Bigelow v. Denison, 23 Vt. 564; St. Louis Nat. Stock Yard v. O'Reilly, 85 Ill. 546; Mason v. Caldwell, 5 Gil. (Ill.) 196; s. c., 48 Am. Dec. 330; City of Detroit v. Jackson, 1 Doug. (Mich.) 106; Hall v. Chicago, etc., R. Co., 48 Wis. 317; Stewart v. Mather, 32 Wis. 344; Berger's Appeal, 96 Pa. St. 443; Nesbitt v. Helser, 49 Mo. 383; Summerville v. Hannibal R. Co., 62 Mo. 391; Golson v. Ebert, 52 Mo. 260; Goss v. Stevens, 32 Minn. 472; Wisconsin v. Torinus, 26 Minn. 1; Sheffield v. Ladue, 16 Minn. 388; Clealand v. Walker, 11 Ala. 1058; Chapman v. Lee, 47 Ala. 143; Downer v. Morrison, 2 Gratt. (Va.) 237; State v. Shaw, 28 Iowa. 67; Blanchard v. Waite, 28 Me. 51; Gulick v. Grover, 33 N. J. L. 463; Clark v. Van Riemsdyk, 9 Cranch. (U. S.) 153; Fleckner v. U. S. Bank, 8 Wheat. (U. S.) 338; Drakeley v. Gregg, 8 Wall. (U. S.) 242.

One H., as the agent of some one not named in the contract, entered into a written contract with the plaintiffs for the construction of a railway, under circumstances which justified the plaintiff in believing that H. was contracting as the agent of the defending corporation. The defendant corporation by subsequent acts recognized and ratified the contract as its own. *Held*, that it could not afterwards avoid liability under the contract, on the ground that H. had not been appointed agent of the corporation by its proper board of directors, and that he was not an officer of the company sustaining such relations to it that the law will imply his authority to bind it as its agent. Flynn v. Des Moines, etc., R. Co., 63 Iowa, 492.

**Must be Voidable.**—The act to be ratified must be voidable merely and not absolutely void. A principal cannot ratify an act which he could not have authorized in the first instance.<sup>1</sup>

The ratification of an agent's acts, with knowledge of the circumstances, relates back to the time when such acts were performed, and binds the principal the same as if authority had been given in advance. Story Agency (8th Ed.), §§ 239, 242; U. S. Exp. Co. v. Rawson, 106 Ind. 215; Louisville, etc., R. Co. v. McVay, 98 Ind. 391; s. c., 49 Am. Rep. 770; Hammond v. Hinness, 21 Mich. 374; s. c., 4 Am. Rep. 490; Davis v. School Distr., 44 N. H. 399; Low v. Connecticut, etc., R. Co., 46 N. H. 284; Grant v. Beard, 50 N. H. 239; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205; s. c., 37 Am. Dec. 203; Weed v. Carpenter, 4 Wend. (N. Y.) 219; Towle v. Stevenson, 1 Johns. Cas. (N. Y.) 110; Brower v. Lewis, 19 Barb. (N. Y.) 574; Smith v. Tracy, 36 N. Y. 79; Lawrence v. Taylor, 5 Hill (N. Y.), 107; Hankins v. Baker, 46 N. Y. 666; Como v. Port Henry Co., 12 Barb. (N. Y.) 27; Reynolds v. Dothard, 11 Ala. 531; McGowen v. Garrard, 2 Stew. (Ala.) 479; Lee v. Fontaine, 10 Ala. 755; s. c., 44 Am. Dec. 505; Cox v. Robinson, 2 Stew. & P. (Ala.) 91; Brigham v. Peters, 1 Gray (Mass.), 139; McIntyre v. Park, 11 Gray (Mass.), 102; Williams v. Mitchell, 17 Mass. 98; Frothingham v. Haley, 3 Mass. 68; Lent v. Padelford, 10 Mass. 230, 236; Odiorne v. Maxcy, 15 Mass. 39; Fisher v. Willard, 13 Mass. 379; Forsyth v. Day, 41 Me. 382; Cowan v. Wheeler, 31 Me. 439; Lowry v. Harris, 12 Minn. 255; Goss v. Stevens, 32 Minn. 472; Pollock v. Cohen, 32 Ohio St. 514; Kehler v. Kemble, 26 La. Ann. 713; Sentell v. Kennedy, 29 La. Ann. 679; Bloodworth v. Jacobs, 2 La. Ann. 25; Dunbar v. Bullard, 2 La. Ann. 810; Overby v. Overby, 18 La. Ann. 546; Meyers v. Simmons, 19 La. Ann. 370; Roby v. Cossitt, 78 Ill. 638; Goodell v. Woodruff, 20 Ill. 191; Ohio, etc., R. Co. v. Middleton, 20 Ill. 629; Union, etc., Co. v. Rocky Mt. Bank, 2 Colo. 248; Southern Exp. Co. v. Palmer, 48 Ga. 85; Perry v. Hudson, 10 Ga. 362; Kelsey v. Nat. Bank of Crawford, 69 Pa. St. 426; Workman v. Guthrie, 29 Pa. St. 495; s. c., 72 Am. Dec. 654; Vanhorne v. Frick, 6 S. & R. (Pa.) 90; Gulick v. Grover, 33 N. J. L. 463; Vincent v. Rather, 31 Tex. 77; Brock v. Jones, 16 Tex. 461; Irons v. Reyburn, 11 Ark. 378; Bell v. Ryerson, 11 Iowa, 233; s. c., 77 Am. Dec. 142; Coffin v. Gephart, 18

Iowa, 256; Barbour v. Craig, 6 Litt. (Ky.) 213; Baker v. Byrne, 10 Miss. 193; Kountz v. Price, 40 Miss. 341; Ruggles v. Washington Co., 3 Mo. 496; Little v. Stettheimer, 13 Mo. 572; Weiseiger v. Wheeler, 14 Wis. 101; Brown v. La Crosse City, etc., Co., 21 Wis. 51; Drakely v. Gregg, 8 Wall. (U. S.) 242; Courcier v. Ritter, 4 Wash. (U. S.) 549; Den v. Wright, Pet. U. S. C. Ct. 64; Clark v. Van Riemsdyk, 9 Cranch. (U. S.) 153; Bronson v. Chappell, 12 Wall. (U. S.) 681.

Where the local agent of an express company, without authority to accept partial payment upon a draft held by him for collection, receives such payment and holds the same subject to instructions from the general agent, a ratification by such general agent dates back and binds the company the same as if authority to receive the partial payment had been given in advance, and renders the company liable for the misappropriation of the money by the local agent. U. S. Expr. Co. v. Rawson, 106 Ind. 215.

The ratification of a contract originally made by one without authority, will relieve the agent from all responsibility if the contract purports to be made by him merely as agent, although without such ratification he would be liable to the other party and also in some cases to the principal. Berger's App., 96 Pa. St. 443.

1. De Cuir v. Le Jeune, 15 La. Ann. 569; Harrison v. McHenry, 9 Ga. 164; s. c., 52 Am. Dec. 435; State v. Matthis, 1 Hill (S. Car.), 37; O'Connor v. Arnold, 53 Ind. 203; Price v. Grand Rapids, etc., R. Co., 13 Ind. 58; Richardson v. Payne, 114 Mass. 429; Seery v. Springfield, 112 Mass. 512; Armitage v. Widoe, 36 Mich. 124; McCracken v. City of San Francisco, 16 Cal. 591; Supervisors v. Arrighi, 54 Miss. 668; School Dist. v. Aetna Ins. Co., 62 Me. 330; Fitzpatrick v. School Comm'rs, 7 Humph. (Tenn.) 224; s. c., 46 Am. Dec. 76.

Where a fraud is of such a character as to involve a crime, the ratification of the act from which it springs is opposed to public policy and cannot be permitted. When the indorsement of a note is forged, such indorsement cannot be ratified by the person whose name is forged, as the act is criminal and against public policy. Shisler v. Vandike, 92 Pa. St. 447; s. c., 37 Am. Rep. 702; McHugh v. Schuykill,

*Act must be done in Name of Principal.*—Where the party making the contract had no authority to contract for the third person, and did not profess, at the time, to act for him, the subsequent assent of such third party to be bound as principal has no operation. A ratification is only effectual when the act is done by a person professedly acting as the agent of the party sought to be charged as principal.<sup>1</sup>

67 Pa. St. 391; s. c., 5 Am. Rep. 445; Workman v. Wright, 33 Ohio. St. 405; s. c., 31 Am. Rep. 546.

When the directors of a corporation undertake to enter into a contract which is beyond the powers of a corporation, such contract is void and cannot be ratified. Ashbury, etc., Co. v. Riche, L. R. 7 H. L. 653.

The government is liable for the illegal acts of its agents when expressly ratified. Wiggins v. U. S., 3 Ct. of Cl. 412.

1. Collins v. Waggoner, Breese (Ill.), 26; Beveridge v. Rawson, 51 Ill. 504; Grund v. Van Vleck, 69 Ill. 478; Roby v. Cossett, 78 Ill. 638; Forsyth v. Day, 46 Me. 176; Crowder v. Reed, 80 Ind. 1; Harrison v. Mitchell, 13 La. Ann. 260; Harper v. Devene, 10 La. Ann. 724; Collins v. Suau, 7 Robt. (N. Y.) 623; Fellows v. Comm'rs, 36 Barb. (N. Y.) 655; Farmers' L. & T. Co. v. Walworth, 1 N. Y. 435; Brainerd v. Dunning, 30 N. Y. 211; Vanderbilt v. Turnpike Co., 2 N. Y. 479; s. c., 51 Am. Dec. 315; Alldred v. Bray, 41 Mo. 484.

One cannot be held to have ratified the unauthorized acts of another as his agent where there was no agency. Hammerslough v. Cheatham, 84 Mo. 13.

Where one has wrongfully taken the property of another and sold it, not as agent, but on his own account, mere silence upon the part of the owner does not confirm the sale; the confirmation must rest upon some consideration upholding it, or upon an estoppel. Hamlin v. Sears, 82 N. Y. 329; Workman v. Wright, 33 Ohio St. 405; s. c., 31 Am. Rep. 546.

A mere promise to the obligee by a party whose name has been signed to a note by the principal therein, without the knowledge or consent of the promissor to pay the note, or a part of it, no previous relation of principal and agent existing between the parties, is without consideration and void. Such a promise cannot be regarded as a ratification of the act, and the note as to the promissor is invalid. Owsley v. Phillips, 78 Ky. 517; s. c., 39 Am. Rep. 258; Shisler v. Vandike, 92 Pa. St. 447; s. c., 37 Am. Rep. 702; McHugh v. Schuykill Co., 67 Pa. St. 391; s. c., 5 Am. Rep. 445; Brook v.

Hook, L. R. 6 Exch. 99; s. c., 31 Am. Rep. 549, note; Mackenzie v. British Linen Co., L. R. 6 App. Cas. 82. See Whiteford v. Monroe, 17 Md. 135; Walters v. Monroe, 17 Md. 154; s. c., 77 Am. Dec. 328; Fenny v. Taylor, 33 Md. 323; Duncunge v. Forgay, 15 La. Ann. 37.

A voluntary payment of a certain sum to indemnify for expenses incurred in a service voluntarily rendered is not a ratification which makes the payee the agent of the principal as regards such services. Camp v. U. S., 113 U. S. 648.

But where A without authority empowered B to receive money for C, it was held that C might ratify A's actions and hold him responsible for the money; B being regarded as A's agent. Strickland v. Hudson, 55 Miss. 235.

It has been held that the ratification of a forgery, like the ratification of any other unauthorized contract will give the forged instrument the same power as if the signature had been duly authorized. Howard v. Duncan, 3 Lans. (N. Y.) 174; Greenfield Bank v. Crafts, 4 Allen (Mass.), 447; Wellington v. Jackson, 121 Mass. 157; Negley v. Linsday, 67 Pa. St. 217; s. c., 5 Am. Rep. 427; Hefner v. Vandolah, 62 Ill. 483; s. c., 14 Am. Rep. 106; Thorn v. Bell, Lalor's Supl. (N. Y.) 430.

Other cases, however, hold that such ratification can work only as an estoppel where a third party acting upon the strength of the ratification would suffer detriment, or where the ratification was given for a consideration. Crout v. De Wolf, 1 R. I. 393; Forsyth v. Day, 46 Me. 177; Corser v. Paul, 41 N. H. 24; s. c., 77 Am. Dec. 753; Union Bank v. Middlebrook, 33 Conn. 95; Fitzpatrick v. School Comm'rs, 7 Humph. (Tenn.) 224; s. c., 46 Am. Dec. 76; Livrigs v. Wiler, 32 Ill. 387; Charles River Bank v. Davis, 100 Mass. 413. And see Rudd v. Matthews, 79 Ky. 479; s. c., 42 Am. Rep. 231, where defendant, whose name had been forged as surety on a note, on being shown the note by the owner admitted the signature was genuine, and promised to pay the note, supposing he had signed the note. The owner was thus induced to forbear suit until the maker became insolvent. Held, that the defendant was

*Principal must be in Existence.*—The person in whose behalf the act is done must be in existence at the time of its performance, except in cases governed by rules of equity.<sup>1</sup>

*Must have Knowledge of all Facts.*—The person who undertakes to ratify must do so with a knowledge of all material circumstances, or with an intent to take all liability without such knowledge.<sup>2</sup>

estopped from setting up that his signature was forged. *S. P. Heffren v. Dawson*, 63 Ill. 93. In *Casco Bank v. Keene*, 53 Me. 103, it was held that one who adopts a signature knowing it to be forged is estopped from denying its genuineness, when upon the strength of such adoption the bank refrained from proceedings against the forger.

In *Woodruff v. Munroe*, 33 Md. 147, it was held that if the party whose name is forged adopted the note prior to its maturity, and by such adoption assisted in its negotiation, he would be estopped from setting up the forgery in a suit by a *bona-fide* holder. But any admission made subsequent to the maturity of the note would not be evidence that he had authorized the indorsement of his name thereon.

1. *Stainsby v. Frazier, etc., Co.*, 3 Daly (N. Y.), 98; *Marchand v. Loan Assoc.*, 26 La. Ann. 389.

So where an agent had authority from a firm to advance money for the purchase of bills and notes, and after a change in the firm by the admission of new partners, one of the new partners received and receipted for bills and notes so bought, and where the proceeds were used in the new firm's business, it was held that these facts were sufficient to authorize the agent in believing that the previous arrangement was confirmed by the new firm, and to hold the new firm liable on such advances. *Callanan v. Van Vleck*, 36 Barb. (N. Y.), 324. See *Sinclair v. Galland*, 8 Daly (N. Y.), 508.

An incorporated company will be bound by the agreement of a majority of its individual members acting before incorporation on its behalf, when the company has received the full benefit of the consideration for the agreement. *Bell's Gap R. Co. v. Christy*, 79 Pa. St. 54; *Grape Sugar, etc., Co. v. Small*, 40 Md. 395; 46 N. H. 284; 28 Vt. 401. *Compare Safety Dep. L. I. Co. v. Smith*, 65 Ill. 309; *Rockford, etc., R. Co. v. Sage*, 65 Ill. 328; *Western Screw, etc., Co. v. Consley*, 72 Ill. 531; 27 Conn. 170; 31 Md. 59.

Where a corporation at the date of a contract had not filed its articles of association, as required by statute, but subsequently ratified the contract by recogniz-

ing and treating it as valid, this made it in all respects what it would have been if the requisite corporate power had existed when it was entered into. *Whitney v. Wyman*, 11 Otto (U. S.), 392.

A lease was taken by A in trust for a corporation thereafter to be formed. Held, that it created on the formation of such corporation, and upon its receiving an assignment of such lease, with knowledge of the terms upon which it was executed and received from the lessor A, a liability in equity, on the part of such corporation, to pay the rent to the lessor. *Van Schaick v. Third Ave. R. Co.*, 38 N. Y. 346. See also *Lorillard v. Lorillard*, 4 Abb. Pr. (N. Y.) 210; *Borrell v. Newell*, 3 Daly (N. Y.), 233; *Nicoll v. Burke*, 78 N. Y. 580; *Pittsburg, etc., R. Co. v. Gazzan*, 32 Pa. St. 340; *Rockford, etc., R. Co. v. Sage*, 65 Ill. 328.

2. *Roberts v. Rumley*, 58 Iowa, 301; *Tidrick v. Rice*, 13 Iowa, 214; *White v. Morgan*, 42 Iowa, 113; *Potter v. Harvey*, 30 Iowa, 502; *Bryant v. Moore*, 26 Me. 84; s. c., 45 Am. Dec. 96; *Morrell v. Dixfield*, 30 Me. 157; *Hovey v. Brown*, 59 N. H. 114; *Grant v. Beard*, 50 N. H. 139; *Lester v. Kinne*, 37 Conn. 9; *Thacher v. Pray*, 113 Mass. 291; *Meyer v. Baldwin*, 52 Mass. 263; *Dickinson v. Conway*, 12 Allen (Mass.), 487; *Coombs v. Scott*, 12 Allen (Mass.), 493; *McIntyre v. Park*, 11 Gray (Mass.), 102; *Dean v. Bassett*, 57 Cal. 640; *Dupont v. Wertheman*, 10 Cal. 354; *Billings v. Morrow*, 7 Cal. 171; s. c., 68 Am. Dec. 235; *Miller v. Board of Education*, 44 Cal. 166; *Thompson v. Craig*, 16 Abb. Pr. N. S. (N. Y.) 29; *Brass v. Worth*, 40 Barb. (N. Y.) 648; *Roach v. Coe*, 1 E. D. Smith (N. Y.), 175; *Hoffman v. Livingston*, 46 N. Y. Super. Ct. 552; *Craighead v. Peterson*, 72 N. Y. 279; *Rowan v. Hyatt*, 45 N. Y. 138; *Seymour v. Wyckoff*, 10 N. Y. 213; *Ritch v. Smith*, 82 N. Y. 627; *People v. Schuyler*, 17 Hun (N. Y.), 106; *Pittsburg, etc., R. Co. v. Gazzan*, 32 Pa. St. 340; *Kerr v. Sharp*, 83 Ill. 199; *Stein v. Kendall*, 1 Ill. App. 101; *Mathews v. Hamilton*, 23 Ill. 470; *Reynolds v. Ferree*, 86 Ill. 570; *Proctor v. Tows*, 115 Ill. 138; *Dodge v. McDonnell*, 14 Wis. 553; *Etna Ins. Co. v. N. W. Iron Co.*, 21 Wis. 458;

*Must be Capable of Ratifying.*—The principal must also be capable of ratifying the act.<sup>1</sup>

Woodbury v. Larned, 5 Minn. 339; Humphrey v. Havens, 12 Minn. 298; Bannon v. Warfield, 44 Md. 22; Hoffman Steam Coal Co. v. Cumberland, etc., Co., 16 Md. 456; s. c., 77 Am. Dec. 311; Adams Exp. Co. v. Trego, 35 Md. 47; Pairo v. Vickery, 37 Md. 467; Trader v. Lowe, 45 Md. 1; Hardeman v. Ford, 12 Ga. 205; Mapp v. Phillips, 32 Ga. 72; Turner v. Wilcox, 54 Ga. 593; Delaney v. Levi, 19 La. Ann. 251; Mummy v. Haggerty, 15 La. Ann. 268; Union, etc., Co. v. Rocky Mt. Bank, 2 Colo. 565; Pacific Rolling Mill Co. v. Dayton, etc., R. Co., 7 Sawyer (U. S.), 61; Rust v. Eaton, 24 Fed. Repr. 830; Bossean v. O'Brien, 4 Biss. (U. S.) 395; Owings v. Hall, 9 Pet. (U. S.) 607; Fletcher v. Dysart, 9 B. Mon. (Ky.) 413; Bank of Owensboro v. Western Bank, 13 Bush. (Ky.) 526; Bott v. McCoy, 20 Ala. 578; s. c., 56 Am. Dec. 223; Howe Machine Co. v. Ashley, 60 Ala. 496; Herring v. Skaggs, 77 Ala. 446; Spooner v. Thompson, 48 Vt. 259; Mulford v. Minch, 3 Stockt. Ch. (N. J.) 16; s. c., 64 Am. Dec. 472; Manning v. Gasharie, 27 Ind. 399; Williams v. Storm, 6 Cold. (Tenn.) 203; Commercial Bank v. Jones, 18 Tex. 801; Vincent v. Rather, 31 Tex. 77; Snow v. Grace, 29 Ark. 131.

Knowledge by the principal of the unauthorized act of the agent in assuming to make a contract for him which the agent had no power to make is essential to a ratification of the agent's act. If the agent fraudulently misrepresented his authority, and the principal has received the avails of the fraud without knowledge of the agent's fraudulent conduct, the remedy of the party injured against the principal is not upon the contract in damages, but by rescission of the contract and suit for the consideration paid. Titus v. Cairo, etc., R. Co., 46 N. J. L. 393.

If the principal assents while in ignorance of the facts, he may disaffirm the transaction when informed of them. Bannon v. Wanfield, 42 Md. 22; Miller v. Board of Education, 44 Cal. 166; Scott v. Turley, 9 Lea (Tenn.), 631.

Where an agent has defrauded a buyer, the mere reception or retention of the purchase-money by the principal without knowledge of the wrong will not operate as a ratification. Herring v. Skaggs, 73 Ala. 446; S. P. Aetna Ins. Co. v. N. W. Iron Co., 21 Wis. 458.

But if the principal retains the proceeds after he has knowledge he will be held to ratify the act. Davis v. Krum,

12 Mo. App. 279; Wallace v. Lawyer, 90 Ind. 499; McDowell v. McKenzie, 65 Ga. 630; Smith v. Tracy, 36 N. Y. 79.

Where a principal accepts security for a debt he will be presumed to have taken it with full knowledge, and to have ratified the arrangements made by his agent. Meehan v. Forrester, 52 N. Y. 277.

Notice of facts to another agent of the principal where the matter is within the scope of his agency affects the principal though not in fact communicated. Union, etc., Co. v. Rocky Mt. Bank, 2 Colo. 565.

Where an agent is deceived about the real facts, and makes representations to his principal based upon the wrong knowledge, the acts of the principal will not be held to ratify a contract. Mummy v. Haggerty, 15 La. Ann. 268; Bank of Owensboro v. Western Bank, 13 Bush. (Ky.), 526.

A principal will not be presumed to have knowledge of deeds on record. Billings v. Morrow, 7 Cal. 171; s. c., 68 Am. Dec. 235.

Where a principal received money arising from a sale of goods by his agent, he will not be regarded as confirming the sale if he is ignorant of the facts. Bott v. McCoy, 20 Ala. 578; s. c., 56 Am. Dec. 223; Bryant v. Moore, 26 Me. 84; s. c., 45 Am. Dec. 96; Pennsylvania, etc., Co. v. Dandridge, 8 Gill & J. (Md.) 248; s. c., 29 Am. Dec. 543; Smith v. Tracy, 36 N. Y. 79; Bell v. Cunningham, 3 Pet. (U. S.) 69; Evans v. Chicago, etc., R. Co., 26 Ill. 189.

An agent authorized to buy goods for cash, without the knowledge of his principal made an unauthorized purchase on credit. Held, that the acceptance and use of the goods by the principal did not operate as a ratification. Manning v. Gasharie, 27 Ind. 399.

1. McCracken v. San Francisco, 16 Cal. 591.

The acceptance of a town meeting properly called for the purpose of hearing the report of a person assuming to act as agent for the town in conducting certain suits and authorizing him to compromise suits then pending is a ratification of his acts. Kinsley v. Norris, 60 N. H. 131.

The ratification may be made for the principal by an agent who has authority to do the thing which he ratifies. Whitehead v. Wells, 29 Ark. 99; Mound City M. L. Ins. Co. v. Huth, 49 Ala. 529; Palmer v. Cheney, 35 Iowa, 281, 85 Pa.

*Disavowal does not prevent Ratification.*—If a principal disavows an unauthorized act upon hearing of it, such disavowal does not prevent a subsequent ratification.<sup>1</sup>

*Act of Public Officer may be Ratified.*—Where an officer executes process in favor of a creditor, although his authority is conferred by law, he acts for and is the agent of the creditor in such a sense that the act is capable of ratification.<sup>2</sup>

*Of Tort.*—One cannot be liable as for the ratification of a tort that was not committed in his interest.<sup>3</sup>

*Ratification cannot be Retracted.*—If a principal ratifies and adopts the agents' acts, even for a moment, he is bound by them, and can no more deny the agent's authority.<sup>4</sup>

*Cannot be in Part.*—There can be no ratification of a part only of a transaction. The law does not allow one part of a transaction to be affirmed and the rest to be disallowed.<sup>5</sup>

St. 299. Compare *Lucas v. Brooks*, 18 Wall. (U. S.) 436.

A note was issued in the partnership name by a clerk. It was shown to one of the partners, who corrected the date, saying it was all right. *Held*, a ratification. *Harper v. Devene*, 10 La. Ann. 724.

Where one of the new members of a firm received property from an agent of the old firm, such act will constitute a ratification. *Callanan v. Van Vleck*, 36 Barb. N. Y. 324.

1. *Woodward v. Harlow*, 28 Vt. 338.

2. *Farmers' L. & T. Co. v. Walworth*, 1 N. Y. 435.

3. So held where suit was brought against the general agent of a sewing-machine company for a forcible trespass committed by employees while removing a machine by his direction and in compliance with the orders of the company from the premises of one who held it under a sewing-machine lease which had been forfeited. *Smith v. Lozo*, 42 Mich. 6.

If the principal appropriates the proceeds of a tort, it will be held that it was committed with his knowledge. *Exum v. Brister*, 35 Miss. 391.

To hold one responsible for a tort not committed by himself nor by his order, his adoption of the same must be explicit and made with a full knowledge of the tort, or at least of the injured party's claim that there has been one. *Tucker v. Jerris*, 75 Me. 184.

4. *Silverman v. Bush*, 16 Ill. App. 437; *Beall v. January*, 62 Mo. 434; *Hazleton v. Batchelder*, 44 N. H. 40; *Clark v. Riemsdyk*, 9 Cranch. (U. S.) 153; *Vaughn v. Sheridan*, 50 Mich. 155; *Brock v. Jones*, 16 Tex. 461; *Andrews v. Aetna Ins. Co.*, 92 N. Y. 596; *Avila v. Manhattan*

*Chem. Co.*, 32 Hun (N. Y.), 1; *Smith v. Cadogan*, 2 T. R. 189.

Affirmance of an assumed agency in the disposition of property, when made with full knowledge of the facts, is a single act; and when a party has once ratified such transaction he cannot afterwards be heard to disaffirm it when it turns out different from his expectations. *Whitfield v. Riddle*, 78 Ala. 99; *McGeoch v. Hooker*, 11 Ill. App. 649.

5. *Drennan v. Walker*, 21 Ark. 539; *Seago v. Martin*, 6 Heisk. (Tenn.) 308; *Fort v. Coker*, 11 Heisk. (Tenn.) 579; *Newall v. Hurlbutt*, 2 Vt. 351; *Burgess v. Harris*, 47 Vt. 322; *Benedict v. Smith*, 10 Paige (N. Y.), 128; *Farmers' L. & T. Co. v. Walworth*, 1 N. Y. 433; *Crans v. Hunter*, 28 N. Y. 389; *Elwell v. Chamberlin*, 31 N. Y. 611; *Fowler v. N. Y. Gold Exch.*, 67 N. Y. 138; *Corning v. Southland*, 3 Hill (N. Y.), 552; *Moss v. Rossie, etc., Co.*, 5 Hill (N. Y.), 137; *Widner v. Lane*, 14 Mich. 124; *Henderson v. Cummings*, 44 Ill. 325; *Cochran v. Chitwood*, 59 Ill. 53; *Barhydt v. Clark*, 12 Ill. App. 646; *Krider v. Weston College*, 31 Iowa, 547; *Beidman v. Goodell*, 56 Iowa, 592; *Roberts v. Rumley*, 58 Iowa, 301; *Warder v. Pattee*, 57 Iowa, 515; *Southern Exp. Co. v. Palmer*, 48 Ga. 85; *Hunter v. Stenbridge*, 17 Ga. 243; *Hardeman v. Ford*, 12 Ga. 205; *Menkens v. Watson*, 27 Mo. 163; *Joslin v. Miller*, 15 N. W. Repr. (Neb.) 214; *New Eng. M. I. Co. v. De Wolf*, 8 Pick. (Mass.) 63; *Culver v. Ashley*, 19 Pick. (Mass.) 300; *Peters v. Ballistier*, 3 Pick. (Mass.) 495; *Hovey v. Blanchard*, 13 N. H. 145; *Wright v. Boynton*, 37 N. H. 9; s. c., 72 Am. Dec. 319; *Tasker v. Kenton Ins. Co.*, 59 N. H. 438; *Grant v. Beard*, 50 N. H. 139; *Strasser v. Conklin*, 54 Wis. 102;

*After Termination of Agency.*—After the agency has terminated, the principal will be held to have ratified any acts in which he continues to acquiesce, and which are done by third parties in ignorance of the termination of the agency.<sup>1</sup>

*Form of Ratification.*—The form of the ratification should be

Saveland *v.* Green, 40 Wis. 431; Babcock *v.* Deford, 14 Kans. 408; Coleman *v.* Stark, 1 Oregon, 115; Billings *v.* Morrow, 7 Cal. 171; s. c., 68 Am. Dec. 235.

An agent made an unauthorized sale, giving a warranty. *Held*, that as the principal accepted the proceeds of the sale, he ratified both sale and warranty. Cochran *v.* Chitwood, 59 Ill. 53. Compare Cooley *v.* Perrine, 41 N. J. L. 322.

Where an agent exceeds his authority, his principal must either wholly ratify or wholly repudiate the transaction. He cannot ratify that portion of the contract which is beneficial to him and repudiate the remainder. Rudasill *v.* Falls, 92 N. Car. 222.

The principal cannot affirm a loan made by an agent at usurious interest, and repudiate the usurious part. Joslin *v.* Miller, 14 Neb. 91. See Condit *v.* Baldwin, 21 N. Y. 219; s. c., 78 Am. Dec. 137; Crawford *v.* Barkley, 18 Ala. 270; Hodnett *v.* Tatum, 9 Ga. 70; Henderson *v.* Cummings, 44 Ill. 325; Widner *v.* Lane, 14 Mich. 124; Peninsular Bank *v.* Hanmer, 14 Mich. 208; Coleman *v.* Stark, 1 Oregon, 115; Elam *v.* Carruth, 2 La. Ann. 275; Crans *v.* Hunter, 28 N. Y. 389.

The present suit was upon an indorsement of a guaranty upon commercial paper, made in a firm-name by an agent whose authority is denied. The guaranty was made in the course of a transfer to a bank, which thereupon discounted the note and placed the proceeds to the credit of such firm. A portion of such proceeds was afterwards drawn by such firm by checks to their creditors. The firm is held liable on such guaranty to the extent of proceeds received. It cannot repudiate the agent's authority without restoring the proceeds. The court declined to extend the liability to the remainder of the funds which were drawn out by the same agent, but not used in the firm business. First Nat. Bank *v.* Oberne, 7 N. East. Repr. (Ill.), 85.

A principal who affirms a contract made for him by his agent must adopt all the instrumentalities employed by the agent to bring it to a consummation. Joslin *v.* Miller, 14 Neb. 91; New England, etc., Co. *v.* Hendrickson, 13 Neb. 575; Elwell *v.* Chamberlain, 31 N. Y. 611.

And he may not ratify or disavow con-

ditionally, as "if he received no harm by it." Fort *v.* Coker, 11 Heisk. (Tenn.) 579.

The defendant gave a written order to the plaintiffs through their agent for an organ. The agent seasonably carried an organ substantially like the one ordered to the defendant's house; but in the mean time he had bought another and refused to receive the plaintiffs'. Negotiation ensued, and the agent gave the defendant to understand, and he did understand, that if he would let the organ be set up, the trade should be at an end if he was not satisfied with it. Afterwards the defendant, without cause, thought that he was dissatisfied with its tone, and so notified the agent. *Held*, in action of book account, that the plaintiffs by claiming a delivery adopted a part of the agent's last transaction, and thereby the whole of it. McClure *v.* Briggs, 58 Vt. 83.

Where the principal ratified the act of his agent under a misapprehension of its full scope, the act is voidable to the extent of the mistake, and the party can be relieved *pro tanto*. Miller *v.* Board of Education, 44 Cal. 166; Baldwin *v.* Burrows, 47 N. Y. 199.

So if the principal ratifies a sale he does not include a warranty which was unauthorized and of which he had no knowledge. Smith *v.* Tracy, 36 N. Y. 79.

Third parties may by their acts ratify an assumed agency so as to estop them from denying the authority of the agent. Where a party borrows money from another who professes to act only as agent for his principal, the first party cannot put up lack of authority on the part of the agent in defence of an action by the principal for the recovery of the money. Union Minn. Co. *v.* Rocky Mt. Nat. Bank, 2 Colo. 248.

1. Where an agent entered into a parol contract, void under the statute of frauds, for the purchase of wood, and where after the acceptance of a portion of the wood the agency was terminated, but the vendor, without notice and in ignorance of such termination, delivers the residue of the wood, which was accepted by the former agent; *held*, that the principal was liable for all the wood delivered at the contract price. Barkley *v.* Rensselaer, etc., R. Co. 71 N. Y. 205.



the same as required for the original appointment. Where agents might have been orally authorized to make a contract, the unauthorized contracts made in behalf of the principal may be ratified in any manner expressing his assent.<sup>1</sup> But where the contract is required to be under seal a ratification must also be under seal.<sup>2</sup>

*Must Refer to Precise Act.*—The ratification must refer to the precise act to be ratified. A subsequent extension of the powers of an agent, which would have made the previous act legal if given before the act was done, will be no ratification unless it refers to the act specially.<sup>3</sup>

1. Roby v. Cossitt, 78 Ill. 638; Brown v. Eaton, 21 Minn. 409; Dickerman v. Ashton, 21 Minn. 538; Gose v. Stevens, 32 Minn. 472; Lawrence v. Taylor, 5 Hill (N. Y.), 113; Hanford v. McNair, 9 Wend. (N. Y.), 354; Evans v. Wells, 22 Wend. (N. Y.) 324; Worrall v. Munn, 5 N. Y. 240; s. c., 55 Am. Dec. 330; Briggs v. Partridge, 64 N. Y. 358; Merrifield v. Parritt, 11 Cush. (Mass.) 590; State v. Spartanburg, etc., R. Co., 8 Shand. (S. Car.) 129. See Breithaupt v. Thurmond, 3 Richm. L. (S. Car.) 216; Adams v. Power, 52 Mass. 828; Hammond v. Hannin, 21 Mich. 374; Powell v. Gossom, 18 B. Mon. (Ky.) 179; Baines v. Burbridge, 15 La. Ann. 628.

2. Ragan v. Chenault, 78 Ky. 545; Pollard v. Gibbs, 55 Ga. 45; Bragg v. Fessenden, 11 Ill. 544; Ingraham v. Edwards, 64 Ill. 526; Bellas v. Hays, 5 S. & R. (Pa.) 427; s. c., 9 Am. Dec. 385; McDowell v. Simpson, 3 Watts (Pa.), 129; s. c., 27 Am. Dec. 338; Cooper v. Rankin, 5 Binn. (Pa.) 613; Gordon v. Bulkeley, 14 S. & R. (Pa.) 331; Stetson v. Patten, 2 Greenl. (Me.) 358; s. c., 11 Am. Dec. 111; Heath v. Nutter 50 Me. 378; Paine v. Tucker, 21 Me. 138; s. c., 38 Am. Dec. 255; Turbeville v. Ryan, 1 Humph. (Tenn.) 113; Smith v. Dickinson, 6 Humph. (Tenn.) 261; s. c., 44 Am. Dec. 306; Tappan v. Redfield, 1 Halst. Ch. (N. J.) 339; Blood v. Goodrich, 9 Wend. (N. Y.) 68; s. c., 24 Am. Dec. 121; s. c., 12 Wend. (N. Y.) 525; 27 Am. Dec. 152; Wells v. Evans, 20 Wend. (N. Y.) 251; Hanford v. McNair, 9 Wend. (N. Y.) 54; Despatch line v. Bellamy Mfg. Co., 12 N. H. 231; s. c., 37 Am. Dec. 203. Compare Holbrook v. Chamberlain, 116 Mass. 155; s. c., 17 Am. Rep. 146; Swan v. Stedman, 4 Metc. (Mass.) 548; Cady v. Shepherd, 11 Pick. (Mass.) 400; s. c., 22 Am. Dec. 379; McIntyre v. Park, 11 Gray (Mass.), 102; Fouch v. Wilson, 59 Ind. 93; Grove v. Hodges 55 Pa. St. 504; Peine v. Weber, 47 Ill. 41; Drumright v. Philpot, 16 Ga. 424; s. c., 60

Am. Dec. 738; McDonald v. Eggleston, 26 Vt. 154; s. c., 60 Am. Dec. 303.

Where an attorney appointed by parol executes a bond in the name of the principal and afterward the principal gives him a regular power of attorney, dated prior to the bond, this is a good ratification of the bond. Milliken v. Coombs, 1 Greenl. (Me.) 343; s. c., 10 Am. Dec. 70.

A sale of land under parol authority is ratified by an admission of the authority by the principal in his answer to the bill in equity in which the transaction is relied upon. Stoney v. Shultz, 1 Hill Ch. (S. Car.) 465; s. c., 27 Am. Dec. 429.

Delivery by the principal of a deed executed by his agent without authority will act as a ratification. Harshaw v. McKesson, 65 N. Car. 688.

3. Moore v. Lockett, 2 Bibb. (Ky.) 67; s. c., 4 Am. Dec. 683.

But see Rice v. McLarren, 42 Me. 157, where it was held that a letter authorizing acts which the agent had performed before the receipt of the letter is a ratification.

The ratification is not retroactive to the extent of binding the principal for other acts in excess of the authority of the agent. Baldwin v. Burrows, 47 N. Y. 199.

If intervening rights have been acquired by a third party, such rights cannot be injuriously affected by the ratification. Pollock v. Cohen, 32 Ohio St. 514; Stoddard's Case, 4 Ct. of Claims, 511; Wood v. McCain, 7 Ala. 800; s. c., 42 Am. Dec. 612; Taylor v. Robinson, 14 Cal. 396; Fiske v. Holmes, 41 Me. 441. Compare Williams v. Butler, 35 Ill. 544; Freeman v. Boynton, 7 Mass. 483; Bank of Utica v. Smith, 18 Johns. (N. Y.) 230.

The plaintiff sued as assignee of a demand, and it appeared that the alleged assignment had been made by an agent, without authority from the principal; held, that proof of a ratification of the assignment, made subsequently to the

*May be Implied.*—A ratification may be implied, as from the principal's acts; but implied ratifications extend only to such acts of the agent as are known to the principal at the time they are made.<sup>1</sup>

commencement of the action, was unavailing. *Whittenbrock v. Bellmer*, 57 Cal. 12.

1. *Taylor v. Agricultural, etc., Assoc.*, 68 Ala. 229; *Wallace v. Lawyer*, 90 Ind. 499; *Haus v. Niblack*, 80 Ind. 407; *Warder v. Pattee*, 57 Iowa, 515; *Durham v. Carbon Coal Co.*, 22 Kans. 232; *Carter v. Roland*, 53 Tex. 540; *Filer v. Jenks*, 38 Mich. 585; *Jennison v. Parker*, 7 Mich. 355; *Connett v. Chicago*, 114 Ill. 233; *Searing v. Butler*, 69 Ill. 575; *Cochran v. Chitwood*, 59 Ill. 53; *Harrod v. McDaniels*, 126 Mass. 413; *Curry v. Hale*, 15 W. Va. 867; *Rowland v. Barnes*, 81 N. Car. 234; *Succession of Massien*, 24 La. Ann. 237; *Szymaski v. Plassan*, 20 La. Ann. 90; *Hazard v. Spears*, 2 Abb. App. Dec. (N. Y.) 353; *Harrett v. Garney*, 35 N. Y. Super. Ct. 327. *Compare Pope v. Lowitz*, 14 Ill. App. 96.

Where the principal accepts the results of the agent's unauthorized act, it will be a ratification. *Tooker v. Sloan*, 30 N. J. Eq. 394; *McDowell v. McKenzie*, 65 Ga. 630; *Ketchum v. Verdell*, 42 Ga. 534; *Turner v. Wilcox*, 54 Ga. 593; *Herring v. Skaggs*, 73 Ala. 446; *Jones v. Atkinson*, 68 Ala. 167; *Taylor v. Agricultural, etc., Assoc.*, 68 Ala. 229; *Bacon v. Johnson*, 56 Mich. 782; *Pratt v. Campbell*, Har. Ch. (Mich.) 236; *Hutchings v. Ladd*, 16 Mich. 493; *Nichols v. Shaffer*, 30 N. Western Repr. (Mich.) 383; *Gardner v. Warren*, 17 N. Western Repr. (Mich.) 853; *Vaughan v. Sheridan*, 15 N. Western Repr. (Mich.) 62; *Waterson v. Rogers*, 21 Kans. 529; *Breed v. Bank*, 4 Colo. 481; *Fouch v. Wilson*, 59 Ind. 93; *Beidman v. Goodell*, 56 Iowa, 592; *Milligan v. Davis*, 49 Iowa, 126; *Chamberlain v. Collinson*, 45 Iowa, 429; *Elkenberry v. Edwards*, 24 N. Western Repr. (Iowa) 570; *White v. Morgan*, 42 Iowa, 113; *Eadie v. Ashlaugh*, 44 Iowa, 519; *Pike v. Douglass*, 28 Ark. 59; *Maddux v. Bevan*, 39 Md. 485; *Reynolds v. Davison*, 34 Md. 662; *Seago v. Martin*, 6 Heisk. (Tenn.) 308; *Dunn v. Hartford, etc., R. Co.*, 43 Conn. 434; *Frank v. Jenkins*, 22 Ohio St. 597; *State v. Perry*, Wright (Ohio), 662; *Arnold v. Spurr*, 130 Mass. 347; *Bassett v. Brown*, 105 Mass. 551; *French v. Price*, 24 Pick. (Mass.) 13; *Cashman v. Loker*, 2 Mass. 106; *Narragansett Bank v. Atlantic Co.*, 3 Metc. (Mass.) 282; *Ely v. James*, 123 Mass. 36; *Churchhill v. Palmer*, 115 Mass. 310;

*Episcopal Charitable Soc. v. Episc. Church*, 1 Pick. (Mass.) 372; *Wright v. Burbank*, 64 Pa. St. 247; *Davis v. Krum*, 12 Mo. App. 279; *Ruggles v. Washington Co.*, 3 Mo. 496; *Hastings v. Bangor House*, 18 Me. 436; *Low v. Connecticut, etc., R. Co.*, 46 N. H. 284; *Hatch v. Taylor*, 10 N. H. 538; *Miles v. Ogden*, 54 Wis. 573; *Reid v. Hibbard*, 6 Wis. 175; *Morse v. Ryan*, 26 Wis. 356; *Pierce v. O'Keefe*, 11 Wis. 180; *Ballston Spa Bank v. Mar. Bank*, 16 Wis. 120; *Codwise v. Hacker*, 1 Cal. (N. Y.) 526; *Moss v. Rossie Co.*, 5 Hill (N. Y.), 137; *Palmerton v. Huxford*, 4 Den. (N. Y.) 166; *Houghton v. Dodge*, 5 Bosw. (N. Y.) 326; *Farmers', etc., Bank v. Sherman*, 6 Bosw. (N. Y.) 181; *Smith v. Tracy*, 36 N. Y. 79; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; *Krumm v. Beach*, 25 Hun (N. Y.) 203; *Harris v. Simmerman*, 81 Ill. 413; *Sessums v. Henry*, 38 Tex. 37; *Robinson v. Mut. Ben. L. I. Co.*, 16 Blatch. (U. S.) 194; *Gold Mfg. Co. v. Nat. Bank*, 96 U. S. 640; *Bank of Columbia v. Patterson*, 7 Cranch. (U. S.) 299. *Compare Carter v. Roland*, 53 Tex. 540.

And that whether a ratification was intended or not. *Hazard v. Spears*, 2 Abb. App. Dec. (N. Y.) 353.

The Baptist State Convention was the legatee and the money was paid to its treasurer. *Held*, that the convention by accepting and using the money, with knowledge of all the facts, ratified the acts of the treasurer in receiving it, if there were doubt as to his authority. *Baptist Convention v. Ladd*, 58 Vt. 95.

One who accepts, with a knowledge of all the facts, the avails of a compromise and settlement of a controversy made in his behalf without authority thereby ratifies the settlement. *Strasser v. Conklin*, 54 Wis. 102; *Vermont Bapt. State Co. v. Ladd*, 4 Atl. Repr. (Vt.) 635; *Jackson v. Badger*, 26 N. Western Repr. (Minn.) 908; *Adams v. Smith*, 9 Pac. Repr. (Nev.) 337; *McClelland v. Whiteley*, 15 Fed. Repr. 322; *Kelly v. Newburyport, etc., R. Co.*, 6 N. Eastern Repr. (Mass.) 745.

Where an agent without authority accepts a deed of land to his principal as a payment on a debt due the principal, a retention by the latter of the title is a ratification. *Miles v. Ogden*, 54 Wis. 573.

An agent received Confederate money in payment of a note. He handed the money over to his principal, who re-

**Clear Intention must be Shown.**—The acts of the principal must, however, show a clear intention to ratify the unauthorized acts of

ceived and used it. *Held*, that it was a ratification. *Murray v. Walker*, 44 Ga. 58.

If an agent makes an unauthorized sale, and steals the proceeds, and the principal subsequently compromises with the agent, the principal by such compromise ratifies the sale. *Ogden v. Marchard*, 29 La. Ann. 61. See *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9.

A managed a business for B, but without authority to purchase on credit, except upon the written order of B. A purchased of C goods without such an order, and C was ignorant of the conditions of the agency. B took possession of the stock and sold it, including the goods sold by C. *Held*, that B by so doing ratified the purchase by A. *Sartwell v. Frost*, 122 Mass. 184.

An agent having made, without authority, an exchange of a mule for a horse, a claim and assertion by the principal of right and title to the horse, with knowledge of the facts, is a ratification. *Jones v. Atkinson*, 68 Ala. 167.

If an agent defrauds a buyer, and the principal with knowledge of the wrong receives or retains the money, he will be held to have ratified the contract. *Herring v. Skaggs*, 73 Ala. 446.

Where a railroad corporation received railroad material bought upon its credit, and for its use by one of its officers, without authority, and uses it for the corporate purposes for which it was designed, this is an adoption and ratification of the act of the officer. *Scott v. Middletown, etc., R. Co.*, 4 Am. & Eng. R. R. Cas. 114; s. c., 86 N. Y. 200.

A merchant whose agent purchased goods on credit, cannot refuse to pay when he has received and sold the goods, and kept the proceeds; especially where he has paid other bills made by the same agent. *McDowell v. McKenzie*, 65 Ga. 630.

When an agent without the authority or knowledge of his principal borrows money and applies it to the payment and discharge of the legal liabilities of his principal, and the principal knowingly retains the benefit of such payment, the lender may recover therefor in an action against the principal for money had and received. The principal cannot knowingly retain the benefit of money hired by his agent, in his name, and at the same time legally refuse to repay the loan upon the ground that the agent had no authority to borrow money. *Perkins v. Boothby*, 71 Me. 91.

A principal who, after knowledge of the terms of a sale made by the agent, does not disaffirm but accepts and enjoys all the benefits thereof, cannot afterwards deny the authority of the agent to make the sale upon those terms. *Parish v. Reeve*, 63 Wis. 315.

The collection of a small portion of rents due from a tenant under a lease, after knowledge of the making of an unauthorized contract by the lessor's agent, is not a ratification of such contract for the sale of the lands; nor is the retention of the possession of the leased property obtained under such agent's contract, where the lessor had the right to declare a forfeiture and take forcible possession of the demised premises. *Torrence v. Shedd*, 112 Ill. 466.

Where principal pays notes made by an agent it is a ratification. *Harrod v. McDaniels*, 126 Mass. 413; *Long v. Colburn*, 11 Mass. 97; s. c., 6 Am. Dec. 160; *Dow v. Spenny*, 29 Mo. 386; *Commercial Bank v. Warren*, 15 N. Y. 577. See *Ward v. Williams*, 26 Ill. 446; s. c., 79 Am. Dec. 385.

Where a principal knowing that his agent has disobeyed instructions settled with him and gave him notes for the balance due, this is a ratification. *Beall v. January*, 62 Mo. 434.

An agent of A guaranteed the payment of goods that B might order. A agreed to the guarantee provided he had sufficient funds belonging to B to meet the bill, which he had. A delivered a statement of the goods purchased by B to his agent, who paid the account. *Held*, that A had ratified his agent's act. *Burgess v. Harris*, 47 Vt. 322.

Where T. who was indebted to B. agreed to supply him with lumber which he ordered of S. representing himself to be B.'s agent, and S. sent the lumber to B. with bills made out as against B. which bills B. received and retained without giving notice to S. that he was buying of T.; *held*, that B. had ratified T.'s action, and was liable to S. *Bearce v. Bowker*, 115 Mass. 129. Compare *Carson v. Cummings*, 69 Mo. 325; *Moody v. Blake*, 177 Mass. 23.

One who employs a contractor to do a work, not in its nature a nuisance, but which becomes so by reason of the manner in which the contractor has performed it, if he accepts the work in that condition becomes at once responsible for the nuisance. *Vogel v. Mayor of N. Y.*, 92 N. Y. 10; s. c., 44 Am. Rep. 349.

the agent, and must be inconsistent with a different intention; and where the evidence is doubtful, the question of ratification is for the jury.<sup>1</sup>

**Form of Action.**—Ratification may be implied by the form of action in the prosecution, or in the defence of suits, relating to the subject-matter of the agency.<sup>2</sup>

**Must Disavow.**—A principal is bound to disavow the unauthorized act of his agent within a reasonable time after the fact comes to his knowledge; otherwise, in many cases, he makes the act his

The acts of an agent from which a ratification can be implied are always construed liberally in favor of the agent. *Terril v. Flower*, 6 Martin (La.), 584; *Codwise v. Hacker*, 1 Cal. (N. Y.) 526; *Byrne v. Doughty*, 13 Ga. 46; *Lorraine v. Cartwright*, 3 Wash. (U. S.) 151.

1. *Abbott v. May*, 50 Ala. 97; *Hortons v. Townes*, 6 Leigh. (Va.) 47; *Crooker v. Appleton*, 25 Me. 131; *Barnard v. Wheeler*, 24 Me. 412; *Bryant v. Moore*, 26 Me. 84; *Burr v. Howard*, 58 Ga. 564; *Estevez v. Purdy*, 66 N. Y. 446; *Farwell v. Meyer*, 35 Ill. 40; Penn., etc., *Steam Nav. Co. v. Dandridge*, 8 G. & J. (Md.) 248; s. c., 28 Am. Dec. 543.

An agent instructed to remit cash by express sent a check of a party in good credit. The principal deposited the check for collection, but meanwhile the drawer became insolvent. *Held*, that the principal did not ratify the act of the agent. *Walker v. Walker*, 5 Heisk. (Tenn.) 425.

A letter written by the principal to a party who had made a purchase which the agent was not authorized to make, requesting the party to decline the sale, is not a ratification. *Johnson v. Craig*, 21 Ark. 533.

2. *Gibson v. Sav. Bank*, 69 Me. 579; *Partridge v. White*, 59 Me. 564; *Benson v. Liggett*, 78 Ind. 452; *Kyser v. Wells*, 60 Ind. 261; *Eadie v. Ashbaugh*, 44 Iowa, 519; *Grant v. Beard*, 50 N. H. 139; *Corsier v. Paul*, 41 N. H. 24; s. c., 77 Am. Dec. 753; *Ham v. Boody*, 20 N. H. 411; s. c., 51 Am. Dec. 235; *Payne v. Smith*, 12 N. H. 34; *Pratt v. Putnam*, 13 Mass. 361; *Herring v. Polley*, 8 Mass. 113; *Hampshire v. Franklin*, 16 Mass. 76; *Sutton v. Cole*, 3 Pick. (Mass.) 232; *Folger v. Mitchell*, 3 Pick. (Mass.) 396; *Dodge v. Lambert*, 2 Bosw. (N. Y.) 570; *Bank of Beloit v. Beale*, 34 N. Y. 473; *Wilmot v. Richardson*, 4 Abb. Dec. (N. Y.) 614; *Bank v. Conrey*, 28 Miss. 667; *Walker v. Mobile*, etc., R. Co., 34 Miss. 245; *Meyer v. Morgan*, 51 Miss. 21; *Franklin v. Ezell*, 1 Sneed (Tenn.), 497; *Gracy v. Potts*, 4 J. Baxt. (Tenn.) 395; *Warden v. Eichbaum*, 3 Grant. Cas. (Pa.) 42; *Lyman v. Norwich University*, 28

Vt. 560; *Drennen v. Walker*, 21 Ark. 537; *Woodward v. Suydam*, 11 Ohio, 363; *Frank v. Jenkins*, 22 Ohio St. 597; *Bank of Owensboro v. Western Bank*, 13 Bush (Ky.), 526.

The abandonment of a suit by the principal operates as a ratification of a compromise of the suit by an agent. *Holt v. Cooper*, 41 N. H. 111.

Suit by the principal to enforce his claim will not, as between the principal and agent, be a ratification releasing the agent from a claim for negligence. *Bank v. Western Bank*, 13 Bush (Ky.), 526.

Bringing a suit for the price of a horse, which the agent had sold, but had given an authorized warranty, is not a ratification of the warranty. *Cooley v. Perrine*, 41 N. J. L. 322, 42 N. J. L. 623. See *Carew v. Lillienthal*, 50 Ala. 44.

A suit prosecuted by a corporation in a lessee's name is not a ratification of a lease made by their agent. *Gillis v. Bailey*, 17 N. H. 18.

A, without authority, received for B money derived from the sale of real estate by a commissioner in partition, and notified B of the fact. B disputed the validity of the sale, and refused to accept or have anything to do with the money; thereupon A loaned the money to C, who became insolvent. B sued A's administrator for the money. *Held*, that the bringing of the suit ratified the receipt of the money by A, but not the loaning. *Benson v. Liggett*, 78 Ind. 452.

Where, under a N. Y. statute, a husband procures a policy of insurance upon his life in the name and for the benefit of his wife, or, in case of her death before his, of their children, in procuring it and in doing whatever is necessary to perfect and continue the rights of the assured, he acts simply as their agent, and they acquire a vested interest in the policy at the moment of its delivery to the insured; and this although no knowledge of the existence of the policy comes to them until after his death; their claim to the fruits of the insurance is a ratification of the act by which it was obtained. *Whitehead v. N. Y. L. Ins. Co.*, 102 N. Y. 143.

own; as where the silence of the principal might cause a loss to third persons, or might result from a desire to speculate on the chances of profit, or where the principal would, in fact, gain an advantage by his silence; in these and like cases the principal must act promptly, and disavow, or he ratifies the transaction.<sup>1</sup>

1. McClure v. Evartson, 14 Lea (Tenn.), 495; Hart v. Dixon, 5 Lea (Tenn.), 336; Walker v. Walker, 7 Baxt. (Tenn.) 260; Western, etc. R. Co. v. McElivee, 6 Heisk. (Tenn.) 208; Southern Oil Works v. Jefferson, 2 Lea (Tenn.), 581; Curry v. Hale, 15 W. Va. 867; Thurmmond v. Carter, 59 Miss. 127; Meyer v. Morgan, 51 Miss. 21; Connett v. Chicago, 114 Ill. 233; Hall v. Harper, 17 Ill. 82; McGeoch v. Hooker, 11 Ill. App. 649; Searing v. Butler, 69 Ill. 575; Williams v. Merritt, 23 Ill. 623; Hurd v. Marple, 2 Bradw. (Ill.) 402; McDermid v. Cotton, 2 Bradw. (Ill.) 297; Johnston v. Berry, 3 Ill. App. 256; Indianapolis, etc., R. v. Morris, 67 Ill. 295; Pope v. Lowitz, 14 Ill. App. 96; Francis v. Kerker, 85 Ill. 190; Hall v. Chicago, etc., R. Co., 48 Wis. 317; Walworth, etc., Bank v. Farmers', etc., Co., 16 Wis. 629; Kelly v. Phelps, 57 Wis. 425; Cooper v. Schwartz, 40 Wis. 54; Saveland v. Green, 40 Wis. 431; Perkins v. Boothby, 71 Me. 91; Johnson v. Wingate, 29 Me. 404; Blanchard v. Waite, 28 Me. 51; s. c., 48 Am. Dec. 474; Hawkins v. Lange, 22 Minn. 557; State of Wisconsin v. Torinus, 26 Minn. 1; Farwell v. Howard, 26 Iowa, 381; Hayes v. Steele, 32 Iowa, 44; Burlington, etc., Co. v. Greene, 22 Iowa, 508; Nixon v. Brown, 57 N. H. 34; Brigham v. Peters, 1 Gray (Mass.), 139; Frothingham v. Haley, 3 Mass. 68; Lent v. Paddleford, 10 Mass. 320; s. c., 6 Am. Dec. 119; Odiorne v. Maxcy, 13 Mass. 178; Stockbridge v. West Stockbridge, 14 Mass. 257; Amory v. Hamilton, 17 Mass. 103; Bassett v. Brown, 105 Mass. 551; Bredig v. Dubarry, 14 S. & R. (Pa.) 27; Lindsley v. Malone, 23 Pa. St. 24; Kelsey v. Nat. Bank of Crawford, 69 Pa. St. 426; Phila., etc., R. Co. v. Cowell, 28 Pa. St. 329; s. c., 70 Am. Dec. 128; Nat. Bank v. Fassett, 42 Vt. 432; Bigelow v. Denison, 23 Vt. 564; Beecher v. Grand Trunk R. Co., 43 Vt. 133; Brooks v. Fletcher, 56 Vt. 624; Judevine v. Hardwick, 49 Vt. 180; Watson v. Gray, 4 Abb. Dec. (N. Y.) 540; Cairnes v. Bleecker, 12 Johns. (N. Y.) 300; Rogers v. Kneeland, 10 Wend. (N. Y.) 218; Vianna v. Barclay, 3 Cow. (N. Y.) 281; Johnson v. Jones, 4 Barb. (N. Y.) 369; Bridenbecker v. Lowell, 32 Barb. (N. Y.) 9; Hope v. Lawrence, 50 Barb. (N. Y.) 258; Sheldon,

etc., Co. v. Eickenmeyer, etc., Co., 90 N. Y. 607; Craus v. Hunter, 28 N. Y. 389; Sage v. Sherman, 2 N. Y. 417; Murray v. Bininger, 3 Keyes (N. Y.), 107; Hazard v. Spears, 2 Abb. App. Dec. (N. Y.) 353; Benedict v. Smith, 10 Paige (N. Y.), 128; Pitts v. Shubert, 11 La. Ann. 286; s. c., 30 Am. Dec. 718; Lafite v. Godchaux, 35 La. Ann. 1161; Woods v. Rocchi, 32 La. Ann. 210; Mangum v. Bell, 20 La. Ann. 215; Oliver v. Johnson, 24 La. Ann. 460; Kehlor v. Kemble, 26 La. Ann. 713; Abernathie v. Consolidated, etc., Co., 16 Nev. 260; Owsley v. Woolhopter, 14 Ga. 124; Bray v. Gunn, 53 Ga. 144; McConnell v. Bowdry, 4 T. B. Mon. (Ky.) 392; Clay v. Spratt, 7 Bush (Ky.), 334; Chetwood v. Berrian, 39 N. J. Eq. 203; Peck v. Ritchey, 66 Mo. 114; Maddux v. Bevan, 39 Md. 485; Downer v. Morrison, 2 Gratt. (Va.) 250; First Nat. Bank v. Reed, 36 Mich. 263; Clealand v. Walker, 11 Ala. 1058; s. c., 46 Am. Dec. 238; Lee v. Fontaine, 10 Ala. 755; Whilden v. Merchants', etc., Bank, 64 Ala. 1; Wallace v. Lawyer, 90 Ind. 499; Breed v. First Nat. Bank, 6 Colo. 235; s. c., 4 Colo. 481; Smith v. Sheeley, 12 Wall. (U. S.) 358; Law v. Cross, 1 Black. (U. S.) 533; Thompson v. Craig, 16 Abb. Pr. (N. Y.) 29; Union Gold Min. Co. v. Nat. Bank, 96 U. S. 640.

As to what is reasonable time see McDermid v. Cotton, 2 Ill. App. 297, where ten days, the party being absent from home, *held*, a reasonable time.

Where the principal remained silent for four years, although he had not received the money paid to his agent, and the agent finally absconded with it, *held*, a ratification. Alexander v. Jones, 64 Iowa. 207.

Although a principal might have repudiated the acts of his agent in the sale of land, and although the purchase-money never came to his hands, yet, since he made no objections to the transaction for four years, during which time the grantee of the land made valuable improvements, *held*, that his silence for so long a time must be regarded as a ratification of the sale. Alexander v. Jones, 64 Iowa. 207.

The fact that a depositor in a bank remained silent for over two years after

**Must have Full Knowledge of Facts.**—In order to make the principal liable for not promptly disavowing unauthorized acts of

being informed that the cashier had signed his name to a check, and took no measures to assert his rights, may be regarded as a strong circumstance tending to show that the cashier was authorized to draw the check; but it is error to instruct the jury, as a matter of law, that if the depositor neglected to repudiate the act within a reasonable time after being informed of the facts, he thereby ratified and confirmed the act of the bank in charging him with such check. *De Land v. Dixon Nat. Bank*, 111 Ill. 323.

The assignment was made in December, 1879. The mortgage was afterwards foreclosed, the premises bought by the agent, and conveyed to the defendant in July, 1881. The complainant, who was then in Paris, was notified thereof in October, 1881, and returned to this State in April, 1882. He lived continuously thereafter, until April, 1883, with his agent, who informed him fully as to this transaction. He filed his bill in June, 1883. *Held*, that his delay constituted a ratification and an estoppel as against defendant. *Chetwood v. Berrian*, 39 N. J. Eq. 203.

But a principal must have an opportunity to repudiate or ratify the act of his agent. *Williams v. Storms*, 6 Cold. (Tenn.) 203.

If the principal does not instantly, on learning of the unauthorized act, repudiate it, the failure to do so is not *ipso facto* a ratification. *Miller v. Excelsior Stone Co.*, 1 Ill. App. 273; *Caswell v. Cross*, 120 Mass. 545.

Where he receives no direct benefit from the act, and the party dealing with the agent is not misled or prejudiced by his failure to repudiate the act promptly, and a prompt reply is not demanded by fair dealing or a usage of trade, a ratification of the act will not be presumed from his mere silence. *Mobile, etc., R. Co. v. Jay*, 65 Ala. 113.

A principal upon being informed of an unauthorized act of an agent has a right to elect whether he will adopt it or not; and so long as the condition of the parties is unchanged cannot be prevented from such adoption by the fact that the other party prefers to treat the contract as invalid. *Andrews v. Aetna Life Ins. Co.*, 92 N. Y. 596.

Silence will not imply a ratification if the principal did not know of the unauthorized act. *Walters v. Monroe*, 17 Md. 154; s. c., 77 Am. Dec. 328; *Ladd v. Hildebrandt*, 27 Wis. 135.

Failure to answer letters or inquiries from the agent as to the consummation of the sale does not constitute a ratification. *Bosseau v. O'Brien*, 4 Biss. (U. S.) 395. *Compare Lindsley v. Malone*, 23 Pa. St. 24.

Silence will amount to ratification where the principal with knowledge of the transaction of his agent fails for a reasonable time to dissent. Delay in suing after the principal has given notice of his refusal to approve the agent's act raises no presumption of ratification. *McClure v. Evartson*, 14 Lea (Tenn.), 495.

A principal having retained doubtful notes about two years after settlement is not entitled to recover against the agent. *Plano Mfg. Co. v. Buxton*, 30 N. Western Repr. (Minn.) 668.

Where an agent has wrongfully taken the property of his principal and sold it, not as agent, but on his own account, mere silence on the part of the owner does not confirm the sale. The owner, upon discovery of the wrong, is not required to make immediate efforts to regain his property; and silence, short of the time prescribed by the statute of limitations, will not bar his claim. *Hamlin v. Sears*, 82 N. Y. 327.

The rule of silent ratification applies only to principals, not to joint agents so as to ratify individual acts. *Penn v. Evans*, 28 La. Ann. 576.

Where an agent for disbursing funds makes a report to his principal, showing his disbursements, and accompanied with a draft for the balance in his hands, the principal must within a reasonable time (a question for the jury) examine the report, and make known to the agent any objections which he may desire to make thereto. Failing so to do within a reasonable time, his silence will be treated as a ratification of the agent's disbursements. *Minnesota, etc., Co. v. Montague*, 65 Iowa, 67.

The cashier of a bank offered a reward. *Held*, the failure of the directors to disavow the act constituted a ratification. *Kelsey v. Nat. Bank*, 69 Pa. St. 426. See *Walworth, etc., Bank v. Farmers, etc., Bank*, 16 Wis. 629.

Where an attachment was sued out by an agent without authority and the principal did not repudiate the suit, he is liable in damages. *Pollock v. Gantt*, 69 Ala. 374; s. c., 44 Am. Rep. 519.

Where one stands silently by and hears a contract made for him by another, he is bound by such contract. *James v.*

his agent, he must have full notice of such acts. But such notice may be given to another agent of the principal where the matter is within the scope of his agency, and such notice will affect the principal although not communicated to him.<sup>1</sup>

*Agent Must have been Appointed.*—A failure to disavow the acts of one who acted as an agent, but who had no appointment, and acted as a mere volunteer, will not be a ratification. In such case an express ratification is necessary.<sup>2</sup>

*Slight Evidence Sufficient.*—In some instances slight evidence of ratification is sufficient to bind the principal.<sup>3</sup>

Russell, 92 N. Car. 194; Bronson v. Chappell, 12 Wall. (U. S.) 681.

The agent of a partnership caused the arrest and imprisonment of parties indebted to the firm. The partners had no knowledge of the arrest until the parties were in prison, when the agent informed one of the partners, who made no inquiry as to the grounds of the arrest, and gave no directions in the matter. *Held*, this was a virtual ratification and adoption of what had been done by the agent, and that the firm were responsible for the agent's acts. *Forbes v. Hagman*, 75 Va. 168.

Where the principal gave her agent a sum of money to make some repairs on her property, and the agent made repairs far in excess of the amount allowed, and bought the materials on credit, it was held that the principal, knowing of the progress of the work and making no objection, had assented to the increased expenditure. *Paine v. Tillinghast*, 52 Conn. 532.

Where the owner of land had for a long time neglected to look after it, and at his death it appeared that an agent with a power of attorney had sold it for its own use, the heirs were prevented from setting aside the conveyance. *Hammond v. Hough*, 52 Tex. 63; *Crane v. Bedwell*, 25 Miss. 507; *Abbe v. Rood*, 6 McLean (U. S.), 106.

1. *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565; s. c., 96 U. S. 640; *Hoffman v. Livingston*, 46 N. Y. Super. Ct. 552.

The record of a deed executed by an agent without authority is not *per se* notice to the principal. *Reese v. Medlock*, 27 Tex. 120.

There can be no ratification of an agent's acts by the principal without a knowledge of the material facts; thus, A fraudulently obtained possession of a chest of tea by ordering it of the plaintiff in the name of the defendant, who received a bill or invoice of the tea, and delivered the bill to A on his request and

on being told by A that he ordered it as he did lest it might be attached; but A did not tell the defendant that it was bought on his credit, and defendant gave no notice that he was not the purchaser. *Held*, that the mere silence of the defendant was not a ratification. *Sayville v. Welch*, 58 Vt. 683.

The principal may, upon learning that the agent exceeded his authority, repudiate the act without restoring the property, if, before he learned of the unauthorized act, he had disposed of the property so that he could not restore it, or if its restoration would be of no practical value to the other party. *Humphrey v. Havens*, 12 Minn. 298.

2. *Ward v. Williams*, 26 Ill. 451; s. c., 79 Am. Dec., 385; *Ladd v. Hildebrand*, 27 Wis. 135. Compare *Miller v. Excelsior Stone Co.*, 1 Ill. App. 279; *Saveland v. Green*, 40 Wis. 431, 438; *Phila.*, etc., R. Co. v. *Cowell*, 28 Pa. St. 329; s. c., 70 Dec. 128.

Neither is the principal bound promptly to disavow the act of one whose agency was revoked. *Kelly v. Phelps*, 57 Wis. 425.

3. *Conn v. Penn.*, 1 Pet. (U. S. C. C.) 496; *Lorraine v. Cartwright*, 3 Wash. (U. S.) 151; *Richmond Mfg. Co. v. Starks*, 4 Mason (U. S.), 296; *Bank of Columbia v. Paterson*, 7 Cranch (U. S.), 299; *Terril v. Flower*, 6 Martin (La.), 584; *Rogers v. Kneeland*, 13 Wend. (N. Y.) 114; *Codwise v. Hacker*, 1 Cai. (N. Y.) 526; *Cooper v. Schwartz*, 40 Wis. 54; *Blakely v. Graham*, 111 Mass. 8.

When the unauthorized act is done in the execution of a power conferred in a mode not sanctioned by its terms and in excess or misuse of the authority given, ratification is more readily implied from slight acts of confirmation. *Harrod v. McDaniels*, 126 Mass. 415; *Myers v. Mut. Ins. Co.*, 32 Hun (N. Y.), 321.

Much less evidence of assent may be required in a case where the money has come to the principal's use, and has been expended in a manner advantageous to

But an act of ratification, in order to be sufficient, must be something by which the party, by relying upon it, has been prejudiced.<sup>1</sup>

**18. Termination of Agency.—By Limitation.**—Whenever an express agreement exists limiting the agency either to some definite object, or for some definite time, as, for instance, where a man is authorized to buy a quantity of merchandise according to sample, or to buy generally for a year, there being at the same time a condition that the employment shall continue in the one case until the merchandise has been bought, and in the other until the year has expired, the agency will be dissolved in due course by the happening of these results respectively.<sup>2</sup>

him, than would otherwise be necessary. *Harris v. School Dist.*, 28 N. H. 58; *Wilson v. School Dist.*, 32 N. H. 118; *Breed v. Bank*, 6 Colo. 235.

1. *Doughaday v. Crowell*, 11 N. J. Eq. 201.

Neglect to give notice of dissent does not always operate to ratify an act; that principle applies only to a case where the party neglecting to give such notice is benefited or the other party injured thereby. *Whittemore v. Hamilton*, 51 Conn. 153; *Johnston v. Berry*, 3 Ill. App. 256.

When a house was nearly completed the builder gave the defendant a written statement of the extra work and materials ordered by the superintending architect beyond the scope of his authority, to which the latter made no objection at the time. *Held*, that he was not estopped thereby from making the objection afterwards. The extra work and materials had then gone into the building and could not be withdrawn, so that, as to these extras, the builder was not led into any action resulting in loss to him by the defendant's failing to make the objection. Some other extras were afterwards ordered by the architect and furnished by the builder; but it did not appear that the builder suggested at the time of exhibiting his first bill of extras to the defendant that more extras might be so ordered or that either party thought of the matter. *Held*, that the defendant was not estopped, by his failure to object to the first bill, from denying the architect's authority to order the later extras. *Starkweather v. Goodman*, 48 Conn. 101; s. c., 40 Am. Rep. 152.

2. *Short v. Millard*, 68 Ill. 292; *Irby v. Lawshe*, 62 Ga. 216.

The authority of a broker, who is not a general agent to place and manage insurance on his principal's property, but is specially employed to procure insur-

ance on certain property, terminates with the procurement of the policy; no authority can be implied from the original employment to discharge the contract. *Hermann v. Niagara Ins. Co.*, 99 N. Y. 413.

Where an agent is employed to secure a debt of his principal which he does by taking the indorsement of notes by the debtor to his principal, his agency does not cease while he still holds the notes, and his acts have not been approved by his principal. Until such notes are accepted by the principal, the agent's declarations are admissible in evidence against the principal. *Wallace v. Goold*, 91 Ill. 15.

Where an agent is appointed to borrow money for his principal, and before he succeeds the necessity of borrowing ceases; *held* to terminate the agency. *Benoit v. Conway*, 10 Allen (Mass.) 528.

An agency to find a purchaser terminates as soon as the purchaser is found, so as to enable him to receive remuneration from the purchaser to see that the papers in the transaction are properly executed. *Short v. Millard*, 68 Ill. 292; *Moore v. Stone*, 40 Iowa, 259; *Walker v. Derby*, 5 Biss. (U. S.) 134.

Where an agent was appointed for the sale of machines and the only provision in regard to the duration of the agency was an agreement by the principal to furnish the agent such number of machines as he could sell prior to a certain date, *held*, that the agency terminated at that date so as to discharge the agent's sureties. *Gundlach v. Fischer*, 59 Ill. 172.

Where a contract with a railroad company provided that it might be terminated by a written notice for thirty days, to be signed by a person designated in the contract, it was held that the agent giving the notice had the power to recall it before the expiration of the thirty days. *Patrick v. Richmond, etc., R. Co.*, 93 N. Car. 422.



*By Act of Principal.*—A principal who employs an agent may revoke the appointment at any time.<sup>1</sup> And

*Appointment under Seal, Revoked by Parol.*—This principle has been so well established that it even has been held that the authority of an agent appointed under seal may be revoked by parol.<sup>2</sup>

*May be Implied.*—The revocation of an agency by the principal need not be expressed in words. It may be implied from his acts.<sup>3</sup>

1. Succession of Babin, 27 La. Ann. 114; Jacobs v. Warfield, 23 La. Ann. 395; Spear v. Gardner, 16 La. Ann. 383; Peacock v. Cummings, 46 Pa. St. 434; Coffin v. Landis, 46 Pa. St. 426; Blackstone v. Buttermore, 53 Pa. St. 266; Trust v. Repoor, 15 How. Pr. (N. Y.) 570; Tyler v. Ames, 6 Lans. (N. Y.) 280; Wells v. Hatch, 43 N. H. 246; Attrill v. Patterson, 58 Md. 226; Walker v. Denison, 86 Ill. 142.

If the principal gives his agent an order, but countermands it before it is acted upon, the principal will not be responsible for what the agent does under the order. Tucker v. Lawrence, 56 Vt. 467.

If a principal hands over to his agent a sum of money wherewith to make a purchase or to be invested or to pay a debt, he may, any time before the money is used, revoke the authority, and require the money to be repaid to him. Howard College v. Pace, 15 Ga. 486; Simonton v. First Nat. Bank, 24 Minn. 216; Dole v. Bodman, 3 Metc. (Mass.) 139; Kelly v. Roberts, 40 N. Y. 432.

Where a principal handed a sum of money to an agent to be used in settling a law-suit between two parties, the principal receiving no consideration for the money, *held*, that he could revoke the power at any time before a settlement was completely effected. Phillips v. Howell, 60 Ga. 411; Lewis v. Sawyer, 44 Me. 332.

An attorney receiving a claim for collection stated in his receipt therefor that the money when collected was to be paid to a third party. *Held*, that this was merely an authority to the attorney to dispose of the proceeds of the claim in that manner, and such authority could at any time be revoked. Swartz v. Earls, 53 Ill. 237.

If a principal delivers property to an agent for sale he can at any time before the sale actually takes place revoke the power of sale and require such property to be restored to him. Chambers v. Seay, 73 Ala. 372; Brown v. Pforr, 38 Cal. 550.

But if the goods had been offered to a customer at an authorized price and the agent had agreed to let the offer remain

open for two days, and before the time expired the principal notified the agent not to sell at the stated price, it was held that the principal was bound by the agent's act. Meister v. Cleveland Dryer Co., 11 Ill. App. 227.

Where a broker was engaged to sell land within a certain time, and his principal revoked the agency before the time expired, and he found a customer after the revocation, but within the time specified, he was held not to be entitled to his commission. Brown v. Pforr, 38 Cal. 550.

A sub-contractor received money of the general contractor in excess of what was due him, as the agent of the general contractor, to pay debts due to laborers and material-men, whereby to protect the principal from liability from the enforcement of liens, but instead of paying out the money deposited it with another for safe keeping, under a promise of the latter to pay the same only to the depositor, or upon his written order. The depositor, on the demand of the principal to whom the money belonged, delivered the same to him. It was *held* the depositary was not liable to the agent for a breach of his contract, the principal having the right to revoke the agency of the sub-contractor at any time before he paid out the money as directed. In such case the delivery of the money to the true owner will relieve the depositary of liability to the agent from whom he received it. Solomon v. Nicholas, 113 Ill. 351.

2. Brookshire v. Brookshire, 3 Ired. (N. Car.) 74; s. c., 47 Am. Dec. 341; Pickler v. State, 18 Ind. 266; Henderson v. Hydraulic Works, 9 Phil. (Pa.) 100; United States v. Jarvis, Davies (U. S.), 274.

3. As by a sale of the subject-matter of the agency. Walker v. Denison, 86 Ill. 142; Gilbert v. Holmes, 64 Ill. 548.

Any disposition by the principal of the subject-matter, such as an assignment for the benefit of creditors, inconsistent with the appropriation first intended, will be a revocation. Simonton v. First Nat. Bank, 24 Minn. 216; Trumbull v. Nicholson, 27 Ill. 149.

Demand for a note sent to a bank as

*By Act of Agent.*—An agent can terminate the agency at any time; but if the agency has been undertaken for a valuable consideration he will be liable in damages to his principal, and in many cases he will be required to give reasonable notice.<sup>1</sup>

*Naked Power Revocable.*—As a general rule any naked power is revocable, and even an express declaration that it is irrevocable will not prevent its revocation.<sup>2</sup>

*Not when Coupled with Interest.*—If the power is coupled with a vested interest it cannot be revoked.<sup>3</sup>

an agent for collection terminates the agency. *Potter v. Merchants' Bank*, 28 N. Y. 654.

So will payment of the agent for his services under suitable circumstances. *Moore v. Stone*, 40 Iowa, 259; *Reid v. Latham*, 40 Conn. 452.

Where a principal takes the subject-matter of the agency out of the hands of the agent by performing the work himself, the agency will be revoked. *Torre v. Thiele*, 25 La. Ann. 418.

The appointment of a general agent revokes a special agency. *Rapier v. Louisiana, etc., Ins. Co.*, 57 Ala. 101.

A power which is silent as to a similar power given previously to another agent does not work a revocation. *Hatch v. Coddington*, 95 U. S. 48.

Neither does the appointment of another agent when this is not incompatible with the continuance of the first agency. *Davol v. Quimby*, 11 Allen (Mass.), 208. Compare *Copeland v. Merc. Ins. Co.*, 6 Pick. (Mass.) 198.

The appellant and the appellee entered into a written contract on the 7th day of July, 1880, wherein the former agreed to pay the latter three per cent commission for selling real estate; subsequently a verbal contract was made, wherein it was agreed that the appellee should enter the service of the appellant at a compensation of one dollar and twenty-five cents per day, but there was evidence showing that the written contract was not modified or abrogated; and that the compensation stipulated in the verbal contract was for managing appellant's general business. *Held*, that the verbal contract did not necessarily supersede the original written agreement and prevent the agent from recovering commissions for services performed under it. *Smith v. Lane*, 101 Ind. 449.

A power of attorney, executed by the widow and heirs of decedent, empowering an agent to complete a contract made by decedent, is not revoked by a grant of administration to the widow two days thereafter, and payments to him as agent

held to be good. *Jones v. Commercial Bank of Ky.*, 78 Ky. 413.

1. *Barrows v. Cushway*, 37 Mich. 481; *Case v. Jennings*, 18 Tex. 661; *Stoddart v. Key*, 62 How. Pr. (N. Y.) 137; *White v. Smith*, 6 Lans. (N. Y.) 5; *Bender v. Manning*, 2 N. H. 289; *Gill v. Middleton*, 105 Mass. 477.

2. *Chambers v. Seay*, 73 Ala. 372; *MacGregor v. Gardner*, 14 Iowa, 326; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Peacock v. Cummings*, 46 Pa. St. 434; *Succession of Babin*, 27 La. Ann. 114; *Jacobs v. Warfield*, 23 La. Ann. 395; *Pickler v. State*, 18 Ind. 266; *Trust v. Repoor*, 15 How. Pr. (N. Y.) 570; *Knapp v. Alvord*, 10 Paige (N. Y.), 205; s. c., 40 Am. Dec. 241; *Marfield v. Douglass*, 1 Sandf. Sup. Ct. (N. Y.) 360; *Wells v. Hatch*, 43 N. H. 246; *Gibbons v. Gibbons*, 4 Harr. (Del.) 105; *Walker v. Denison*, 86 Ill. 142; *Attrill v. Patterson*, 58 Md. 226.

A power stipulating that it is not to be revoked within two years may be revoked at any time. *Walker v. Denison*, 86 Ill. 142.

Where there is no valuable consideration passed for the agreement on the part of the agent, there was no power coupled with an interest, and the agency could at any time be terminated on notice. *Simpson v. Carson*, 11 Oregon, 361.

3. *Chambers v. Seay*, 73 Ala. 372; *Hynson v. Noland*, 14 Ark. 710; *Hill v. Day*, 34 N. J. Eq. 150; *Matthieson, etc., Co. v. McMahon*, 9 Vroom (N. J.), 546; *Hartley's Appeal*, 53 Pa. St. 212; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Smyth v. Craig*, 3 W. & S. (Pa.) 14; *Brown v. Pforr*, 38 Cal. 550; *Posten v. Rasette*, 5 Cal. 467; *Barr v. Schroeder*, 32 Cal. 609; *Walker v. Denison*, 86 Ill. 142; *Bonney v. Smith*, 17 Ill. 531; *Gilbert v. Holmes*, 64 Ill. 548; *Wheeler v. Knaggs*, 8 Ohio, 169; *Mansfield v. Mansfield*, 6 Conn. 559; s. c., 16 Am. Dec. 76; *Hutchins v. Hebbard*, 34 N. Y. 24; *Marfield v. Goodhue*, 3 N. Y. 62; *Goodwin v. Bowden*, 54 Me. 424; *Brookshire v. Vancannon*, 6 Ired. L. (N. Car.) 231;

*Interest must be in Subject-matter.*—But the interest must be in the subject-matter of the agency itself; an interest in the proceeds to arise as compensation for executing the power will not make it irrevocable.<sup>1</sup>

*Not when Conferred for a Consideration.*—Where an agency is conferred for a valuable consideration it is irrevocable.<sup>2</sup>

*Revocation by Operation of Law—Death of Principal.*—Death of either principal or agent instantly ends the agency as regards all parties, unless the agency is coupled with an interest.<sup>3</sup>

Hunt v. Rousmaniere, 8 Wheat. (U. S.) 174; Attrill v. Patterson, 58 Md. 226.

A power of attorney to collect a debt to secure previous advances by the agent is irrevocable, but as far as the agent is concerned only to the amount of those advances. Marziou v. Pioche, 8 Cal. 522.

1. Chambers v. Seay, 73 Ala. 372; Blackstone v. Buttermore, 53 Pa. St. 266; Coffin v. Landis, 46 Pa. St. 426; Hartley's Appeal, 53 Pa. St. 212; Bonney v. Smith, 17 Ill. 531; Gilbert v. Holmes, 64 Ill. 548; Le Moyne v. Quimby, 70 Ill. 399; Walker v. Denison, 86 Ill. 142; Mansfield v. Mansfield, 6 Conn. 559; s. c., 16 Am. Dec. 76; Barr v. Schroeder, 32 Cal. 609; Travers v. Crave, 15 Cal. 12; Hunt v. Rousmaniere, 8 Wheat. (U. S.) 174; Houghtailing v. Marwin, 7 Barb. (N. Y.) 412; Attrill v. Patterson, 58 Md. 226; Raleigh v. Atkinson, 6 M. & W. 670. Compare Merry v. Lynch, 68 Me. 94.

A agreed to pay B all over \$15,500 realized upon the sale of property. B sold the property for \$20,000. A repudiated the contract, and B sued to recover commissions. Held, that where there is no valuable consideration passed for the agreement on the part of the broker, there was no power coupled with an interest, and the agency could at any time be terminated on notice. Simpson v. Carson, 11 Oregon, 361; s. c., 8 Pac. Repr. 325.

A power of attorney to confess a judgment is not revocable by act of the party giving it. Enne v. Clark, 2 Pa. St. 234; Marziou v. Pioche, 8 Cal. 522; Kindig v. March, 15 Ind. 248. Compare Judson v. Sierra, 22 Tex. 365; Spear v. Gardner, 16 La. Ann. 383; United States v. Jarvis, Dav. (U. S.) 274.

2. Hunt v. Rousmaniere, 8 Wheat. (U. S.) 174; Walker v. Denison, 86 Ill. 142; Blackstone v. Buttermore, 53 Pa. St. 266.

If a consideration is given to make the power irrevocable, it cannot be revoked. Guthrie v. Wabash, etc., R. Co., 40 Ill. 109; MacGregor v. Gardner, 14 Iowa, 326.

When the consideration fails the agency becomes revocable. *Ex-p.* Smither, 1 Deac. 413.

3. Scruggs v. Driver, 31 Ala. 274; Saltmarsh v. Smith, 32 Ala. 404; Travers v. Crane, 15 Cal. 12; Ferris v. Irving, 28 Cal. 645; McGriff v. Porter, 5 Fla. 373; Turnan v. Temke, 84 Ill. 286; Johnson v. Wilcox, 25 Ind. 182; Lewis v. Kerr, 17 Iowa, 73; Harper v. Little, 2 Me. 14; s. c., 11 Am. Dec. 25; Gleason v. Dodd, 4 Metc. (Mass.) 333; Marlett v. Jackman, 3 Allen (Mass.), 287; Gale v. Tappan, 12 N. H. 145; s. c., 37 Am. Dec. 194; Wilson v. Edmonds, 24 N. H. 517; Shift v. Lesseps, 22 La. Ann. 185; Clayton v. Merrett, 52 Miss. 353; Peries v. Aycinena, 3 Watts & S. (Pa.) 64; Riggs v. Cage, 2 Humph. (Tenn.) 350; Primm v. Stewart, 7 Tex. 178; Cleveland v. Williams, 29 Tex. 205; McDonald v. Black, 20 Ohio, 185; s. c., 55 Am. Dec. 448; Michigan Ins. Co. v. Leavenworth, 30 Vt. 12; Davis v. Windsor Sav. Bank, 46 Vt. 728; Nichols v. Chapman, 9 Wend. (N. Y.) 452; Galt v. Galloway, 4 Pet. (U. S.) 341; Hunt v. Rousmaniere, 8 Wheat. (U. S.) 174; Clark v. Courtney, 5 Pet. (U. S.) 319; Hunt v. Ennis, 2 Mason (U. S.), 244. Compare Ish v. Crane, 8 Ohio St. 520; s. c., 13 Ohio St. 574; Dick v. Page, 17 Mo. 234; s. c., 57 Am. Dec. 267; Carringer v. Whittington, 26 Mo. 311; s. c., 72 Am. Dec. 212; Cassidy v. McKenzie, 4 Watts & S. (Pa.) 282; s. c., 39 Am. Dec. 505.

The death of the principal is *per se* a revocation of the agent's authority, and hence all contracts or other engagements subsequently entered in to by the agent are absolutely void as to the legal representatives of the principal, notwithstanding the death of the principal may have been unknown at the time such contracts or engagements were entered into. Est. of Rapp v. Phoenix Ins. Co., 113 Ill. 390.

But if the power is coupled with an interest the death of the principal does not work a revocation. Hunt v. Rousmaniere, 8 Wheat. (U. S.) 174; Knapp v. Alford, 10 Paige Ch. (N. Y.) 205; s. c., 40 Am. Dec. 241; Hess v. Rau, 95 N. Y.

**Innocent Third Parties.**—In some States it has, however, been held that acts done by the agent after the death of the principal, but before notice of his death has reached him, binds the principal's estate so as to protect innocent third parties.<sup>1</sup>

**Revokes Power of Sub-agent.**—The death of the agent extinguishes his power and revokes the power of his sub-agent.<sup>2</sup>

**By Lunacy.**—The principal's insanity operates, *per se*, as a revocation or suspension of the agent's authority, except in cases where a consideration has previously been advanced in the trans-

359; *Bergen v. Bennett*, 1 Cal. (N. Y.) 1; s. c., 2 Am. Dec. 281; *Houghtailing v. Marvin*, 7 Barb. (N. Y.) 412; *Varnum v. Meserve*, 8 Allen (Mass.), 158; *Merry v. Lynch*, 68 Me. 94; *Goodwin v. Bowden*, 54 Me. 424; *Travers v. Crane*, 15 Cal. 12; *Gilbert v. Holmes*, 64 Ill. 548; *Bonney v. Smith*, 17 Ill. 531.

An agent received for collection certain notes. Before the notes fell due the principal died and the makers became insolvent. The agent did not make effort to collect the notes. *Held*, that the agent's power ceased with the death of the principal, after which he had no authority to collect the notes. *Darr v. Darr*, 59 Iowa, 81.

An indorsement of negotiable paper for the purpose of collection passes the legal title in trust, and the authority to collect is not revoked by the death of the owner. *Moore v. Hall*, 48 Mich. 143.

Where a broker had sold stock short for a customer, and in accordance with the usual custom had borrowed the stock for delivery, becoming himself obligated to return the borrowed stock, and borrowing from time to time as required to replace the stock previously borrowed, and while the transaction was so kept alive the customer died; *held*, that the broker had authority, acting in good faith, to continue it in the same manner until the appointment and qualification of a legal representative of the estate of the deceased, upon whom the proper notice could be served in order to close it. *Hess v. Rau*, 95 N. Y. 359.

1. *Cassiday v. McKenzie*, 4 W. & S. (Pa.) 282; s. c., 39 Am. Dec. 505; *Wilson v. Stewart*, 5 Pa. L. J. Rep. 450; *Carriger v. Wilmington*, 26 Mo. 311; s. c., 72 Am. Dec. 212; *Dick v. Page*, 17 Mo. 234; s. c., 57 Am. Dec. 267; *Ish v. Crane*, 8 Ohio St. 520; s. c., 13 Ohio St. 574; *Bank of N. Y. v. Vanderhorst*, 33 N. Y. 553. *Compare* *Lewis v. Kerr*, 17 Iowa, 73, where it was held that a sale made by an agent after the death of the principal and in ignorance of that event, the agent having merely a power to sell and no interest in the property, is absolutely void, and

cannot be made valid by the consent of the party to whom the land descends.

Where an agent of a firm, authorized to draw checks against the firm's bank account for the use of the firm continues to do so after the death of one of the members of the firm, both he and the bank being in ignorance of the death, checks so drawn will bind the firm. The authority of such agent continues in qualified form after the death of one of the members of the firm. *Bank of N. Y. v. Vanderhorst*, 32 N. Y. 553; *Merry v. Lynch*, 68 Me. 94; *Wilson v. Edmonds*, 24 N. H. 517; *Primm v. Stewart*, 7 Tex. 178.

In case of joint principals, the death of one of them revokes the authority of the agent. *Travers v. Crane*, 15 Cal. 12; *Marlett v. Jackman*, 3 Allen (Mass.), 287; *Johnson v. Wilcox*, 25 Ind. 182.

But the death of one of two or more joint and several principals as trustees, does not necessarily extinguish the agent's power. *Wilson v. Stewart*, 5 Pa. L. J. Rep. 450.

2. *Merrick's Estate*, 8 W. & S. (Pa.) 402; *Gage v. Allison*, 1 Brev. (S. Car.) 495; s. c., 2 Am. Dec. 682; *City Council v. Duncan*, 3 Brev. (S. Car.) 386; *Watt v. Watt*, 2 Barb. Ch. (N. Y.) 371; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296. *Compare* *Smith v. White*, 5 Dana (Ky.), 376.

And where the agent has dealt with third parties in his own name, and moneys are due the agent on his principal's account, his administrators have no authority to collect the money. The third party becomes the debtor of the principal exclusively. *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

Where an agent has a power of substitution, and exercises it, his death revokes the authority of the substitute. *Lehigh, etc., Co. v. Mohr*, 83 Pa. St. 228; s. c., 24 Am. Rep. 161.

Where two agents are appointed to perform a duty, the death of one revokes the authority of the other. *Salisbury v. Brisbane*, 61 N. Y. 617; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180.

action which was the subject-matter of the agency, so that the power has become coupled with an interest; or where a consideration of value is given by a third person, trusting to an apparent authority, and in ignorance of the principal's insanity.<sup>1</sup>

*Insanity of Agent.*—The case of the insanity of the agent would seem to constitute a natural, nay, a necessary revocation of his authority, for the principal cannot be presumed to intend that acts done for him and to bind him shall be done by one who is incompetent to understand or to transact the business which he is employed to execute.<sup>2</sup>

*Bankruptcy.*—The bankruptcy of a principal or an agent revokes the agent's authority when not coupled with an interest.<sup>3</sup>

*Marriage.*—The marriage of a woman does not of itself work a revocation of her authority as an agent, but her marriage will, of itself, operate as a revocation of any power she may have given as principal.<sup>4</sup>

*Dissolution of Partnership.*—The dissolution of a partnership works a revocation of an agency therefor.<sup>5</sup>

*War* does not revoke an agency.<sup>6</sup>

*Effect on Sub-agents.*—Any revocation of authority of an agent revokes the powers of his sub-agents.<sup>7</sup>

*When Bound after Revocation.*—Acts of an agent done after the revocation of his agency bind both his principal and himself, so far as they regard third persons who have had no notice of the revocation.<sup>8</sup>

1. Hill v. Day, 34 N. J. Eq. 150; Matthiesen, etc., Co. v. McMahon, 9 Vroom (N. J.), 546; Davis v. Lane, 10 N. H. 156; Wallis v. Manhattan Co., 2 Hall (N. Y.), 495; Motley v. Head, 43 Vt. 633; Bunce v. Gallagher, 5 Blatch. (U. S.) 481.

2. Story on Agency, § 487.

3. Story on Agency, §§ 482, 486; Ogden v. Gillingham, Baldwin (U. S.), 38; In re Daniels, 13 Nat. Bank Reg. 46; Audenried v. Betteley, 8 Allen (Mass.), 302.

4. Story on Agency, §§ 481, 485; Wamboole v. Foote, 2 Dak. 1.

The marriage of a woman does not revoke her agency, where there is a vested interest. Story's Agency, § 485; Enne v. Clark, 2 Pa. St. 234. Compare Judson v. Sierra, 22 Tex. 365.

If a woman retains the right to manage her paraphernal property without her husband's assistance, her marriage will not revoke the powers of an agent previously intrusted with its administration. Reynolds v. Rowley, 2 La. Ann. 890.

A power to sell land given by a single man is revoked by his marriage. Henderson v. Ford, 46 Tex. 627.

5. Schlater v. Winpenny, 75 Pa. St. 321. Compare Bank of N. Y. v. Vanderhorst, 32 N. Y. 553.

A change in the name of a firm does not revoke the agency. Billingsley v. Dawson, 27 Iowa, 210.

6. Darling v. Lewis, 11 Heisk. (Tenn.) 125; Maloney v. Stephens, 11 Heisk. (Tenn.) 738; Jones v. Harris, 10 Heisk. (Tenn.) 98; Shelby v. Offutt, 51 Miss. 128; Murrell v. Jones, 40 Miss. 565. Compare Howell v. Gordon, 40 Ga. 302; Ins. Co. v. Davis, 95 U. S. 425; Fretz v. Storer, 12 Wall. (U. S.) 198; United States v. Grossmayer, 9 Wall. (U. S.) 72; Conley v. Burson, 1 Heisk. (Tenn.) 145; Blackwell v. Willard, 65 N. Car. 555; Robinson v. International Life Ass. Co., 42 N. Y. 54; Sands v. N. Y. Life Ins. Co., 50 N. Y. 626; Manhattan Life Ins. Co. v. Warwick, 20 Gratt. (Va.) 614.

7. Lehigh, etc., Co. v. Mohr, 83 Pa. St. 228; s. c., 24 Am. Rep. 161; Jackson Ins. Co. v. Partee, 9 Heisk. (Tenn.) 296.

Unless it be specially provided in the contract that the revocation shall not so operate. And such provision may be implied as in the case of the death or incapacity of the master of a ship who has appointed the mate. Story on Agency, § 469. See also SHIPPING.

8. Eadie v. Ashbaugh, 44 Iowa, 519; Gelpcke v. Quentell, 74 N. Y. 599; McNeilly v. Continental, etc., Ins. Co., 66

## AGGREGATE—AGGRIEVED.

**AGGREGATE.**—A number of things united into one.<sup>1</sup>

**AGGRIEVED.**—An injury; a grievance.<sup>2</sup>

N. Y. 23; *Claffin v. Lenheim*, 66 N. Y. 301; *Barkley v. Rensselaer, etc.*, R. Co., 71 N. Y. 205; *Marsh v. Gilbert*, 4 Th. & C. (N.Y.) 259; *Rice v. Isham*, 4 Abb. App. Dec. (N. Y.) 37; *Harris v. Cuddy*, 21 La. Ann. 388; *Hancock v. Byrne*, 5 Dana (Ky.), 514; *Lamothe v. St. Louis, etc.*, R. Co. 17 Mo. 204; *Beard v. Kirk*, 11 N. H. 398; *Diversy v. Kellogg*, 44 Ill. 114; *Murphy v. Ottenheimer*, 84 Ill. 39; *Meyer v. Hehner*, 96 Ill. 400; *Packer v. Hinckley Locomotive Works*, 122 Mass. 484; *Rice v. Barnard*, 127 Mass. 241; *Wright v. Herrick*, 128 Mass. 240; *Morgan v. Stell*, 5 Binn. (Pa.) 305; *Jones v. Hodgkins*, 61 Me. 480; *Braswell v. Am. L. Ins. Co.*, 75 N. Car. 8; *Ulrich v. McCormick*, 66 Ind. 243; *Robertson v. Cloud*, 47 Miss. 208; *Fellows v. Hartford, etc.*, *Steamboat Co.*, 38 Conn. 197; *Tier v. Lampson*, 35 Vt. 179; *Hatch v. Coddington*, 95 U. S. 48; *Ins. Co. v. McCain*, 96 U. S. 84.

The agent also must have notice of the revocation. A notice to a third party without notice to the agent leaves the power in force. *Weile v. U. S.*, 7 Ct. of Cl. 535; *Robertson v. Cloud*, 47 Miss. 208.

A foreign corporation leased its works to its agent, who, without authority from such corporation, continued to operate the works in its name, and retained in his service an employee of the corporation without notice to him of the change. *Held*, that the corporation was liable to the employee. *North Chicago, etc., Co. v. Hyland*, 94 Ind. 448.

Defendant authorized plaintiff to honor drafts of A. Shortly after he revoked the authority. Before the revocation A made drafts on the plaintiff which were honored, but the drafts were not presented until after the notice of revocation was received, and could not have been so presented. *Held*, that defendant was liable to plaintiff for amount of drafts so made. *Gelpcke v. Quentell*, 74 N. Y. 599.

The doctrine that a discharged agent may, under some circumstances, bind his former principal to the extent of the authority with which he had been apparently clothed, has no application beyond the claim of authority made by the agent. Accordingly, where an agent of plaintiff, after his discharge, which was unknown to defendant, represented that he had authority to draw upon his principal, but not that he had authority to procure an accommodation indorser, *held* that the principal was not bound to indemnify de-

fendant for indorsing the discharged agent's draft, which the principal refused to pay, notwithstanding the principal had honored several other drafts drawn by the agent before his discharge and indorsed by the defendant. *Bandowine v. Grimes*, 64 Iowa, 370.

Two agents of different principals agreed to settle the indebtedness of each agent to his principal by a transfer of accounts, and by a payment by one agent to the other of the difference in cash. Before the agreement was executed the agency of the one who was to pay was revoked. *Held*, that the arrangement thus came to an end, and could not be enforced by the principal. *Providence Gas Burner Co. v. Barney*, 14 R. I. 18.

For a full statement of the law on agents for Private Corporations, see PRIVATE CORPORATIONS. Also, for the law on Public Agents, see MUNICIPAL CORPORATIONS; and the titles ATTORNEYS AT LAW; AUCTIONEERS; BROKERS; COLLECTION AGENCIES; COMMERCIAL AGENTS, or DRUMMERS; COMMISSION MERCHANTS, or FACTORS; POWER OF ATTORNEY; SHIPMASTERS, for the law regarding those particular classes of agents.

1. **Aggregate Payments.**—A city ordinance provided for the grading, curbing, etc., of twenty streets. The city charter required that every ordinance shall contain a specific appropriation from the proper fund for the whole of the cost of each street, etc., and that every contract shall contain a clause to the effect that it is subject to the provisions of the charter that the aggregate payments thereon shall be limited by the amount of such work, specific appropriation, based upon an estimate of cost indorsed by the engineer. It was contended in this case that "aggregate payments" was the amount to be paid for the whole work, and not the amount paid by the city alone. The court held "aggregate payments" applied only to the payments to be made by the city treasury. *Seibert v. Covender*, 3 Mo. App. 423.

2. A statute provided that if the Secretary of State shall neglect or refuse to perform the duties enjoined on him by law, . . . he shall pay to the person aggrieved a sum not less than one hundred dollars, etc. The question before the court was whether the plaintiff was aggrieved by the refusal of the secretary, after a decision by a proper tribunal against the plaintiff, to open and cast up election returns, when by so doing the

**AGGRIEVED PERSON.**—One whose rights are concluded or injuriously affected.<sup>1</sup>

plaintiff would be entitled to a certificate of election. The court: "It cannot be said that a person is not aggrieved by the refusal of the secretary to cast up the votes returned for him. He has a right to have all the votes counted that have been cast for him, and it is a personal as well as a public wrong to refuse to count them. A denial of this right is an injury, a grievance, and the statute furnishes a redress." *Swityler v. Rodman*, 48 Mo. 199.

A candidate at an election is aggrieved by the mere fabrication of a voting-paper, whether or not the fabricated voting-paper can have any influence on the return of the candidates at the election. *Lush, J., in Verdin v. Wray*, 2 Q. B. Div. 609.

**Party Aggrieved.**—"A party cannot be said to be 'aggrieved' unless error has been committed against him. The law seems to be well settled that a party cannot take an appeal from a judgment in his own favor." *Sherwood, C. J., in Mevialy v. Macklin*, 67 Mo. 95: "He is aggrieved when an appealable order or judgment is entered against him." *Ely v. Frisbie et al.*, 17 Cal. 250.

A trustee has no right to object to the distribution of the trust estate among creditors. He is not such a party aggrieved as would entitle him to an appeal, for the right to his commissions in such a case is not denied. *Salmon, Trustee, v. Pierson*, 8 Md. 297.

"A party aggrieved is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested by the decree." *Wiggin, Admr., v. Swett* 6 Metc. (Mass.) 197; *Swackhamer v. Kline's Admr.*, 25 N. J. Eq. 503; *Raleigh v. Rogers*, 25 N. J. Eq. 506.

"And it is not a mere remote and contingent interest, or a wish dictated by whim or policy, without any pecuniary interest to be directly affected by the decree, that will suffice." *Barrows, J., in Veayie Bank v. Young*, 53 Me. 559; *Adams v. Woods et al.*, 8 Cal. 306.

"In legal acceptance, a party is aggrieved by such decree only when it operates on his property or bears upon his interest directly." *Deering v. Adams*, 34 Me. 44.

"A defendant is not legally aggrieved by his discharge from custody." *Com. v. Graves*, 112 Mass. 282.

Where a person's interest in property has ceased, he cannot be said to be aggrieved by any judgment rendered as to

that property. *Kiefer v. Winkens*, 3 Daly, 191.

For a party to be aggrieved, one of his rights must have been injuriously affected. *Ex parte Davidson*, 18 C. B. 310.

Consequently a party is aggrieved by entries in Stationers' Hall calculated to prejudicially affect a literary copyright. *Ex parte Hutchins v. Ramer*, 4 Q. B. Div. 90; *Chappell v. Purday*, 12 W. & W. 303.

Some person who has sustained special and peculiar injury. *Rex v. Essex*, 5 Barn. & Cress. 432.

The provision in the New York Code authorizing any party aggrieved to appeal embraces only such persons as are technically parties to the action or their representatives. *Mackin v. Kanouse*, 2 Abb. Pr. (N. Y.) 390.

But in *Morrow et al. v. Wood*, 56 Ala. 1, it was held that a county superintendent was a party aggrieved on the default of the county treasurer, by reason whereof there was no money for public instruction.

1. The question before the court was as to the construction of a section of the Code giving any person aggrieved the right to appeal. *Dewey, J.*: "The language in reference to appeals from the Probate Court [this case] is different from that used in reference to justices of the peace, police courts, and the Superior Court. In all these cases it is provided that any 'party' aggrieved may appeal, while in the Probate Court the right of appeal is given to any 'person aggrieved.' This language includes a wider range of persons than those entitled to an appeal in other courts. From the nature of the case it must be so, as in suits at law in the other courts there are well-defined parties. It is not so in cases in the Probate Court. It includes any one who 'might eventually be affected,' or whose 'probable future interest would be affected,' or, in other words, 'did the decree of the Probate Court conclude or in any way affect the right of the appellant?' " *Farrar et al. v. Parker et al.*, 3 Allen (Mass.), 556.

A person aggrieved is one immediately aggrieved. *Rex v. Justices of Middlesex*, 3 Barn. & Adol. 938.

One against whom a final judgment has been rendered. *Porter v. The United States*, 2 Paine (U. S. C. C.), 315.

"And we are furthermore of the opinion that the respondent was a person aggrieved by such order. He was di-

AGISTER—AGREEABLE—AGREEABLY—AGREED.

**AGISTER.**—One who takes the cattle of another into his own ground to be fed for a consideration to be paid by the owner.<sup>1</sup> (See also ANIMALS.)

**AGREEABLE.**—In accordance with one's wishes.<sup>2</sup>

**AGREEABLY.**—In accordance with.<sup>3</sup>

**AGREED.**—The consent of both parties.<sup>4</sup>

rectly interested to the full extent of his title." Dixon, C. J., in *Betts v. Shotton*, 27 Wis. 670.

"But a party who loses no rights and is unaffected by the decree, and of whom it may be said it is *res inter alios*, is not a person aggrieved." *Lowrey v. Lowrey et al.*, 64 N. Car. 110.

A person aggrieved is one injuriously affected by a decree; but where a will is duly probated and the whole estate of the decedent is disposed of under it, the heirs-at-law cannot be said to be aggrieved by any decision as to the settlement of the estate. *Lalar v. Nichols*, 23 Mich. 310.

When trustees have interest as well as duties, they are persons aggrieved who may appeal. *Ex parte Gaaler*, 27 W. R. 156.

As also any third person whose title to property is affected by bankruptcy adjudication. *Ex parte Learoyd*, 27 W. R. 227.

But a creditor under a bankruptcy proceeding who has omitted for several years to prove his debt in the regular way is not a person aggrieved by the refusal to make an order the result of which if made would be to increase the assets available for the creditors. *Ex parte Dillon*, 11 Ch. Div. 56.

A person who applies property is a person aggrieved. *In re Tucker*, 12 Ch. Div. 388.

And when two bankruptcy petitions are presented against the same debtor, and an immediate adjudication is had against him on the second petition, and on the court finding out there has been collusion between the debtor and second petitioner, orders the conduct of the proceeding under the adjudication up to the appointment of a trustee, the first petitioner is not a person aggrieved. *Ex parte Mason*. *In re White*, 14 Ch. Div. 71.

1. *Bass v. Pierce*, 16 Barb. (N. Y.) 595.

2. Testatrix gave the residue of her personal estate "in trust for such of my nieces A and B as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." *Jessel*. M. R.: "What is that but to make them

judges of the mode of distribution, and place the residue at their absolute disposal?" *Stead v. Mellor*, 5 Ch. Div. 225.

3. Agreeably to the usual mode of process against offenders in such State. "My opinion is, that it was the intention of Congress by these words, 'agreeably to the usual mode of process against offenders in such State,' to assimilate all the proceedings for holding accused persons to answer before a court of the United States, to the proceedings had for similar purposes by the laws of the State where the proceedings should take place." *United States v. Rundlett*, 2 Curtis C. C. 41; *United States v. Horton's Sureties*, Dill. U. S. C. C. 97.

4. "'Agreed' *ex vi termini* means that it is the agreement of both parties, each and both consenting to it." *Aikin v. Albany, Vermont & Canada R. Co.*, 26 Barb. (N. Y.) 298.

"The term 'agreed' is a technical word, and is synonymous with 'contracted.'" *McKisick v. McKisick*, Meigs (Tenn.), 433.

**In Plea.**—The use of the word "agreed" in a declaration in *assumpsit* does not make the count one in debt. The count may notwithstanding show that defendant "undertook and promised." *North v. Kuger et al.*, 72 Ill. 172.

The word "agreed" is the word of both in account. *Elderton v. Emmens*, 6 S. B. 175.

And when it is substituted for "promised" in a declaration it is equivalent to promised. *Corbett v. Packington*, 6 Barn. & C. 273.

**Dismissed Agreed.**—The words "dismissed agreed" entered as the judgment of a court do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. *Halde-man et al. v. U. S.*, 91 U. S. 584.

**Freight as Agreed.**—Trover by freighter against ship-owner to recover the goods, the charter-party giving a lien for dead freight, but the master to sign bills of lading, which bound the goods for "freight as agreed," the freighter having when he demanded the goods been prepared to pay freight of carriage and the ship-owner having refused to



## AGREES—AGRICULTURE—AID.

**AGREES.**—The concurrence of two parties.<sup>1</sup>

**AGRICULTURE.**—The cultivation of the ground for the purpose of procuring vegetables and fruits for the use of man and beast; equivalent to husbandry, or the business of a farmer.<sup>2</sup>

**AID.**—Help or assistance. In criminal law, assistance given to the commission of a crime.<sup>3</sup>

deliver the goods except on payment of the dead freight. *Held*, that the action would lie; freight for carriage alone was due. *Kerford v. Mondel*, 7 Hurl. N. 932.

**It is Agreed.**—If, in a written contract signed by two parties, it be said that it is "agreed" the one shall furnish the other with certain property at a specified price, this imports a promise to the latter to accept and pay; for "it is agreed" is to be deemed to be words of both parties. *Barton v. McLean*, 5 Hill (N. Y.), 256.

**It is Mutually Agreed.**—Where a printed receipt containing the words "it is mutually agreed" was given by a common carrier to a shipper on the taking of goods to be sent to a certain place, it was held that a loss of the goods beyond the company's line which gave the receipt must be paid for, as the shipper did not know that the company's line only extended to a certain point, there could be no mutual agreement in such a case. *Mesher & Co. v. The Southern Express Co.*, 38 Ga. 37.

1. "Wells accepted a free ticket from the railroad, on which was indorsed, 'the person accepting this free ticket assumes all risks,' etc., 'and expressly agrees,' etc., is a contract on the part of the passenger with the company; it seems necessary to say that the word 'agreed' means the concurrence of two parties, and that the act of acceptance binds the acceptor as fully as his hand and seal would." *Gould, J., in Wells v. New York Central R. Co.*, 24 N. Y. 183.

2. *Webster's Dictionary*.

**Engaged in Agriculture.**—The Tennessee statutes exempt in the hands of the head of a family "engaged in agriculture" certain property. One who owned within the town of Gallatin a lot of ground of one acre, and was engaged in the business of butchering, working as a day-laborer, and cultivating his garden for the support of his family, claimed the exemption. *Held*, not to be an agriculturist in the sense of the exemption laws, the court saying: "The word 'agriculture,' as used in these exemption laws, has its peculiar legal sense, and relates to the vocation. It is true that two or more vocations may be combined, but we are not accustomed to think of an artisan, a

merchant, or a lawyer, who living within a crowded town or city, and following his avocation happens to cultivate a little patch of earth in vegetables for his table, as an agriculturist, even in its most general sense. If he produced them on any extended scale for market, or "for man and beast" in the sense of husbandry, then he might be regarded as an agriculturist in the sense of the law. *Simons v. Lovell*, 7 Heisk. (Tenn.) 510.

**Agricultural Employment.**—Work in a grist-mill, at eight shillings per day, to be paid weekly, is not monthly labor, nor "agricultural employment." 62 Me. 526.

3. *Stat. West.* 1, c. 14.

**Aid**, in this sense, according to Lord Coke, comprehends all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do an act, and who are not present when the act is done. *Burrill's Law Dict.*: 'Sub Voce.'

The legislature of Nebraska, by several acts, authorized any county or city in the State to issue bonds to aid in the construction of any railroad or work of internal improvement. Such bonds were issued to pay for work constructed by the county itself. On an application for an injunction to restrain the collection of certain taxes levied for the payment of the interest due on said bonds, on the ground that they were illegal and void, the bonds were declared valid and the injunction refused; the court saying: "It is evident that the word 'aid,' as used in this connection by the legislature, has a much broader meaning than that contended for by the plaintiff's counsel, and is not necessarily restricted to works of internal improvement in which the county has no interest. The word 'aid,' as used, evidently means that the county may contribute toward the cost of the improvement by issuing its bonds, a portion of the fund necessary to make the improvement to be contributed in some other manner, as by grant from the State, donations, by two counties, bordering on the river uniting in the enterprise, etc., but does not necessarily repel the conclusion that the county may construct the desired improvement for the benefit of the public."

## AIDERS AND ABETTERS.

**AIDERS AND ABETTERS.**—These are persons who either actually or constructively are present at the commission of an offence, aiding and abetting or counselling and procuring the same to be done; they are principals in the second degree. The aider and abettor of high treason is a principal in the first degree, *propter odium delicti*;¹ the aider and abettor of a misdemeanor is

*N. P. R. v. Commissioners of Colfax County*, 4 Neb. 450; s. c., 3 Central Law Journal, 287.

**Aid and Abet—Aid or Comfort—Aid or Assistance.**—For the use of these words in criminal law, see ACCESSORY; AIDER and ABETTOR. *Cf. Raiford v. State*, 59 Ala. 106; *Com. v. Knapp*, 9 Pick. 496; s. c., 20 Am. Dec. 491; *Com. v. Adams*, 127 Mass. 15.

The mere mental approval by a bystander of a murder committed in his presence does not make him an accomplice in the murder; and where the judge at trial charged as follows,—“That it is not necessary for the State to prove that the defendant by his own hand shot and killed the deceased; for if he was present, aiding or abetting, or counselling, or advising or inciting, or encouraging, or approving of some other persons in shooting and killing the deceased, he is guilty of murder in the first degree,”—it was *held*, error; the court saying: “If an explanation of the term ‘aiding and abetting,’ as used in our statute, or in the common-law definition of an accomplice, should be deemed necessary, it is proper that the explanatory terms used should convey a correct idea of the meaning of the offence. The court probably did not mean to hold that the mere mental approval by a bystander of a murder committed in his presence would make such bystander a principal in the murder, yet the use of the disjunctive ‘or’ between the various terms employed to describe the crime of an accomplice, necessarily leads to this interpretation of the instruction. The words ‘or approving of,’ have no place in legal phraseology to explain the meaning of the words to ‘aid and abet.’ The fact itself is incapable of proof. Mental operations, not accompanied with any action or language, are beyond the reach of testimony. There was no necessity for the introduction of these words in the instruction, and they may not have misled the jury; but when a party is on trial for his life, he is entitled to a correct exposition of the law touching his case.” *State v. Cox*, 65 Mo. 29.

A person who stands by when an attempt is made by others to commit a

rape, but who does not act to “aid, assist or abet” its commission, is not guilty of an attempt to commit a rape. *People v. Woodward*, 45 Cal. 293.

Information conveyed either verbally or by a writing to a prisoner that he has a friend and can be released from confinement is not a violation of a statute forbidding the conveying to any person lawfully imprisoned any instrument, arms, or other thing calculated to “aid” his escape. The design of the act was to prohibit the conveying to prisoners in confinement any substantial, tangible thing which might be used or handled by them in facilitating or effecting their escape; but conveying information to a prisoner by which he is led to expect aid, or that he could be released, or conveying to him any substance which could in itself be in nowise useful or of advantage to him in making his escape, does not come within the prohibition. *Hughes v. State*, 1 English (Ark.), 131.

Simply advising a debtor to run away, though the advice be given to delay, hinder, or defraud his creditors, is not equivalent to “aiding and assisting,” and will not sustain an action under the statute against the fraudulent removing of debtors. “Most persons are willing to give advice; some do it officiously; but if called on to give aid or assistance, the subject is looked at in a different point of view. Advice costs nothing; it is but words. Aid, or assistance, is the doing of some act whereby the party is enabled, or it is made easier for him, to do the principal act, or effect some primary purpose.” *Pearson, J. Wiley v. McRee*, 2 Jones Law (N. C.), 349.

**Aid or Comfort.**—See ADHERING. The words “aid or comfort” used in the act March 12, 1863 (12 Stat. 820), allowing any person claiming to be the owner of property captured by the United States during the Rebellion to bring suit therefor in the Court of Claims, on proof that “he has never given aid or comfort to the present rebellion,” have the same meaning as they have in the clause of the Constitution defining treason (Art. 3, § 3). *Young v. U. S.*, 7 Otto, 39, 62.

1. 3 Inst. 138.

## AIR-TIGHT—ALARM—ALCALDE—ALEATORY—ALIBI.

also a principal in the first degree, but for a very different reason, namely, the maxim *de minimis non curat lex*. Consequently, aiders and abettors that are principals in the second degree are only found in the case of felonies, whether at common law or under any statute. The aider and abettor must participate in the felony, in the sense of acting in concert with those committing it; for although he be present, yet if he do not participate, but remain merely passive, he will not be an abettor.<sup>1</sup> Moreover, the participation must be with a felonious intent, and not in ignorance of the nature of the act.<sup>2</sup> (See ACCESSORY.)

**AIR-TIGHT.**—That which excludes the air. A chamber is said to be air-tight when it is so closed that the air cannot penetrate into it.<sup>3</sup>

**ALARM.**—This word as used in reference to the methods employed to summon firemen to a fire denotes the actual means used, without regard to the effect produced on the firemen.<sup>4</sup>

**ALCALDE.**—In Spanish law, a magistrate or judge.<sup>5</sup> A judicial officer in Spain, and in those countries which have received the body of their laws from those of Spain. His powers and duties are similar to those of a justice of the peace.<sup>6</sup>

**ALEATORY.**—Dependent on some uncertain event.<sup>7</sup>

**ALIBI.**—A prisoner or accused person is said to set up an *alibi* when he alleges that at the time when the offence with which he is charged was committed he was "elsewhere," that is, in a different place from that in which it was committed. If proved, it is of course a complete answer to the charge.<sup>8</sup>

1. 1 Hale, 439.

2. 1 Hale, 446.

**Aid and Abet.**—These words, in legal phrase, are pretty much the synonyms of each other. They comprehend all assistance rendered by acts, words of encouragement or support, or presence, actual or constructive, to render assistance, should it become necessary. No particular acts are necessary. *Timberlake v. Brewer*, 59 Ala. 108.

3. In a suit for the infringement of a patent the court held: "The term 'air-tight,' as applied to the floor of an ice-reservoir, means substantially 'water-tight,' or such a construction of the floor that the water will not run upon the articles stored below, nor the air escape to melt the ice above. A patent for such a floor cannot be evaded by constructing a leaky floor. A person cannot use a patented device by constructing it in an imperfect manner. *Chicago Fruit-house Co. v. Busch*, 2 Bissell (U. S.), 472.

4. **Giving a False Alarm.**—Where one knowingly meddled with the wires, or other parts of the telegraph apparatus, with the intention to cause a "false

alarm" of fire, he may be convicted of "giving or causing to be given a false alarm by the fire-alarm telegraph, knowing the same to be such," although in consequence of the irregular manner in which the bells were rung the firemen were not deceived and induced to turn out with their engines. *Koppersmith v. State*, 51 Ala. 6.

5. *Burrill's Law Dict.*: "Sub Voca."

6. *Bouvier's Law Dict.*: "Sub Voca." See *U. S. v. Castellero*, 2 Black (U. S.), 17, 194; *Strother v. Lucas*, 12 Peters, 410, 442.

7. **Aleatory Contracts.**—"It is of the essence of aleatory contracts that there should be risk on one side or both, and that all risks appertaining to the contract and not excepted were assumed by the parties." *Moore v. Johnson*, 8 La. Ann. 488.

8. *Sweet's Law Dict.* See *Provo v. State*, 55 Ala. 222.

The evidence of an *alibi* cannot avail unless it preponderates. *State v. Reed*, 62 Iowa, 40; *State v. Hamilton*, 57 Iowa, 598; *State v. Northrup*, 48 Iowa, 583.

But a bare preponderance is sufficient.

An *alibi* is as much a traverse of the crime charged as any other defence, and proof tending to establish it, though not clear, may, with other facts of the case, raise a reasonable doubt of the guilt of the accused. When the evidence is so imperfect as not to satisfy the jury they will not find the fact. Where the prosecution rests upon positive and undoubted proof of the prisoner's guilt, it should not be overcome by less than full, clear, and satisfactory evidence of the alleged *alibi*. But the evidence tending to establish an *alibi*, though not of itself sufficient to work an acquittal, shall not be excluded from the case, for the burden of proof never shifts, but rests upon the prosecution throughout, upon all the evidence given in the cause taken together, to convince the jury, beyond a reasonable doubt, of the prisoner's guilt.<sup>1</sup>

State v. Hardin, 46 Iowa, 623; s. c., 26 Am. Rep. 174; Turner v. Commonwealth, 86 Pa. St. 54; s. c., 27 Am. Rep. 683.

Where an *alibi* is relied upon as a defence in a criminal prosecution, the burden rests upon the defendant to establish it to the satisfaction of the jury. State v. Jennings, 81 Mo. 185; Garrity v. People, 107 Ill. 162; Creed v. People, 81 Ill. 565; State v. Henrick, 62 Iowa, 414; State v. Reed, 62 Iowa, 40; State v. Kremjen, 57 Iowa, 588; State v. Hamilton, 57 Iowa, 598; State v. Vincent, 24 Iowa, 570; State v. Ostrander, 18 Iowa, 435; State v. Waterman, 1 Nev. 453; French v. State, 12 Ind. 670; Ware v. State, 67 Ga. 349; Com. v. Webster, 5 Cush. (Mass.) 324; State v. Davidson, 30 Vt. 377; s. c., 73 Am. Dec. 312; Fife v. Commonwealth, 29 Pa. St. 429. Compare Humphries v. State, 18 Tex. App. 302, and cases cited *post*.

Where the evidence tends to prove the commission by the defendant of the crime charged in the indictment at a particular time and place, and the defendant offers evidence tending to show that at such time he was at another place, it is error for the court to charge the jury that testimony tending to show such *alibi* was not to be considered, unless it established the fact by a preponderance of evidence. The burden of proof was not changed when the defendant undertook to prove an *alibi*; and if by reason of the evidence in relation to such *alibi* the jury should entertain reasonable doubt as to the defendant's guilt, he should be acquitted, although the jury might not be able to find that the *alibi* was fully proved. Walters v. State, 39 Ohio St. 215; s. c., 4 Am. Cr. R. 33.

To establish an *alibi* it is not necessary that the jury should be fully satisfied of its truth. But the evidence of an *alibi* cannot avail unless it preponderates. State v. Reed, 62 Iowa, 40; State v. Hamilton, 57 Iowa, 598.

The accused is not bound to prove an *alibi* beyond a reasonable doubt. Landis v. State, 70 Ga. 651; s. c., 48 Am. Rep. 588; State v. Reed, 62 Iowa, 40; State v. Henry, 48 Iowa, 403; State v. Hardin, 46 Iowa, 623; State v. Watson, 7 S. Car. 63; Binns v. State, 46 Ind. 311; Howard v. State, 50 Ind. 190; Adams v. State, 42 Ind. 373; Chappel v. State, 7 Coldw. (Tenn.) 92; Davis v. State, 5 Baxt. (Tenn.) 612; State v. Josey, 64 N. Car. 56; People v. Pearsall, 50 Mich. 233; Stuart v. People, 42 Mich. 255; Sullivan v. People, 31 Mich. 1.

The burden of proving an *alibi* is on defendant, but he is not bound to prove it beyond a reasonable doubt; and if, upon the whole case, the testimony raises a reasonable doubt that defendant was present when the crime was committed, he should be acquitted. State v. Fry, 25 N. W. Repr. (Iowa) 738. See State v. Rivers, 27 N. W. Repr. (Iowa) 781.

A defendant, to establish an *alibi*, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place. Klein v. People, 113 Ill. 506.

Evidence to prove an *alibi* is not open to the objection of being cumulative. Smythe v. State, 17 Tex. App. 244.

All proof, though inconclusive, should go to the jury. People v. Fong Ah Sing, 64 Cal. 253; Landis v. State, 70 Ga. 651; s. c., 48 Am. Rep. 588.

The detection of perjury in an attempt to prove an *alibi* raises presumption of the prisoner's guilt. Porter v. State, 55 Ala. 95. Compare Turner v. Commonwealth, 86 Pa. St. 54; s. c., 27 Am. Rep. 683.

1. Watson v. Commonwealth, 95 Pa. St. 418.

Proving an *alibi* does not impose the burden of showing that the accused was absent at the very time at which the evidence for the prosecution tends to show the offence was committed, nor need it absolutely preclude the possibility of his being at both places.<sup>1</sup> The range of the evidence in respect to time and place must be such as reasonably to exclude the possibility of such presence.<sup>2</sup>

An *alibi* is a fact shown in rebuttal of the State's evidence; and it does not, therefore, demand a specific instruction from the court.<sup>3</sup>

**ALIEN.** (See also CITIZENSHIP; ESCHEAT; FOREIGN CORPORATION; NATURALIZATION.)

1. *Definition.*

2. *Alien Friend.*

3. *Alien Enemy.*

1. **Definition.**—An alien is one who is born out of the jurisdiction

1 Stuart v. People, 42 Mich. 255. See State v. Jaynes, 78 N. Car. 504; Kaufman v. State, 49 Ind. 248; Adams v. State, 42 Ind. 373; White v. State, 31 Ind. 262; Galloway v. State, 29 Ind. 442. Compare Com. v. Castley, 118 Mass. 1.

But where the exact time at which the crime was committed is not known, but it is shown that it was committed, the *alibi* must cover the whole of such time. West v. State, 48 Ind. 483. See Brice-land v. Commonwealth, 74 Pa. St. 463; Johnson v. State, 59 Ga. 142.

Where the trial judge charged "this defence is liable to great abuse, growing out of the ease with which it may be fabricated and the difficulty with which such fabrication can be detected," held, that this was erroneous; that the law does not attach suspicion to evidence tending to prove an *alibi* any more than it does to evidence tending to prove any other fact. Albin v. State, 63 Ind. 598; s. c., 3 Am. Cr. R. 295; Line v. State, 51 Ind. 172; s. c., 1 Am. Cr. R. 615. See Spenser v. State, 50 Ala. 124; Williams v. State, 47 Ala. 659; Crisson v. State, 51 Ga. 597; Walker v. State, 37 Tex. 366. Compare People v. Larned, 7 N. Y. 448.

2. Johnson v. State, 59 Ga. 142; Wade v. State, 65 Ga. 756.

A respondent swearing to an *alibi* was cross-examined as to what he saw of an alleged procession in the town where he claimed to have been. Held, proper to show by others what the facts were as to the procession as bearing on the truth of his statements. People v. Gibson, 58 Mich. 368.

3. State v. Reed, 62 Iowa, 40.

On a trial for murder, where an *alibi* is set up as a defence, an instruction was not improperly refused that "if you [the jury] believe that the knife and pistol which

are said to have been found near the deceased at the time of the arrival of the officers were the property of the deceased, you will give the defendant the benefit of every rational doubt growing out of such circumstances." Such instruction was misleading, and the jury could not understand therefrom whether the rational doubt must be of defendant's guilt or of some other matter of an uncertain nature. People v. Lee Gam, 11 Pac. Repr. (Cal.) 183.

An instruction as follows—"Now, in determining that fact, gentlemen, I instruct you that evidence to establish an *alibi*, like any other evidence, may be open to special observation. Persons may, perhaps, fabricate with greater hopes of success, or less fear of punishment, than most other kinds of evidence; and honest witnesses often mistake dates and periods of time and identity of people seen, and other things about which they testify"—held, not erroneous. People v. Wong Ah Foo, 10 Pac. Repr. (Cal.) 275; People v. Lee Gam, 11 Pac. Repr. (Cal.) 183.

It is error to charge the jury that an unsuccessful attempt to establish an *alibi* is a circumstance of great weight against the prisoner. People v. Malaspina, 57 Cal. 628. See Toler v. State, 16 Ohio St. 583. Line v. State, 51 Ind. 172; s. c., 1 Am. Cr. Rep. 615.

Where the accused in a criminal action has relied for his defence upon an *alibi*, and the court in its charge to the jury has omitted any special instruction as to the *alibi*, but has given them a general direction to consider all the facts in the case, and give defendant the benefit of a doubt, the appellate court will not consider an exception, by defendant, that the court should have instructed the jury that he ought to establish the *alibi* by a

of the United States, subject to some foreign government, and who has never been naturalized under the constitution or laws of the United States, or any of them. There must be a union of birth abroad and subjection to some other power, as one may be born abroad and still be a citizen of the United States.<sup>1</sup> Aliens

preponderance of evidence, as the omission to so instruct does not prejudice defendant. *State v. Sutton*, 30 N. West. Repr. (Iowa) 367.

1. 1 Bouvier's Inst. § 163; 2 Kent's Com. 40; *Dawson v. Godfrey*, 4 Cranch. (U. S.) 321; *Jones v. McMasters*, 20 How. (U. S.) 8; *Ainslie v. Martin*, 9 Mass. 456.

All children born out of the limits and jurisdiction of the U. S. whose fathers are citizens thereof are citizens of the U. S. U. S. Rev. Stat. § 1993. See *Ludlam v. Ludlam*, 26 N. Y. 356; *Davis v. Hall*, 1 Nott & M. (S. Car.) 292; *Crane v. Ruder*, 25 Mich. 303; *Campbell v. Wallace*, 12 N. H. 362; s. c., 37 Am. Dec. 219.

An alien female who intermarries with a citizen thereby becomes a citizen, capable of taking and holding lands by purchase or descent. *Luhrs v. Eimer*, 80 N. Y. 171.

An alien woman whose husband became a naturalized citizen of the U. S. thereby herself became a citizen, although she may have been living at a distance from her husband for years, and may never have come into the U. S. until after his death. *Headman v. Rose*, 63 Ga. 458.

A person born in Canada of parents of African blood who were born in Virginia, and held there as slaves until their emigration to Canada, held not entitled to vote as a citizen of the U. S. without being naturalized. *Hedgman v. Board*, etc., 26 Mich. 51. See *Alsberry v. Hawkins*, 9 Dana (Ky.), 177; s. c., 33 Am. Dec. 546; *Manchester v. Boston*, 16 Mass. 230.

Persons born in the U. S. who have, according to the laws of a foreign country, become subjects of such country must be regarded as aliens. Such a person cannot become a citizen of the U. S. again except in the manner provided for the naturalization of aliens. *Expatriation*, 14 Op. Atty.-Genl. 295. See *Inglis v. Sailors' Snug Harbor*, 3 Pet. (U. S.) 123. See *Alsberry v. Hawkins*, 9 Dana (Ky.), 177; s. c., 33 Am. Dec. 546.

Nor will his children be citizens. *Browne v. Dexter*, 4 Pac. Repr. (Cal.) 913.

The defendant's affidavit, together with an official passport certifying the naturalization of the defendant as a British

citizen, held sufficient *prima facie* evidence that the requirements of the English statutes had been complied with. *Maloy v. Duden*, 25 Fed. Repr. 673.

Aliens domiciled in the U. S. owe a local and temporary allegiance to the government. They are bound to obey all the laws of the country not immediately relating to citizenship during their residence in it, and are equally amenable with citizens for any infraction of those laws. *Carlisle v. U. S.*, 16 Wall. (U. S.) 147.

**Chinese.**—The refusal to allow a Chinese passenger to land is a restraint of his liberty, within the meaning of the *habeas corpus* act, and it is the duty of the court, justice, or judge to whom the application for a writ of *habeas corpus* is made to forthwith award the writ, unless it appears from the petition itself that the party is not entitled thereto. Rev. St. § 755; *In re Jung Ah Lung*, 25 Fed. Repr. 141; *In re Jung Ah Hon*, 25 Fed. Repr. 141.

The court, in investigating the legality of the detention of a Chinese passenger on board a vessel, in such case is not bound or controlled by the decision of the collector of the port, or his deputy, as to the right of such passenger to land. Rev. St. § 755; *In re Jung Ah Lung*, 25 Fed. Repr. 141; *In re Jung Ah Hon*, 25 Fed. Repr. 141.

Where a Chinese person is detained on board of a ship and refused the right to land, whether by the authority of the master in pursuance of the provisions of the Chinese restriction act, or by the refusal of the collector to grant him permission to land, he is restrained of his liberty under or by color of the authority of the U. S., and he is entitled as of common right to sue out a writ of *habeas corpus* that the legality of his detention and restraint may be passed upon by the court. *In re Chow Goo Pooi*, 25 Fed. Repr. 77.

When his body is produced in court in obedience to the writ, the control of his person remains with the court, and he may be committed to the custody of the marshal, or be held to bail to await the decision of the court; and if on investigation the court should be of opinion that he had no right to land, it is its duty to remand him to the custody from which

are divisible into alien friends (alien amys) and alien enemies, according as the state of which they are subjects is or is not at war with this country.

**2 Alien Friend.**—An alien may take an estate in lands by purchase<sup>1</sup> at common law until office found, and by statute

he was taken, if the ship be in port and about to return to the country from which he came; but the court has no right, nor color of right, to detain the ship. *In re Chow Goo Pooi*, 25 Fed. Repr. 77.

A Chinaman thus brought before the court has no right to a trial by jury in the investigation before the "justice, judge, or commissioner" to ascertain and find out whether he is unlawfully within the U. S. *In re Chow Goo Pooi*, 25 Fed. Repr. 77.

Where the "justice, judge, or commissioner" finds that the petitioner is a Chinese laborer, prohibited by law from landing or from being or remaining in the U. S., and, if the ship were in port and about to return to China, would remand him to the ship to be carried to the country from whence he came, such a finding amounts to a finding in effect that he is unlawfully in the U. S., and the court should order him to be remanded by the marshal to the custody from which he was taken, and when the marshal returns that the ship has sailed, a supplemental order may be passed committing him to the custody of the marshal to be held for a reasonable time to await the direction of the President. *In re Chow Goo Pooi*, 25 Fed. Repr. 77.

The order of the President may be either general or special. It may be retrospective and prospective; and, inasmuch as the law imposes on him the duty of causing the person to be removed to the country whence he came after he shall have been found to be unlawfully here by a "justice, judge, or commissioner," but gives him no power to revise that judgment, and apparently confers on him no discretion in the matter, he may by a general order, directed to the marshal (or perhaps to the collector), direct that all persons who shall thus have been found to be unlawfully here shall be removed, and he may instruct that officer to procure them tickets and effectuate their removal; and if there be any difficulty from the want of appropriation or means at his command in fulfilling that duty imposed on him by law, it is for Congress to remove it. *In re Chow Goo Pooi*, 25 Fed. Repr. 77.

**Chinese Children.**—A person born within the U. S. of Chinese parents residing therein, and not engaged in any diplo-

matic or official capacity under the emperor of China, is a citizen of the U. S. *In re Look Tin Sing*, 21 Fed. Repr. 905.

1. 1 Washburne Real Prop. (4th Ed.) 74, n. 7; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *Gouverneur v. Robertson*, 11 Wheat. (U. S.) 332; *Jones v. McMasters*, 20 How. (U. S.) 8; *Jackson v. Lunn*, 3 Johns. Cas. (N. Y.) 109; *Bradstreet v. Supervisors*, 13 Wend. (N. Y.) 546; *Wadsworth v. Wadsworth*, 12 N. Y. 376; *Munro v. Merchant*, 28 N. Y. 9; *People v. Snyder*, 41 N. Y. 397; *Hall v. Hall*, 81 N. Y. 130; *Fox v. Southack*, 12 Mass. 143; *Scanlon v. Wright*, 13 Pick. (Mass.) 523; s. c., 25 Am. Dec. 344; *Foss v. Crisp*, 20 Pick. (Mass.) 121; *Ferguson v. Neville*, 61 Cal. 356; *Estate of Billings*, 65 Cal. 593; *Halstead v. Commissioners*, 56 Ind. 363; *Dudley v. Grayson*, 6 T. B. Mon. (Ky.) 259; *Trustees v. Gray*, 1 Litt. (Ky.) 149; *McCreery v. Allender*, 4 Har. & M. (Md.) 409; *Marshall v. Conrad*, 5 Call. (Va.) 364; *Territory v. Lee*, 2 Montana, 124.

**Common Law.**—At common law an alien could take land by devise, or grant and hold it against the whole world except the sovereign, and even against him until inquest of office found. The state alone has power to enforce this proceeding, and it cannot proceed after naturalization. *Marx v. McGlynn*, 88 N. Y. 357; see *Maynard v. Maynard*, 36 Hun (N. Y.), 227; *Crane v. Reeder*, 21 Mich. 24; s. c., 4 Am. Rep. 430; *Harley v. State*, 40 Ala. 689; *Halstead v. Commissioners*, 56 Ind. 363; *Ferguson v. Neville*, 61 Cal. 356; *Emmett v. Emmett*, 14 Lea (Tenn.), 369; *Territory v. Lee*, 2 Montana, 124; *Jones v. McMasters*, 20 How. (U. S.) 21; *Hammekin v. Clayton*, 2 Woods (U. S.), 336; *Osterman v. Baldwin*, 6 Wall. (U. S.) 121; *Phillips v. Moore*, 100 U. S. 208; 1 Washburne Real Prop. (4th Ed.) 74.

Until office found an alien may sell and convey or devise lands, and pass a good title to the same. 1 Washburne Real Prop. (4th Ed.) 74.

Upon the death of an alien holder of lands his title by common law at once vests in the State without office found. *Crane v. Reeder*, 21 Mich. 24; s. c., 4 Am. Rep. 430; *Goodrich v. Russell*, 42 N. Y. 177.

**By Statute** in almost if not all the States aliens are empowered to hold lands, or to take by devise, bequest, or

**By Statute—Continued.**

descent (see special statutes of the different States). 1 Washburne Real Prop. (4th Ed.) 74, n. 7; Chase's Blackstone, 119, n. 2; Estate of Billings, 4 Pac. Repr. (Cal.) 639; Farrell v. Enright, 12 Cal. 450; McConville v. Howell, 17 Fed. Repr. (Colo.) 104; Starks v. Traynor, 11 Humph. (Tenn.) 292; Eustache v. Rodaquest, 11 Bush (Ky.), 42; Duke v. Milne, 17 La. 312; s. c., 36 Am. Dec. 613; State v. Killian, 51 Mo. 80; Rubeck v. Gardner., 7 Watts (Pa.), 455; Montgomery v. Dorion, 7 N. H. 475.

Under the provision of the act of 1845 to enable resident aliens to hold and convey real estate, which provides that a resident alien to whom any real estate had been or should thereafter be devised might, on filing the deposition of intention to become a citizen, etc., prescribed by the Revised Statutes, hold the real estate the same as if he was a citizen at the time of the devise, a resident alien devisee of a citizen takes, upon acceptance of the devise, a conditional title, absolute as against the heirs of the testator, but defeasible by the State until he complies with the conditions as to aliens. Hall v. Hall, 81 N. Y. 130; see Ettenheimer v. Heffernan, 66 Barb. (N. Y.) 374; Goodrich v. Russell, 42 N. Y. 177; McClenaghan v. McClenaghan, 1 Strob. Eq. (S. Car.) 295; s. c., 47 Am. Dec. 532; Barclay v. Cameron, 25 Tex. 232; Settegast v. Schrimpf, 35 Tex. 323.

The fact that the vendee of lands is an alien does not entitle the vendor to rescind the contract. Hepburn v. Dunlop, 1 Wheat. (U. S.) 198.

An alien who has made the primary declaration to become a citizen may take and hold lands and transmit them by descent, though he dies before he is fully naturalized. Settegast v. Schrimpf, 35 Tex. 323, 38 Tex. 96.

In ejectment, the plaintiff relied upon the presumption of a lost grant from the government to his ancestor, who was an alien. *Held*, that he was bound to show affirmatively that his ancestor had license to purchase and hold, and that the fact could not be presumed. Sulphen v. Norris, 44 Tex. 204.

J., an alien, took land in the territory of Michigan by deed, the title to which was afterwards confirmed to him by an act of Congress passed to carry into effect Jay's treaty, and conveyed the same to his only child M., who was also an alien, by a deed void for want of attestation. R., the husband of M., after her death, without issue, occupied the land upwards of twenty years without interruption, and de-

vised it to defendants. *Held*, in ejectment by one claiming under a grant from the State of Michigan, dated a year prior to the death of R., that the disability of alienage of M. was not removed by the act giving her father title in fee to the land; that the land escheated to the State after the death of J. without any inquest in the nature of office found; and that no lapse of time was a bar to the rights of the State by escheat. Crane v. Reeder, 21 Mich. 24.

Although the constitution of Texas declared generally that no alien should hold lands in Texas except by titles emanating directly from the government, that declaration did not divest the title of aliens; for it was added that aliens should have a reasonable time to take possession of and dispose of their lands in a manner thereafter to be pointed out by law. Before the title can be divested proceedings for enforcing their forfeiture must be provided by law and carried into effect; and no such proceedings have hitherto been provided for that purpose. Airhart v. Massien, 8 Otto (U. S.), 491.

Sec. 9 of Texas act of March 18, 1848 (Paschal, Dig. art. 44), allowing alien heirs nine years in which to naturalize, or to sell land inherited by them, before they shall forfeit it, is not repealed by the act of February 13, 1854, providing that aliens shall enjoy in Texas the same rights as are accorded to Americans in their country under the laws and treaties thereof, the latter expressly repealing the former only so far as inconsistent therewith. Under the former act, alien heirs, by the law of whose country aliens cannot inherit real estate, obtain a defeasible title to lands in Texas good for nine years at least, and which will ripen into an indefeasible title if, before the expiration of the nine years, the law of their country is so changed as to enable aliens to inherit. Hanrick v. Patrick, 119 U. S. 156.

Article 1, § 17, Const. California, prohibiting the legislature from depriving resident foreigners of any of the rights enjoyed by native-born citizens with respect to the acquisition, possession, enjoyment, transmission, or inheritance of property, does not deprive it of the right to confer the same privileges on non-resident foreigners.

Code Civil Proc. Cal. § 671, providing for succession by non-resident foreigners, confers a right to be enjoyed within the State, and is not beyond the legislative power as a law having an extraterritorial operation. Under section 672, Civil



absolutely. In like manner he may take by devise,<sup>1</sup> by bequest,<sup>2</sup> and under the statute of distributions.<sup>3</sup> If an alien dies intestate

Code Cal., requiring a non-resident alien, in order to take by succession, to "appear and claim the property," etc., appearance in person or by attorney, and claim by taking possession, or conveying or contracting with respect to the property, or any acts in the State indicating that the alien asserts a right to it, are sufficient. Under Civil Code Cal. § 672, providing that the non-resident alien must appear and claim the property "within five years from the time of succession" or be barred, a proceeding brought by the attorney-general to secure to the school fund, under Const. Cal. art. 9, § 4, the estate of an intestate who left no resident heirs as an escheat, is premature if instituted within five years after the death of the intestate. *State v. Smith*, 12 Pac. Repr. (Cal.) 121.

Where an alien female intermarries with a citizen, by virtue of the marriage she becomes a citizen and capable of taking and holding lands by purchase or descent. *Luhrs v. Eimer*, 80 N. Y. 171; *Kelly v. Owen*, 7 Wall. (U. S.) 496.

**Mining Claim.**—A *bona-fide* resident of the State, though not a citizen of the U. S., or having declared his intention to become such, may by conveyance acquire and hold the title of the locators of an unpatented mining claim acquired under §§ 2319 and 2322 of the U. S. R. S., and has a full and complete right to convey the same. *Ferguson v. Neville*, 61 Cal. 356; see *Croesus*, etc., Co. v. Colorado, etc., Co., 19 Fed. Repr. 78; *Territory v. Lee*, 2 Montana, 124; *Courtney v. Turner*, 12 Nev. 345. Compare *Golden Fleece Co. v. Cable*, etc., Co., 12 Nev. 312.

The right to locate and the right to possess a mining claim go together; they are part of the same grant, and neither can exist without the other. If, therefore, the grant by assignment or conveyance falls upon an alien, incapable of making a location, his possession is of no consequence, the possession being transferred to one who, under the statutes, is incapable of becoming a purchaser from the government. Such possession being part and parcel of the purchase is illegal, and is equivalent to an abandonment, and opens the ground to location and possession by any qualified person. The alien cannot become the government's grantee, and cannot become so in a roundabout way, by being the grantee of the government's grantee. *Tibbitts v. Ah Tong*, 4 Montana, 536.

Persons who are not citizens of the U.

S., or have not declared their intention to become such, cannot acquire any vested right to the possession of a mining claim on U. S. public lands. *Lee Doon v. Tesh*, 8 Pac. Repr. (Cal.) 621.

1. See 1 Washburne Real Prop. (4th Ed.) 74, n 7.

**Common Law.**—At common law an alien could take by devise until office found. *Crosse v. De Valle*, 1 Wall. (U. S.) 13; *Taylor v. Benham*, 5 How. (U. S.) 270; *Fairfax v. Hunter*, 7 Cranch. (U. S.) 602; *Fox v. Southack*, 12 Mass. 143; *Foss v. Crisp*, 20 Pick. (Mass.) 121; *Vaux v. Nesbit*, 1 McC. Ch. (S. Car.) 352; *Harley v. State*, 40 Ala. 689.

While a devise of real estate to an alien is void under the statute, a devise to executors who are citizens, in trust, to pay the income to an alien is valid, as the beneficiary takes no interest in the lands. *Marx v. McGlynn*, 88 N. Y. 357.

2. See 1 Washburne Real Prop. 74, n. 7; *Greenheld v. Morrison*, 21 Iowa, 538; *Greenia v. Greenia*, 14 Mo. 526; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *Meakings v. Cromwell*, 5 N. Y. 136; *Polk v. Ralston*, 2 Humph. (Tenn.) 537; *Com. v. Martin*, 5 Munf. (Va.) 117; *Craig v. Leslie*, 3 Wheat. (U. S.) 563.

**Inheritance from Alien.**—While a husband and wife were domiciled in this State the wife inherited property from her father in Norway, which, in the form of money, was transmitted to this country. *Held*, that the rights of the husband and wife in respect to such property are determined by the laws of this State and not by those of Norway. *Muus v. Muus*, 29 Minn. 115.

3. See 1 Washburne Real Prop. (4th Ed.) 74, n 7.

The law existing at the time of descent cast governs the right of aliens to inherit realty. *Pilla v. German*, etc., Assoc., 23 Fed. Repr. 700.

**Common Law.**—At common law an alien could not take lands by descent. *Fairfax v. Hunter*, 7 Cranch. (U. S.) 602; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *Lick v. Stockdale*, 18 Cal. 219; *Farrar v. Dean*, 24 Mo. 16; *Slater v. Nason*, 15 Pick. (Mass.) 345; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *Jackson v. Fitzsimmons*, 10 Wend. (N. Y.) 9; s. c., 24 Am. Dec. 198.

And the title escheats to the State without office found. *Crane v. Reeder*, 21 Mich. 24; s. c., 4 Am. Rep. 430.

**By Statute.**—An alien is now enabled to take as a citizen in about every State.

without any known heirs, his estate vests immediately in the State

A person who was born and has always resided in Ireland and has never been in the U. S. is an alien, and is entitled, as such, to inherit property in California, and he may take it by succession, though he does not come here to make a claim to it. *State v. Lyons*, 7 Pac. Repr. (Cal.) 763. See *Purcell v. Smidt*, 21 Iowa, 540.

A non-resident alien may sell his interest in an inheritance, and his assignee may appear and claim under such assignment. *State v. Carrasco*, 7 Pac. Repr. (Cal.) 766. See *De Franca v. Howard*, 21 Fed. Repr. 774.

Alienism is an impediment to taking lands by descent only when it comes between the stock of descent and the person claiming to take; if some of the persons who answer the description of heirs are incapable of taking by reason of alienage, they are disregarded, and the whole title vests in those heirs competent to take, provided they are not compelled to trace the inheritance through an alien. *Luhrs v. Eimer*, 80 N. Y. 171.

By the laws of Missouri in force in 1866 an alien was capable of taking by descent lands in that State, and of holding and alienating them, if he either resided in the United States, and, by taking the oath prescribed by the act of Congress, had declared his intention to become a citizen, or resided in Missouri, although the ancestor through whom he claimed was, at the time the descent was cast, an alien, who, by reason of his non-residence, was incapable of inheriting. The statute of 1855 which gave to a non-resident alien the right within a limited period to sell and convey the lands whereof the intestate died seized, applied only where at the time of his death there was no person capable of taking them by descent. *Sullivan v. Burnett*, 105 U. S. 334.

An alien could inherit land in Texas under the constitution of the republic and the act of 1840. § 14 of the act of 1840, as re-enacted in 1848, is part of an act regulating descent and distribution, and when considered with reference to the context it follows by necessary construction that aliens are embraced in the terms "kindred," "children," "descendants," "heirs," and other like expressions, and that section is in the nature of a limitation upon the rights of aliens in that respect. *Hanrick v. Hanrick*, 61 Tex. 596.

Where a non-resident alien purchased land and received a patent therefor from

the U. S., *held*, that he took an estate of inheritance therein, and the State could not question his title by escheating the lands or nullifying the sale; but under §§ 2488-2493, R. S. 1860, heirs that were non-resident aliens would not inherit such land, and where a portion of the heirs were residents and citizens here they would take the land to the exclusion of the alien non-resident. *King v. Ware*, 53 Iowa, 97.

J., a naturalized citizen, died in 1866 intestate and seized of certain real estate. He left him surviving his widow, his father, the defendant B., who was his sister and the wife of a citizen, and two alien children of a deceased sister who was an alien. The widow died in 1870. B. in 1873, by judgment in an action of ejectment, wherein she founded her claim upon her title by descent, recovered possession of the premises. She contracted to sell the same to plaintiff in 1877. Upon submission of the controversy as to her title under section 1279 of the Code of Civil Procedure, *held*, that the title to the premises vested in B. upon the death of her brother; that the act of 1874 (chap. 261 of Laws of 1874) amending the said provision of the act of 1845, by inserting after the words "resident alien" the words "or any naturalized or native citizen," could not operate to divest her estate thus acquired, and that, therefore, she could give a good title and was entitled to a performance of the contract. *Luhrs v. Elmer*, 80 N. Y. 171.

**Dower.**—At common law it was held that if an alien woman marry a subject she could not claim dower. *Sutliff v. Forgey*, 1 Cow. (N. Y.) 89. See *Mick v. Mick*, 10 Wend. (N. Y.) 380; *Connolly v. Smith*, 21 Wend. (N. Y.) 59.

But by statute she is now in almost if not every State entitled to dower. 1 Washburne Real Prop. (4th, Ed.) 74, n. 7; *Bennett v. Harms*, 51 Wis. 251; *State v. Beackmo*, 8 Blackf. (Ind.) 246; *Eldon v. Doe*, 6 Blackf. (Ind.) 341; *Stokes v. O'Fallon*, 2 Mo. 32; *Piper v. Richardson*, 9 Metc. (Mass.) 155; *Mussey v. Pierce*, 24 Me. 559; *Whiting v. Stevens*, 4 Conn. 44; *Hall v. Hall*, 81 N. Y. 130; *Colgan v. McKeon*, 4 Zab. (N. J.) 566; *Reese v. Waters*, 4 W. & S. (Pa.) 145; *Headman v. Rose*, 63 Ga. 458; *Forrester v. Forrester*, 39 Ala. 320; *Alsberry v. Hawkins*, 9 Dana (Ky.), 177; s. c., 33 Am. Dec. 546; *Moore v. Tisdale*, 5 B. Mon. (Ky.) 352.

If an alien husband, after desertion of

without office found.<sup>1</sup> He may obtain a patent or file a caveat.<sup>2</sup> He may protect a trade-mark by suit,<sup>3</sup> and to some extent a copy-right.<sup>4</sup>

He may sue and be sued,<sup>5</sup> or having suffered injury may prose-

his wife, settles in Tennessee, and dies, leaving an alien wife abroad, she is entitled to dower in the lands of her deceased husband, but is not entitled to homestead. *Emmett v. Emmett*, 14 Lea (Tenn.), 369. See *Burton v. Burton*, 1 Keyes (N. Y.), 359. Compare *Alsberry v. Hawkins*, 9 Dana (Ky.), 177; s. c., 33 Am. Dec. 546.

A wife who is a non-resident of the State at the time the husband makes an absolute conveyance of lands, divesting himself entirely of his seizin and estate, has no right of dower under the statutes of this State in the lands so conveyed. *Ligare v. Semple*, 32 Mich. 438; *Bennett v. Harms*, 51 Wis. 251.

An alien husband who makes the preliminary declaration of his intention to become a citizen before the death of his wife, and completes his naturalization after her death, is not entitled to her land as tenant by the curtesy. *Foss v. Crisp*, 20 Pick. (Mass.) 121.

1. *Sands v. Lynham*, 27 Gratt. (Va.) 291; s. c., 21 Am. Rep. 348; *Hinkle v. Shadden*, 2 Swan (Tenn.), 46.

A sale of such lands to satisfy a debt against an alien in a proceeding to which the State is not a party, is void as to the State, but the purchaser at such sale is entitled to be substituted to the rights of the creditor, and if the claim is just, to have lands subjected to its payment. *Sands v. Lynham*, 27 Gratt. (Va.) 291; s. c., 21 Am. Rep. 348.

2. *Walker on Patents*, § 423; *Curtis on Patents*.

3. *Taylor v. Carpenter*, 2 Wood & M. (U. S.); 1 s. c., 42 Am. Dec. 114; *Coffeen v. Brunton*, 4 McLean (U. S.), 516. See *Coats v. Holbrook*, 11 Paige (N. Y.), 292.

4. Where a piano-forte arrangement of the orchestral score of an opera was made by a U. S. citizen, with the consent of the non-resident foreign composers of the opera, and then transferred by him to a fellow-citizen, who procured a copyright, which he assigned to a non-resident foreigner, acting as agent of the original composers of the opera, *held*, that there was nothing of evasion or violation of law, and that the assignee was entitled to the protection of the court against infringers. *Cart v. Evans*, 27 Fed. Repr. 861.

5. U. S. Rev. Stat. §§ 563; ¶ 16, 629; ¶ 1, 639; ¶ 1, 1068; *Taylor v. Carpen-*

*ter*, 2 Wood & M. (U. S.) 1; *De Laviaga v. Williams*, 5 Sawy. (U. S.) 573; *Airhart v. Massieu*, 8 Otto (U. S.), 491; U. S. O'Keefe, 11 Wall. (U. S.) 178; *Carlisle v. U. S.*, 16 Wall. (U. S.) 147; *Lorway v. Lousada*, 1 Low (U. S.), 78; *In re Ah Fong*, 3 Sawy. (U. S.) 144; *St. Luke's Hospital v. Barclay*, 3 Blatchf. (U. S.) 265; *Brown v. U. S.*, 5 Ct. of Cl. 571; *McNair v. Toler*, 21 Minn. 175; *Den v. Brown*, 2 Halst. (N. J.) 305. See *Steers v. Leonard*, 20 Minn. 494; *Mitchell v. Wells*, 37 Miss. 235.

The jurisdiction of the circuit courts of U. S. of suits by citizens against aliens is not defeated by the fact that the defendant is the consul of a foreign government. *Börs v. Preston*, 111 U. S. 252.

Where alien plaintiffs expressly sue as a class for the benefit of the class, all of whom, whether named or not, may avail themselves of the decree, if obtained, a citizen, member of the class, joined with them, may be regarded as an unnecessary and formal party, whose joinder does not affect the defendants' right of removal. The extraterritorial service of process upon alien defendants, who have not voluntarily appeared, is ineffectual to bring them within the jurisdiction of the court, or make them parties to the suit; and the fact that these persons are named as defendants is no obstacle to its removal. *McHenry v. New York, etc., R. Co.*, 25 Fed. Repr. 65.

Declaration of intention to become a citizen of the United States does not make the citizen or subject of a foreign country cease to be such, within the act of March 3, 1875, so as to prevent his removal of a suit from the State court. *Maloy v. Duden*, 25 Fed. Repr. 673.

A resident alien is not within the statute requiring non-residents to give security for costs, unless such residence is merely temporary. *Norton v. Mackie*, 8 Hun (N. Y.), 520.

A defendant having pleaded to a declaration in which his being an alien was not set forth, and having, although the fact was brought out upon the evidence, offered no objection then, but suffered the case to proceed to verdict, cannot, after verdict against him, be allowed a new trial for the purpose of having the action dismissed for want of jurisdiction. *Hartog v. Memory*, 116 U. S. 588.

cute the offenders.<sup>1</sup> He may be tried for crime.<sup>2</sup> The right to reside in the country implies a right to trade and labor.<sup>3</sup>

An alien may serve as an administrator or executor unless prohibited by statute.<sup>4</sup>

He is not liable to military service, but if he voluntarily enlists he will be held to serve out the term of enlistment.<sup>5</sup>

An alien married woman, abandoned by an alien husband in a foreign country, coming to this country to reside, is competent to contract for her support and maintenance, and to sue and be sued in the same manner as a *feme sole*.<sup>6</sup>

Unless empowered by statute, an alien can create a trust in lands only until office found, but he can create a valid trust of personal property.<sup>7</sup> He can take and hold lands by grant in trust to the same extent that he can take and hold the legal title.<sup>8</sup> He cannot plead his alienage to defeat any trust that may be charged upon the lands that come to him.<sup>9</sup>

An alien may be a corporator and a trustee for a corporation.<sup>10</sup>

An alien may bring suit to foreclose a mortgage. *Hughes v. Edwards*, 9 Wheat. (U. S.) 496.

Alienage does not relieve a defendant from liability, under the provisions of the bankrupt act, to account for property transferred to him by the bankrupt in fraud of that act. When an alien comes here and violates the bankrupt law, he subjects himself and his property, if found here, to the remedies given by law. *Olcott v. Maclean*, 73 N. Y. 223.

1. 3 Op. Atty.-Genl. 253.

The courts of a State have jurisdiction of an action brought by one foreigner against another for a tort committed in a foreign country, but it will only be exercised in exceptional cases. *Dewitt v. Buchanan*, 54 Barb. (N. Y.) 31. See *Roberts v. Knights*, 7 Allen (Mass.), 449.

2. *People v. McLeod*, 1 Hill (N. Y.), 377; 25 Wend. (N. Y.) 483; s. c., 37 Am. Dec. 328.

3. *Baker v. Portland*, 5 Sawy. (U. S.) 566.

A State statute forbidding certain aliens from working in a mining claim, either for themselves or others, is null and void. *Chapman v. Toy Long*, 4 Sawy. (U. S.) 36; *Baker v. Portland*, 5 Sawy. (U. S.) 566.

4. *Cutler v. Howard*, 9 Wis. 309.

Whether an alien enemy can be an administrator or executor, see 1 Williams on Exrs. 229; *Schouler's Exrs.* §§ 32, 109; *Cutler v. Howard*, 9 Wis. 309; *Headman v. Rose*, 63 Ga. 458; *Hebert v. Jackson*, 28 La. Ann. 377; *Vogel's Case*, 20 La. Ann. 81; *Poindexter's Case*,

19 La. Ann. 22; *Berney v. Drexel*, 12 Fed. Repr. 393.

5. *Wilson v. Izard*, 1 Paine (U. S.), 68; *In re Scheel*, 54 How. Pr. (N. Y.) 478; *U. S. v. Wyngall*, 5 Hill (N. Y.), 16; *U. S. v. Cottingham*, 1 Rob. (Va.) 615; s. c., 40 Am. Dec. 710; *In re Wehlitz*, 16 Wis. 443. Compare *People v. Clark*, 54 How. Pr. (N. Y.) 488.

6. *Wagg v. Gibbons*, 5 Ohio St. 580; *Gregory v. Paul*, 15 Mass. 31; *Abbot v. Bayley*, 6 Pick. (Mass.) 90; *McArthur v. Bloom*, 2 Duer (N. Y.), 151; *Blumenberg v. Adams*, 49 Cal. 308. See *Robinson v. Reynolds*, 1 Aik. (Vt.) 174; s. c., 15 Am. Dec. 673.

7. 1 Perry on Trusts (3d. Ed.), § 36.

8. 1 Perry on Trusts (3d. Ed.), § 55. See *Jackson v. Lunn*, 3 Johns. Cas. (N. Y.) 109; *Jackson v. Adams*, 7 Wend. (N. Y.) 367.

Where by the laws of a State aliens are prohibited from acquiring and holding lands, a deed made by A to B upon a secret trust for C, who is an alien, A having no knowledge of the trust, is not void; the trust only is void. *Hammekin v. Clayton*, 2 Woods (U. S.), 336. See *Leggett v. Dubois*, 5 Paige (N. Y.), 114; s. c., 28 Am. Dec. 413; *Taylor v. Benham*, 5 How. (U. S.) 270; *Philips v. Crammond*, 2 Wash. (U. S.) 441.

If an alien is made the *cestui que trust* of land, he may enjoy it to same extent as he could the legal title. 1 Perry on Trusts, § 64.

9. 1 Perry on Trusts (3d. Ed.) § 55.

10. *Cammeyer v. United Ger. Churches*, 2 Sandf. Ch. (N. Y.) 186.

An alien cannot vote<sup>1</sup> or hold a political office,<sup>2</sup> nor serve as a juror,<sup>3</sup> nor be the master of an American vessel,<sup>4</sup> nor be admitted to the bar.<sup>5</sup>

He may be taxed.<sup>6</sup> He cannot at common law be a tenant by curtesy.<sup>7</sup> He cannot gain a settlement under the poor laws.<sup>8</sup>

1. Cooley's Const. Lim. (4th Ed.) 38.

The Minnesota constitution allows aliens to vote at State elections and hold office. See *Laaz v. Randall*, 4 Dill. (U. S.) 425.

A foreign-born infant came to this country as a member of the family of his reputed father, whose wife was the infant's mother. The father was naturalized. *Held*, that the child's right to vote upon his becoming of age could not be impeached upon the ground that he was illegitimate and not really the son of his reputed father. *Dale v. Irwin*, 78 Ill. 171.

2. *Walther v. Rabolt*, 30 Cal. 185.

An alien may be elected to a public office, and may hold the same if his disability is removed before the term of office begins. *State v. Murray*, 28 Wis. 96; s. c., 9 Am. Rep. 489; *State v. Trumpf*, 50 Wis. 103; *Walther v. Rabolt*, 30 Cal. 185.

3. *Borst v. Becker*, 6 Johns. (N. Y.) 332; *Grubb v. State*, 14 Wis. 434; *Byrne v. State*, 12 Wis. 519.

A statute which makes alienage a cause of challenge of a juror requires only that he be a citizen of this State, and not that he shall be a citizen of the United States. *McDonel v. State*, 90 Ind. 320.

Where aliens are prohibited by statute from serving on juries generally, *held*, that an alien accused of a crime could not have a jury *de medietati*. *People v. Chin Mook Sow*, 51 Cal. 597.

It is a good plea in abatement to an indictment that one of the grand jury who found it was an alien. *Reich v. State*, 53 Ga. 73; s. c., 21 Am. Rep. 265.

Where alienage of grand jurors finding an indictment is alleged as ground for challenge, party must show such alienage affirmatively. Upon a challenge to two grand jurors on the ground of alienage, it appeared that, as to one of them, though born in Canada, his father was a native of the United States, and the juror moved into the United States at the age of 16; as to the other, that he was born in Ireland, came to this country at the age of 12, and the father was naturalized when the juror was a minor. *Held*, that the challenges were properly overruled. *State v. Haynes*, 54 Iowa, 109.

A verdict rendered by a jury two of

whose members were aliens is erroneous but not void. It might be reversed on appeal, but it cannot be disregarded as a nullity. *Foreman v. Hunter*, 59 Iowa, 550.

Alienage of a juror *held* not assignable after verdict. *Johr v. People*, 26 Mich. 427; *Chase v. People*, 40 Ill. 352; *Hollingsworth v. Duane*, 4 Dall. (Pa.) 353; *State v. Quarrell*, 2 Bay. (S. Car.) 150; s. c., 1 Am. Dec. 637; *Siller v. Cooper*, 4 Bibb. (Ky.) 90; *State v. Hardin*, 25 La. Ann. 369; *Bonneville v. State*, 53 Wis. 680.

An alien not being qualified to sit upon a jury, it is not improper for the court, upon discovering such a one upon the panel after its completion but before further proceedings had in the case, to order such person to stand aside and be discharged, and another juror drawn in his stead, giving permission meantime to the defendant to challenge the other eleven jurors, either peremptorily or for cause. *People v. Barker*, 27 N. W. Repr. (Mich.) 539.

An alien is not disqualified as a juror in the District of Columbia. *Queen v. Hepburn*, 2 Cranch. C. C. 3.

4. *The Dubuque* 2 Abb. (U. S.) 28.

5. *Weeks on Attys.* § 43.

An alien may not be admitted to practice as an attorney and counsellor-at-law. The provision of the rule of the Court of Appeals authorizing the admission of persons who have practised three years in the highest courts of law of another country applies only to the case of a citizen of the U. S. who has thus practised. It seems that the legislature has power under the Constitution to authorize the admission of persons not citizens of the State. *In re O'Neill*, 90 N. Y. 584.

6. *Cooley on Taxation*, §§ 14, 15; *Kuntz v. Davidson*, 6 Lea (Tenn.), 65; *Scholey v. Rew*, 23 Wall. (U. S.) 331.

The legislature may lay a poll-tax upon an alien who is an inhabitant of the State. *Kuntz v. Davidson*, 6 Lea (Tenn.), 65.

7. *Mussey v. Pierre*, 24 Me. 559; *Fass v. Crisp*, 20 Pick. (Mass.) 121; *Hatfield v. Sneden*, 54 N. Y. 280; *Reese v. Waters*, 4 W. & S. (Pa.) 145; *Copeland v. Sauls*, 1 Jones L. (N. Car.) 70.

8. *Knox v. Waldoborough*, 3 Me. 455; *Jefferson v. Litchfield*, 1 Me. 196.

*Effect of Treaties.*—Every treaty made by the authority of the United States is superior to the constitution and laws of any individual State. If the law of a State refuses certain rights to aliens which are secured by treaty, such law is void.<sup>1</sup>

3. **Alien Enemy** is one who owes allegiance to the adverse belligerent. The tendency of modern law is to give them protection for person and property until ordered out of the country.<sup>2</sup>

1. *Hauenstein v. Lynham*, 100 U. S. 483; *People v. Gerke*, 5 Cal. 381.

As to construction of treaties, see *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *Bligh v. Rochester*, 7 Wheat. (U. S.) 535; *Craig v. Radford*, 3 Wheat. (U. S.) 594; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489; *Shanks v. Dupont*, 3 Pet. (U. S.) 242; *Fox v. Southack*, 12 Mass. 143; *Crane v. Reeder*, 21 Mich. 24; s. c., 4 Am. Rep. 430; *People v. Snyder*, 41 N. Y. 397; *Munro v. Merchant*, 28 N. Y. 9; *Jackson v. Wright*, 4 Johns. (N. Y.) 75; *Jackson v. Decker*, 11 Johns. (N. Y.) 418; *Stephen v. Swann*, 9 Leigh. (Va.) 404; *Fiott v. Commonwealth*, 12 Gratt. (Va.) 564.

A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *Hauenstein v. Lynham*, 100 U. S. 483.

Where a treaty allows a specified time within which alien heirs can sell the property and withdraw the proceeds, it operates in the absence of or in place of State laws. During the period named alien heirs enjoy all the rights of resident heirs. *Kull v. Kull*, 37 Hun (N. Y.), 476.

The alien heirs must act within the time allowed by treaty; and if the treaty makes no exception in case of infants, they are equally cut off. *Wieland v. Renner*, 65 How. Pr. (N. Y.) 245.

The treaty between the U. S. and Switzerland declares that in case real estate in one country shall fall to a citizen of the other, who, on account of alienage, could not be permitted to hold such property in the State or canton where it is situated, there shall be accorded to such heir "such time as the laws of the State or canton will permit" to sell such property, and he shall be at liberty to export the proceeds thereon. *Held*, that if a State had such a law, the estate must be closed within the time prescribed; but if it had not such a law, it was competent to enact one, and until one exists there can be no bar arising from lapse of time. *Hauenstein v. Lynham*, 100 U. S. 483, reversing 28 Gratt. (Va.) 62. See *Jost v. Jost*, 1 Mackey (D. C.), 487.

A statute of California prohibiting all

aliens incapable of becoming electors from fishing in the waters of the State is a violation of the Fourteenth Amendment of the U. S. Const. and of the 5th and 6th articles of the treaty with China, and is void. *In re Ah Chong v. U. S. Pac. Coast, L. J.*, June 12, 1880.

Where the laws of the country with which the treaty is made allow claims to be prosecuted against the government, the same privilege will be extended to aliens by this country. *De Give v. U. S.*, 7 Ct. of Cl. 517; *Fichera v. U. S.*, 9 Ct. of Cl. 254; *Rothschild v. U. S.*, 6 Ct. of Cl. 205; *Dauphin v. U. S.*, 6 Ct. of Cl. 221; *Collie v. U. S.*, 9 Ct. of Cl. 431; *Brown v. U. S.*, 5 Ct. of Cl. 571; *U. S. v. O'Keefe*, 11 Wall. (U. S.) 178; *Carlisle v. U. S.*, 16 Wall. (U. S.) 147.

2. *Bouvier's Law Dict.* See *Greenhood on Pub. Policy*, 371 *et seq.*

An alien enemy is not *civiliter mortuus*; he is alive, but under a disability. *De Wahl v. Braune*, 1 H. & N. 178.

An alien enemy may be sued, and his liability to suit carries with it the right to employ counsel. *McVeigh v. U. S.*, 11 Wall. (U. S.) 259; *Masterson v. Howard*, 18 Wall. (U. S.) 99; *M'Nair v. Toler*, 21 Minn. 175; *Seymour v. Bailey*, 66 Ill. 288; *De Jarnette v. De Giverville*, 56 Mo. 440; *Russ v. Mitchell*, 11 Fla. 80.

The objection that the plaintiff is an alien enemy is waived unless taken by answer or demurrer. *M'Nair v. Toler*, 21 Minn. 175. See *Burnside v. Matthews*, 54 N. Y. 78.

A plea of an alien enemy which does not contain an averment that such was the character and status of the plaintiff when suit was commenced is bad on demurrer. *Elgee v. Lovell*, 1 Woolw. (U. S.) 102, 110.

A valid debt by note, bond, or contract is not nullified by war. The debt is suspended until peace returns. *Sands v. N. Y. Life Ins. Co.*, 50 N. Y. 626; s. c., 10 Am. Rep. 535.

As to deeds or mortgages between citizens of the United States and Confederate States made during the war, see *Filar v. U. S.*, 3 Ct. of Cl. 25; *Dillon v. U. S.*, 5 Ct. of Cl. 586; *Hill v. Baker*, 32 Iowa, 302; *Mims v. Armstrong*, 42 Miss.

## ALIENATE—ALIENATED—ALIENATION.

**ALIENATE.**—The act by which the title to an estate is voluntarily resigned by one person and accepted by another, in the forms prescribed by law.<sup>1</sup>

**ALIENATED.**—A transfer of title.<sup>2</sup>

**ALIENATION.**—A mode of obtaining an estate by purchase by which it is yielded up by one person and accepted by another.<sup>3</sup>

429; *Hyatt v. James*, 2 Bush (Ky.), 463; *Shaw v. Carlisle*, 9 Heisk. (Tenn.) 594.

As to deeds between citizens of the Confederate States of lands situated within the Federal lines, see *Conrad v. Waples*, 96 U. S. 279.

A lease of lands in Mississippi between a citizen of Massachusetts and a citizen of Mississippi held valid. *Kershaw v. Kelsey*, 100 Mass. 561. Compare *Shotwell v. Ellis*, 42 Miss. 439.

As to contracts of sale between citizens of the United States and citizens of the Confederate States, see *Walker v. U. S.*, 106 U. S. 413.

A citizen of Virginia during the existence of the late war could not maintain an action in the courts of Maryland. *Whelan v. Cook*, 29 Md. 1.

On a suit to foreclose a mortgage during the late war, notice was given to the mortgagor, who was an officer in the Confederate army, by publication in a newspaper within the Union lines. Held, that such notice was ineffectual to bind the mortgagor, and a sale of the mortgaged property was void and inoperative. *Johnson v. Robertson*, 34 Md. 165. Compare *Ludlow v. Ramsey*, 11 Wall. (U. S.) 581; *Dean v. Nelson*, 10 Wall. (U. S.) 158.)

The creditors of a party who is an alien enemy may have the same remedy against his property, remaining within the jurisdiction of the State, as they could have against the property of any other non-resident debtor. *Dorsey v. Kyle*, 30 Md. 512; *Dorsey v. Dorsey*, 30 Md. 522.

1. The term "alienate" has a technical legal meaning, and any transfer of real estate short of a conveyance of the title is not an alienation of the estate. No matter in what form the sale may be made, unless the title is conveyed to the purchaser the estate is not alienated. *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. (N. Y.) 629.

2. *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. (N. Y.) 629.

To alienate is to transfer property in anything to another; and an alienation is to make a thing another man's—to alter the possession from one to another. To alienate real estate is voluntarily to part with it, either by bargain and sale or by some conveyance, or by gift or will. The

right to alienate was a right which the owner had over real estate to divest it from the heir. Consequently where a policy of insurance contained a clause avoiding it if the property should be alienated by sale or otherwise, the death of the assured intestate would not avoid. *Burbank v. Rockingham M. F. I. Co.*, 24 N. H. 558.

The property from which the fund in the sheriff's hands was raised had been "alienated" by the defendant in this *fa.* at some time between "the signing of the first judgment and the signing of the judgment on the appeal;" that is, the property had, in the interval, been mortgaged to these mortgagees." *Phillips et al v. Behn & Foster*, 19 Ga. 302.

3. An act whereby one man transfers the property and possession of lands, tenements, or other things to another person. *Boyd v. Cuddeback et al.*, 31 Ill. 119; *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. (N. Y.) 629.

**Alienation and Descent.**—Alienation differs from descent in this, that alienation is effected by the voluntary act of the owner of the property, while descent is the legal consequence of the decease of the owner and is not changed by any previous act or volition of the owner. There is, however, a species of involuntary alienation, so made by the statutes of 13 Edward I. and 27 Edward II., by which the land becomes answerable by attachment and execution for the debts of the owner. *Burbank v. Burlington M. F. Ins. Co.*, 24 N. H. 558.

**In Insurance Policies.**—A mortgage is not such an alienation of property as will defeat a policy of insurance which provides that if the property insured is alienated the policy shall be void. *Smith v. Mut. F. Ins. Co.*, 50 Me. 96; *Pollard v. Somerset M. F. Ins. Co.*, 42 Me. 221.

But the defeasance should be seasonably recorded under the Maine law. *Tomlinson v. Monmouth Mut. F. Ins. Co.*, 47 Me. 232.

In other States this would not seem to be necessary. *Shepherd v. Union Mut. F. Ins. Co.*, 38 N. H. 232; *Allen v. Hudson River Mut. Ins. Co.*, 19 Barb. (N. Y.) 442; *Conover v. Mutual Ins. Co. of Albany*, 3 Denio (N. Y.), 254; *Burbank v. Rock-*

**ALIMONY.**—1. **Definition.**—Alimony in divorce law is the allowance which a husband pays, by order of court, to his wife, while living separate from her, for her maintenance; or it may be a like provision ordered for the sustenance of a woman divorced from the bond of matrimony, out of her late husband's estate—the latter branch of the definition denoting a form of alimony known only to the modern law. It may be for the wife's use during the pendency of the suit, called alimony *pendente lite*, or after its termination, known as permanent alimony.<sup>1</sup>

Ingham Mutual Ins. Co., 24 N. H. 558; Rollins v. Columbian F. Ins. Co., 25 N. H. 200.

Nor will the transfer of the interest of one co-tenant to another co-tenant be such an alienation as will avoid the policy. Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553.

Nor will the leasing of the building be such an alienation. Lane v. Maine M. F. Ins. Co., 12 Me. 44.

Nor the mortgage of personal property without the transfer of the possession. Rice et al. v. Tower & Trustees, 1 Gray (Mass.), 426.

Where, however, the by-laws of a mutual insurance company provided that "all alienation and alterations in the ownership, situation, or state of the property insured by this company in any material particular shall avoid any policy, etc.," it was held that the policy was avoided by a mortgage. Edwards v. Mutual Safety F. Ins. Co., 1 Allen (Mass.), 311; Edes et al. v. Hamilton Mut. Ins. Co., 3 Allen (Mass.), 362.

And where personal property was sold by a master in chancery, but before the fire the decree under which the sale had been made had been vacated, yet there was such an alienation as avoided the policy. Mt. Vernon Mfg. Co. v. Summit Co. Mut. F. Ins. Co., 10 Ohio St. 347.

But an execution sale of the realty will not avoid the insurance policy. See Hammel v. Queens Ins. Co., 54 Wis. 72.

**In Mortmain.**—Alienation in mortmain in its primary signification is an alienation of lands or tenements to any corporation, aggregate, ecclesiastical, or temporal, the consequence of which in former times was that by allowing lands to become vested in objects endowed with perpetuity of duration the lords were deprived of escheats and other feudal profits. Perin et al. v. Carey et al., 24 How. (N. Y.) 495; Bonning v. Marshall, 23 How. Pr. (N. Y.) 134.

**In Statute.**—The statute of descents provides "that if a widow shall marry a

second or any subsequent time, holding real estate in virtue of any previous marriage, such widow may not during such marriage, with or without the consent of her husband, alienate such real estate." A mortgage is in some sense an alienation, and fairly within the prohibition of the statute. Vennedige et al., v. Shaffer, 35 Ind. 341.

A deed of an undivided three fourths of grantor's homestead, in 1851, to A as trustee for grantor's wife, and X and Y, his two children, and their heirs and assigns, without any duty charged upon the trustee in relation thereto, was not void for want of the wife's signature, not being an alienation of the homestead within the meaning of the statute. Riehl v. Burgenheimer, 28 Wis. 84.

The words in the homestead laws avoiding any "grant or conveyance" without a *bona-fide* entry on the lands are as broad as "alienation," and consequently a mortgage would be avoided, for at the time of passing the act in question (about 1841) a mortgage was an alienation. Brewster v. Madden, 15 Kans. 250.

A conveyance of real estate before suit commenced by a mother who inherited it from her child, to whom it descended from the father, is not an alienation under a statute making an heir or a devisee liable for his ancestor's debts to the value of the land alienated, if he alien before action brought or process sued out. Maydwell v. Maydwell et al., 9 Heisk. (Tenn.) 571.

1. 2 Bishop on M. & D. (6th Ed.) § 351. For other definitions see Godol. Abr. 508; Burr v. Burr, 7 Hill (N. Y.) 207, 213; Wallingsford v. Wallingsford, 6 H. & J. (Md.) 485, 488; Parsons v. Parsons, 9 N. H. 309; Wooldridge v. Lucas, 7 B. Mon. (Ky.) 49, 51; 1 Blk. Comm. 441; Cooke v. Cooke, 2 Phillim. 40, 41; Bowman v. Worthington, 24 Ark. 522, 533; Lyon v. Lyon, 21 Conn. 185, 197; Odom v. Odom, 36 Ga. 286, 320; Stillman v. Stillman, 99 Ill. 196, 201; Newman v. Newman, 69 Ill. 167; O'Hagan v.



**2. Jurisdiction.**—Where alimony is granted as an incident of divorce, the court which has jurisdiction to decree the divorce has also the power to grant alimony,<sup>1</sup> provided it obtains jurisdiction of both parties; but if the divorce was *ex parte* and the defendant is domiciled in another State and does not appear, no alimony can be granted,<sup>2</sup> unless he has been duly served with process within the jurisdiction of the court or appears and defends.<sup>3</sup>

When the wife has obtained a divorce in one State with which no alimony was granted, she has, in some cases, been permitted to obtain from the court of the domicile of the husband a decree for alimony.<sup>4</sup> If after alimony is decreed the husband moves to another jurisdiction, the decree can be enforced by the courts of the latter,<sup>5</sup> or by the United States courts.<sup>6</sup>

Without domicile there is usually no jurisdiction to decree

O'Hagan, 4 Iowa, 509; Russell v. Russell, 4 Green (Iowa), 26, 29; Maguire v. Maguire, 7 Dana (Ky.), 181, 189; Chase v. Chase, 55 Me. 21, 23; Keerl v. Keerl, 34 Md. 21, 25; Crane v. Meginnis, 1 G. & J. (Md.) 463, 474; Graves v. Graves, 108 Mass. 314, 317; Crews v. Mooney, 74 Mo. 26, 29; Waters v. Waters, 49 Mo. 385, 387; Sheafe v. Sheafe, 24 N. H. 564, 567; Calame v. Calame, 25 N. J. Eq. 548; Miller v. Miller, 75 N. Car. 70; Cox v. Cox, 19 Ohio St. 502, 512; Francis v. Francis, 31 Gratt. (Va.) 283; Bailey v. Bailey, 21 Gratt. Va. 43, 57; Campbell v. Campbell, 37 Wis. 206, 212; Taylor v. Taylor, 93 N. Car. 418; Sanchez v. Sanchez, 21 Fla. 346. See also Cal. Civ. Code, 1880, § 137, and Ga. Code, 1882, § 1736.

1. McGee v. McGee, 10 Ga. 477, 487, in which the court said that the principle was sustained by an invincible array of authorities, many of which it cites. See also Fischli v. Fischli, 1 Blackf. (Ind.) 360, 365; Lawson v. Shotwell, 27 Miss. 630; Chaires v. Chaires, 10 Fla. 308.

2. 2 Bish. on M. & D. § 381, also § 169, 170, c. See also Prosser v. Warner, 47 Vt. 667; Lytle v. Lytle, 48 Ind. 200; Middleworth v. M'Dowell, 49 Ind. 386.

3. Sanford v. Sanford, 5 Day (Conn.), 353, 358; Beard v. Beard, 21 Ind. 321; Nichols v. Nichols, 10 C. E. Green (N. J.), 60; Lytle v. Lytle, 48 Ind. 200, 202; Madden v. Fielding, 19 La. Ann. 505; Ellison v. Martin, 53 Mo. 575, 578; Gould v. Crow, 57 Mo. 200; Leith v. Leith, 39 N. H. 20, 39; Jackson v. Jackson, 1 Johns. (N. Y.) 424; Prosser v. Warner, 47 Vt. 667, 673, and cases there cited; and see Turner v. Turner, 44 Ala. 437, 451; Thompson v. State, 28 Ala. 12, 17.

If defendant domiciled in another State appears by attorney, alimony may

be decreed against him. Sanford v. Sanford, 5 Day (Conn.), 353.

And if defendant is domiciled in the State, by statute in Indiana alimony may be granted on constructive notice. Beard v. Beard, 21 Ind. 321; and see Cook v. Cook, 56 Wis. 195.

If husband domiciled elsewhere has property in the State where the wife lives, the court will, under certain circumstances, grant her a divorce from bed and board and alimony to the extent of the property. For principle see 1 Bishop on M. & D. § 156. But not where neither party is domiciled where the property is situated. Keerl v. Keerl, 34 Md. 21, 26.

4. 2 Bish. on M. & D. § 170, b; Rogers v. Rogers, 15 B. Mon. (Ky.) 364. And for cases in which it was held that the court would decree alimony to a wife, who had previously obtained a decree of divorce without alimony, see Cox v. Cox, 19 Ohio St. 502, 512; Stilphen v. Stilphen, 58 Me. 508; Nichols v. Nichols, 10 C. E. Green (N. J.), 60.

A decree of divorce *a vinculo* fraudulently obtained in one State will not bar alimony properly decreed in another. Barber v. Barber, 21 How. (U. S.) 582.

5. Borden v. Fitch, 15 Johns. (N. Y.) 121; Rogers v. Rogers, 15 B. Mon. (Ky.) 364; and see *contra*, Barber v. Barber, 1 Chand. (Wis.) 280; Harrison v. Harrison, 20 Ala. 629.

Where a decree of divorce and alimony was obtained by publication in Ohio, neither party residing there, the decree, so far at least as the alimony was concerned, was void in New York. Phelps v. Baker, 60 Barb. (N. Y.) 107.

6. Barber v. Barber, 21 How. (U. S.) 582, 591. See Cheever v. Wilson, 9 Wal. (U. S.) 108, 124; Bennett v. Bennett, Deady (U. S.), 299; and see 1 Bish. on M. & D. 128, a.

divorce, much less alimony; the latter being an action *in personam*.<sup>1</sup>

The legislature in granting a divorce cannot give alimony,<sup>2</sup> but the jurisdiction to do so has been given by statute, or assumed by the courts in some States.<sup>3</sup>

**3. Sources of the Law.**—From the time of the decision of Foliamb's case (44 Eliz.) until the divorce act of 20 and 21 Vict. c. 85, no absolute divorce could be judicially granted in England. The only legal separation recognized was a divorce from bed and board upon the decree of the Ecclesiastical Court.<sup>4</sup> These courts as an incident to the decree also granted alimony—*pendente lite* and permanent<sup>5</sup>—but only as a part of the decree *a mensa et thoro*.<sup>6</sup> This alimony was obtained by presenting a petition stating the faculties of the husband<sup>7</sup>—if for temporary alimony, at any time after suit begun;<sup>8</sup> if for permanent alimony, at any time after the wife's right to the divorce was determined, and before judgment,<sup>9</sup> or even after judgment.<sup>10</sup>

Alimony, therefore, under the English law had no independent existence, and could only be granted as an incident to some other legal proceeding, and no court, not even the Ecclesiastical, could grant it if it was the only relief sought.<sup>11</sup> This doctrine was adopted and followed in many States of this country.<sup>12</sup> But in some of these, statutes now provide for the wife's maintenance by the husband where without her fault she is separated from him. This is in the nature of alimony, but is usually termed maintenance.<sup>13</sup> Before the statutes were passed in some States, and in

1. 1 Bish. on M. & D. § 201, note. Compare with §§ 169, 170, c.

2. 1 Bish. on M. & D. § 693, and cases there cited.

3. In Maryland, where the divorce was *a mensa et thoro*, the wife was allowed alimony by the court. *Crane v. Meginnis*, 1 Gill & J. (Md.) 463, 475. And in Tennessee, the act gives this right to the wife. *Richardson v. Wilson*, 8 Yerg. (Tenn.) 67, 77; and perhaps in other cases. See 2 Bish. M. & D. § 382.

4. Foliamb's Case, 3 Salk. 138; 1 Eng. Law Review, 353; Macq. Parl. Pract. 470 n.; 2 Bish. on M. & D. §§ 661, 662, 705. Marriages, however, might be declared null or void for certain causes. 2 Burn. Ecc. Law, 503.

5. *Cooke v. Cooke*, 2 Phillim. 40; *Lawson v. Shotwell*, 27 Miss. 630, 633; *Head v. Head*, 3 Atk. 295; *Rees v. Waters*, 9 Watts (Pa.), 90, 93.

6. *Ball v. Montgomery*, 2 Ves., Jr. 191, 195.

7. *Rees v. Rees*, 3 Phillim. 387; *Cox v. Cox*, 3 Add. Ec. 276.

8. *Smyth v. Smyth*, 2 Add. Ec. 254; *Deane v. Deane*, 28 Law Jour. Mat. Cas. 23, 24; *Tomkins v. Tomkins*, 1 Swab & T. 163.

9. 2 Bish. on M. & D. § 488; *Covell v. Covell*, L. R. 2 P. & D. 411; *Cooke v. Cooke*, 2 Phillim. 40.

10. *Westmeath v. Westmeath*, 3 Knapp, 42.

11. 2 Bish. on M. & D. § 351, and cases there cited.

12. *Bowman v. Worthington*, 24 Ark. 522, 537; *Moore v. Moore*, 18 La. Ann. 613; *Heyob v. Heyob*, 18 La. Ann. 41; *Adams v. Adams*, 100 Mass. 365, 369; *Peltier v. Peltier*, Har. (Mich.) 19, 30; *De Graw v. De Graw*, 7 Mo. App. 121, 133; *Parsons v. Parsons*, 9 N. H. 309, 317. As to New York, see R. S. 147, § 55; *Ruckman v. Ruckman*, 58 How. Pr. (N. Y.) 278, 283; *Davis v. Davis*, 75 N. Y. 221, 225; *Douglas v. Douglas*, 5 Hun (N. Y.), 140; *Pomeroy v. Wells*, 8 Paige (N. Y.), 406. And as to Pennsylvania, see *Rees v. Waters*, 9 Watts (Pa.), 90, 93; *Yohe v. Barnett*, 1 Binn. (Pa.) 365.

13. Ill. R. S. 1880, p. 594, § 23; *Foss v. Foss*, 2 Ill. App. 411, 412; *Hunter v. Hunter*, 7 Ill. App. 253; *Angelo v. Angelo*, 81 Ill. 251; Ind. R. S. 1882, §§ 5132-5141; *Stanbrough v. Stanbrough*, 60 Ind. 275, 280; *Chapman v. Chapman*, 13 Ind. 396; *Fischli v. Fischli*, 1 Blackf. 360; Md. Rev. Code, 1878, art. 51, § 17, p.

others where there is no statutory provision, the courts held that it is one of the ordinary equitable powers of a chancellor to grant alimony without a divorce; entertaining it as an original bill.<sup>1</sup>

In those States in which jurisdiction is given to the courts to decree this maintenance, the statute which grants the power usually defines the circumstances under which the court may grant it.<sup>2</sup> But in those States in which the court assumes the jurisdiction as one of its equitable powers, the circumstances that must exist to entitle the wife are not so clearly defined. Desertion, leaving wife without means, is a sufficient cause.<sup>3</sup> But mere abandonment has been held insufficient.<sup>4</sup> Cruelty is another cause, but generally it must be sufficient to entitle the wife to a decree *a mensa et thoro*.<sup>5</sup> The wife must show rectitude of con-

481; Keerl v. Keerl, 34 Md. 21, 25; Helms v. Franciscus, 2 Bland. (Md.) 544, 565; Farnshill v. Murray, 1 Bland. 479, 483; Jamison v. Jamison, 4 Md. Ch. 289, 295; Dunnoek v. Dunnoek, 3 Md. Ch. 140, 143; Crane v. Meginnis, 1 Gill & J. (Md.) 463, 475; Galwith v. Galwith, 4 H. & McH. (Md.) 477; Wright v. Wright, 2 Md. 429; N. J. Rev. 1877, p. 318; Miller v. Miller, 1 N. J. Eq. 386, 389; Yule v. Yule, 10 N. J. Eq. 138, 145; Cory v. Cory, 11 N. J. Eq. 400; Anshutz v. Anshutz, 16 N. J. Eq. 162; Van Arsdalen v. Van Arsdalen, 30 N. J. Eq. 359; Nicely v. Nicely, 3 Head (Tenn.), 184; Richardson v. Wilson, 8 Yerg. (Tenn.) 67, 77; N. H. Gen. Laws, 1878, chap. 183, § 3; Mass. Public Statutes, 1882, chap. 147, § 33; Mich. Annotated Statutes 1882, § 6291; Laws 1885, § 149; Kan. Compiled Laws 1879, chap. 80, § 649; N. C. Code 1883, § 1292; Mo. Rev. Stat. 1879, § 3283; Cal. Hittell's Code 1876, amendment § 5137; Wy. Laws 1882, chap. 40, § 18; Ga. Code, 1882, §§ 1744, 1746, 1747. As to Canada, see Severn v. Severn, 3 U. C. Chan. 431, 432; Soules v. Soules, 2 U. C. Chan. 299, 300.

1. Glover v. Glover, 16 Ala. 440, 447; Wray v. Wray, 33 Ala. 187; Kinsey v. Kinsey, 37 Ala. 393. By a majority of the court in Galland v. Galland, 38 Cal. 265, 272; Graves v. Graves, 36 Iowa, 310, 313; Butler v. Butler, 4 Litt. Ky. 201, 203; Griffin v. Griffin, 8 B. Mon. (Ky.) 120, 121; Gaines v. Gaines, 9 B. Mon. (Ky.) 295, 299; Logan v. Logan, 2 B. Mon. (Ky.) 142; Lockridge v. Lockridge, 3 Dana (Ky.), 28; Boggess v. Boggess, 4 Dana (Ky.), 307; Garland v. Garland, 50 Miss. 604, 716; Shotwell v. Shotwell, 27 Miss. 630; Verner v. Verner, 62 Miss. 260; Wallingsford v. Wallingsford, 6 H. & J. (Md.) 485, 488; McNamara's case, 2 Bland. (Md.) 566, note; Anon., 1 Hayw.

(N. Car.) 347; Spiller v. Spiller, 1 Hayw. (N. Car.) 482; Knight v. Knight, 2 Hayw. (N. Car.) 101; Bascom v. Bascom, Wright (Ohio), 632; Questel v. Questel, Wright (Ohio), 491; D'Arusmont v. D'Arusmont, 4 Law Rep. N. S. 311, 321; Jelineau v. Jelineau, 2 Desau. Eq. (S. Car.) 45, 50; Anon., 2 Desau. Eq. (S. Car.) 198, 207; Prather v. Prather, 4 Desau. Eq. (S. Car.) 33, 43; Rhame v. Rhame, 1 McCord (S. Car.), 197, 205; Mattison v. Mattison, 1 Strob. Eq. (S. Car.) 387; Prince v. Prince, 1 Rich. Eq. (S. Car.) 282, 287; Converse v. Converse, 9 Rich. Eq. (S. Car.) 535, 570; Hair v. Hair, 10 Rich. Eq. (S. Car.) 163, 172, 176. Perhaps Texas: Stringfellow v. Stringfellow, 30 Tex. 570. And see, as to Va., Almond v. Almond, 4 Rand. (Va.) 662, 667; Purcell v. Purcell, 4 H. & M. (Va.) 507, 511; Carr v. Carr, 22 Gratt. (Va.) 168, 173.

2. For instance, for any of the causes of divorce, the husband being guilty: N. H. and Kan. Husband deserting for one year: Cal. Or is a drunkard or spendthrift: N. Car. Or is convicted of crime and imprisoned: N. H. and Ind.

3. Prince v. Prince, 1 Rich. Eq. (S. Car.) 282; Purcell v. Purcell, 4 H. & M. (Va.) 507; Hair v. Hair, 10 Rich. Eq. (S. Car.) 163; Prather v. Prather, 4 Desau. Eq. (S. Car.) 33; Wiles v. Wiles, 3 Mo. 1; Jamison v. Jamison, 4 Md. Ch. 289; Butler v. Butler, 4 Litt. (Ky.) 205; and see Battey v. Battey, 1 R. I. 212; Gray v. Gray, 65 Ga. 193.

4. Logan v. Logan, 2 B. Mon. (Ky.) 142. See, *contra*, Glover v. Glover, 16 Ala. 440, 447; and see Butler v. Butler, 4 Litt. (Ky.) 205; 2 Bish. on M. & D. §§ 355, 357.

5. Taylor v. Taylor, 4 Desau. (S. Car.) 167; Jelineau v. Jelineau, 2 Desau. (S. Car.) 45; Anon., 4 Desau. (S. Car.) 94; Hair v. Hair, 10 Rich. Eq. (S. Car.) 163;

duct on her part, if complaining of the ill conduct of her husband.<sup>1</sup> She need not, however, be entirely blameless.<sup>2</sup>

The court should only decree maintenance when the same causes exist as were required by the ecclesiastical courts to grant a divorce *a mensa et thoro*, or a restitution of conjugal rights.<sup>3</sup> It has been decreed, however, on slighter grounds.<sup>4</sup> As in the case of alimony, the court will not decree maintenance to a wife who has sufficient separate property for her needs.<sup>5</sup> In general, the practice and procedure is analogous to that in suits for alimony with divorce. They must be living apart.<sup>6</sup> The court must decree a periodical allowance and not specific property,<sup>7</sup> unless authorized by statute. And it has been affirmed<sup>8</sup> and denied<sup>9</sup> that alimony *pendente lite* can be allowed during the suit.

Bascom v. Bascom, Wright (Ohio), 632; Almond v. Almond, 4 Rand. (Va.) 662; Lockridge v. Lockridge, 3 Dana (Ky.), 28; Glover v. Glover, 16 Ala. 440; 1 Bish. on M. & D. § 719, note. See N. J. Rev. 318, § 20; Vanarsdalen v. Vanarsdalen, 3 Stew. Ch. (N. J.) 359; Cray v. Cray, 5 Stew. Ch. (N. J.) 25.

1. Anon., 4 Desau. (S. Car.) 94; Bedell v. Bedell, 1 Johns. Ch. (N. Y.) 604; Watkyns v. Watkyns, 2 Atk. 96; 1 Bish. on M. & D. § 764; Boggess v. Boggess, 4 Dana (Ky.), 307; Angelo v. Angelo, 81 Ill. 251; Wahle v. Wahle, 71 Ill. 510; Slack v. Slack, Dudley (Ga.), 165; Carr v. Carr, 22 Gratt. (Va.) 168, 173.

And if the judgment is for the husband for separation for fault of the wife, the court cannot grant allowance. Waring v. Waring, 100 N. Y. 570.

2. Griffin v. Griffin, 8 B. Mon. (Ky.) 120.

As to other causes held sufficient to entitle wife, see Graves v. Graves, 36 Iowa, 310.

3. Rhame v. Rhame, 1 McCord Ch. (S. Car.) 197; Hair v. Hair, 10 Rich. Eq. (S. Car.) 163; Helms v. Franciscus, 2 Bland (Md.), 544; 2 Bish. on M. & D. §§ 355, 357.

And where, on account of a fault of her husband which would entitle her to a divorce, the wife leaves him and lives apart, the court may grant her maintenance, without divorce, suitable to her status in life. Platner v. Platner, 66 Iowa, 378.

4. Boggess v. Boggess, 4 Dana (Ky.), 307, 309; Cray v. Cray, 32 N. J. Eq. 25, 27.

Yet adultery alone has been held insufficient if the husband offered to cohabit with and treat the wife well. Prather v. Prather, 4 Desau. (S. Car.) 33, 43; 2 Bish. on M. & D., § 361, note. See, *contra*, Sykes v. Halstead, 1 Sanf. (N. Y.) 483.

5. Converse v. Converse, 9 Rich. Eq. (S. Car.) 538. See *post*, p. 485.

The husband's duty to support the wife is not altered if she become insane. Wray v. Wray, 33 Ala. 187.

Or if they are living apart under articles of separation which make no provision for the wife. Miller v. Miller, 1 N. J. Eq. 386, 390; Moores v. Moores, 16 N. J. Eq. 276; Head v. Head, 3 Atk. 547; Almond v. Almond, 4 Rand. (Va.) 662.

6. Anshutz v. Anshutz, 16 N. J. Eq. 162; Burns v. Burns, 60 Ind. 259; Head v. Head, 3 Atk. 547; Miller v. Miller, 1 N. J. Eq. 386, 390; Almond v. Almond, 4 Rand. (Va.) 662, 667; Babbitt v. Babbitt, 69 Ill. 277.

7. Almond v. Almond, 4 Rand. (Va.) 662; Purcell v. Purcell, 4 H. & M. (Va.) 507; Wallingsford v. Wallingsford, 6 H. & J. (Md.) 485.

8. Vreeland v. Vreeland, 18 N. J. Eq. 43, 44; Verner v. Verner, 62 Miss. 260. See Porter v. Porter, 41 Miss. 116.

9. Foss v. Foss, 2 Ill. App. 411, 413.

And on general subject of maintenance where husband refuses to support wife, see Fellows v. Fellows, 8 N. H. 160, 162; Beavan v. Beavan, 2 Swab & T. 652; Fletcher v. Fletcher, 2 Swab & T. 434; Gayner v. Gayner, 31 L. J. Mat. Cas. 144; Brown v. Brown, 3 Swab & T. 217; Capstick v. Capstick, 33 L. J. Mat. Cas. 105; Coombs v. Coombs, L. R. 1 P. & D. 218; Moss v. Moss, 15 Week. R. 532; Washburn v. Washburn, 9 Cal. 475; Devoe v. Devoe, 51 Cal. 543; Holt v. Holt, 117 Mass. 202; Harteau v. Harteau, 14 Pick. (Mass.) 181; F. v. F., 1 N. H. 198; James v. James, 58 N. H. 266; Davis v. Davis, 37 N. H. 191; Prince v. Prince, 1 Rich. Eq. (S. Car.) 282, 290; Battey v. Battey, 1 R. I. 212, 217; Keeler v. Keeler, 24 Wis. 522.

Alimony in divorce suits is now regulated in England and in most of the United States by statutes.<sup>1</sup>

4. Alimony *Pendente Lite* is that alimony decreed to the wife during the pendency of the suit.<sup>2</sup> This is also regulated by statute in most of the States, usually declaratory of the common law.<sup>3</sup> The mere pendency of the suit where the wife has no separate means adequate to her support, and the husband has the means, entitles her, whether plaintiff or defendant, to alimony so long as the litigation continues.<sup>4</sup>

As regards the marriage which must exist to entitle the wife to a decree for temporary alimony—as the merits are not gone into,<sup>5</sup> the court will be justified in granting the decree if the parties had lived together and adjusted their property-rights on the basis of the validity of the marriage.<sup>6</sup> 'So alimony *pendente lite* has been allowed in nullity suits,<sup>7</sup> and also where the wife alleges and the husband denies a marriage,<sup>8</sup> though not where the wife is complainant and asserts, or is defendant and admits, the invalidity of the marriage.<sup>9</sup>

A suit must be pending either for divorce or separation.<sup>10</sup> If the wife is complainant the husband must have been properly brought into court, until which time the court has no jurisdiction, as no suit is pending.<sup>11</sup>

1. See Stewart on M. & D. (Ed. 1884) § 364, where references are given to the statutes and to cases under them. See Stimson's American Statute Law, § 6261 (A). The statutes, however, are not complete nor exhaustive, but have frequently to be supplemented by the ecclesiastical and unwritten law. Goldsmith v. Goldsmith, 6 Mich. 285, 286; McGee v. McGee, 10 Ga. 478, 485; Petrie v. People, 40 Ill. 334, 342; Grove v. Grove, 68 Pa. St. 143, 145; Le Barron v. Le Barron, 35 Vt. 365, 367; Harris v. Harris, 31 Gratt. (Va.) 13, 17.

2. 2 Bish. on M. & D. § 351.

3. Stimson's American Statute Law, § 6264. There are some changes, however, as, for instance, allowing alimony *pendente lite* to the husband under certain circumstances as well as to the wife, as in Iowa Wisconsin, and Georgia.

4. 2 Bish. on M. & D. § 384; McGee v. McGee, 10 Ga. 477; Jones v. Jones, 2 Barb. Ch. (N. Y.) 146; Story v. Story, Walk. (Mich.) 421; Shelton M. & D. 533, 586; Breenig v. Breenig, 2 Casey, 161. And see Halleman v. Halleman, 69 Ga. 676.

5. Little v. Little, 63 N. Car. 22, 24; McGee v. McGee, 10 Ga. 478, 489; Story v. Story, Walk. Ch. (Mich.) 421, 422.

6. 2 Bish. on M. & D. § 402. See also, as to whether by contract or celebration, Vreeland v. Vreeland, 18 N. J. Eq. 43, 45; Brinkley v. Brinkley, 50 N. Y. 184;

McFarland v. McFarland, 51 Iowa, 565, 570; North v. North, 1 Barb. Ch. (N. Y.) 241; Humphreys v. Humphreys, 49 How. Pr. (N. Y.) 140; Herforth v. Herforth, 2 Abb. Pr. N. S. (N. Y.) 483, 489. See also Smith v. Smith, 61 Iowa, 138.

7. Bird v. Bird, 1 Lee, 621; Miles v. Chilton, 1 Rob. Ecc. 684, 693; Vandegrift v. Vandegrift, 30 N. J. Eq. 76; Griffin v. Griffin, 47 N. Y. 134; North v. North, 1 Barb. Ch. (N. Y.) 241.

8. Smith v. Smith, 1 Edw. Ch. (N. Y.) 255.

9. Griffin v. Griffin, 47 N. Y. 134; North v. North, 1 Barb. Ch. (N. Y.) 241. And see Bartlett v. Bartlett, Clarke Ch. (N. Y.) 460; Bloodgood v. Bloodgood, 59 How. Pr. (N. Y.) 27, 42.

10. Usually so provided by the statutes; but see cases where alimony allowed though suit not for divorce or separation. Head v. Head, 3 Atk. (Eng.) 295; Yeo v. Yeo, 2 Dick. (Eng.) 498; Dickinson v. Mavil, 2 Dick. (Eng.) 582; D'Arusmont v. D'Arusmont, 8 West. Law. J. 548.

11. Deane v. Deane, 28 L. J. Mat. Cas. 23, 24; Tomkins v. Tomkins, 1 Swab & T. 163, 164; Holland v. Holland, 4 Houst. (Del.) 86; Lytle v. Lytle, 28 Ind. 260, 202; Madden v. Fielding, 19 La. Ann. 505, 506; Russell v. Russell, 69 Me. 336, 338; Ellison v. Martin, 53 Mo. 575, 578; Simmons v. Simmons, Phillips Eq. (N. Car.) 63; Cox v. Cox, 19 Ohio St. 502, 511; Weishaupt v. Weishaupt, 27 Wis. 621;

After the husband is summoned, and until the suit has been dismissed or a final decree has been entered, the wife may at any time apply for and the court decree temporary alimony.<sup>1</sup> After final decree it is too late.<sup>2</sup> So if the suit has been dismissed.<sup>3</sup>

During the pendency of the suit the wife must be living separate from her husband.<sup>4</sup> If they are living together the allowance would be improper.<sup>5</sup>

If the wife has means sufficient to maintain her in the rank of life to which she is accustomed, no temporary alimony will be granted her.<sup>6</sup> If the husband is destitute and the wife is complainant neither suit-money nor temporary alimony will be decreed.<sup>7</sup> On the other hand, if the husband is complainant and destitute the court may suspend the suit until some provision is made for the wife,<sup>8</sup> and if he cannot give her the means to defend herself he cannot have a divorce.<sup>9</sup>

The wife's application for alimony *pendente lite* must show

and on constructive notice see *Beard v. Beard*, 21 Ind. 321.

1. It may be made on final hearing. *Bennett v. Southard*, 35 Cal. 688, 691; *McGee v. McGee*, 10 Ga. 477, 489; *Dinet v. Pfirshing*, 86 Ill. 83; *Pritchard v. Pritchard*, 4 Abb. N. C. (N. Y.) 298; *Shy v. Shy*, 7 Heisk. (Tenn.) 125; 2 Bish. on M. & D. § 488.

2. *Newman v. Newman*, 69 Ill. 167, 169; *Wilde v. Wilde*, 2 Nev. 306, 308.

3. *Chestnut v. Chestnut*, 77 Ill. 346; *Howell v. Howell*, 39 Ind. 185; *Waters v. Waters*, 49 Mo. 385; *Persons v. Persons*, 7 Humph. (Tenn.) 183, 184.

Counsel fees are sometimes taxed with the costs and allowed on final decree. *Weaver v. Weaver*, 33 Ga. 172; *Howell v. Howell*, 39 Ind. 185; *Thorndike v. Thorndike*, 1 Wash. Ter. 175. See, however, *Thompson v. Thompson*, 3 Head. (Tenn.), 527.

4. *Bathey v. Bathey*, 1 R. I. 212; *Chapman v. Chapman*, 25 N. J. Eq. 394; *Brown v. Smith*, 83 Ill. 291; *Pincard v. Pincard*, 22 Ga. 31; *Sykes v. Halstead*, 1 Sandf. (N. Y.) 483; *Cooke v. Cooke*, 2 Phillim. 40; *Wallingsford v. Wallingsford*, 6 H. & J. (Md.) 485, 488; *Keerl v. Keerl*, 34 Md. 21; *Chase v. Chase*, 55 Me. 21; *Crews v. Mooney*, 74 Mo. 26; 1 Bish. on M. & D. § 801; 2 Bish. on M. & D. § 40.

But the mere offer of the husband in his answer to receive his wife will not destroy her right to proceed if the court think that the husband is acting in bad faith. *Breinig v. Breinig*, 2 Casey (Pa.), 161.

5. *Tayman v. Tayman*, 2 Md. Ch. 393, 397, 398; *Anshutz v. Anshutz*, 16 N. J. Eq. 162, and cases cited *supra*.

In the latter case, however, suit-money might be allowed. *Tayman v. Tayman*, 2 Md. Ch. 393, 397.

6. 2 Bish. on M. & D. § 775; *Furst v. Furst*, *Poynter M. & D.* 260, note, 261, note; *Fyler v. Fyler*, *Deane & S.* 175; *Eaton v. Eaton*, L. R. 2 P. & M. 51; *Kenemer v. Kenemer*, 26 Ind. 330; *Coad v. Coad*, 40 Wis. 392; *Porter v. Porter*, 41 Miss. 116.

Where her separate means are partly adequate the court will compel the husband to supply the deficiency; and so if she can maintain herself but cannot pay the expenses of the suit, the court will decree her the amount of her expenses. *D'Aguilar v. D'Aguilar*, 1 Hagg. Ec. 773; *Belcher v. Belcher*, 1 Curt. Ec. 444; *Wilson v. Wilson*, 2 Hagg. Con. 203; *Logan v. Logan*, 2 B. Mon. (Ky.) 142; *Collins v. Collins*, 2 Paige (N. Y.), 9; *Holmes v. Holmes*, 2 Lee, 90; *Furst v. Furst*, *Poynter M. & D.* 260, note, 261, note; *Rose v. Rose*, 11 Paige (N. Y.), 166; *Beavan v. Beavan*, 2 Swab & T. 652; and see *post*, notes 4, 5, p. 485, as to wife's means.

7. *Laurie v. Laurie*, 9 Paige (N. Y.), 234; *Kittle v. Kittle*, 8 Daly (N. Y.), 72; *Thayer v. Thayer*, 9 R. I. 377; *Bathey v. Bathey*, 1 R. I. 212; *Feigley v. Feigley*, 7 Md. 537.

8. *Purcell v. Purcell*, 3 Edw. Ch. (N. Y.) 194; *Bruere v. Bruere*, 1 Curt. Ec. 566; *Walker v. Walker*, 1 Curt. Ec. 560.

9. *Purcell v. Purcell*, 3 Edw. Ch. (N. Y.) 194; *Mangels v. Mangels*, 6 Mo. App. 481. See also *Osgood v. Osgood*, 2 Paige (N. Y.), 621; *Cason v. Cason*, 15 Ga. 405; *Soules v. Soules*, 3 Grant V. C. Chan. 113.

merits,<sup>1</sup> and should be supported<sup>2</sup> by her own affidavit<sup>3</sup> or that of others.<sup>4</sup> It ought to allege a marriage,<sup>5</sup> separation,<sup>6</sup> pendency of a suit,<sup>7</sup> her need,<sup>8</sup> and the husband's faculties.<sup>9</sup> The husband if defendant may present affidavits as to his wife's means and his faculties,<sup>10</sup> but not, it seems, if complainant.<sup>11</sup>

The alimony *pendente lite* usually is made up of a sum to support the wife;<sup>12</sup> to pay her counsel fees<sup>13</sup> and the expenses of the

1. Though only a *prima-facie* case is required. *Warden v. Warden*, 3 Edw. Ch. (N. Y.) 387; *Ballentine v. Ballentine*, 1 Halst. Ch. N. J. 471; *Jones v. Jones*, 2 Barb. Ch. (N. Y.) 146; *Krause v. Krause*, 23 Wis. 354; *Boubon v. Boubon*, 3 Rob. (N. Y.) 715; *Walling v. Walling*, 1 C. E. Green (N. J.), 389; *Weishaupt v. Weishaupt*, 27 Wis. 621; *Countz v. Countz*, 30 Ark. 73, 78; *Phelan v. Phelan*, 12 Fla. 449, 455; *McGee v. McGee*, 10 Ga. 478; *Harrell v. Harrell*, 39 Ind. 185, 189; *Chaffee v. Chaffee*, 14 Mich. 463; *Porter v. Porter*, 41 Miss. 116; *Kennedy v. Kennedy*, 73 N. Y. 369; *Sparks v. Sparks*, 69 N. Car. 319; *Ward v. Ward*, 1 Tenn. Ch. 262; *Lishey v. Lishey*, 2 Tenn. Ch. 1.

If the bill is bad on demurrer no allowance is granted. *Rose v. Rose*, 11 Paige (N. Y.), 166; *Wood v. Wood*, 2 Paige (N. Y.), 454; s. c., 8 Wend. (N. Y.) 357; but see *Robertson v. Robertson*, 1 Edw. Ch. (N. Y.) 360; *D'Arusmont v. D'Arusmont*, 14 Law Rep. (Ohio) 311; *Coles v. Coles*, 2 Md. Ch. 341; *Chaffee v. Chaffee*, 14 Mich. 463; 2 Bish. on M. & D. § 402.

2. See *Countz v. Countz*, 30 Ark. 73, 79; *McGee v. McGee*, 8 Ga. 295; *Bayly v. Bayly*, 2 Md. Ch. 326, 331; *Vandegrift v. Vandegrift*, 30 N. J. Eq. 76; *Glasser v. Glasser*, 28 N. J. Eq. 22; *Wright v. Wright*, 1 Edw. Ch. (N. Y.) 62, 63; *Kock v. Kock*, 42 Barb. (N. Y.) 515; *Edwards v. Edwards*, *Wright* (Ohio), 308, 309; *Wright v. Wright*, 3 Tex. 168.

3. *Schonwald v. Schonwald*, *Phillips* Eq. (N. Car.) 215; *Glenn v. Glenn*, 44 Ark. 46. See also *Bayly v. Bayly*, 2 Md. Ch. 326, 331.

In New Jersey the court sometimes requires affidavits from both sides. *Dougherty v. Dougherty*, 4 Halst. Ch. (N. J.) 540; *Martin v. Martin*, 4 Halst. Ch. (N. J.) 563; but see *Vandegrift v. Vandegrift*, 3 Stew. Ch. (N. J.) 76. See also *Countz v. Countz*, 30 Ark. 73; *Monk v. Monk*, 9 Rob. (N. Y.) 153.

And in some States the wife to obtain alimony *pendente lite* must deny the husband's charge of adultery under oath. See 2 Bish. on M. & D. § 409.

4. *Brinkley v. Brinkley*, 50 N. Y. 184.

5. *Swearingen v. Swearingen*, 19 Ga. 295; *Frith v. Frith*, 18 Ga. 272. See *ante*, notes 5 and 6, p. 472.

In an action for divorce, temporary alimony should not be allowed unless the marriage is proved or admitted; but where the testimony of the parties *pro* and *con* as to the marriage is in equipoise and a disinterested witness proves the ceremony, this is sufficient to grant temporary alimony. *Smith v. Smith*, 61 Iowa, 138.

6. See *ante*, note 4, p. 473.

7. See *ante*, notes 10, 11, p. 472.

8. *Methvin v. Methvin*, 15 Ga. 97; *Coles v. Coles*, 2 Md. Ch. 341; *Story v. Story*, Walk. Ch. (Mich.) 421; *Ross v. Ross*, 47 Mich. 185; *Coad v. Coad*, 40 Wis. 392. See *ante*, note 6, p. 473.

9. *Mitchell v. Mitchell*, 1 Spinks, 102; *Ross v. Ross*, 47 Mich. 185; *Lovett v. Lovett*, 11 Ala. 763, 777; *Warden v. Warden*, 3 Edw. Ch. (N. Y.) 387; *Weishaupt v. Weishaupt*, 27 Wis. 621; *Porter v. Porter*, 41 Miss. 116, 117. See *post*, notes, etc., 6, 7, p. 485.

10. *Wright v. Wright*, 1 Edw. Ch. (N. Y.) 62, 63; *Story v. Story*, Walk. Ch. (Mich.) 421.

11. *Mangels v. Mangels*, 6 Mo. App. 481; and see *Bird v. Bird*, 1 Lee, 572. See *ante*, note 8, p. 473.

12. *Lovett v. Lovett*, 11 Ala. 763; *McGee v. McGee*, 10 Ga. 477; *Coles v. Coles*, 2 Md. Ch. 341; *Mangels v. Mangels*, 6 Mo. App. 481; *Porter v. Porter*, 41 Miss. 116; *Weishaupt v. Weishaupt*, 27 Wis. 621.

13. *Cooke v. Newell*, 40 Conn. 596; *Sprayberry v. Merk*, 30 Ga. 81; *Glenn v. Hill*, 50 Ga. 94; *Day v. Eyster*, 79 Ill. 254; *Williams v. Monroe*, 18 B. Mon. (Ky.) 514; *Ricketts v. Ricketts*, 4 Gill. (Md.) 105; *Ray v. Adden*, 50 N. H. 82; *Dorsey v. Goodenow*, *Wright* (Ohio), 120; *Wing v. Hulburt*, 15 Vt. 607; *Dumner v. Dumner*, 54 Wis. 642.

The English doctrine of wife's lawyer in divorce suits recovering his fees from the husband is fully stated and commented on in 2 Bish. on M. & D. § 388.

This doctrine is adopted in some of the

suit.<sup>1</sup> And this the court will award upon having the necessary facts presented to it almost as a matter of course,<sup>2</sup> despite a plea to the merits,<sup>3</sup> or even to the jurisdiction.<sup>4</sup>

The court, however, will not grant alimony *pendente lite* if it appears that there was no marriage,<sup>5</sup> or if the wife admits guilt,<sup>6</sup> or is greatly at fault,<sup>7</sup> or does not make out cause in her bill,<sup>8</sup> or is acting in bad faith,<sup>9</sup> or if the husband is insane,<sup>10</sup> and, of course, if he does not appear.<sup>11</sup>

It may be granted by the lower court,<sup>12</sup> or by the appellate court pending an appeal,<sup>13</sup> and even after verdict against wife, if the cause has not yet had final hearing.<sup>14</sup> The award is a matter

U. S. *Sprayberry v. Merk*, 30 Ga. 81; *Glenn v. Hill*, 50 Ga. 94; and see cases *supra*. But is denied in others. *Morrison v. Holt*, 42 N. H. 478; *Ray v. Adden*, 50 N. H. 82; 2 Bish. on M. & D. § 388.

The usual rule being to grant it to the wife or tax it with the costs. See *Weaver v. Weaver*, 33 Ga. 172; *Howell v. Howell*, 185; *Thorndike v. Thorndike*, 1 Wash. Ter. 198. See, however, *Thompson v. Thompson*, 3 Head. 527, 529.

1. *D'Aguilar v. D'Aguilar*, 1 Hagg. Ec. 773; *Belcher v. Belcher*, 1 Curt. Ec. 444; *Holmes v. Holmes*, 2 Lee, 90; *Fitzgerald v. Fitzgerald*, 1 Lee, 572; *Collins v. Collins*, 29 Ga. 517; *Walton v. Walton*, 38 Ind. 228; *Call v. Call*, 65 Me. 407, 409; *Daiger v. Daiger*, 2 Md. Ch. 335; *Coles v. Coles*, 2 Md. Ch. 341; *Tayman v. Tayman*, 2 Md. Ch. 393; *Goldsmith v. Goldsmith*, 6 Mich. 285; *Mix v. Mix*, 1 Johns. Ch. (N. Y.) 108, 110; *North v. North*, 1 Barb. Ch. (N. Y.) 241; *Kendall v. Kendall*, 1 Barb. Ch. (N. Y.) 610; *Smith v. Smith*, 3 Oregon, 363; *Graves v. Coles*, 19 Pa. St. 171; *Waldron v. Waldron*, 55 Pa. St. 231; *Thompson v. Thompson*, 3 Head. (Tenn.) 527; *Moe v. Moe*, 39 Wis. 308.

2. *Smith v. Smith*, 2 Phillim. 158; s. c., 4 Swab & T. 228; *McGee v. McGee*, 30 Ga. 478; *Frith v. Frith*, 18 Ga. 272; *Methvin v. Methvin*, 15 Ga. 97; *Jenkins v. Jenkins*, 91 Ill. 167; *Foss v. Foss*, 100 Ill. 576; *Coles v. Coles*, 2 Md. Ch. 341; *Daiger v. Daiger*, 2 Md. Ch. 335; *Tayman v. Tayman*, 2 Md. Ch. 393; *Story v. Story*, Walk. Ch. (Mich.) 421; *Wright v. Wright*, 1 Edw. Ch. (N. Y.) 62; *Hammond v. Hammond*, Clarke (N. Y.) 151; *Jones v. Jones*, 2 Barb. Ch. (N. Y.) 142; *Little v. Little*, 63 N. Car. 22, 24; *Sparks v. Sparks*, 69 N. Car. 319, 321; *Lishey v. Lishey*, 2 Tenn. Ch. 1, 2.

3. *McGee v. McGee*, 10 Ga. 478; *Story v. Story*, Walk. Ch. (Mich.) 421; *Mix v. Mix*, 1 Johns. Ch. (N. Y.) 108, 110; *Moe v. Moe*, 39 Wis. 308.

4. *King v. King*, 27 Ala. 387; *Coles v.*

*Coles*, 2 Md. Ch. 341, 347; *Brinkley v. Brinkley*, 50 N. Y. 184. See also *Ronalds v. Ronalds*, L. R. 3 P. & D. 259.

5. *Collins v. Collins*, 71 N. Y. 269. Also, *Collins v. Collins*, 80 N. Y. 1.

6. *Scott v. Scott*, 17 Ind. 309.

7. *Kock v. Kock*, 42 Barb. (N. Y.) 515. See also *Purcell v. Purcell*, 4 Hen. & Munx. 605. See *Terry v. Terry*, 2 Barb. Ch. (N. Y.) 285, 289; and see cases where husband is in default: *Hicks v. Hicks*, L. R. 9 Eq. 175; *Constable v. Constable*, L. R. 2 P. & D. 17; *Graves v. Graves*, 2 Paige (N. Y.), 62, 63.

8. *Rose v. Rose*, 11 Paige (N. Y.), 166; *Burrows v. Burrows*, 6 Lea (Tenn.), 497.

9. *Rogers v. Rogers*, 4 Swab & T. 82; *Swearingen v. Swearingen*, 19 Ga. 265; *Zeigenfuss v. Zeigenfuss*, 21 Mich. 414; *Glasser v. Glasser*, 28 N. J. Eq. 22; *Vandegrift v. Vandegrift*, 30 N. J. Eq. 76; *Thompson v. Thompson*, 3 Head. (Tenn.) 527.

10. *McEwen v. McEwen*, 2 Stock. (N. J.) 286, n.

The fact that the wife is a drunkard does not prevent the award, but the court will see that the money is not misapplied. *Sanders v. Sanders*, 2 Edw. Ch. (N. Y.) 491.

11. 2 Bish. on M. & D. §§ 404, 408.

12. *King v. King*, 27 Ala. 387; *Jenkins v. Jenkins*, 91 Ill. 167; *Call v. Call*, 65 Me. 407; *Miller v. Miller*, 43 Iowa, 325; *Chaffee v. Chaffee*, 14 Mich. 463.

13. *Krause v. Krause*, 23 Wis. 354; *Goldsmith v. Goldsmith*, 6 Mich. 285; *Zeigenfuss v. Zeigenfuss*, 21 Mich. 417; *Whittmore v. Whittmore*, 49 Mich. 417. See *Jones v. Jones*, L. R. 2 P. & D. 333.

It is in the court's discretion in such a case. It is not a matter of right. *Holthoefer v. Holthoefer*, 47 Mich. 643.

14. *D'Oyley v. D'Oyley*, 4 Swab & T. 226; *Willis v. Willis*, 3 Swab & T. 542; *Standford v. Standford*, 1 Edw. Ch. (N. Y.) 317; *Germond v. Germond*, 1 Paige Ch. (N. Y.) 83; *Roblett v. Roblett*, L. R. 1 P. & M. 651.

The discretion is judicial, not arbitrary.



within the sound judicial discretion of the court.<sup>1</sup> In some States the decree by the lower court of alimony *pendente lite* is final, at least as to the amount.<sup>2</sup> In others it is subject to appeal, where it may be annulled or altered.<sup>3</sup> So the court which granted it may amend or revoke it.<sup>4</sup>

**5. Amount of Alimony Pendente Lite.**—This is determined by no fixed rule,<sup>5</sup> being in the discretion<sup>6</sup> of the court in view of the circumstances of each case.<sup>7</sup> The amount of alimony *pendente lite* is less than that of permanent alimony,<sup>8</sup> and like permanent alimony is arrived at by considering the joint means,<sup>9</sup> the husband's faculties<sup>10</sup> and the wife's property.<sup>11</sup> Where the fortune or property came, whether from the wife or from the husband.<sup>12</sup> The ages and abilities of the parties,<sup>13</sup> and the expenses to which they are

1. *Cooke v. Cooke*, 2 Phillim. 40; *Jones v. Jones*, L. R. 2 P. & D. 333; *Stillman v. Stillman*, 99 Ill. 196; *Foote v. Foote*, 22 Ill. 425; *Brinkley v. Brinkley*, 50 N. Y. 184; *Burr v. Burr*, 7 Hill (N. Y.), 207; *De Llamosas v. De Llamosas*, 62 N. Y. 618; *Foss v. Foss*, 100 Ill. 576; *Glen v. Hill*, 30 Ga. 94, 95.

2. *Call v. Call*, 63 Me. 407.

3. Left to discretion of trial court, but subject to appeal when such discretion has been abused. *Rose v. Rose*, 53 Mich. 595; *Froman v. Froman*, 53 Mich. 581; *Hecht v. Hecht*, 28 Ark. 92; *Glenn v. Glenn*, 44 Ark. 46; *Sparhawk v. Sparhawk*, 120 Mass. 390; *Lapham v. Lapham*, 40 Mich. 527; *De Llamosas v. De Llamosas*, 62 N. Y. 618; *Schonwald v. Schonwald*, Phillips Eq. (N. Car.) 215; *Cox v. Cox*, 19 Ohio St. 502; *Cooke v. Cooke*, 2 Phillim. 40; *Street v. Street*, 2 Add. Ec. 1; *Whitsell v. Whitsell*, 8 B. Mon. (Ky.) 50; *Jenkins v. Jenkins*, 91 Ill. 167; *Andrews v. Andrews*, 69 Ill. 609, 612; *Ressor v. Ressor*, 82 Ill. 442.

The discretion must have been abused, or the appellate court will not disturb the decree. *Powell v. Powell*, 53 Ind. 513; and see cases *supra*.

4. *Cox v. Cox*, 3 Add. Ec. 276; *McGee v. McGee*, 10 Ga. 477; *Waters v. Waters*, 49 Mo. 385; *Anon.*, 4 N. J. Eq. 171; *Moe v. Moe*, 39 Wis. 308; *Leslie v. Leslie*, 11 Abb. Pr. N. S. (N. Y.) 311; *Hopkins v. Hopkins*, 40 Wis. 462; *Coad v. Coad*, 40 Wis. 392; *Williams v. Williams*, 29 Wis. 517; *Kock v. Kock*, 42 Barb. (N. Y.) 515; *Goldsmith v. Goldsmith*, 6 Mich. 285.

5. *Andrews v. Andrews*, 69 Ill. 609; *Farley v. Farley*, 30 Iowa, 353; *Richmond v. Richmond*, 2 N. J. Eq. 90; *Burr v. Burr*, 7 Hill (N. Y.), 207; *Prince v. Prince*, 1 Rich. Eq. (S. Car.) 282; *Stillman v. Stillman*, 7 Baxt. (Tenn.) 169; *Bailey v. Bailey*, 21 Gratt. (Va.) 43; *Williams v.*

*Williams*, 36 Wis. 362; *Rees v. Rees*, 3 Phillim. 235.

6. *Collins v. Collins*, 71 N. Y. 269; *Hill v. Hill*, 47 Ga. 332; *Powell v. Powell*, L. R. 3 P. & D. 186; *Jones v. Jones*, 2 P. & D. 333, 338; *Rose v. Rose*, 53 Mich. 585; see cases *supra*, and see *ante*, note 1.

7. *Smith v. Smith*, 2 Phillim. 235, and cases *supra*, notes 1, 5, and 6.

8. *Cooke v. Cooke*, 2 Phillim. 40; *Kempe v. Kempe*, 1 Hagg. Ec. 532; *Hawkes v. Hawkes*, 1 Hagg. Ec. 526; *McGee v. McGee*, 10 Ga. 477, 490; *Amos v. Amos*, 4 N. J. Eq. 171, 172; *Germond v. Germond*, 4 Paige (N. Y.), 643; *Hammond v. Hammond*, *Clarke* (N. Y.), 151; *Coles v. Coles*, 2 Md. Ch. 341; *Little v. Little*, 63 N. Car. 22, 24; *Melizet v. Melizet*, 1 Parsons, 77, 78; 2 Bish. on M. & D. § 458.

9. *Cooke v. Cooke*, 2 Phillim. 40; *Street v. Street*, 2 Add. Ec. 1; *Smith v. Smith*, 2 Phillim. 235; *Powell v. Powell*, L. R. 3 P. & D. 186.

10. *Bergen v. Bergen*, 22 Ill. 187; *Edenmuller v. Edenmuller*, 37 Cal. 364. See *post*, notes 6 *et seq.*, p. 485.

11. *McGee v. McGee*, 10 Ga. 477; *Brown v. Brown*, 22 Mich. 242; *Harrison v. Harrison*, 49 Mich. 240, 241; *Merritt v. Merritt*, 99 N. Y. 643. See *post*, notes 4 *et seq.*, p. 485.

12. *Cooke v. Cooke*, 2 Phillim. 40; *Otway v. Otway*, 2 Phillim. 109; *Smith v. Smith*, 2 Phillim. 152, 235; *Street v. Street*, 2 Add. Ec. 1; *Wades v. Wades*, 29 L. J. Mat. Cas. 151, note; *McGee v. McGee*, 10 Ga. 477; *Burr v. Burr*, 7 Hill, 207; *Stillman v. Stillman*, 7 Baxt. (Tenn.) 169, 183; *Von Glahn v. Von Glahn*, 46 Ill. 134; *Lovett v. Lovett*, 11 Ala. 763; *Ressor v. Ressor*, 82 Ill. 442; 2 Bish. on M. & D. § 457; *Merritt v. Merritt*, 99 N. Y. 643.

13. *Lovett v. Lovett*, 11 Ala. 763;

subjected, the custody and support of minor children, and the like.<sup>1</sup>

Taking all these circumstances into account, the court will award the wife her just proportion; <sup>2</sup> as for instance, one fourth,<sup>3</sup> one fifth,<sup>4</sup> one eighth,<sup>5</sup> almost one third,<sup>6</sup> one half,<sup>7</sup> which may in the discretion of the court be increased or diminished as the cause progresses,<sup>8</sup> or even revoked.<sup>9</sup>

As a part of this alimony, or besides this allowance, the court will also allow her suit-money<sup>10</sup> and counsel-fees.<sup>11</sup>

**6. When Alimony Pendente Lite Ceases.**—As shown before,<sup>12</sup> alimony *pendente lite* may begin as soon as the husband is "in court;" and if the court does not annul the decree,<sup>13</sup> it continues as long as the suit is pending, but ceases when the suit is dismissed,<sup>14</sup> or the parties are reconciled,<sup>15</sup> or one of them dies,<sup>16</sup> or a final decree is entered.<sup>17</sup>

Schlosser v. Schlosser, 29 Ind. 488; Bursler v. Bursler, 5 Pick. (Mass.) 427; Lynde v. Lynde, 2 Barb. Ch. (N. Y.) 72.

1. Hawkes v. Hawkes, 1 Hagg. Ec. 526; Street v. Street, 2 Add. Ec. 1; Lynde v. Lynde, 2 Barb. Ch. (N. Y.) 72; Amos v. Amos, 4 N. J. Eq. 171; McGee v. McGee, 10 Ga. 477; Halleman v. Halleman, 65 Ga. 476; Bergen v. Bergen, 22 Ill. 187; Plaster v. Plaster, 67 Ill. 93; Call v. Call, 65 Me. 407; Hammond v. Clarke (N. Y.) 151; Burr v. Burr, 7 Hill (N. Y.), 207; Foss v. Foss, 100 Ill. 570.

2. Williams v. Williams, 29 Wis. 517, 525; Constable v. Constable, L. R. 2 P. & D. 17; Powell v. Powell, L. R. 3 P. & D. 186; Haviland v. Haviland, 32 L. J. Mat. Cas. 67.

3. Finlay v. Finlay, Milw. 575; Irwin v. Dowling, Milw. 629.

4. Cooke v. Cooke, 2 Phillim. 40; Williams v. Williams, 29 Wis. 517, 525.

5. Butler v. Butler, Milw. 629.

6. Brown v. Brown, 2 Hagg. Ec. 5, 7; Harris v. Harris, 1 Hagg. Ec. 351; Smith v. Smith, 2 Phillim. 1.

7. Collins v. Collins, 29 Ga. 517.

8. See *ante*, note 4, p. 476.

9. Kock v. Kock, 42 Barb. (N. Y.) 515; Goldsmith v. Goldsmith, 6 Mich. 285.

10. See *ante*, note 1, p. 475.

11. See *ante*, note 13, p. 474.

The amount of counsel-fees and suit-money depends on the means of the husband. 2 Bish. on M. & D. § 420.

The character of services to be rendered. Baldwin v. Baldwin, 6 Gray (Mass.), 341; Williams v. Williams, 29 Wis. 317.

And the practice of the various courts. Hepworth v. Hepworth, 3 Swab & T. 414; Elloytt v. Elloytt, 3 Swab & T. 105; Weber v. Weber, 1 Swab & T. 219;

Pearson v. Darrington, 32 Ala. 327; Lowell v. Lowell, 55 Cal. 315; Collins v. Collins, 29 Ga. 517; Weaver v. Weaver, 33 Ga. 172; Blake v. Blake, 70 Ill. 618; Champlin v. Champlin, 42 Iowa, 169; Meyjor v. Meyjor, 3 Metc. (Ky.) 298; Dugan v. Dugan, 1 Duval (Ky.), 289; Prescott v. Prescott, 59 Me. 146; Chaffee v. Chaffee, 14 Mich. 463; Waters v. Waters, 49 Mo. 385; De Llamosas v. De Llamosas, 62 N. Y. 618; Thompson v. Thompson, 3 Head. (Tenn.) 527; Williams v. Williams, 29 Wis. 517.

In many States the right to give counsel-fees, etc., is provided for by statute, but a statute is not necessary. McGee v. McGee, 10 Ga. 477; Dow v. Eyster, 79 Ill. 254.

12. *Ante*, notes 4, 11, p. 472; n. 1, p. 473.

13. See *ante*, notes 3, 4, p. 476.

14. Weaver v. Weaver, 33 Ga. 172; Persons v. Persons, 7 Humph. (Tenn.) 183. See *ante* note 3, p. 473. See also McCullough v. Murphy, 45 Ill. 256; Holt v. Holt, 2 Swab & T. 604; Gosset v. Patton, 23 Kan. 340; Wilde v. Wilde, 2 Nev. 306; Gregory v. Gregory, 32 N. J. Eq. 424.

15. Tiffin v. Tiffin, 2 Binney (Pa.), 202; Wallingsford v. Wallingsford, 6 H. & J. (Md.) 485.

16. Dewees v. Dewees, 55 Miss. 315.

17. Standford v. Standford, 1 Edw. Ch. (N. Y.) 317.

The order, however, may be made on final hearing. Jeter v. Jeter, 36 Ala. 391; and see *ante*, note 1, p. 473.

Or on appeal. Chaffee v. Chaffee, 14 Mich. 463.

And may be made to take effect from the beginning of the suit. Swearingen v. Swearingen, 19 Ga. 267; Hamerton v. Hamerton, 1 Hagg. Ec. 23; Bain v. Bain, 2 Add. Ec. 253; Harris v. Harris, 1

7. **Permanent Alimony** is that alimony which is granted after the termination of the suit.<sup>1</sup>

The power to grant permanent alimony and the circumstances under which it may be decreed is regulated largely by statute.<sup>2</sup> Generally it is allowed in any case of divorce absolute<sup>3</sup> or limited, provided the marriage was a valid one.<sup>4</sup>

But by statutes in many States it is allowed only when the divorce is for adultery or other fault of husband,<sup>5</sup> and by others not when for adultery or misconduct of the wife.<sup>6</sup> In other States a certain part of the wife's estate, in the nature of alimony, is given to the husband,<sup>7</sup> and in some States no distinction is apparently made between the laws governing alimony to the wife and alimony to the husband.<sup>8</sup>

The court may grant alimony though not specifically prayed for<sup>9</sup> if the proper facts are before the court.<sup>10</sup> It usually, how-

Hagg. Ec. 353; *Rees v. Rees*, 3 Phillim. 387; *Russell v. Russell*, 69 Me. 336.

Or from the date of the order. See *Rees v. Rees*, 3 Phillim. 387; *Coles v. Coles*, 2 Md. Ch. 341.

1. See *ante*, note 1, p. 467; and see as to maintenance, sometimes called permanent alimony, *ante*.

2. See, for references to statutes and cases under them, *Stewart on M. & D.* § 364; and see also *Stimson's American Statute Law*, § 6261 (A). See *ante*, note 1, p. 472.

3. It is doubtful if alimony would be allowed in cases of absolute divorce in the absence of a statute. See 2 *Bish. on M. & D.* § 376.

4. This is so well established that it scarcely needs authority. See, however, *Smyth v. Smyth*, 2 Add. Ec. 254; *Turner v. Turner*, 44 Ala. 437; *Bowman v. Worthington*, 24 Ark. 522; *Frith v. Frith*, 18 Ga. 273; *McFarland v. McFarland*, 51 Iowa, 565; *Holbrook v. Holbrook*, 32 La. Ann. 13.

5. *Me.*, Rev. Stat. 1883, chap. 60, § 9; *Oreg. Civ. Code*, § 497; *R. I.*, Pub. Stat. 1882, chap. 167, § 9; *Dak.*, Civ. Code, § 73; *N. Y.*, Civ. Code, § 1760; *La.*, Rev. Civ. Code, 1875, § 160; *Kan.*, Comp. Laws, 1879, chap. 80, § 646; *Cal.*, *Hittel's Code*, 1876, § 5139.

6. *Mich.*, *Howell's Annotated Stat.* 1882, § 6245; *Wis.*, Rev. Stat. 1878, § 2364; *Minn.*, Gen. Stat. 1878, chap. 62, § 23; *Neb.*, Comp. Stat. 1881, part 1, chap. 25, § 22; *Ariz.*, Comp. Laws 1877, § 1922.

And for cases in which no alimony allowed because wife in fault, see *Latham v. Latham*, 30 Gratt. (Va.) 307; *Harris v. Harris*, 31 Gratt. 13; *Lee v. Lee*, 1 Duv. 196; *Carr v. Carr*, 22 Gratt. (Va.) 168; *Atwater v. Atwater*, 53 Barb. (N. Y.) 621; *Spitler v. Spitler*, 108 Ill. 120.

And others where she is not entitled upon a divorce decreed in favor of the husband. *Goval Abr.* 508; 3 *Black. Com.* 94; 2 *Chitt. Gen. Prac.* (Am. Ed.) 462, 463; *Palmer v. Palmer*, 1 *Paige* (N. Y.), 276; *Everett v. Everett*, 52 *Cal.* 383. And in Missouri only when the decree is in her favor. *McIntire v. McIntire*, 80 *Mo.* 470.

7. *Iowa*, R. S. 1880, § 2226, and see § 6229; *Small v. Small*, 42 *Iowa*, 111; *Mass.*, Pub. Stat. 1882, p. 817, § 36; *Va.*, Code 1873, chap. 105, § 12; *Vt.*, R. S. 1880, § 2377.

8. *Oreg.*, Civ. Code, § 497; *Wash.*, Code 1881, § 2007. See *Iowa*, *supra*. And by statute in *Illinois*, R. S. 1880, p. 424, § 19.

Alimony is to be given in nullity suits. Without a statute it has been held that this could not be done. *Chase v. Chase*, 65 *Me.* 21; *Fischli v. Fischli*, 1 *Blackf. (Ind.)* 360; *Bartlett v. Bartlett*, *Clarke* (N. Y.) 460; *North v. North*, 1 *Barb. Ch.* (N. Y.) 241; *Bird v. Bird*, 1 *Lee*, 621. But see *Graves v. Graves*, 108 *Mass.* 314; *Brown v. Westbrook*, 27 *Ga.* 102; *Zull v. Zull*, *Saxton* (N. J.) 96.

Though where a woman marries a man, knowing of no impediment, if the marriage is afterwards declared null or void the court will not allow her to go entirely destitute. See *Strode v. Strode*, 3 *Bush* (Ky.), 227; *Griffin v. Griffin*, 47 *N. Y.* 134; *Van Alley v. Van Alley*, 19 *Ohio St.* 588; *State v. Smith*, 19 *Wis.* 531.

In England this is accomplished by giving the wife something *nomine expensarum*. *Scrimshire v. Scrimshire*, 2 *Hagg. Con.* 395.

9. *Jackson v. Jackson*, 1 *McArth.* (D. C.) 341; *Chandler v. Chandler*, 13 *Ind.* 492; *Prescott v. Prescott*, 59 *Me.* 146; *Danow v. Danow*, 43 *Iowa*, 411. But see *Clayton v. Clayton*, 1 *Ashm.* (Pa.) 52.

10. *Weishaupt v. Weihaupt*, 27 *Wis.*

ever, should be specifically prayed for either in the original bill or libel,<sup>1</sup> or by a petition or affidavit setting forth the husband's faculties.<sup>2</sup>

It may be prayed for at any time before final decree,<sup>3</sup> or after final decree, if the divorce is *a mensa et thoro*;<sup>4</sup> though not, it seems, if *a vinculo*.<sup>5</sup> The defendant should be allowed to answer,<sup>6</sup> unless he is in default.<sup>7</sup> It is usually granted in the same judgment with the divorce,<sup>8</sup> but may be in a separate one.<sup>9</sup>

It may be ordered to begin from the date of final decree,<sup>10</sup> or from the beginning of the suit.<sup>11</sup>

In the absence of statute, the award is usually a sum to be paid periodically,<sup>12</sup> and not either specific property,<sup>13</sup> or a sum in gross.<sup>14</sup> But by statutes in some States the court may award a specific part of the husband's lands,<sup>15</sup> and in others, in the discretion<sup>16</sup> of the court, either an allowance or a sum in gross.<sup>17</sup>

621. See also Wallingsford v. Wallingsford, 6 Har. & J. (Md.) 485; Lishey v. Lishey, 2 Tenn. Ch. 1.

1. See Chandler v. Chandler, 13 Ind. 492; Damon v. Damon, 28 Wis. 510; Prescott v. Prescott, 59 Me. 146.

2. See *ante*, and see Countz v. Countz, 30 Ark. 73; Sheafe v. Leighton, 36 N. H. 240; McGee v. McGee, 10 Ga. 477; Vandegrift v. Vandegrift, 30 N. J. Eq. 76; Wright v. Wright, 3 Tex. 168; Litowich v. Litowich, 19 Kans. 451; Reeves v. Reeves, 82 N. Car. 348.

3. Prescott v. Prescott, 59 Me. 146. See *ante*, notes 1 and 2.

4. Covell v. Covell, L. R. 2 P. & D. 411, 412. See also Crugom v. Crugom, 64 Wis. 253.

5. Wilde v. Wilde, 36 Iowa, 319. See, however, Shotwell v. Shotwell, 1 S. & M. Ch. (Miss.) 51, 64; Lawson v. Shotwell, 27 Miss. 630; Lyon v. Lyon, 21 Conn. 185; McKarracker v. McKarracker, 3 Yeates (Pa.), 56; D'Arusmont v. D'Arusmont, 14 Law Rept. 311; 8 West. L. J. 548. See also 2 Bish. on M. & D. §§ 382, 492.

6. Wright v. Wright, 3 Texas, 168; 1 Hemp. (U. S.) 58.

7. Hicks v. Hicks, 9 Ired. Eq. (N. Car.) 175, 176; Constable v. Constable, L. R. 2 P. & D. 17; Grove v. Grove, 2 Paige (N. Y.), 62.

8. Campbell v. Campbell, 37 Wis. 206.

9. Bacon v. Bacon, 34 Wis. 594.

If obtained in the same suit wherein the divorce is pronounced it need not be decreed at the same time. Call v. Call, 65 Me. 407; Sheafe v. Leighton, 36 N. H. 240; Gregory v. Gregory, 5 Stew. Ch. (N. J.) 424; Covell v. Covell, L. R. 2 P. & D. 411. Also Crugom v. Crugom, 64 Wis. 253.

And for cases in which *ex-parte* divorce granted, and subsequent suit for alimony,

see Cox v. Cox, 19 Ohio St. 502; Stilphen v. Stilphen, 58 Me. 508; Nichols v. Nichols, 10 C. E. Green (N. J.), 60. See 2 Bish. on M. & D. § 170, *b*.

10. Durant v. Durant, 1 Hagg. Ec. 528; Kempe v. Kempe, 1 Hagg. Ec. 532; Soules v. Soules, 3 U. C. Chan. 111, 115, 116, 118; Ricketts v. Ricketts, 4 Gill (Md.), 105; Holmes v. Holmes, 29 N. J. Eq. 9, 12.

11. Forrest v. Forrest, 25 N. Y. 501; s. c., 6 Duer, 102, 149; Burr v. Burr, 7 Hill (N. Y.), 207; 2 Bish. on M. & D. §§ 425, 458.

12. Wallingsford v. Wallingsford, 6 H. & J. (Md.) 485. See Russell v. Russell, 4 Greene, 26; Lockridge v. Lockridge, 3 Dana (Ky.), 28, 29; Maguire v. Maguire, 7 Dana (Ky.), 181; Calame v. Calame, 25 N. J. Eq. 548; 24 N. J. Eq. 434; Almond v. Almond, 4 Rand (Va.), 662; 2 Bish. on M. & D. § 427.

13. Almond v. Almond, 4 Rand (Va.), 662. See also Halleman v. Halleman, 65 Ga. 476.

14. Calame v. Calame, 25 N. J. Eq. 548; Crain v. Cavana, 36 Barb. (N. Y.) 410, 413.

This may be done by agreement or consent. Crews v. Mooney, 74 Mo. 26.

15. Del. Rev. Code 1874, 75, 9.

If for fault of husband, Wis. 2364, in any case; and Oreg. Civ. C. § 495, to either, one third undivided part in fee of other's real estate, in addition to allowance of alimony. See also Wiggin v. Smith, 54 N. H. 213; Jolly v. Jolly, 1 Iowa, 9; Dinot v. Eigenmann, 80 Ill. 275; Blankenship v. Blankenship, 19 Kans. 159; Broadwell v. Broadwell, 21 Ohio St. 657; Taylor v. Taylor, 93 N. Car. 418.

16. Ross v. Ross, 78 Ill. 402; McClung v. McClung, 40 Mich. 493; Williams v. Williams, 36 Wis. 362.

17. Me. Rev. Stat. 1883, chap. 60, §

**8. Amount of Permanent Alimony.**—In some States this is regulated by statute,<sup>1</sup> but usually, like alimony *pendente lite*, it is left to the discretion of the court, who consider the circumstances of each case,<sup>2</sup> taking into account the husband's faculties,<sup>3</sup> the wife's means,<sup>4</sup> the expenses to be borne by each, support of children, etc.,<sup>5</sup> the source from which the money came, whether from the husband or the wife,<sup>6</sup> likewise the ages and abilities of the parties,<sup>7</sup> and their conduct,<sup>8</sup> giving more to the wife if the husband was the offender<sup>9</sup> than if she had contributed to the fault,<sup>10</sup> and a bare maintenance,<sup>11</sup> if anything,<sup>12</sup> if she were wholly wrong.

14; Ohio Rev. Stat. 1880, § 5700; Mich., Howell's Annotated Statutes 1882, § 6245; Kans. Comp. Laws 1879, chap. 80, § 646; Del. Rev. Code 1874, chap. 75, § 10; Mo. Rev. Stat. 1879, § 2180; Oreg. Civ. C. § 497. See also cases *Campbell v. Campbell*, 37 Wis. 206; *Wheeler v. Wheeler*, 18 Ill. 39; *Miller v. Clark*, 23 Ind. 370; *Graves v. Graves*, 108 Mass. 314, 317; *Burrows v. Purples*, 107 Mass. 428; *Prescott v. Prescott*, 59 Me. 146; *McClung v. McClung*, 40 Mich. 493; *Taylor v. Gladwin*, 40 Mich. 232; *Petersine v. Thomas*, 28 Ohio St. 596; *Buckminster v. Buckminster*, 38 Vt. 248; *Williams v. Williams*, 36 Wis. 362.

But not unless by statute. See *Crain v. Cavana*, 36 Barb. (N. Y.) 410.

And though awarded in gross may be made payable in instalments. Ind. Rev. Stat. 1881, § 1047; *Taylor v. Gladwin*, 40 Mich. 232.

1. So in Rhode Island it must not exceed the use for life of one half the real estate and one half the personalty absolutely, nor in Connecticut and Minnesota one half the husband's property real and personal, and in Louisiana one half his income.

2. See *ante*, notes 5, 6, 7, p. 476; see also *Forman v. Forman*, 109 Ill. 63; *Dawson v. Dawson*, 110 Ill. 279; *Sesterhen v. Sesterhen*, 60 Iowa, 301.

3. See *ante*, notes 9, 10, p. 476; see *post*, note 6 *et seq.*, p. 485; see also *Jenkins v. Jenkins*, 69 Ga. 483, where it was held to be error to exclude the husband's testimony as to his faculties.

4. See *ante*, note 11, p. 476; see *post*, notes 4, 5 *et seq.*, p. 485.

5. See *ante*, note 1, p. 477.

6. See *ante*, note 12, p. 476; see *Robbins v. Robbins*, 101 Ill. 416, and *Wilson v. Wilson*, 102 Ill. 297.

7. See *ante*, note 13, p. 476.

8. *Becker v. Becker*, 79 Ill. 532; *Bergen v. Bergen*, 22 Ill. 187; *Hammond v. Hammond*, *Clarke* (N. Y.), 151; *Burr v. Burr*, 7 Hill (N. Y.), 207; *Williams v. Williams*, 29 Wis. 517.

9. *Cooke v. Cooke*, 2 Phillim. 40; *Smith v. Smith*, 2 Phillim. 235; *Bergen v. Bergen*, 22 Ill. 187; *Burr v. Burr*, 7 Hill (N. Y.), 207.

And for cases in which only given to wife when husband in fault, see *ante*, note 1, p. 478; and in *Metzler v. Metzler*, 99 Ind. 384, where divorce for fault of husband and custody of child given to wife, the court granted the wife \$1590, the husband being worth at least \$3500.

10. See *Lovett v. Lovett*, 11 Ala. 763; *Reavis v. Reavis*, 2 Ill. 242; *Conner v. Conner*, 29 Ind. 48; *Zuver v. Zuver*, 36 Iowa, 190, and cases there cited; *Stevens v. Stevens*, 49 Mich. 504; *Buerfening v. Buerfening*, 23 Minn. 563.

11. See *Conner v. Conner*, 29 Ind. 48; *Fivecoat v. Fivecoat*, 32 Iowa, 198; *Sheafe v. Loughton*, 36 N. H. 240; *Sheafe v. Sheafe*, 24 N. H. 564; see *Graves v. Graves*, 108 Mass. 314; *Richardson v. Yerg* (Tenn.), 67, 77, 81; see *Bailey v. Bailey*, *Wright* (Ohio), 514; *Pritchard v. Pritchard*, 3 Swab & T. 523; *Jee v. Thurlow*, 4 Donl. & R. 11.

For other cases of alimony to a wife in fault, see *Deenis v. Deenis*, 79 Ill. 74; *Reavis v. Reavis*, 2 Ill. 242; *Zuver v. Zuver*, 36 Iowa, 419; *Gaines v. Gaines*, 9 B. Mon. (Ky.) 295; *Pence v. Pence*, 6 B. Mon. (Ky.) 496; *Hedrick v. Hedrick*, 28 Ind. 291; *Coon v. Coon*, 26 Ind. 189; *Cox v. Cox*, 25 Ind. 303; *Chandler v. Chandler*, 13 Ind. 492; *Fulk v. Fulk*, 8 Blackf. (Ind.) 561.

This is sometimes regulated by statute. See cases *supra*, and see Ala. R. C. 1876, § 3697; Pa. Purd. Dig. 1871, p. 513, §§ 24, 27; *Miles v. Miles*, 76 Pa. St. 357.

And is forbidden by Cal. Civ. Code, 1881, § 139. *Everett v. Everett*, 52 Cal. 383.

12. *Lovett v. Lovett*, 11 Ala. 763; *Lee v. Lee*, 1 Duv. (Ky.) 196; *Shafer v. Shafer*, 10 Neb. 468; *Fry v. Fry*, 7 Paige (N. Y.), 461; *Carr v. Carr*, 22 Gratt. (Va.) 168; *Palmer v. Palmer*, 1 Paige (N. Y.), 276; *Allen v. Allen*, 43 Conn. 419; *Wallingsford v. Wallingsford*, 6

The court will also take into account what amount the husband can readily pay without rendering him destitute or impairing his business.<sup>1</sup> If the parties have made a fair, *bona-fide* agreement, without any fraud, the court will adopt it as its decree.<sup>2</sup>

And after due consideration of the circumstances of the case the following amounts have been awarded: one third,<sup>3</sup> one half,<sup>4</sup> from one half to one third,<sup>5</sup> one quarter,<sup>6</sup> from one third to one quarter,<sup>7</sup> two fifths,<sup>8</sup> not to exceed one third his income as the maximum, etc.<sup>9</sup>

9. **Increasing or Diminishing Amount of Permanent Alimony.**—A motion or petition may be presented setting forth facts to lead the court to increase or diminish the amount of alimony decreed.<sup>10</sup> This they usually have the power to do in cases where the alimony was decreed in a divorce *a mensa et thoro*<sup>11</sup> or in cases of alimony without divorce.<sup>12</sup> But not, it seems, in cases where the court has no longer jurisdiction of the parties, as in a divorce *a vinculo*,<sup>13</sup> or

Har. & J. (Mo.) 485; Atwater v. Atwater, 53 Barb. (N. Y.) 621; Latham v. Latham, 30 Gratt. (Va.) 307; Harris v. Harris, 31 Gratt. (Va.) 13; State v. Smith, 19 Wis. 531.

And for cases where not allowed to adulterous wife, see *ante*, note 6, p. 478.

1. See Neil v. Neil, 4 Hagg. Ec. 273; Ward v. Ward, 1 Swab & T. 484; Andrews v. Andrews, 69 Ill. 609; Farley v. Farley, 30 Iowa, 353; Abbey v. Abbey, 32 Iowa, 575; Forrest v. Forrest, 8 Bosw. (N. Y.) 610; Williams v. Williams, 39 Wis. 362; Gardner v. Gardner, 54 Ga. 560; Wardlaw v. Wardlaw, 39 Ga. 53; Williams v. Williams, 29 Wis. 517.

So in Graft v. Graft, 76 Ind. 136, a decree of \$4000 to a wife out of an estate of \$7000 was excessive.

2. Crews v. Mooney, 74 Mo. 26; Petersine v. Thomas, 28 Ohio St. 596; Speck v. Damson, 7 Mo. App. 165; Stilson v. Stilson, 46 Conn. 15; Moon v. Baum, 58 Ind. 194; Shaw v. Gould, 74 Me. 540; Adams v. Adams, 52 Minn. 72. See Calame v. Calame, 25 N. J. Eq. 548; McLaren v. McLaren, 33 Ga. Supp. 99.

3. Some of these cases apply to alimony *pendente lite*, but the principles are discussed. See Ricketts v. Ricketts, 4 Gill. (Md.) 105; Kempe v. Kempe, 1 Hagg. Ec. 532; Otway v. Otway, 2 Phillim. 109; Williams v. Williams, 36 Wis. 363, 367; Jeans v. Jeans, 2 Har. (Del.) 142; Persons v. Persons, 82 Ill. 442; Musselman v. Musselman, 44 Ind. 106.

4. Halleman v. Halleman, 65 Ga. 476; Stillman v. Stillman, 7 Baxt. (Tenn.) 169; Fischli v. Fischli, 2 Litt. (Ky.) 337; Rees v. Rees, 7 Oreg. 47; Bergen v. Bergen, 22 Ill. 187; Cooke v. Cooke, 2 Phillim.

40. Haigh v. Haigh, L. R. 1 P. & D. 709. See Thornberry v. Thornberry, 4 Litt. (Ky.) 251; Ross v. Ross, 78 Ill. 402; Wilson v. Wilson, 102 Ill. 297; Chenault v. Chenault, 5 Sneed (Tenn.), 248; Damon v. Damon, 28 Wis. 510.

5. Durant v. Durant, 1 Hagg. Ec. 528; Hyde v. Hyde, 29 L. J. Mat. Cas. 150-151, n.; Lovett v. Lovett, 11 Ala. 763; Thornberry v. Thornberry, 4 Litt. (Ky.) 251.

6. Plaster v. Plaster, 47 Ill. 290.

7. Miller v. Miller, 6 Johns. Ch. (N. Y.) 91; Turner v. Turner, 44 Ala. 437; Musselman v. Musselman, 44 Ind. 106; Lockridge v. Lockridge, 3 Dana (Ky.), 28.

8. Severn v. Severn, 7 U. C. Chan. 109.

9. Pa. Purdon's Digest, Div. § 25; McClurg's App. 66 Pa. St. 366.

The jury is not confined, in determining the amount, to the property owned by the husband at the date of the verdict. The verdict may cover any property mentioned in the schedule. Halleman v. Halleman, 65 Ga. 476; see, *contra*, Crulle v. Crulle, 79 Va. 102.

10. Bauman v. Bauman, 18 Ark. 320; Perkins v. Perkins, 12 Mich. 456.

11. Rogers v. Viness, 9 Ired. (N. Car.) 293; Taylor v. Taylor, 93 N. Car. 418; Smith v. Smith, 45 Ala. 264; Miller v. Miller, 6 Johns. Ch. (N. Car.) 51, 93; Sloan v. Cox, 4 Hayw. (N. Car.) 75, 77; Otway v. Otway, 2 Phillim. 109; De Blanquiere v. De Blanquiere, 3 Hagg. Ec. 322, 329; Cox v. Cox, 3 Add Ec. 276.

12. Anon., 1 Desaus. Eq. (S. Car.) 113; Whorewood v. Whorewood, 1 Rep. Ch. 223.

13. Fischli v. Fischli, 1 Blackf. (Ind.)

where the decree was a final settlement of the property-rights between the parties,<sup>1</sup> unless the court has reserved this right in its decree,<sup>2</sup> or is given it by statute as it is in many States.<sup>3</sup> The power is only exercised in a case that clearly calls for interposition,<sup>4</sup> generally some marked change in the circumstances of the parties.<sup>5</sup>

And from the decision of the lower court there is usually an appeal.<sup>6</sup>

10. **Enforcing the Decree for Alimony.**<sup>7</sup>—In the jurisdiction in which the decree was granted the court which granted it is the proper court to enforce it,<sup>8</sup> and although it has been said that it is not a debt,<sup>9</sup> yet it has been enforced as a judgment,<sup>10</sup> and if

360; *Shepherd v. Shepherd*, 1 Hun (N. Y.), 240; *Bacon v. Bacon*, 43 Wis. 197; *Kamp v. Kamp*, 59 N. Y. 212; *Smith v. Smith*, 45 Ala. 264; *Fries v. Fries*, 1 McArth. 291; *Mitchell v. Mitchell*, 20 Kan. 665; *Kerr v. Kerr*, 59 How. Pr. (N. Y.) 255; *Petersine v. Thomas*, 28 Ohio St. 596; *Hardin v. Hardin*, 38 Tex. 616.

1. See *Shepherd v. Shepherd*, 1 Hun (N. Y.), 240; *Forrest v. Forrest*, 3 Bosw. (N. Y.) 631; *Webster v. Webster*, 64 Wis. 438.

2. *Severns v. Severns*, 7 U.C.Chan. 109, 111; *Fries v. Fries*, 1 McArth. 291; *Lockridge v. Lockridge*, 3 Dana (Ky.), 28; *Petersine v. Thomas*, 28 Ohio St. 596; *Williams v. Williams*, 29 Wis. 517.

3. See statutes in various States; and see *Bauman v. Bauman*, 18 Ark. 320; *Bowman v. Worthington*, 24 Ark. 522; *McGee v. McGee*, 10 Ga. 477; *Stillman v. Stillman*, 99 Ill. 196; *Foote v. Foote*, 22 Ill. 425; *Wheeler v. Wheeler*, 18 Ill. 39, 40; *Wilde v. Wilde*, 36 Iowa, 319; *Shaw v. McHenry*, 52 Iowa, 182; *Fisher v. Fisher*, 32 Iowa, 20; *Blythe v. Blythe*, 25 Iowa, 266; *Lockridge v. Lockridge*, 3 Dana (Ky.), 28; 2 B. Mon. (Ky.) 258; *Call v. Call*, 65 Me. 407; *Sparhawk v. Sparhawk*, 120 Mass. 390; *Graves v. Graves*, 108 Mass. 314; *Albee v. Wyman*, 10 Gray (Mass.), 222; *Perkins v. Perkins*, 12 Mich. 456; *Goodman v. Goodman*, 26 Mich. 417; *Weld v. Weld*, 28 Minn. 33; *Semron v. Semron*, 23 Minn. 214; *Sheafe v. Sheafe*, 36 N. H. 155; *Richmond v. Richmond*, 2 N. J. Eq. 90; *Amos v. Amos*, 4 N. J. Eq. 121, 179; *Petersine v. Thomas*, 28 Ohio St. 596; *Buckminster v. Buckminster*, 38 Vt. 248; *Campbell v. Campbell*, 37 Wis. 206; *Hopkins v. Hopkins*, 40 Wis. 462; *Moe v. Moe*, 39 Wis. 308; *Thomas v. Thomas*, 41 Wis. 229; *Codd v. Codd*, 40 Wis. 23; *Bacon v. Bacon*, 43 Wis. 197.

The power is not lost by removal of parties. *Andrews v. Andrews*, 15 Iowa, 423. But is by death. *O'Hagan v. O'Hagan*, 4 Iowa, 509.

4. *Fisher v. Fisher*, 32 Iowa, 20; *Buckminster v. Buckminster*, 38 Vt. 248.

5. *Wilde v. Wilde*, 36 Iowa, 319; *Perkins v. Perkins*, 12 Mich. 456; *Goodman v. Goodman*, 26 Mich. 417; *Semron v. Semron*, 23 Minn. 214; *Petersine v. Thomas*, 28 Ohio, 596. See, however, *Shepherd v. Shepherd*, 1 Hun (N. Y.), 240; affirmed, 58 N. Y. 644.

As that the husband's faculties have increased or diminished. *De Blanquiere v. De Blanquiere*, 3 Hagg. Ec. 322, 329; *Fisher v. Fisher*, 32 Iowa, 20; *Halstead v. Halstead*, 5 Duer (N. Y.), 859.

Or the wife's means have improved or decreased. *Holmes v. Holmes*, 4 Barb. (N. Y.) 295.

Or that the wife has remarried. *Bowman v. Worthington*, 24 Ark. 522; *Stillman v. Stillman*, 99 Ill. 196; *Albee v. Wyman*, 10 Gray (Mass.), 222; *Fisher v. Fisher*, 2 Swab & T. 411; *Sidney v. Sidney*, 4 Swab & T. 180.

And as to change for wife's bad conduct, see *Sloan v. Cox*, 4 Hayw. (N. Car.) 75; *Forrest v. Forrest*, 3 Bosw. (N. Y.) 661.

6. This is of course largely regulated by the statutes of the various States; and on general subject of appeal see *Whitsell v. Whitsell*, 8 B. Mon. (Ky.) 50; *Jenkins v. Jenkins*, 91 Ill. 167; *Andrews v. Andrews*, 69 Ill. 609; *Ressor v. Ressor*, 82 Ill. 442; *Stillman v. Stillman*, 99 Ill. 196; *Powell v. Powell*, 53 Ind. 513; *Cooke v. Cooke*, 2 Phillim. 40.

7. This is usually done under statutes.

8. *Allen v. Allen*, 100 Mass. 373; *Van Buskirk v. Mulock*, 18 N. J. L. 184; *Guenther v. Jacobs*, 44 Wis. 354.

9. *Perkins v. Perkins*, 18 Cal. 60. See *Carleton v. Carleton*, 44 Ga. 216; *Menzie v. Anderson*, 65 Ind. 239; *Daniels v. Lindley*, 44 Iowa, 567; *Pain v. Pain*, 80 N. Car. 322. Compare *Blake v. People*, 80 Ill. 11; *Allen v. Allen*, 100 Mass. 373.

10. *Allen v. Allen*, 100 Mass. 373. See also *Foster v. Foster*, 130 Mass. 189. *Hausfen v. Van Auken*, 79 Ill. 302.

parties reside in different States, by the United States courts;<sup>1</sup> and has also been enforced in the different ways, according to the practice of the various courts,<sup>2</sup> as an ordinary decree,<sup>3</sup> by supplementary proceedings,<sup>4</sup> by execution,<sup>5</sup> by *scire facias*,<sup>6</sup> by attachment,<sup>7</sup> by sequestration,<sup>8</sup> or by appointing a receiver,<sup>9</sup> or by charging it on land,<sup>10</sup> or by proceedings for contempt.<sup>11</sup>

As a general rule, alimony cannot be enforced after the death of either party.<sup>12</sup>

**12. Security for Alimony.**<sup>13</sup>—After the suit has been begun the wife may present a petition or affidavit alleging that the husband is about to leave the jurisdiction, and upon this the court may issue a *ne exeat republica*, which will not be discharged until he gives security.<sup>14</sup>

She may likewise obtain an injunction preventing the husband

1. *Barber v. Barber*, 21 How. (U. S.) 582.

2. *Prescott v. Prescott*, 59 Me. 146; *Coughlin v. Ehlert*, 39 Mo. 285; *Barker v. Dayton*, 28 Wis. 367; *Damon v. Damon*, 28 Wis. 510.

3. *Blake v. People*, 80 Ill. 11; *Burrows v. Purple*, 107 Mass. 428.

4. *Barker v. Dayton*, 28 Wis. 367.

5. *Call v. Call*, 65 Me. 407. See *Blake v. People*, 80 Ill. 11; *Russell v. Russell*, 69 Me. 336; *Prescott v. Prescott*, 59 Me. 146; 60 Me. 429; *Burrows v. Purple*, 107 Mass. 428; *North v. North*, 39 Mich. 67; *Waters v. Waters*, 49 Mo. 385; *Wooley v. Wooley*, *Wright (Ohio)*, 245. Compare *Grove v. Grove*, 68 Pa. St. 143.

6. *Morton v. Morton*, 4 Cush. (Mass.) 518; *Bouslough v. Bouslough*, 68 Pa. St. 495. But see *Goss v. Goss*, 29 Ga. 109.

7. *Goss v. Goss*, 29 Ga. 109; *Daniels v. Lindley*, 44 Iowa, 367. See *Waters v. Waters*, 49 Mo. 385; *Bouslough v. Bouslough*, 68 Pa. St. 495.

8. *Blake v. People*, 80 Ill. 11; *Lockridge v. Lockridge*, 3 Dana (Ky.), 28, 30; *Guenther v. Guenther*, 44 Wis. 354.

9. *Holmes v. Holmes*, 29 N. J. Eq. 9. *Bergen v. Bergen*, 22 Ill. 187; *Carey v. Carey*, 2 Daly, 424; *Questel v. Questel*, *Wright*, 492; *Stillman v. Stillman*, 7 Baxt. 169, 186.

10. *O'Callaghan v. O'Callaghan*, 69 Ill. 552; *Russell v. Russell*, 4 Greene (Iowa), 26; *Holmes v. Holmes*, 29 N. J. Eq. 9; *Olwar v. Hungerford*, 10 Ohio St. 268; *Stillman v. Stillman*, 7 Baxt. 169, 186; *Blankenship v. Blankenship*, 19 Kan. 159.

11. *Perkins v. Perkins*, 18 Cal. 60; *Cottrell v. Cottrell*, 59 Cal. 417; *Lyon v. Lyon*, 21 Conn. 185; *Goss v. Goss*, 29 Ga. 109; *Blake v. People*, 80 Ill. 11; *Andrews v. Andrews*, 69 Ill. 609; *Wightman v. Wightman*, 45 Ill.

167; *Russell v. Russell*, 69 Me. 336; *Storbridge v. Storbridge*, 21 Hun (N. Y.), 288; *Park v. Park*, 80 N. Y. 156; *Pritchard v. Pritchard*, 4 Abb. N. C. (N. Y.) 298; *Grove v. Grove*, 68 Pa. St. 143. Compare *Coughlin v. Ehlert*, 39 Mo. 285.

How much arrears will be enforced, has been held to be within the discretion of the court. *Guenther v. Jacobs*, 44 Wis. 354; and see 2 Bish. on M. & D. § 398.

Arrears may be enforced against a deceased husband's estate, as any other claim. *Guenther v. Guenther*, 40 Wis. 115, 119; *Smith v. Smith*, 1 Rob. Ec. 349; *Francis v. Francis*, 31 Gratt. (Va.) 283. But see 2 Beasley (N. Y.), 119.

In cases of wife's death her administrator cannot collect arrears except for creditors. *Stones v. Cooke*, 8 Sim. 821, n.; *Bouslough v. Bouslough*, 68 Pa. St. 495; *Miller v. Clark*, 6 W. & S. (Pa.) 85.

Unless, of course, the decree reserves it. *Burr v. Burr*, 7 Hill (N. Y.), 207.

Or it is regulated by statute. *Miller v. Clark*, 23 Ind. 331.

Or the award was a sum in gross. *Miller v. Clark*, 23 Ind. 331; *Dinet v. Engenham*, 87 Ill. 275.

12. *De Blanquiere v. De Blanquiere*, 3 Hagg. Ec. 322; *Deweese v. Dewees*, 55 Miss. 315; *Travers v. Travers*, 31 Gratt. (Va.) 283; *McCurley v. Stockbridge*, 62 Md. 422. See *supra*, note 11.

13. Usually regulated by statute. See *Stimson Amer. Statute Law*, § 6266, for references.

14. *McGee v. McGee*, 8 Ga. 295; *Bylandt v. Bylandt*, 6 N. J. Eq. 28; *Lyon v. Lyon*, 21 Conn. 185; *Harper v. Rooker*, 52 Ill. 370; *Bayly v. Bayly*, 2 Md. Ch. 326; *Yule v. Yule*, 10 N. J. Eq. 138; *Kirby v. Kirby*, 1 Paige (N. Y.), 261; *Denter v. Denter*, 1 Johns. Ch. (N. Y.) 364; *Hammond v. Hammond*, *Clarke (Ohio)*, 151; *Prather v. Prather*, 4 Desaus. Eq.



from alienating or charging his property.<sup>1</sup> Courts have also charged it on husband's land,<sup>2</sup> appointed a receiver,<sup>3</sup> assigned certain property in trust for wife,<sup>4</sup> and ordered husband to give security for payment.<sup>5</sup>

Permanent alimony ceases generally upon the death of either party,<sup>6</sup> or after reconciliation,<sup>7</sup> or by statute upon the re-marriage of the wife;<sup>8</sup> and if the alimony was granted with a divorce *a mensa et thoro*, when they become divorced absolutely.<sup>9</sup>

**13. Dividing Property.**—By statutes in many of the States, not otherwise, the court has the discretion to award specific property in place of alimony proper,<sup>10</sup> thus dividing the property between the husband and the wife.<sup>11</sup> In so doing they pro-

(S. Car.) 33; Devall v. Devall, 4 Desaus. (S. Car.) 79. And see as to ecclesiastical law, 2 Bish. on M. & D. §§ 505, 508.

1. Goodrich v. Goodrich, 44 Ala. 670; Norris v. Norris, 27 Ala. 519; Johnson v. Johnson, 59 Ga. 613; Gray v. Gray, 65 Ga. 193; Draper v. Draper, 68 Ill. 17; Erissman v. Erissman, 25 Ill. 136; Vangant v. Vangant, 23 Ill. 536; Bergen v. Bergen, 22 Ill. 187; Frankes v. Brown, 2 Blackf. (Ind.) 295; Wharton v. Wharton, 57 Iowa, 696; Fischli v. Fischli, 2 Litt. (Ky.) 492; Gechter v. Gechter, 51 Md. 187, 190; Ricketts v. Ricketts, 4 Gill. (Md.) 105; Morrison v. Morrison, 49 N. H. 69; Kirby v. Kirby, 1 Paige (N. Y.), 261; Laurie v. Laurie, 9 Paige (N. Y.), 234; Rose v. Rose, 11 Paige (N. Y.), 166; Carey v. Carey, 2 Daly (N. Y.), 424; Hammond v. Hammond, Clarke (Ohio), 151; Gilmore v. Gilmore, 5 Jones Eq. (N. Car.) 284; Tolerton v. Williard, 30 Ohio St. 579; Wilson v. Wilson, Wright (Ohio), 128; Questel v. Questel, Wright (Ohio), 492; Wilson v. Wilson, 1 Desaus. Eq. (S. Car.) 219, 224; Stillman v. Stillman, 6 Baxt. (Tenn.) 169; Boils v. Boils, 1 Coldw. (Tenn.) 284.

An injunction when granted prevents encumbrances and assignments. Vangant v. Vangant, 23 Ill. 536, 543.

And as to a *bona-fide* purchaser, see Frankes v. Brown, 2 Blackf. (Ind.) 295, 299.

If an injunction is granted prohibiting defendant from mortgaging his property, it seems that this does not restrain him from mortgaging real estate aside from his homestead for the purpose of raising money to pay alimony. Froman v. Froman, 53 Mich. 581.

2. See *ante*, note 8, p. 483. See also Foster v. Foster, 56 Vt. 540.

3. See *ante*, note 7, p. 483.

4. Madison v. Madison, 1 Wash. T. 73, 75.

5. Reiffenstein v. Hooper, 36 U. C. Q. B. 295, 300. See Holmes v. Holmes, 29 N. J. Eq. 9, 12.

6. Rogers v. Viness, 6 Ired. (N. Car.)

293; Dewees v. Dewees, 55 Miss. 315; Gaines v. Gaines, 9 B. Mon. (Ky.) 293; Nary v. Nary, 41 Vt. 180; Taylor v. Taylor, 93 N. Car. 418; Lennahan v. O'Keefe, 107 Ill. 620. But see Smith v. Banks, 73 Ga. 303.

7. Tiffin v. Tiffin 2 Binney (Pa.), 202, 206; Lockridge v. Lockridge, 3 Dana (Ky.), 28; Wallingsford v. Wallingsford, 6 H. & J. (Md.) 485; Rogers v. Viness, 6 Ired. (N. Car.) 293; Lockwood v. Krum, 34 Ohio St. 2. See also Taylor v. Taylor, 93 N. Car. 418.

8. La. Code, § 1196. And see Sidney v. Sidney, 4 Swab. & T. 178; 2 Bish. on M. & D. § 477. See also Stillman v. Stillman, 99 Ill. 196.

9. Blaker v. Cooper, 7 S. & R. (Pa.) 500; Smith v. Smith, 2 S. & R. (Pa.) 248.

Of course if there was a division of the property between the parties, no after-conduct or decree could change this. See *ante*, notes 1, 2, 3, p. 481.

10. See statutes in various States, and the following cases, which either explain the statutes or deny the rights: Robbins v. Robbins, 101 Ill. 416; Wilson v. Wilson, 102 Ill. 297; Lovett v. Lovett, 11 Ala. 763; Quisenberry v. Quisenberry, 1 Duval, 197; Calame v. Calame, 25 N. J. Eq. 548; Brooks v. Arkeny, 7 Oregon, 461; Donovan v. Donovan, 20 Wis. 536; Bacon v. Bacon, 43 Wis. 197.

As to giving land to husband, see *ante*, note 7, p. 478.

11. Smith v. Smith, 45 Ala. 264, 268; Plaster v. Plaster, 47 Ill. 290; Chum v. Chum, Meigs (Tenn.) 131, Boggess v. Boggess, 6 Baxt. (Tenn.) 299. See Varney v. Varney, 58 Wis. 19.

And where specific property of the husband is awarded to the wife it has been held that the title still remained in the husband, and would revert to him on his wife's death or reconciliation. Taylor v. Taylor, 43 N. Car. 418.

This however, is not thought to be the general rule.

ceed upon the same principles that govern the award of alimony.<sup>1</sup>

Other statutes provide for the restoration of the wife's property upon divorce,<sup>2</sup> yet if the husband has settled property on the wife, the court may not grant the divorce unless she will execute a reconveyance of the property.<sup>3</sup>

**14. Means of the Wife.**—The wife's means are what she has or owns; the nature or source are immaterial: it may be separate property or earnings, or she may be supported by her father, other relatives, or second husband.<sup>4</sup> The general rule is, that if the wife has sufficient means to support herself in the rank of life to which she belongs, no alimony, temporary or permanent, will be awarded her.<sup>5</sup>

**15. Faculties of the Husband.**—The husband's faculties are what he has<sup>6</sup> or can acquire by labor, mental or physical.<sup>7</sup> From this his debts must be deducted,<sup>8</sup> and if then the husband cannot

1. Cases *supra*, for instance.

In *Varney v. Varney*, 58 Wis. 19, it was held that the unchastity of the wife previous to marriage, though not a ground for dissolving the marriage, may be considered in the division of property.

2. Mass. P. S. 1882, p. 814; *Grubb v. Grubb*, 1 Har. (Del.) 516; *Flood v. Flood*, 5 Bush (Ky.), 167; *Williams v. Gooch*, 5 Metc. (Ky.) 486; *Kreger v. Day*, 2 Pick. (Mass.) 316; *Dean v. Richmond*, 5 Pick. (Mass.) 461; *Dean v. Dean*, 5 Pick. (Mass.) 428; *Page v. Estes*, 19 Pick. (Mass.) 269; *Warner v. Warner*, 33 Miss. 547; *Whittier v. Whittier*, 31 N. H. 452; *Vincent v. Parker*, 7 Paige, 65; *Sharp v. Sharp*, 2 Sneed (Tenn.), 496; *Jennings v. Montaigne*, 2 Gratt. (Va.) 350.

3. *Oliver v. Oliver*, 5 Ala. 75. And see *Orr v. Orr*, 8 Bush (Ky.), 156; *Ainsworth v. Ainsworth*, 37 Ga. 627.

4. *Pinckard v. Pinckard*, 22 Ga. 31; *Goodheim v. Goodheim*, 2 Swab. 250; *Bremmer v. Bremmer*, 3 Swab & T. 249; *Rose v. Rose*, 11 Paige (N. Y.), 166; *Barnes v. Barnes*, L. R. 1 P. & D. 506; *Powell v. Powell*, L. R. 3 P. & D. 55, 186; *Eaton v. Eaton*, L. R. 2 P. & D. 51; *Burrow v. Burrow*, L. R. 1 P. & D. 554; *Holt v. Holt*, L. R. 1 P. & D. 610; *Stillman v. Stillman*, 99 Ill. 196; *George v. George*, L. R. 1 P. & D. 556; *Gardner v. Gardner*, 54 Ga. 560; *Ressor v. Ressor*, 82 Ill. 442; *Brown v. Brown*, 22 Mich. 242; *Willing v. Willing*, 16 N. J. Eq. 389.

5. *D'Aguilar v. D'Aguilar*, 1 Hagg. Ec. 773; *Belcher v. Belcher*, 1 Curt. Ec. 444; *Westmeath v. Westmeath*, 3 Knapp, 42; *Fyler v. Fyler*, *Deane & S.* 175; *Soules v. Soules*, 3 U. C. Chan. 111; *Turner v. Turner*, 44 Ala. 437; *Morse v. Morse*, 25 Ind. 156; *Kenemer v.*

*Kenemer*, 26 Ind. 330; *Logan v. Logan*, 2 B. Mon. (Ky.) 142; *Gaines v. Gaines*, 9 B. Mon. (Ky.) 295; *Coles v. Coles*, 2 Md. Ch. 341; *Daiger v. Daiger*, 2 Md. Ch. 331; *Brown v. Brown*, 22 Mich. 242; *Stevens v. Stevens*, 49 Mich. 504; *Porter v. Porter*, 41 Miss. 116; *Collins v. Collins*, 2 Paige (N. Y.), 9, 10; *Hoffman v. Hoffman*, 7 Rob. (N. Y.) 474; *Maxwell v. Maxwell*, 28 Hun (N. Y.), 566; *Collins v. Collins*, 80 N. Y. 1; *Miller v. Miller*, 75 N. Car. 70; *Coad v. Coad*, 40 Wis. 392. See cases *supra*.

Under statutes a portion of husband's property may be given wife without regard to her means. Wis. R. S. 1878, § 2364; *Damon v. Damon*, 28 Wis. 510, 516; *Tewksbury v. Tewksbury*, 5 Miss. 109; *Rees v. Rees*, 7 Oregon, 47.

6. *Crampton v. Crampton*, 32 L. J. Mat. Cas. 142; *Williams v. Williams*, L. R. 1 P. & D. 370; *Campbell v. Campbell*, 37 Wis. 206; *Fischli v. Fischli*, 1 Blackf. (Ind.) 360; *Boggers v. Boggers*, 6 Baxt. (Tenn.) 299; *Russell v. Russell*, 4 Green (Iowa), 26; *Holmes v. Holmes*, 29 N. J. Eq. 9; *Cox v. Cox*, 20 Ohio St. 439; *Prince v. Prince*, 1 Rich. Eq. (S. Car.) 282; *Foote v. Foote*, 22 Ill. 425; *Bailey v. Bailey*, 21 Gratt. (Va.) 43. Compare *Stone v. Stone*, 3 Curt. Ec. 341; *Beavan v. Beavan*, 8 Jur. N. S. 769; *Bouere v. Bouere*, 1 Curt. Ec. 506.

7. *Muse v. Muse*, 84 N. Car. 35; *Campbell v. Campbell*, 37 Wis. 206; *Holmes v. Holmes*, 29 N. J. Eq. 9; *Thompson v. Thompson*, L. R. 1 P. & D. 553.

8. *Foster v. Foster*, 2 Swab & T. 553; *Nokes v. Nokes*, 3 Swab & T. 529; *Carithers v. Venable*, 52 Ga. 389; *Spencer v. Spencer*, 9 R. I. 150. See also *Forman v. Forman*, 109 Ill. 63.

## ALIMONY—ALIUNDE—ALL.

support his wife no alimony, temporary or permanent, will be decreed against him.<sup>1</sup> If he is complainant, however, and cannot give the wife alimony *pendente lite*, the court will not permit him to proceed until he has made some provision for her.<sup>2</sup>

**16. Costs.**—These are usually payable by the husband if the wife prevail;<sup>3</sup> and even if he prevail,<sup>4</sup> in many cases, until the wife has a separate estate<sup>5</sup> or is suing by a next friend.<sup>6</sup>

**ALIUNDE.**—Independent of.<sup>7</sup>

**ALL.**—This word is of constant occurrence in deeds, wills, and other instruments, and, especially in wills, has been made the subject of repeated construction by the courts. It generally means "the whole of; every one of;" but it is often limited by the context to the whole of a particular class only.<sup>8</sup>

1. *Bouere v. Bouere*, 1 Curt. Ec. 566; *Godall v. Godall*, 2 Lec. 264; *Fletcher v. Fletcher*, 31 L. J. Mat. Cas. 82; *Gaynor v. Gaynor*, 32 L. J. Mat. Cas. 144; *Brown v. Brown*, 32 L. J. Mat. Cas. 144; *Crampton v. Crampton*, 32 L. J. Mat. Cas. 142; *Capstick v. Capstick*, 33 L. J. Mat. Cas. 105; *Nokes v. Nokes*, 32 L. J. Mat. Cas. 24; *Soules v. Soules*, 3 V. C. Chan. 113; *Eidenmuller v. Eidenmuller*, 37 Cal. 364; *Phelan v. Phelan*, 12 Fla. 449; *Carlton v. Carlton*, 44 Ga. 216; *Foote v. Foote*, 22 Ill. 425; *McCrocklin v. McCrocklin*, 2 B. Mon. (Ky.) 370; *Russell v. Russell*, 69 Me. 336; *Wallingsford v. Wallingsford*, 6 Hor. & J. (Md.) 485; *Feighley v. Feighley*, 7 Md. 537, 563; *Stuart v. Stuart*, 127 Mass. 370; *Bursler v. Bursler*, 5 Pick. (Mass.) 427; *Burrows v. Purple*, 107 Mass. 428, 475; *Graves v. Graves*, 108 Mass. 314; *Bankston v. Bankston*, 27 Mass. 692; *Tewksbury v. Tewksbury*, 5 Miss. 109; *Schmidt v. Schmidt*, 26 Mo. 235; *Mangels v. Mangels*, 6 Mo. App. 481; *Holmes v. Holmes*, 29 N. J. Eq. 9; *Purcell v. Purcell*, 3 Edw. Ch. (N. Y.) 194; *Kittle v. Kittle*, 8 Daly (N. Y.), 72; *Strorbridge v. Strorbridge*, 21 Hun (N. Y.) 288; *Muse v. Muse*, 84 N. Car. 35; *Miller v. Miller*, 75 N. Car. 70; *Thayer v. Thayer*, 9 R. I. 377; *Batley v. Batley*, 1 R. I. 212; *Prince v. Prince*, 1 Rich. Eq. (S. Car.) 282; *Wright v. Wright*, 3 Tex. 168, 179; *Bailey v. Bailey*, 21 Gratt. (Va.) 47; *Campbell v. Campbell*, 37 Wis. 206.

2. *Kaye v. Kaye*, 4 Swab & T. 239, 240; *Symonds v. Symonds*, 2 Swab & T. 435, 436; *D'Aguilar v. D'Aguilar*, 1 Hagg. Ec. 773; *McKay v. McKay*, 6 V. C. Chan. 380, 383; *Masser v. Masser*, 29 Ala. 313; *Richardson v. Richardson*, 4 Port. (Ala.) 467; *Thornberry v. Thornberry*, 2 J. J. Marsh. (Ky.) 322; *Stevens v. Stevens*, 1 Metcalf, 279; *De Rose v. De Rose*, Hopk. 100; *Graves v. Graves*,

2 *Paige* (N. Y.), 62; *Williamson v. Williamson*, 1 Johns. Ch. (N. Y.) 488.

3. *Richardson v. Richardson*, 4 Port. (Ala.) 467.

4. *De Rose v. De Rose*, Hopk. 100. See also *Wood v. Wood*, 29 Ga. 281.

5. *Jones v. Fawcett*, 2 Phill. Ch. (N. Car.) 278; *Masser v. Masser*, 29 Ala. 313; *Cornelius v. Cornelius*, 31 Ala. 479; *Hughes v. Hughes*, 44 Ala. 698; *Ward v. Ward*, 2 Dev. Eq. (N. Car.) 553.

6. See, on general subject of costs, chap. xxv., Bish. on M. & D.; 2 Bish. M. & D. §§ 364 *et seq.*

**References for Alimony.**—Bishop on Marriage and Divorce, 6th Ed.; Stewart on Marriage and Divorce, 4th Ed.; Stimson's American Statute Law; Browne's Digest of Divorce and Alimony.

7. As "Nothing is said in the deed itself, nor proved *aliunde*, about the conveyance of a lien for money." *Sherwood v. Waller*, 20 Conn. 271.

8. It is often carelessly used in written instruments, and requires to be qualified and limited to the subject-matter. Thus, where a statute provided that "'in all cases' where a levy is made on property which is claimed by a third person, and good and sufficient security is tendered by the party claiming the same, it shall be the duty of the sheriff to leave the same in possession of such claimant," it was held that these words, "'in all cases,'" only meant in all cases in which the defendant is the claimant. "True," said the court, "it says that in 'all' cases where a levy is made, etc. One is amazed, in casting a glance over our statute-book, to find how often this form of expression occurs, frequently signifying, as here, not absolutely all, but all of a particular class only. Indeed, it seems to be common to all writings, lay as well as legal, sacred as well as profane. And the generality of the phrase is frequently

to be restrained in an act, not only by the context, but by the general form and scheme of the statute, as demonstrative of the intention of the legislature. Here it means, in all cases where the claimant is in possession of the property he shall not be deprived of it, but it shall be left with him." "It is made the duty of the sheriff to leave the property with the claimant. How could this be done unless it had been previously found there? Under the view contended for by counsel for the relator, other phraseology would have been used. It would have been made the duty of the levying officer to deliver or turn over the property to the claimant, not leave it with him." *Phillips v. State ex rel. Saunders et al.*, 15 Ga. 518.

So in an action on the case by a commoner for disturbing his common by putting on cattle, where the plea was a right of common appurtenant for cattle levant and couchant; and a replication was filed, with conclusion to the country that "all the said cattle in the said declaration mentioned" were not defendant's own commonable cattle levant and couchant, the word "all" was interpreted to mean that the levancy and couchancy was untruly alleged as to all the cattle, not that it was truly alleged of some and falsely of others. For if the latter, it should have been expressly averred, and the word "all," being in the replication quite ambiguous, must be taken most strongly against the party pleading; and as the plaintiff's opening showed that the defendant had a right to some commonable cattle, the court directed a verdict for the defendant. *Bowen v. Jenkin*, 6 Ad. & El. 905.

Where an act provided "that all laborers who shall perform work and labor for any person under a written or verbal contract, if unpaid for the same, shall have an absolute lien on the production of their labor for such work and labor," it was held that, the lien being only on the "production of their labor," the act had reference only to movable property and the labor performed thereon, and that the word "all" as used in the act was not to be construed literally, as giving to every laborer a lien for his labor. *Dano v. M. O. & R. R. Co.*, 27 Ark. 564.

Where a New Jersey statute had in two sections modified the common law of "distrain" so as to allow the landlord to distrain on the goods and chattels, hogs, horses, cattle, and stock of his tenant, but not of any other person, and then provided that the landlord might seize "all or any wheat, rye, etc., or any

other produce whatever growing or being on the premises," it was held that the power of distress, as to such articles, is not limited to grain growing or being on the premises, belonging exclusively to the tenant. *Guest v. Opdyke*, 2 Vroom (N. J.), 552.

Though negotiable paper not due is liable to attachment under the act 16th June, 1836, relative to executions, which provides that "from and after the service of such writs all debts, etc., shall remain attached," yet a *bona-fide* holder for value who has purchased subsequent to the attachment, but without notice thereof, will be protected; "for," says Lowrie, J., "care is to be taken that laws of general shall not be regarded as of universal application; and this caution is required in relation to the law for attaching debts in execution, and declaring that 'all debts' so attached shall remain in the hands of the garnishee to answer the debt. In acts of Assembly, as well as in common parlance, the word 'all' is a general rather than a universal term, and is to be understood, in one sense or the other, according to the demands of sound reason. It is certainly broad enough to include debts by bills of exchange and promissory notes, and there is nothing in their nature that excludes them from its operation. But they have a legal quality that renders the hold of an attachment upon them very uncertain. Unlike all other property, they carry there their whole evidence of title on their face; and the law assures the right to him who obtains them for valuable consideration by regular indorsement, and without actual notice of any adverse claim, or of such suspicious circumstances as should lead to inquiry. To hold that an attachment prevents a subsequent *bona-fide* indorsee for value from acquiring a good title would be almost a destruction of one of the essential characteristics of negotiable paper." *Kieffer v. Ehler*, 18 Pa. St. 388; *Cf. Stone v. Elliott*, 11 Ohio St. 252.

Under a policy of fire insurance which insures a certain sum "on all or either" of certain specified buildings, the insurers are liable for the full amount of a loss, not exceeding the sum insured, occasioned by the burning of a single one of the buildings. *Com. v. Hide and Leather Ins. Co.*, 127 Mass. 136; s. c., 17 Am. Rep. 72.

**Wills.**—"All" has received frequent interpretation by the courts when used in wills, its meaning depending largely upon each individual case. Thus the question whether the words "all my estate and effects" will include real estate or not

**Wills—Continued.**

depends, first, upon the immediate context of the will; secondly, upon the general form and scheme of the will, as demonstrating the intention. *Woolam v. Kenworthy*, 9 Vesey, Jr., 137. *Cf. Wilde v. Holtzmeier*, 5 Vesey, Jr., 811.

"All my estate," in a will, has been held to carry a fee; for an estate for life or in tail would not be the donor's estate, but a new and a less estate. *Bridgewater v. Bolton*, 6 Mod. 106, 110; *Barnes v. Patch*, 8 Vesey, Jr., 604; *Kellogg v. Blair*, 6 Metc. (Mass.) 322; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537.

Extended to "all my plantation." *French v. McIlhenny*, 2 Binney (Pa.), 12. *Contra* as to "all my homestead farm." *Terrill v. Sayre*, 2 Penn. (N. J.) 598.

"All my freehold property" passes a fee. *Roe v. Patterson*, 16 East, 221.

"All my property both personal and real, forever," passes a fee. *Dacre v. Roper*, 11 East, 518.

Under a devise, "all my property, etc.," real estate passes. *Morgan v. Morgan*, 6 B. & C. 512; *Mayo v. Carrington*, 4 Call (Va.), 472; s. c., 2 Am. Dec. 581.

"All my lands" passes a fee. *Kennon v. McRoberts*, 1 Wash. (Va.) [96] 126. But does not include lands mortgaged to the deviser. *Winson v. Littleton*, 1 Vernon, 3. *Contra*, where the mortgage is all the deviser has in lands. 1 Harr. & McH. (Md.) 565. *Cf. Ballard v. Carter*, 5 Pick. (Mass.) 112; s. c., 16 Am. Dec. 377.

"All my real property," in a will, has been held to import the same as "all my estate." *Nicholls v. Butcher*, 18 Vesey, Jr., 193.

"Whatsoever else I have in the world" will pass a fee. *Hopewell v. Ackland*, 1 Comyn, 168.

But a will wherein the testator says, "I give all to my mother," will not pass lands. *Bowman v. Milbanke*, 1 LeV. 141.

A devise of "all my landed estate," followed by a description of several tracts of land, will not pass a lot not described. *Myers v. Myers*, 2 McCord Ch. (S. Car.) 214; s. c., 16 Am. Dec. 648.

"All my estate whatsoever," in a will, comprehends all that the deviser has, real or personal. *Scott v. Alberry*, 1 Comyn, 337.

"All the estate, both real and personal," to which the grantor is "entitled in law or equity, in possession, remainder, or reversion," passes the grantor's whole estate. *Mundy v. Vawter*, 3 Grattan (Va.), 518; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537.

So "all my real and personal prop-

erty." *Morrison v. Semple*, 6 Binney (Pa.), 94.

The words "all his estate" will pass everything a man has; but if the word "all" is coupled with the word "personal," or a local description, then the gift will pass only personalty or the specific estate particularly described. *Hogan v. Jackson*, 1 Cowper, 299, 306.

Under a bequest to a daughter of "all goods and things of every kind and sort whatever which shall be found in her closet," at grantor's death, money found there will not pass. *Roberts v. Kuffin*, 2 Atkyns, 113.

But "all my estate, real and personal whatever," carries a fee, although immediately followed by words descriptive of local situation; as, "that is to say, my land, houses, and all the other buildings situate." *A. S. Denn v. Hood*, 7 Taunton, 35; *Child v. Wright*, 8 Term (Durnford & East.), 64. *Cf. Jackson v. Babcock*, 12 Johns. (N. Y.) 389; *Lambert's Admr. v. Paine*, 3 Cranch. (U. S.) 97.

"All I am worth," without other words to control them, will pass real as well as personal estate. *Huxtep v. Brooman*, 1 Brown Ch. Cas. 437.

"All and every my property" is as comprehensive as "all I am worth." *Wall v. Langlands*, 14 East. 370; *Rossiter v. Simmons*, 6 S. & R. (Pa.) 452.

Where the devise was "my late purchase from E. C.," and the land purchased from E. C. was purchased in fee simple, held, that a fee simple passed to the devisee. *Neide v. Neide*, 4 Rawle (Pa.), 75.

A devise of "all my property," certain described portions excepted, is a general devise. *Mayo v. Bland*, 4 Maryland Ch. Dec. 484; *Roseboom v. Roseboom*, 81 N. Y. 356; *Howland v. Howland*, 100 Mass. 222; *Piatt v. Sinton*, 37 Ohio St. 353.

"All my personal estate," in a will, was held to be confined to such part only as should not be otherwise disposed of. *Burdett v. Young*, 9 Mod. 93.

But "all my temporal estate" has been held to pass a fee, as being equal to "all my worldly estate;" that is, all that a man has in the world, and including both real and personal estate. *Tanner v. Wise*, 3 P. Wms. 295.

And a second clause in a will disposing of "all my real" estate was held not to revoke a previous devise of certain real estate for life, with remainder over. *Snape v. Nevill*, 11 Q. B. 467; *Alsop v. Russell*, 38 Conn. 99.

The words "all I am possessed of" have been confined to a specific bequest

**Wills—Continued.**

of stock immediately preceding, where the whole tenor of the will has shown that they could not be given their usual sense. *Wilde v. Holtzmeier*, 5 Vesey, Jr., 811.

But where this is not the case they are sufficient to pass real estate. *Tolar v. Tolar*, 3 Hawks. (N. Car.) 74; s. c., 14 Am. Dec. 575.

"All my property of every description," in a will, passes not only tangible property, but money, stocks, bonds, choses in action. *Hurdle v. Outtaw*, 2 Jones Eq. (N. Car.) 75. So also "all my personal property of every name or nature." *Sherman, Admr., v. Lodge's Estate*, 28 Vt. 26. Cf. *Wolf v. Schaeffner*, 51 Wis. 53. And "all my books and papers of every description." *Perkins v. Mathes*, 49 N. H. 107.

In a will, the words "all my notes" include bonds as well as notes, but not judgments upon either. *Perry v. Maxwell*, 2 Dev. Eq. (N. Car.) 488, 496.

But "I give all in Suffolk" does not pass a bond which happened to be at testator's house in Suffolk; for choses in action have no locality. *Moore v. Moore*, 1 Brown's Ch. Cas. 127.

Bank-notes will pass under such a bequest. *Popham v. Lady Aylesbury*, Amb. 68. But see *Shearl v. Marquess of Bute*, 11 Vesey, Jr., 662.

A bequest of "all my accounts" does not pass a deposit in a savings bank. *Gale v. Drake*, 51 N. H. 78.

"All the money" in a will has been held to mean not only the money that might be on hand, but all investments of money under the directions of the will that should stand in the place of and be convertible into money. *Hollingsworth v. Hollingsworth*, 65 Ala. 321.

"All my furniture and other household effects" will not include articles of consumption. *Foxall v. McKenny*, 3 Cranch. C. C. (U. S.) 206.

**All the Rest and Residue.**—These and kindred words are continually used in wills in what is called the residuary clause, to denote what is left after certain specific bequests and devises. *Graydon v. Graydon*, 8 C. E. Green (N. J.), 229; *Walker v. Stewart*, L. R. 17 Ch. Div. 819.

The words "all the rest" are sufficient to pass all the rest of the property, real as well as personal. *Attree v. Attree*, L. R. 11 Eq. Cas. 280.

Such words will pass a freehold. *Dobson v. Bowners*, L. R. 5 Eq. Cas. 404.

And also contingent interests and

remainders. *Cruger v. Heyward*, 2 Des. (S. Car.) 422.

In an administration bond for the proper distribution of "all the rest and residue," this phrase means, what remains after payment of debts. *Carrol v. Connet*, 2 J. J. Marsh. (Ky.) 195, 201.

"All" in other Instruments.—The use of "all" in instruments other than wills is very common, and has received frequent construction by the courts. Thus, "in all cases," in a statute, has been limited to all of a particular class of cases. *Flake v. Van Wagenen*, 54 N. Y. 25; *Jackson v. Reeves*, 53 Ind. 231; *Gilbert v. Neely*, 35 Ark. 24; *Clore v. Graham*, 64 Mo. 249; *Brinsfield v. Austin*, 39 Ala. 227. Compare *Ex-p. Ezell*, 40 Tex. 451; *In re Dole*, 11 Blatch. (U. S.) 499.

**Arbitration and Award.**—In a submission to arbitration, "all matters in dispute" has been held sufficient to sustain an award. *Shackelford v. Purket*, 2 A. K. Marsh. (Ky.) 435; s. c., 12 Am. Dec. 422; *Hoover v. Neighbours*, 64 N. Car. 429; *Bryant v. Fisher*, 85 N. Car. 60.

See *Young v. Shook*, 4 Rawle (Pa.), 299; *Gratz v. Gratz*, 4 Rawle (Pa.), 411; and *Bachman v. Reigart*, 3 Penrose & Watts (Pa.), 270, on the addition of the words in the cause or between the parties.

So "all demands" will support an award. *Byers v. Vandeulen*, 5 Wend. (N. Y.) 268.

And will include questions concerning real as well as personal property. *Sellick v. Addams*, 15 Johns. (N. Y.) 197.

And also costs. *Young v. Shook*, 4 Rawle (Pa.), 299.

But it will not prevent one of the parties from showing that a particular demand, not being in dispute, was not laid before the referees. *Webster v. Lee*, 5 Mass. 334.

**All Faults.**—If goods are sold with "all faults," parol evidence is admissible to show that these words have a well-established meaning in the trade in such goods, and what that meaning is. But the phrase "with all faults" cannot be limited to all such faults or defects as the thing described ordinarily has. That would be to deprive it of force entirely. Its meaning is, such faults or defects as the article sold might have, retaining still its character and identity as the article described. *Whitney v. Boardman*, 118 Mass. 242.

**All Fours.**—Two decisions or cases which are alike in all material respects are said to run upon "all fours."

## ALLEGIANCE—ALLOCATUR—ALLODIAL.

**ALLEGIANCE** (see also CITIZENSHIP; NATURALIZATION), otherwise called *ligeance*, is the obligation or tie existing between the sovereign and the subjects of any given state, and may be described as the lawful and faithful obedience and duty which the subjects of every state owe to the head of that state in return for the protection which the state affords to them. The learning on this subject will be found in Calvin's Case,<sup>1</sup> and in the notes to that case in Broom's Const. Law. It is there said that allegiance is of four kinds, namely: (1) natural allegiance—that which arises by nature and birth; (2) acquired allegiance—that arising through some circumstance or act other than birth, e.g., by denization or naturalization; (3) local allegiance—that arising from residence simply within the country, for however short a time; and (4) legal allegiance—that arising from oath taken usually at the town or leet; for by the common law the oath of allegiance might be tendered to every one upon attaining the age of twelve years.<sup>2</sup>

**ALLOCATUR** (Lat., it is allowed).—A word formerly written on a writ or order by the judge granting the same to signify his approval; hence, the term by which the master's or prothonotary's allowance of a sum referred to his consideration is called, whether touching costs, damages, or matter of account.<sup>3</sup>

Especially used in modern English practice to signify the certificate of a master as to the result of a taxation of costs.<sup>4</sup>

**ALLODIAL.**—**Definition.**—As applied to lands, allodial signifies "held by an absolute ownership, without recognizing any superior to whom any duty is due on account thereof," as distinguished from feudal, where the property in lands was held to reside in the king or lord paramount, who granted out the use thereof to others who were permitted to hold them upon condition of performing certain duties and services for their superior.<sup>5</sup>

**Incidents.**—Allodial or boc-lands, as they were called, were alienable at the will of the owner by sale, gift, or last will. They were liable for his debts, and descended, if undevise, to his heirs without respect to primogeniture. They might be granted absolutely or for a limited interest, on any conditions or services the grantor thought proper, and for any estate, to take effect at once or at a future time, or on the happening of some event. They were frequently entailed, and marriage settlements thereof were also common. They were conveyed by the delivery of a symbol of possession, as a twig or turf; or by a writing or charter called a

1. Calvin v. Smith, 7 Rep. 1; 6 Jac. 1.

2. Brown's Law Dict. (Sprague's Ed.); 8 Opin. Atty.-Genl. 139; 9 Opin. Atty.-Genl. 356.

The obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign, in return for the protection he

receives. It may be an absolute and permanent obligation, or it may be qualified and temporary. Carlisle v. U. S., 16 Wall. (U. S.) 147.

3. Lee's Dict.

4. Archb. Pr. 129.

5. 1. Washb. on Real Prop. (4th ed.)

16-18.

## ALLODIAL—ALLONGE—ALLOTMENT.

land-boc, and deposited generally in a monastery for safe-keeping.<sup>1</sup>

**History.**—The tenures existing throughout civilized Europe before the introduction of the feudal system were allodial. In England they were not abolished entirely till the time of the Conqueror, who introduced the system of feuds in its rigor. By the statute of 12 Car. II. most of the existing feudal tenures, and the services incident thereto, were swept away and free and common socage became and continues to be to this day the principal kind of tenure, the whole system being thus feudal at least in theory.<sup>2</sup> The charters of the early colonies (among them Massachusetts, Rhode Island, Connecticut, Pennsylvania, Maryland, Virginia, the Carolinas, and Georgia) generally prescribed that lands should be held of the crown "in free and common socage, and not *in capite* by knight-service," and in them this tenure differed from allodial only in recognizing in theory the doctrine of fealty.<sup>3</sup> Since the Revolution, however, the tenures in most of the States have been rendered by statute or declared by the courts allodial,<sup>4</sup> although many names and even rules of purely feudal origin still exist, principally in the forms and methods of conveyance.<sup>5</sup>

**ALLONGE.**—A paper attached to and made a part of a promissory note or bill of exchange on which an indorsement may be written wherever for some reason it is inconvenient to write on the back of the note the contract between the parties and at the same time that contract is one which, if on the note, would pass the title.<sup>6</sup>

**ALLOTMENT.**—The setting apart and apportioning of property held formerly by joint owners, so that each one may hold in severalty his own specific share.<sup>7</sup> Also, the portion so set apart.<sup>8</sup>

1. See on this subject: 1. Spence Eq. Juris. 19-125; Digby on Real Property, chap. i. § 1.

2. 2 Black. Com. 47, 77-79.

3. Williams on Real Prop. (6th ed.) 6, n.

4. In Louisiana (*Xiques v. Bujac*, 7 La. Ann. 172), Pennsylvania (*Wallace v. Harmstad*, 44 Pa. St. 500), Virginia (Acts of 1785), Maryland (*Matthews v. Ward*, 10 Gill. & J. 443), New York (Const. of 1846, art. 1, §§ 12, 13; *Cornell v. Lamb*, 2 Cow. 652; *Van Rensselaer v. Hayes*, 19 N. Y. 92), Connecticut (Rev. Laws 1849, p. 454), Wisconsin (Rev. Stat. 1849, art. 1, § 14. See *Barker v. Dayton*, 28 Wis. 367), New Jersey (Rev. Stat. 1877, p. 166, § 73).

5. See 2 Shars. Black. Com. 77, n; 1 Smith's Land. & Ten. (Morris's Ed.) 6, n.

6. *Crosby v. Roub*, 16 Wis. 616. See also *Folger v. Chase*, 18 Pick. (Mass.) 63.

7. Rap. & Lawr. Dict.; *Glenn v. Glenn*, 41 Ala. 571.

8. See Gen. Inclosure Act, 8 and 9 Vic. c. 118, §§ 72, 73, 74.

"**Allotment**" with "**Award**."—By an Inclosure Act the commissioners were required to "set out, allot, and award" to the impropriate rectors and curate, in lien of tithes, etc., certain plots, and to distinguish and separate the several allotments; and "the same allotments" were declared to be in full discharge of all tithes. *Held*, that this latter phrase referred to and included the award, and that the tithes were not extinguished by setting out and allotting the lands without an award. *Ellis v. Arnison*, 5 B. & Ald. 47.

But where there was a provision that the portions which by the act were to be "allotted and awarded" immediately after such allotments are made should



**Of Shares in a Corporation.**—This takes place where shares in excess of the amount authorized in the charter are subscribed for and an apportionment is provided for by law, the contract being incomplete and the subscribers not being present shareholders until such allotment has been made. Otherwise where there is no such provision, in which case all subscriptions beyond the authorized number are void *ab initio*.<sup>1</sup>

**Allotment-note.**—In merchant-shipping, a note made by a seaman stipulating for the payment of his wages by his employers to certain persons, in fixed instalments, at particular times.<sup>2</sup>

**ALLOW.**—To permit, consent to, or approve, as an account; to admit the validity of something contested between the parties, as a demurrer or plea, an appeal, exceptions, a claim against an estate in administration; to permit to have, as costs, compensation; to give a fit portion out of a larger property or fund, as alimony, a sum for maintenance, etc.<sup>3</sup>

"be, remain, and enure to the several persons to whom the same shall be respectively allotted, who shall from thenceforth stand and be seized and possessed thereof to such and the same uses" as the lands in lieu of which they were made, *held*, that one who was seized in fee of this latter land became so of the former immediately after the allotment and before execution of the award. *Doe v. Saunders*, 5 A. & Ell. 664.

**Allotment of Dower.**—Where the constitution gave the Probate Court jurisdiction in "all matters of the allotment of dower," "allotment" was defined as "an apportionment of the interest of one or more parties entitled to a share of the estate," and the clause was held not to confer jurisdiction over the "rights of strangers claiming title to the land adversely to the deceased and his representatives." *Jiggitts v. Bennett*, 31 Miss. 610.

**"Allot" and "Allow."**—It was provided by statute that if a widow's separate estate should be less than her dower interest in and distributive share of her husband's estate, so much "must be allowed her" as, with her separate estate, would be equal to her dower and distributive share. *Held*, that "allowed" was an appropriate word where an allowance of money is made in lieu of dower, or as compensation, and that if "allotted" had been used it would have meant that she should have had the balance due her in land. "To allot is usually understood as to set apart a portion of a particular thing or things to some person," while "allowed means something substituted

by way of compensation for another thing." *Glenn v. Glenn*, 41 Ala. 571.

**In Treaties with the Indians.**—In treaties made with reference to lands guaranteed to the Indians, "allotted" was said to indicate not "a favor conferred," but "a right acknowledged." *Worcester v. State of Georgia*, 6 Pet. (U. S.) 582.

1. *Walker v. Devereaux*, 4 Paige (N. Y.), 229; *Crocker v. Crane*, 21 Wend. (N. Y.) 211. See *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336; *Danbury & Norwalk R. Co. v. Wilson*, 22 Conn. 436.

2. *MacLachlan on Merch. Ship.* 207.

3. *Rap. & Lawr. Law Dict.; Abb. L. Dict.*

**Allow or Permit.**—To support a plea that the trustees under a private act of Parliament did not "allow or permit" the defendant to exercise a certain exclusive right, it is necessary to prove some positive act of obstruction on their part; and it is not enough to prove that a third party took it away, he having a right to it. *Townson v. Green*, 2 Car. & P. 110.

**Forty Days shall be Allowed.**—Where it was covenanted in a charter-party that "forty days shall be allowed for unloading and loading again," *held*, that a detention of the vessel beyond that period by reason of the crowded state of the docks was a breach of the covenant. *Randall v. Lynch*, 2 Camp. 352.

**Examine, Settle, and Allow Accounts.**—The power given to the board of supervisors of a county to "examine, settle, and allow" all accounts chargeable against such county involves also the right to reject if sufficient reasons for allowing are not presented. *People v. Superv'rs of Dutchess*, 9 Wend. (N. Y.) 508.

**ALLOWANCE.**—The act of permitting or admitting the validity of; also, a portion or share given, as to children, married women, guardians, trustees, executors, etc.<sup>1</sup>

**Allowing all People to Pass and Repass.**—It was held with reference to a deed in which these words were contained that the very term "allowing" presupposed "the absence of a right to pass and repass without the permission of the grantee." *Parsons v. Miller*, 15 Wend. (N. Y.) 564.

**Verdict Allowed and Recorded.**—A statute gave the right to take damages in gross "at any time within three months after the verdict is allowed and recorded." *Held*, that the verdict was not "allowed and recorded" until exceptions taken at the time of trial had been overruled by the Supreme Court, and that an election made within three months of that time, though more than three months after the "acceptance" of the verdict in the lower court, was not too late. *Hamilton v. Farrar*, 131 Mass. 572.

**I Allow to Give.**—The words "I allow to give W. J. \$250 to be paid in two years after date," written on an instrument, were held to constitute no valid obligation and to be equivalent to "I intend to give." *Harmon v. James*, 7 Ind. 263.

**"Allow" and "Allot."**—See ALLOTMENT, p. 491, n. 8; *Glenn v. Glenn*, 41 Ala. 571.

In this case "allowed" was defined to be "substituted by way of compensation for another thing."

**In a Repealing Act.**—An act repealing all acts "permitting" a certain thing to be done was held to repeal an act containing a proviso that nothing contained therein "shall prohibit" any person from doing the thing referred to, and it was said that "allowing" would have had the same force. *Huxham v. Wheeler*, 3 H. & C. 75.

1. **"Allowances" of a Soldier.**—Forfeiture of the "allowances" of a soldier for desertion was held to include bounty (he having been restored to duty and afterwards honorably discharged). "Under the term 'allowances' everything was embraced which could be recovered from the government by the soldier in consideration of his enlistment and services, except the stipulated monthly compensation designated as pay." *U. S. v. Landers*, 92 U. S. 77.

**"Allowance" to a Wife.**—The chancellor was authorized by statute, upon granting a divorce, to "decree the wife

an allowance out of the estate of the husband." *Held*, that such allowance passed to her in absolute right as a permanent provision for her support, not liable to increase or diminution. *Smith v. Smith*, 45 Ala. 264.

**Allowance of the Road.**—Where a lease contained the words "the allowance of the road, etc., to be made as usual," it was held that even if this were a covenant by the lessor it did not operate as a "defalcation of the rent." *Davies v. Stacey*, 12 Ad. & Ell. 506.

**"Allowance" to Officers.**—An act declaring that the county prison board "shall make no allowance not specially required by this act" to certain officers was held not to prohibit them from allowing the sheriff for fuel furnished to the county jail. "The word 'allowance' as used in the statute was not intended to embrace a legal demand which any of the officers named might have against the county, but only such matters as would otherwise, under other laws, have rested in the discretion of the board." *Board of Comm'rs v. Reissner*, 58 Ind. 260.

**"Allowance" to a Son.**—A credit was entered by a father in account with his son, in these words: "By further allowance to pay for house, etc., \$5000." *Held*, that this was not a promise founded upon a consideration. "The term 'allowance' is ordinarily only another name for a gift or gratuity to a child or other dependent." *Taylor v. Staples*, 8 R. I. 170.

**"Allowances" of a Trustee.**—In England they are the expenses and charges to which he may be entitled outside of the ordinary fee bill. See *Downing v. Marshall*, 37 N. Y. 390.

"Just allowances" to a trustee regarded as consisting of "charges and expenses" only. *State Bank v. Marsh*, Saxt. Ch. (N. J.) 296.

**With Allowance.**—The acceptance of a conveyance and patent of land described in the articles of agreement as containing a certain number of acres "with allowance" was considered an agreement on both sides to abide by the estimated quantity in the official survey and patent, "be the same more or less." *M'Lelland v. Creswell*, 13 S. & R. (Pa.) 143.

**Cabin or other Allowances.**—In an agreement between a master and shipowner to accept a certain sum "for all cabin or other allowances," "other allow-

**ALLUVION.** See ACCRETION.

**ALMANAC.**—The court will take judicial notice of an almanac.<sup>1</sup>

ances" were held "rather to refer to allowances like cabin and shore money than to those of a different description," and not to prohibit the master from taking primage from the consignee. *Best v. Saunders*, Mov. & M. 208.

**"Allowance" of Executors' Accounts.**—Where a statute declared that after auditing, etc., of the accounts of executors and others "an allowance may be decreed," it was held that "allowance" meant "nothing more than the sanction or approbation which the court gives to the acts of the executor or administrator as manifested by his account." *Gildart's Heirs v. Starke*, 1 How. (Miss.) 457.

**Salary and Allowance.**—In the year 1873 the defendants, who were solicitors at Trowbridge, entered into an arrangement with the local board for Trowbridge whereby the members of the board should have the use of a room belonging to the defendants, and the use of an iron safe, at the rent of 12*l.* a year, including cleaning, warming, and lighting. The room continued in the occupation of the local board down to 1877, when the defendants were appointed clerks to the local board at the rate of 90*l.* a year, "all out-of-pocket expenses and conveyances to be paid in addition to the salary." In 1880 the local board were in want of a room for the use of their surveyor, and they agreed to hire another room of the defendants, also at the rate of 12*l.* The terms of the resolution of the local board hiring the rooms were as follows: "That the clerks be allowed in addition to their salary the sum of 12*l.* for the use and occupation of their large room for board and committee meetings, and the sum of 12*l.* for the front room for the use of the surveyor of the board. Six months' notice from any quarter by either party to determine this arrangement." The rent of 24*l.* a year continued to be paid to the defendants by the local board for the use of the two rooms, and the last payment before action was made about six months before action. The statute forbid any employee of the board receiving any fee, reward, etc., other than his salary and allowance. *Held*, a demise of rooms is a "bargain or contract" within the meaning of sec. 193 of the Public Health Act, 1875; and if an officer employed by a local board constituted under that statute lets rooms to the board at a rent payable by it to him, although the rooms are used by it in the

transaction of its business he becomes liable to the penalty imposed by that section; for the rent payable by the local board cannot be considered as an "allowance" to the officer in addition to his salary within the meaning of secs. 189, 193, it being unconnected with the performance of any services in the course of his employment under the board. *Burgess v. Clark*, L. R. 14 Q. B. D. 735.

1. In *Munshower v. State*, 55 Md. 11, the court said: "It was conceded that it became material and competent for the State to prove at what hour the moon rose on the night of Saturday, the 9th of August, 1879, and for the purpose of proving this the State offered in evidence Gruber's Almanac for the year 1879. The prisoner objected to its admissibility, but the court overruled the objection and allowed the almanac to be offered for the purpose stated. To this ruling the prisoner excepted. This is all the exception states in regard to the almanac offered, and we must assume that it contained tables giving the periods of the rising and setting of the sun and moon on each day of the year, such as are usually found in such works. The prisoner did not propose to offer proof assailing or impeaching the accuracy of the astronomical calculations upon which the tables in the particular almanac in question were made, but his counsel contend that the almanac was not the best evidence, nor indeed any evidence as to when the moon rose on that night. The argument is, that it was a mere calculation made by some one, long anterior to the happening of the event, that the event would occur at a certain hour and minute; it was not evidence that the moon had risen at a certain hour, but the statement of a conjecture that it would do so. On the 2d of January, 1880, when this case was on trial, there were certainly better and surer means of proving when the moon did actually rise on the 9th of August, 1879, than by relying on the computation of an almanac-maker that it would or ought to rise at a given time that night: how is the fact that it did rise at a particular hour proved by tendering as evidence the conjecture or calculation of some one that it would do so? If Gruber's Almanac is evidence for this purpose, so then are all the other various ones published, because there is nothing in this one to make it more authentic than the others, and thus a fact susceptible of exact proof

**ALMS.**—Something given to relieve the poor.<sup>1</sup>

**ALONG.**—By, on, or over.<sup>2</sup>

like any other event that has happened may be established by the unsworn conjecture of almanac-compilers. We do not propose to elaborate the question, nor to rely upon the fact that the statute of 24 Geo. 2, ch. 23, is in force in this State. As has been well argued by the attorney-general in his brief, the precise periods at which the sun and moon will rise or set at any particular period of twenty-four hours in the future is as absolutely certain and just as capable of exact mathematical ascertainment as the occurrence of the day in which such setting or rising will take place. Courts have received as evidence weather reports, reports of the state of the markets, price currents, and insurance tables tending to show the probable duration of human life, though these are records which are not capable of mathematical demonstration, which cannot be tested by any certain law, and which may or may not omit the record of changes which have actually taken place. But an almanac forecasts with exact certainty planetary movements. We govern our daily life by reference to the computations which they contain. No oral evidence or proof which we could gather as to the hours of the rising or setting of the sun or moon could be as certain or accurate as that which we may obtain from such a source. Why then should not these computations, which are, after all, but parts of the ordinary computations of the calendar, be admitted as evidence? As was said by Judge Cooley in considering an analogous question, *Sisson v. Railroad Co.*, 14 Mich. 497, 'Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character.' There is clearly no error in the ruling in this exception."

In *State v. Morris*, 47 Conn. 179, a case of burglary, the court said: "For the purpose of showing that it was in the night season, the State was permitted to introduce in evidence, against the objection of the defence, a copy of Beckwith's Almanac for 1879, in which the hour of sunset for that day is placed at four o'clock and forty-one minutes. There is no error in this. The time of the rising or setting of the sun on any given day belongs to a class of facts, like the succession of the seasons, changes of the moon,

days of the month and week, etc., of which courts will take judicial notice. The almanac in such cases is used, like the statute, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury." See *Reed v. Wilson*, 41 N. J. L. 29; *Kilgour v. Miles*, 6 G. & J. (Md.) 274; *Sasscer v. Farmers' Bank*, 4 Md. 420; *Finney v. Callendar*, 8 Minn. 41; *People v. Cheekee*, 61 Cal. 404; *Sprowl v. Lawrence*, 33 Ala. 674; *Tutton v. Darke*, 5 H. & N. 647; *R. v. Dyer*, 6 Mod. 41; *Brough v. Perkins*, 6 Mod. 81.

1. "Alms," in the clause of a statute disqualifying persons who have received "parochial relief or other alms," means parochial alms. *Regina v. Mayor of Lichfield*, 2 Q. B. 695.

**Begging Alms or Soliciting Charity.**—"Every one whose diseased or crippled condition appeals to sympathy if he places himself in a position to attract attention, or passes along the street calling attention by sign, act, or look to his unhappy condition, and receives from those who observe him the charity which he is obviously seeking," is begging alms or soliciting charity. *In re Haller*, 3 Abb. N. C. (N. Y.) 65.

2. **Along.**—"Along" means "by," "on," or "over," according to the subject-matter and context. *Church v. Meeker*, 34 Conn. 425.

It is sometimes synonymous with "adjoining" in a statute. *Walton v. St. L., I. M. & S. R. Co.*, 67 Mo. 58.

"Along" is equivalent to "on." *Rex v. Morris*, 1 B. & Ad. 448.

**Along a River.**—A statute giving a railroad company the right to lay their road along a river and to acquire the rights of shore-owners will not be construed to give by implication the right to take the land of the State lying below high-water line. *Stevens v. The P. & N. R. Co.*, 5 Vroom (N. J.), 532.

**Along a Wall.**—Where the description in a deed said "along the south side of the brick wall," it was held that the outer surface of the brick wall was intended. *Cornes v. Minot*, 42 Barb. (N. Y.) 60.

**Along the Bank.**—"Where banks of rivers were spoken of, those boundaries were meant which contain their waters at their highest flow." *Howard et al. v. Ingersoll*, 13 How. 415.

**Along the High-water Mark.**—These words indicate a fixed boundary-line, and under them a grantor is entitled to no

## ALONG—ALREADY—ALSO—ALTER.

**ALREADY.**—Before a certain time.<sup>1</sup>

**ALSO.**—In addition to.<sup>2</sup>

**ALTER.**—To make a thing different from what it was;<sup>3</sup> to change.<sup>4</sup>

accretions or land left dry. *Cook v. McClure*, 17 Am. R. 270.

**Along the River.**—The established and only proper meaning of this word as here used is, beside and following the course of, or alongside. When the phrase "upon and along a road" is used, the word "upon" qualifies the meaning of "along." *Stevens v. Erie R. Co.*, 6 C. B. Green (N. J.) 261.

Under a grant "along the river" the grantee takes *usque filum aquæ*, unless the river be expressly excluded. *Luce v. Carley*, 24 Wend. (N. Y.) 451.

**Along the Route.**—*Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

**Along the Shore.**—Under a deed containing these words, "along the shore," the grantee would take no part of the river bed, but only to low-water mark. *Child et al. v. Starr et al.*, 4 Hill (N. Y.), 369; *The Seneca Nation v. Knight*, 23 N. Y. 498.

**Along the Street.**—These words carry a fee to the middle of the street. *Hammond et al. v. McLachlan*, 1 Sandf. (N. Y.) 323; *Hennig v. Fisher*, 1 Sandf. (N. Y.) 344.

1. Where a statute subjected persons to a penalty for practising their profession after a certain date, except persons already in practice, it was held that it was necessary to show that they were practising at the time the act went into operation. *Apothecaries' Co. v. Roly*, 5 B. & Ald. 949.

**Already Accrued.**—These words in a statute limiting the time for the commencement of actions apply not merely to the date of the original enactment, but to any subsequent amendment. *Goillotel v. Mayor, etc.*, 87 N. Y. 444.

**Already Incurred.**—A clause that nothing contained in statute shall affect any penalty, etc., "already incurred" saves from the operation of the statute any penalty incurred before it took effect, although after it was approved by the governor. *Commonwealth v. Bennett*, 108 Mass. 30.

**When not already Done.**—These words in an ordinance directing the laying of sidewalks, etc., apply to the existing and not the prior condition of the subject-matter. *In re Burmeister*, 6 Weekly Dig. (N. Y.) 197.

2. "Also" is a copulative and not a dis-

junctive word. *Farrish v. Cook*, 6 Mo. App. 331.

Testator devised as follows: "I give unto J. C. all that my house and premises at P. I.; also give unto J. C. all that my land, etc., to J. C., his heirs and assigns forever." *Held*, J. C. took a fee in the house. *Fenny v. Ewestace*, 4 M. & S. 60.

Testator gave to A certain property for the sole and separate use of X; also to the said A the sum of one thousand dollars in trust for the use of said X. *Held*, the thousand dollars was for the sole and separate use of X: "also" equivalent to "in like manner." *Evans et ux. v. Knorr*, 4 Rawle (Pa.), 67.

But words importing a tenancy in common in one bequest will not be extended by implication to another bequest which is connected with the former by the term "also." 2 Jarmin on Wills (Bigelow's Ed.), \*257.

3. *Smith v. Brown*, 1 Wend. (N. Y.) 236.

"A power to alter a wharf would seem to mean a power to extend it or diminish it." *Tucker v. St. L., K. C. & N. R. Co.*, 54 Mo. 172.

But a power to "open, alter, abolish," etc., a street would not authorize its entire occupation by a railroad company's tracks. *Sackland v. North Mo. R. Co.*, 31 Mo. 187.

4. *People v. Sassovich*, 29 Cal. 484.

As a road may be discontinued when a new road renders the old unnecessary under a power to alter. *Ponder et al. v. Shannon et al.*, 54 Ga. 187.

Or changes the grade of a street. *Waddell v. The Mayor, etc.*, 8 Barb. (N. Y.) 95.

"Alter" implies "another," and nothing which ceases to exist can be said to be altered. *Haynes v. The State*, 15 Ohio St. 485.

**Alter or Amend.**—The power to alter or amend a contract is to change it between the original parties and such others as are by mutual consent admitted into it. It does not give the power to compel one of the parties to operate in conjunction with others and share with them the privileges and benefits of the contract. *Sage, etc., v. Dillard, etc.*, 15 Ben. M. (Ky.) 359.

## ALTERATION—ALTERATION OF INSTRUMENTS.

**ALTERATION.**—A change or substitution of one thing for another.<sup>1</sup>

**ALTERATION OF INSTRUMENTS.** (See also **BILLS AND NOTES**; **BONDS**; **DEEDS**; **WILLS**.)

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| <ol style="list-style-type: none"> <li>1. <i>Definition.</i></li> <li>2. <i>Immaterial Alterations.</i><br/> <i>What are.</i><br/> <i>Immaterial Alterations of Words.</i><br/> <i>Immaterial Insertions of Words.</i><br/> <i>Immaterial Erasures.</i><br/> <i>Effect, of with Fraudulent Intent.</i></li> <li>3. <i>Material Alterations.</i><br/> <i>Effect of in General.</i><br/> <i>Effect of in Deeds.</i><br/> <i>Effect of made by Consent.</i><br/> <i>Effect of Restored.</i><br/> <i>Effect of by Third Parties.</i><br/> <i>Effect of by Third Parties in Deeds.</i><br/> <i>What are:</i><br/> <i>Must be in Material Part.</i><br/> <i>Change in Parties.</i><br/> <i>Change in Character.</i><br/> <i>Change in Place of Payment.</i><br/> <i>Change in Time of Payment.</i><br/> <i>Change in Principal.</i></li> </ol> | <ol style="list-style-type: none"> <li><i>Change in Consideration.</i><br/> <i>Change in Description of Property.</i><br/> <i>Change in Interest.</i> [erty.</li> <li><i>Change in Date.</i><br/> <i>Change in Memoranda.</i><br/> <i>General Alterations.</i></li> <li>4. <i>Whether Immaterial or Not.</i><br/> <i>Question of Law or Fact.</i><br/> <i>Burden of Proof.</i><br/> <i>General Statement.</i><br/> <i>Common-law Rule in Deeds.</i><br/> <i>Rule as to Negotiable Instruments and Deeds.</i><br/> <i>Rule as to Alterations not Apparent.</i></li> <li>5. <i>Filling up Blanks.</i><br/> <i>Left Negligently.</i><br/> <i>Left in Negotiable Instruments with Authority to Fill in.</i><br/> <i>Left in Deeds.</i><br/> <i>Left in Bonds.</i></li> <li>6. <i>Recovery on Original Consideration.</i></li> <li>7. <i>Ratifications of Alterations.</i></li> <li>8. <i>Alteration in Wills.</i></li> </ol> |
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**1. Definition.**—An alteration of an instrument is something by which its meaning or language is changed either in a material or immaterial particular.<sup>2</sup> If what is written upon or erased from

1. *Johnson v. Wyman et al.*, 9 Gray (Mass.), 189.

An alteration of an instrument is something by which its meaning or language is changed, either in a material or an immaterial particular. *Morrill v. Otis*, 12 N. H. 466; *Oliver v. Hawley*, 5 Neb. 444.

It usually imports some fraud or improper design on the part of the person changing the instrument. *McVey v. Ely*, 5 Lea (Tenn.), 442.

**Alteration and Spoliation.**—Alteration imports an improper design; but spoliation is the act of a stranger without the participation of the party interested. *Mealn v. Platte Co.*, 8 Mo. 239.

**Erection, Alteration, or Repair.**—The removal of a building is not such an erection, alteration, or repair as will entitle the workman to a lien therefor under the mechanics' lien laws. *Trask v. Searle*, 121 Mass. 230.

**Alteration of a Bond.**—The term "alteration" is used to distinguish between the making of an entire new way and changing the location in one or more interme-

diate sections. *Gloucester v. Essex*, 3 Metc. (Mass.) 379.

The substitution of one line of way for another; the establishment of one and the discontinuance of that for which it is substituted. *Sprague v. Waite*, 17 Pick. (Mass.) 315.

2. *Morrill v. Otis*, 12 N. H. 466; *Oliver v. Hawley*, 5 Neb. 439; *Palmer v. Sargent*, 5 Neb. 233; s. c., 25 Am. Rep. 479; *Inhabitants of Gloucester v. County Comm'rs*, 3 Metc. (Mass.) 375; *Bridges v. Winters*, 42 Miss. 135; s. c., 2 Am. Rep. 598.

**A Material Alteration** is one which causes it to speak a language different in legal effect from that which it originally spake. *Reeves v. Pierson*, 23 Hun (N. Y.), 185; *Oliver v. Hawley*, 5 Neb. 439; *Morrill v. Otis*, 12 N. H. 466.

**Spoliation or Mutilation** is the alteration of an instrument by a stranger to it, and without the consent or connivance of any of the parties to it. Spoliation or mutilation does not change the legal operation of the instrument when the origi-

the paper containing an instrument has no tendency to produce this result, nor to mislead any person, it will not be an alteration.<sup>1</sup>

**2. Immaterial Alterations.—*Unchanged Meaning.***—An alteration which does not vary the meaning of an instrument is immaterial. It has been said that an immaterial alteration may be treated as no alteration and cannot avoid the instrument.<sup>2</sup>

***Alterations of Words.***—Altering words in a written instrument without changing the legal sense or altering words which are immaterial is an immaterial alteration.<sup>3</sup>

nal meaning can be ascertained. *Bridges v. Winters*, 42 Miss. 135; *Gorden v. Robertson*, 48 Wis. 493; *Union Nat. Bank v. Roberts*, 45 Wis. 373; *Robertson v. Hay*, 91 Pa. St. 242; *Cochran v. Nebeker*, 48 Ind. 459; *Davis v. Carlisle*, 6 Ala. 707; *Croft v. White*, 36 Miss. 455; *Medlin v. Platte Co.*, 8 Mo. 235; *Lubbering v. Kohlbrecher*, 22 Mo. 596.

1. An alteration is immaterial when the law would supply the matter added, or when it is in an immaterial part of the instrument. *Burnham v. Ayer*, 35 N. H. 351; *Western Building Assoc. v. Fitzmaurice*, 7 Mo. App. 283; *Goodenow v. Curtis*, 33 Mich 505; *Bridges v. Winters*, 42 Miss. 135; *Sharpe v. Orme*, 61 Ala. 263; *Crews v. Farmers' Bank*, 31 Gratt. (Va.) 348; *Kline v. Raymond*, 70 Ind. 271; *State v. Cilley*, Hillsborough, April, 1817, cited 1 N. H. 97; *Derby v. Thrall*, 44 Vt. 413; *Smith v. Lockridge*, 8 Bush (Ky.) 423; *Palmer v. Sargent*, 5 Neb. 233.

2. *Nichols v. Johnson*, 10 Conn. 192; *Pequawket Bridge v. Mathes*, 8 N. H. 139; *Palmer v. Sargent*, 5 Neb. 233; s. c., 25 Am. Rep. 479; *Burnham v. Ayer*, 35 N. H. 351; *Humphreys v. Crane*, 5 Cal. 173; *Cole v. Hills*, 44 N. H. 227; *Manufrs. Bank v. Follett*, 11 R. I. 92; s. c., 23 Am. Rep. 418; *Burlingame v. Brewster*, 79 Ill. 515; *State v. Riebe*, 27 Minn. 315.

Alterations and erasures will not be regarded when they are wholly unimportant, and the contract would be as valid without them as with them. *McKibben v. Newell*, 41 Ill. 461.

An alteration in the recitals of a bond, made after its execution by the attorney of the obligee, without any wrongful or fraudulent purpose, which does not in any manner prejudice the obligors or affect their rights or obligations is immaterial and will not destroy the bond. *Crawford v. Dexter*, 5 Sawy. Cir. Ct. (U. S.) 201.

Alterations in deeds are immaterial where neither the rights nor interests, duties nor obligations, of either of the parties are in any manner affected or

changed. *Smith v. Crooker*, 5 Mass. 538; *Derby v. Thrall*, 44 Vt. 413.

3. *Kline v. Raymond*, 70 Ind. 271, where it was held that altering the words "we hereby guarantee" to "I hereby guarantee" in an instrument signed only by one party is immaterial.

The marginal figures in a note are held to be immaterial, and changing them so as to correspond with the written words is an immaterial alteration. *Smith v. Smith*, 1 R. I. 398; s. c., 53 Am. Dec. 652; *Woolfolk v. Bank of America*, 10 Bush (Ky.), 504; *Schryver v. Hawkes*, 22 Ohio St. 308; *Johnston Harvester Co. v. McLean*, 57 Wis. 258.

So is the alteration of the serial number of a bond where the numbering is not required by statute immaterial. *Plock v. Cobb*, 64 Ala. 127; *Com. v. Emigrants' Bank*, 98 Mass. 12; *City of Elizabeth v. Force*, 29 N. J. Eq. 592; *Birdsall v. Russell*, 29 N. Y. 220.

A promissory note made payable to a partnership under a certain name was altered by the maker and the payee without the knowledge of the surety so as to be payable to the same parties under another name. *Held* to be immaterial. *Arnold v. Jones*, 2 R. I. 345; *Cole v. Hills*, 44 N. H. 227; *Derby v. Thrall*, 44 Vt. 413.

A bond was given for "one hundred dollars," to be paid in twenty-five dollars a year, with interest on the whole." The holder italicized the last three words. *Held*, not to disturb the legal effect of the bond and therefore immaterial. *Gardiner v. Sisk*, 3 Pa. St. 326; *Burkholder v. Lapp*, 31 Pa. St. 322.

Erasing a scroll which took the place of a seal from a written instrument, and substituting another in juxtaposition with the name of the signer, was held not to be a material alteration. *Keen v. Monroe*, 75 Va. 424.

Retracing a faded name with ink—*Dunn v. Clements*, 7 Jones L. (N. Car.) 58—or tracing with ink a word written in pencil is immaterial. *Reed v. Roark*, 14 Tex. 329; s. c., 65 Am. Dec. 127.

*Insertion of Words.*—And so may words be inserted when they are either entirely immaterial, or only explanatory and do not alter the legal sense of the instrument.<sup>1</sup>

And so is the correction of a mistake immaterial; as where both parties intended to make a note payable to B. C., but accidentally wrote B. R. C., the erasure of the R. was held to be an immaterial alteration. *Cole v. Hills*, 44 N. H. 227; *Derby v. Thrall*, 44 Vt. 413; s. c., 8 Am. Rep. 389; *Duker v. Franz*, 7 Bush (Ky.), 273; s. c., 3 Am. Rep. 314; *McRaven v. Crisler*, 53 Miss. 542; *Jessup v. Dennison*, 2 Disn. (Ohio) 150; *Ames v. Colburn*, 11 Gray (Mass.), 390; *Jordan v. Stevens*, 51 Me. 78; *Murray v. Graham*, 29 Iowa, 520; *Arnold v. Jones*, 2 R. I. 345. Compare *Miller v. Gilleland*, 19 Pa. St. 119.

But the effect of the correction must be that it makes the instrument conform to the intentions of the parties concerned. *Hervey v. Hervey*, 15 Me. 357.

The alteration of a note in a material respect by one of several makers thereof assuming to have authority to do so, and for the honest purpose of making it conform to the original intention of the parties without the express though with the implied consent of the holder, will not prevent a recovery by the latter against all the makers in an action upon the note as though in the form originally delivered. *Murray v. Graham*, 29 Iowa, 520.

1. In *Krouskop v. Shoutz* the words "this note to be extended if desired by makers" were held to be so void of legal significance that the addition thereto, after the note was delivered, of the words "on payment of interest, as expressed, until January 1, 1879," was not considered a material alteration. Neither was the alteration of \$600 to \$1000 on a property statement of a wife, which also included a farm worth \$4000, and which was given to secure a note for \$140 given by her and her husband, material. 51 Wis. 204.

Memoranda made on the margin or back of a note for the convenience of the holder, and merely explanatory of some circumstances connected with the note, are immaterial. *Struthers v. Kendall*, 5 Wright (Pa.), 214; *Bachelor v. Priest*, 12 Pick. (Mass.) 399; *Oliver v. Hawley*, 5 Nebr. 439.

An interlineation in a delivery bond giving a description of the attached property, and made by the officer in good faith, is not a material alteration. *Rowley v. Jewett*, 56 Iowa, 492.

Neither is the addition of the full Chris-

tian names of the drawers of an instrument which were only signed with initials. *Blair v. Bank of Tennessee*, 11 Humph. (Tenn.) 84.

Nor the addition of the surname of the payee. *Mowchet v. Cason*, 1 Brev. (S. Car.) 307.

The insertion of the word "Penna" in an acknowledgment is immaterial. *Deviney v. Reynolds*, 1 W. & S. (Pa.) 328.

Inserting words intended to express a waiver of the benefits of a specific act of the assembly in a mortgage, which act had been repealed before the mortgage was executed, does not affect the mortgage and is immaterial. *Robertson v. Hay*, 91 Pa. St. 242.

Inserting two words in a will not in the handwriting of the maker, but which do not change the sense, does not invalidate the will. *McMichael v. Bankston*, 24 La. Ann. 451.

Where in a sealed instrument, which stated that the defendant had "signed" certain promissory notes, the words "and executed" were added, it was held that such an alteration was immaterial. *Langdon v. Paul*, 20 Vt. 217.

Where in a bond the words "are held and firmly bound" are inserted, when there are words to the same effect already in the bond, it is not material. *Western Building Assoc. v. Fitzmaurice*, 7 Mo. App. 283.

Interlining in a deed an important clause which is also found in another part of the deed was held to be an immaterial alteration. *Gordon v. Sizer*, 39 Miss. 818.

The addition of the word "agent" to the signature of a note, where the note was given for the agent's private debt, did not avoid the note, as it was not proved that his principal was accustomed to pay notes so executed. *Manufacturers' Bank v. Follett*, 11 R. I. 92; s. c., 23 Am. Rep. 418.

And so is it immaterial to add the name of the bank after the word "cashier" on a note which was given to bind the bank. *Folger v. Chase*, 18 Pick. (Mass.) 63; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309.

The affixture of a seal to a contract, where it adds no actual strength to the contract, is immaterial. *Truett v. Wainwright*, 4 Gil. (Ill.) 411; *White v. Fox*, 29 Conn. 570.

Adding the words "ten dollars and fif-



ty interest" immediately after the words "value received" in a promissory note is not a material alteration; such words would be construed to mean that a portion of the value received by the makers consisted of ten dollars and fifty cents for interest. *Gardiner v. Harback*, 21 Ill. 129.

One of the makers of a joint note which did not state the rate of interest, although it contained the clause "on demand with interest," added, after delivery, the following memorandum: "Interest on the above note to be nine per cent. G. W. C." *Held*, that this was not a material alteration as far as the other maker was concerned. It being signed by G. W. C. only shows that the parties did not intend to change the joint promise, but to treat it as an independent undertaking by him. *Littlefield v. Coombs*, 71 Me. 110.

A note was given for an amount of money loaned, with the understanding that interest should be paid at the rate of six and a half per cent for six months, and if the note was not then paid that the rate of interest should be raised to seven per cent. At the end of the six months, the note not being paid, the secretary of the association which advanced the money wrote in the body of the note a statement that from the end of the six months interest was to be at the rate of seven per cent. One payment at this rate was made when the makers of the note failed. The surety brought suit to be discharged on account of the alteration of the note. *Held*, that as the secretary acted in good faith and under a mistake of fact, and as the surety had not been injured by it, the alteration should be considered immaterial and erased from the note. *Nickerson v. Swett*, 135 Mass. 514.

A memorandum made on the back of a note by the holder in pursuance of an agreement with the maker, but without the knowledge of a surety, to the effect that the rate of interest after a specified day will be less than provided in the note, is not an alteration and does not discharge the surety. *Cambridge Savings Bank v. Hyde*, 131 Mass. 77; s. c., 41 Am. Rep. 193.

The introduction of the dollar-mark in a note, followed by numerals which may be omitted without affecting its sense, is immaterial. *Houghton v. Francis*, 29 Ill. 244.

Where one placed at the foot of a note to the left of the signature, after the note had been executed, and without the consent or knowledge of the maker, a memorandum making the note payable "at Goodyear Bros. and Durand's, New York.

January 10-13," it was held to be an immaterial alteration, as it in no way varied or increased the liability of the maker. *American Nat. Bank v. Bangs*, 42 Mo. 450.

The maker of a note, after indorsement by the payee, inserted the words, "Payable before maturity, and interest on unexpired term refunded if I so elect." The note was then negotiated, and delivered by him to a *bona-fide* holder for value, who had no notice of the alteration. In a suit of the holder against the indorser, it was decided that such alteration was immaterial, and did not affect the indorser, who was held liable on the note. *Herrick v. Baldwin*, 17 Minn. 209.

And where to the interest clause of a note payable in less than two years the word "annually" was added, it was considered not a material alteration, as it does not require the payment of interest at the end of the year. *Leonard v. Phillips*, 39 Mich. 182; s. c., 33 Am. Rep. 370.

Where the surety knows that a note is to be paid in gold, a memorandum at the bottom of the note "paid in gold, gold having been the consideration," will be an immaterial alteration. *Hanson v. Crawley*, 41 Ga. 303.

Where the principal maker of a note, payable on conditions, indorsed upon the note the fact of the performance of the conditions, it was held not such a material alteration as would discharge the surety. *Jackson v. Boyles*, 64 Iowa, 428.

Inserting words obviously omitted by mistake is immaterial. *Peyton v. Harman*, 22 Gratt. (Va.) 643; *Conner v. Routh*, 7 How. (Miss.) 176; s. c., 40 Am. Dec. 59; *Hunt v. Adams*, 6 Mass. 519; *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93.

And so are interlineations in the handwriting of the grantor, merely curing a defect in the description of lands conveyed, and according with all the purposes of the deed. *Sharp v. Orme*, 61 Ala. 263.

The mere signing of a note by the holder thereof before maturity is not a material alteration of the note. *Denick v. Hubbard*, 27 Hun (N. Y.), 347.

Adding the name of a witness to a note is not a material alteration. *Milbery v. Storer*, 75 Me. 69; s. c., 46 Am. Rep. 361; *Smith v. Dunham*, 8 Pick. (Mass.) 246; *Ford v. Ford*, 17 Pick. (Mass.) 418; *Adams v. Frye*, 3 Metc. (Mass.) 103; *Willard v. Clarke*, 7 Metc. (Mass.) 435; *Rollins v. Bartlett*, 20 Me. 319; *Thornton v. Appleton*, 29 Me. 298.

*Erasures of Words.*—The erasure of words immaterial to the legal sense of the instrument, or inserted by mistake, is also immaterial.<sup>1</sup>

*Immaterial Alterations with Fraudulent Intent.*—Where an alteration is in itself immaterial it will not avoid an instrument even though made with fraudulent intent.<sup>2</sup>

So held, where one who could neither read nor write signed a note with his mark in the presence of a third party; which third party after the making of the mark and before delivery, without knowledge of either the maker or the payee, witnessed the note as a matter of course. *Church v. Fowle*, 5 Eastern Repr. (Mass.)

519.

1. Thomson on Bills (Wilson's Ed.), 114.

Where after the testator's death certain words, mere expletives, were erased from the will by the one who wrote the instrument, it was held to be an immaterial alteration, as such erasure did not alter the tenor of the will. *Cogbill v. Cogbill*, 2 Hen. & M. (Va.) 467.

A note purporting by its terms to be the personal promise of the makers was signed by A, B, and C, "as trustees of the First Universalist Society," a blank being left for the signature of D, a fourth trustee; and the note was delivered to the payee to obtain that signature, which he did after tearing off, without D's knowledge, the descriptive words. Held, that as the note made the trustees personally liable, the tearing off of the descriptive words was an immaterial alteration. *Burlingame v. Brewster*, 79 Ill. 515; s. c., 22 Am. Rep. 177; *Hayes v. Matthews*, 63 Ind. 412; s. c., 30 Am. Rep. 226; *Hayes v. Brubaker*, 65 Ind. 27; *McGuinness v. Bligh*, 11 R. I. 94.

Erasing from a subscription paper the name of a previous subscriber to the stock of a corporation does not affect the liability of a subsequent subscriber. Such alteration of the subscription list is deemed immaterial, as each subscription forms a separate contract with the company, and in the absence of proof there could be no presumption that defendant was induced to subscribe because previous subscribers had done so. *Whittlesey v. Frantz*, 74 N. Y. 456.

And so held in regard to a subscription paper for the erection of a church, where it was alleged that the name of the treasurer to whom the subscriptions were to be paid was inserted after the subscriber signed the paper. *Landmerlen v. Wheeler*, 106 Ind. 523.

The payees of a non-negotiable paper

may strike out their indorsement when the paper is in their hands, the presumption being that there had been no transfer by delivery. *Texas Land & Cattle Co. v. Carroll*, 63 Tex. 48.

The erasure of the name of one who indorsed a note before its delivery, but afterward paid it and sues the maker, is not a material alteration as between the parties to the suit. *Tutt v. Thornton*, 57 Tex. 35.

2. *Miller v. Reed*, 27 Pa. St. 246; s. c., 67 Am. Dec. 459; *Miller v. Gilleland*, 19 Pa. St. 119; *Robinson v. Phoenix Ins. Co.*, 25 Iowa, 430; *Booth v. Powers*, 56 N. Y. 22; *Moge v. Herndon*, 30 Miss. 120.

In other cases it has, however, been decided that an immaterial alteration fraudulently made avoids the instrument. *Turner v. Billagram*, 2 Cal. 523; 1 Greenl. on Ev. 568.

In Missouri it has been held that any alteration, material or immaterial, made fraudulently or innocently, avoids a note in the hands of the one who made the alteration. *Evans v. Foreman*, 60 Mo. 449; *German Bank v. Dunn*, 62 Mo. 79; *Moore v. Hutchinson*, 69 Mo. 429; *Morrison v. Garth*, 78 Mo. 434; *First Nat. Bank of Springfield v. Fricke*, 75 Mo. 178; s. c., 42 Am. Rep. 399.

B. F. C. C., a member of the firm of Champion & Co., executed a promissory note in his own name, and procured the signature of two persons thereon as his indorsers. Subsequently, before procuring sale of the note, without their knowledge he added to his signature the words "& Co." thus making it B. F. C. C. & Co.; and the indorsers were held discharged, although it was contended that the words "& Co." did not vary the contract, as there was no such firm in existence, and that the added words might be treated as a flourish, meaning nothing. *Haskell v. Champion*, 30 Mo. 136.

But compare *Williams v. Jensen*, where it was held that the addition of the signature of a married woman without a separate estate to a note already issued was a nullity, without any legal effect whatever, and therefore to be considered as no alteration, and not to discharge the original parties. 75 Mo. 681.

**3. Material Alterations.**—*Effect of Material Alterations.*—A wilful and material alteration of a written instrument made by one of the parties to it, after execution, and without the authority or consent of the other party, defeats any rights he would otherwise have under it.<sup>1</sup>

*In Deeds.*—An alteration in a deed by a grantee when material and made with fraudulent intent and after delivery, although disabling him from bringing an action upon its covenants, will not affect his legal title to the thing which passed by the deed.<sup>2</sup>

The alteration of a deed in an immaterial part by the grantee has in some cases been held to avoid the deed as to him. *Herdman v. Bratten*, 2 Har. (Del.) 396; *Morris v. Vanderen*, 1 Dall. (U. S.) 67; *Smith v. Weld*, 2 Pa. St. 54; *Barrett v. Thorndike*, 1 Greenl. (Me.) 73; *Lewis v. Payn*, 8 Cow. (N. Y.) 71; s. c., 18 Am. Dec. 427; *Nunnery v. Cotton*, 1 Hawks. (N. Car.) 222; *Wright v. Wright*, 2 Halst. (N. J.) 175; s. c., 11 Am. Dec. 546; *Limestone v. Penick*, 5 T. B. Mon. (Ky.) 31.

In others it has been doubted or denied. *Hatch v. Hatch*, 9 Mass. 307; *Hunt v. Adams*, 6 Mass. 519; *Smith v. Crooker*, 5 Mass. 538; *Langdon v. Paul*, 20 Vt. 217; *Pardee v. Lindley*, 31 Ill. 174; *Hale v. Russ*, 1 Greenl. (Me.) 334; *Gardiner v. Sisk*, 3 Pa. St. 326; *Burkholder v. Lapp*, 31 Pa. St. 322; *Devinney v. Reynolds*, 1 W. & S. (Pa.) 328; *Robertson v. Hay*, 91 Pa. St. 242; *McKibben v. Newell*, 41 Ill. 461; *Nichols v. Johnson*, 10 Conn. 192.

1. *Richmond Mfg. Co. v. Davis*, 7 Blackf. (Ind.) 412; *Dietz v. Harder*, 72 Ind. 208; *Boston v. Benson*, 12 Cush. (Mass.) 61; *Homer v. Wallis*, 11 Mass. 309; s. c., 6 Am. Dec. 169; *Burnham v. Ayer*, 35 N. H. 351; *Haines v. Dennett*, 11 N. H. 180; *Tillon v. Clinton*, etc., Mut. Ins. Co., 7 Barb. (N. Y.) 564; *Kennedy v. Crandell*, 3 Lans. (N. Y.) 1; *Flint v. Craig*, 59 Barb. (N. Y.) 319; *Nunnery v. Cotton*, 1 Hawks. (N. Car.) 222; *Davis v. Coleman*, 7 Ired. L. (N. Car.) 424; *Mills v. Starr*, 2 Bailey (S. Car.) 359; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165; *Newell v. Mayberry*, 3 Leigh. (Va.) 250; s. c., 23 Am. Dec. 261; *Osborne v. Van Houten*, 45 Mich. 444; *Knoxville Nat. Bank v. Clarke*, 51 Iowa, 264; *Oakey v. Wilcox*, 3 How. (Miss.) 330; *King v. Hunt*, 13 Mo. 97.

Even if made without a fraudulent intent. *Marshall v. Gongler* 10 S. & R. (Pa.) 164; *Fay v. Smith*, 1 Allen (Mass.), 477; s. c., 79 Am. Dec. 752; *Murray v. Graham*, 29 Iowa, 520.

And he will not be permitted to establish the contract by other evidence, nor

even avail himself of it as it existed before the alteration. Bonds and other written agreements come within this rule. *Newell v. Mayberry*, 3 Leigh. (Va.) 250; s. c., 23 Am. Dec. 261.

Even if the alteration be done after the signing but before delivery of the instrument. *Pew v. Laughlin*, 3 Fed. Rep. 39.

The instrument will be void even in the hands of a *bona-fide* purchaser for value. *State Savings Bank v. Shaffer*, 9 Neb. 1; *Horn v. Newton Savings Bank*, 32 Kans. 518.

An alteration in a note which discharges it discharges also the mortgage by which it is secured. *Tate v. Fletcher*, 77 Ind. 102.

A material alteration of a bond or note after its execution, when intentionally made by one having an interest in it, and without the consent of the party bound by it, invalidates the instrument as to such party. *Dobyns v. Rawley*, 76 Va. 544.

Q. borrowed of W. \$1000 upon his note indorsed by S. Afterwards, without the consent or knowledge of S., but with the knowledge and consent of W., the note was altered by Q., and raised to \$1500, as security for an additional \$500 which thereupon W. lent Q. *Held*, the alteration invalidated the note entirely as to S. *Batchelder v. White*, 80 Va. 103.

But the alteration of a written instrument evidencing an executed contract by the beneficiary thereunder for whom the contract has performed its office will not discharge the other party. So will the insertion of the name of another party in a bill of sale after its execution and delivery and after possession of the property has been taken thereunder by the vendee not divest him of the right of possession. *Ransier v. Vanorsdol*, 5 Iowa, 130.

2. *Woods v. Hilderbrand*, 46 Mo. 284; s. c., 2 Am. Rep. 513; *Lewis v. Payn*, 8 Cow. (N. Y.) 71; s. c., 18 Am. Dec. 427; *Jackson v. Gould*, 7 Wend. (N. Y.) 364; *Herrick v. Malin*, 22 Wend. (N. Y.)

*By Consent.*—Whenever an alteration has been made by common consent of the parties or before delivery, the instrument will not be avoided.<sup>1</sup>

388; *Alexander v. Hickox*, 34 Mo. 496; *Miller v. Gilleland*, 19 Pa. St. 119; *Jackson v. Chase*, 2 Johns. (N. Y.) 84; *Hatch v. Hatch*, 9 Mass. 307; *Dana v. Newhall*, 13 Mass. 498; *Nicholson v. Halsey*, 1 Johns. Ch. (N. Y.) 417; *Smith v. McGowan*, 3 Barb. (N. Y.) 404; *Raynor v. Wilson*, 6 Hill (N. Y.), 469; *Fletcher v. Mansur*, 5 Ind. 267; *Chessman v. Whittemore*, 23 Pick. (Mass.) 231; *Rifener v. Bowman*, 53 Pa. St. 318; *Jackson v. Jacoby*, 9 Cow. (N. Y.) 125; *Withers v. Atkinson*, 1 Watts (Pa.), 237; *Bliss v. McIntyre*, 18 Vt. 466; s. c., 80 Am. Dec. 766; *Coit v. Starkweather*, 8 Conn. 289; *Wallace v. Harmstead*, 44 Pa. St. 492; s. c., 53 Am. Dec. 603.

The old law was much more severe on alterations in deeds. There it was held that a deed becomes void where after its due execution it is altered by erasure, interlining, addition, drawing a line through the words though they are still legible, or by writing new letters upon the old in any material part of it, by the obligor or any stranger without the privy of the obligee; and if the obligee himself alters the deed by any of said ways, although in words not material yet the deed is void. *Pigot's Case*, 11 Co. 27; *Letcher v. Bates*, 6 J. J. Marsh. (Ky.) 525.

Although an alteration of a deed by the grantee does not divest him from the title to whatever passed by the delivery of the deed, he will be barred from claiming any future benefits under it; as in the case of executory contracts, which cannot be enforced by him; neither will his assignees have any better right. *Herrick v. Malin*, 22 Wend. (N. Y.) 388; *People v. Muzzy*, 1 Denio (N. Y.), 239. *Briggs v. Glenn*, 7 Mo. 572; *Hatch v. Hatch*, 9 Mass. 307; *Barrett v. Thorndike*, 1 Greenl. (Me.) 73; *Bliss v. McIntyre*, 18 Vt. 466; *Waring v. Smith*, 2 Barb. Ch. (N. Y.) 119; s. c., 47 Am. Dec. 299; *Com. v. Hanion*, 1 Nott. & M. (S. Car.) 554; *Hefelinger v. Shutz*, 16 S. & R. (Pa.) 44.

An alteration of a deed in a material part after execution by the grantor affects only such executory interests as he may have in it, as reserved rents, and conveys the thing granted to the grantee, but discharged from the covenants. *Arrison v. Harmstead*, 2 Pa. St. 191.

Whether an altered deed may be set up in evidence to support the title which passed by it seems to be an unsettled

question. The decisions are both ways. *Chesley v. Frost*, 1 N. H. 145; *Withers v. Atkinson*, 1 Watts (Pa.), 236; *Babb v. Clemson*, 10 S. & R. (Pa.) 419; s. c., 13 Am. Dec. 684; *Newell v. Mayberry*, 3 Leigh. (Va.) 250; s. c., 23 Am. Dec. 261; *Woods v. Hilderbrand*, 46 Mo. 284; and see *Doe v. Hirst*, 3 Stark. 60; *Jackson v. Gould*, 7 Wend. (N. Y.) 364; *Lewis v. Payn*, 8 Cow. (N. Y.) 71; s. c., 18 Am. Dec. 427.

As an alteration in a deed does not affect the title to the thing passed by it, it follows that no alteration, as the tearing off of a seal or the signature, not even the destruction of the deed, can act as a re-conveyance. *Arrison v. Harmstead*, 2 Pa. St. 191; *Miller v. Gilleland*, 19 Pa. St. 119; *King v. Gilson*, 32 Ill. 348; *Woods v. Hilberbrand*, 46 Mo. 284; *Stanley v. Epperson*, 45 Tex. 644; *Parker v. Kane*, 4 Wis. 1; s. c., 65 Am. Dec. 283; *Wilke v. Wilke*, 28 Wis. 296; *Flinn v. Brown*, 6 Rich. (S. Car.) 209; *Tibean v. Tibean*, 19 Mo. 78; *Strawn v. Norris*, 21 Ark. 80; *Fonda v. Sage*, 46 Barb. (N. Y.) 109; *Parshall v. Shirts*, 54 Barb. (N. Y.) 99; *Linker v. Long*, 64 N. Car. 296; *Jackson v. Gould*, 7 Wend. (N. Y.) 364.

But it seems that in some States the destruction or return of an unrecorded deed re-conveys the estate. *Mussey v. Holt*, 24 N. H. 248; s. c., 55 Am. Dec. 234; *Dodge v. Dodge*, 33 N. H. 487; *Sawyer v. Peters*, 50 N. H. 143; *Thompson v. Thompson*, 9 Ind. 323; s. c., 68 Am. Dec. 638; *Parker v. Kane*, 22 How. (U. S.) 1.

A deed fraudulently altered becomes void, and a *bona-fide* purchaser from party altering the deed takes nothing by it. *Wallace v. Harmstead*, 15 Pa. St. 462; s. c., 53 Am. Dec. 603.

But a doubtful alteration in a deed does not warrant its exclusion from evidence. *Davis v. Fuller*, 12 Vt. 178; s. c., 36 Am. Dec. 334.

An alteration in a material part of a bond by a party to it invalidates it as to all the parties not consenting. *Long v. Mason*, 84 N. Car. 15; *Briggs v. Glenn*, 7 Mo. 572.

1. *Ravises v. Alston*, 5 Ala. 297; *Stewart v. Preston*, 1 Fla. 10; s. c., 44 Am. Dec. 619; *Wilkes v. Caulk*, 5 Harr. & J. (Md.) 36; *Boston v. Benson*, 12 Cush. (Mass.) 61; *Wright v. Wright*, 7 N. J. L. 175; s. c., 11 Am. Dec. 546; *Camden Bank v. Hall*, 14 N. J. L. 583; *Campbell v. McArthur*, 2 Hawks. (N.

*Alteration Restored.*—An innocent alteration may be erased before transfer, and a note so altered and restored will be good in the hands of a subsequent assignee.<sup>1</sup>

Car.), 33; s. c., 11 Am. Dec. 737; Britton v. Stanley, 4 Whart. (Pa.) 114.

But it must be done with the consent of all the parties. A material alteration by one of the makers of a note with the consent of the payee without the knowledge or consent of the other makers avoids it as to them. *McVey v. Ely*, 5 Lea (Tenn.), 438. Compare Canon v. Grigsby, 116 Ill. 151.

By consent of all the parties concerned, an alteration may be made in a deed or other specialty after execution, and the law presumes a re-execution when so altered. *Woolley v. Constant*, 4 Johns. (N. Y.) 54; s. c., 4 Am. Dec. 246; *Speake v. U. S.*, 9 Cranch (U. S.), 28; *Barrington v. Bank of Washington*, 14 S. & R. (Pa.) 405; *Smith v. Weed*, 20 Wend. (N. Y.) 184; s. c., 32 Am. Dec. 525; *Berry v. Haines*, 4 Wheat. (U. S.) 17; *Stiles v. Probst*, 69 Ill. 382; *Penny v. Corwaithe*, 18 Johns. (N. Y.) 499; *Tompkins v. Corwin*, 9 Cow. (N. Y.) 255.

In a suit on an administrator's bond which by mistake was made out for \$150 and the word "thousand" afterward inserted, it was held that the intention of all the parties to make it a bond for \$150,000 may be shown. *Jackson v. Johnson*, 67 Ga. 167.

It has, however, also been held that where an interlineation is made in a trust deed by consent of all the parties, said deed as altered must be again executed and delivered. Execution and record of the interlineations only will not legally alter the deed, but leave it as it was. *Collins v. Collins*, 51 Miss. 311; s. c., 24 Am. Rep. 632.

But where a man sold the undivided half of a lot, and some time afterward, the deed not being recorded, sold the other half to the same party and struck in the deed the words "one undivided half" and "redelivered" the deed, it was held to be a good conveyance. *Bassett v. Bassett*, 55 Me. 125.

Alterations or interlineations in a deed, in the handwriting of the grantor, made before or concurrently with its execution, do not affect its validity or operation; alterations made by him, or by his authority, after acknowledgment but before delivery, are inoperative without a new acknowledgment, when their effect is to enlarge the estate or premises conveyed; but when their effect is to limit or restrict the estate or premises

conveyed, and they are made by the grantor in pursuance of an intention expressed at the time of the signature and acknowledgment, they take effect from the subsequent delivery of the deed, and a second acknowledgment is not necessary. *Webb v. Mullins*, 78 Ala. 111.

Where consent to make an alteration has been given by the parties concerned, the alteration must be made according to the specific terms of the consent, and not be extended beyond it. *Coburn v. Webb*, 56 Ind. 96; *Exp. Decker*, 6 Cow. (N. Y.) 59; *Swift v. Barber*, 28 Mich. 503; *Toomer v. Rutland*, 57 Ala. 379.

Parties who have given their consent to an alteration will not be permitted to withdraw it after obligations or rights have accrued under the instrument as altered. *Lemay v. Johnson*, 35 Ark. 225.

In case of a reformed insurance policy there must be evidence to show that a mistake has been made by both parties, and that the unreformed instrument was not such as it was intended to be when issued and received. *McHugh v. Imperial Fire Ins. Co.*, 48 How. (N. Y.) Pr. 230; *Hoffecker v. New Castle Mut. Ins. Co.*, 5 Houst. (Del.) 101.

1. *Shepard v. Whetstone*, 51 Iowa, 457; *Kountz v. Kennedy*, 63 Pa. St. 187; *Horst v. Wagner*, 43 Iowa, 373; s. c., 22 Am. Rep. 255.

Where a written instrument has innocently been altered in a material point, the party who made the alteration being mistaken in his right so to do, and it was afterward restored to its original form, it was held not to avoid the instrument. *Kountz v. Kennedy*, 63 Pa. St. 187; *State Savings Bank v. Shaffer*, 9 Neb. 1; s. c., 31 Am. Rep. 395.

Even where the signature of a note had been torn off and was pasted on again the note was not avoided, it being proved that the mutilation was the innocent act of a child. *Frazer v. Boss*, 66 Ind. 1.

But it is otherwise when the alteration has been fraudulently made. *Citizens' Nat. Bank v. Richmond*, 121 Mass. 110; *Robinson v. Reed*, 46 Iowa, 219; *Warpole v. Ellison*, 4 Houst. (Del.) 322.

Where it was apparent upon the face of an indemnity bond that it had been altered and the alteration restored, no fraudulent intent being shown, it was held not to avoid the bond. *Rogers v. Shaw*, 59 Cal. 260.

*When Done by a Third Party.*—An alteration, although material, cannot invalidate a written instrument when made by a stranger to the contract.<sup>1</sup>

*Deeds.*—And this principle holds good as to deeds and other sealed instruments.<sup>2</sup>

*In Material Part.*—An alteration to be material must be in a material part of the instrument and affect the rights and liabilities of the parties thereto.<sup>3</sup>

The accidental erasure of the signature or seal of a surety does not avoid a bond as to the remaining sureties, nor would the restoration of the signature have such effect. *Rhoads v. Frederick*, 8 Watts (Pa.), 448.

1. *Bigelow v. Stilphen*, 35 Vt. 521; *Nichols v. Johnson*, 10 Conn. 192; *Union Nat. Bank v. Roberts*, 45 Wis. 373; *Boyd v. McConnell*, 10 Humph. (Tenn.) 68; *Lee v. Alexander*, 9 B. Mon. (Ky.) 25; *Bellogs v. Weeks*, 41 Vt. 590; *Robertson v. Hay*, 91 Pa. St. 242; *Williams v. Moseley*, 2 Fla. 304; *Ford v. Ford*, 17 Pick. (Mass.) 418; *Bridges v. Winters*, 42 Miss. 135; *Cochran v. Nebeker*, 48 Ind. 459; *Major v. Hansen*, 2 Biss. (U. S.) 195; *Gorden v. Robertson*, 48 Wis. 493.

And when the spoliation be done by an agent of one of the parties, it will not avoid the contract if the agent had no express or implied authority to do it. *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501; *Collins v. Makepeace*, 13 Ind. 448; *Hunt v. Gray*, 35 N. J. L. 227; s. c., 10 Am. Rep. 232; *Bigelow v. Stilphen*, 35 Vt. 521; *Miller v. Reed*, 3 Grant's Cas. (Pa.) 51; s. c., 27 Pa. St. 244; s. c., 67 Am. Dec. 459; *Terry v. Hazlewood*, 1 Duv. (Ky.) 104. But *Compare Morrison v. Welty*, 18 Md. 169.

A note was materially altered in the amount, and the holder, who could neither read nor write, proved that to his knowledge the note had never been out of his possession, and testified that the alteration was made neither by him nor his agent, nor by his knowledge or consent. *Held*, that he could recover the original amount. *Drum v. Drum*, 133 Mass. 566.

In the absence of fraud even the consent of the party claiming under it will not invalidate the instrument. *Thornton v. Appleton*, 29 Me. 298; *Adams v. Frye*, 3 Metc. (Mass.) 103; *Smith v. Dunham*, 8 Pick. (Mass.) 246; *Marshall v. Gogler*, 10 S. & R. (Pa.) 164; *Willard v. Clarke*, 7 Metc. (Mass.) 435; *Rollins v. Bartlett*, 20 Me. 319.

In case of spoliation recovery can be had upon the instrument in its unaltered

form if this can be ascertained, or upon proof of its original condition. *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119; s. c., 47 Am. Dec. 299; *Boyd v. McConnell*, 10 Humph. (Tenn.) 68.

Defacement of the seal of a bond by a stranger will not invalidate the bond. *Evans v. Williamson*, 79 N. Car. 86.

A *bona-fide* holder of a promissory note, from which the place where it was payable, has been erased by an unauthorized person and without his knowledge, can recover against the maker. *Major v. Hansen*, 2 Biss. (U. S.) 195.

2. *Rees v. Overbaugh*, 6 Cow. (N. Y.) 746; *Nichols v. Johnson*, 10 Conn. 192; *Rhoades v. Frederick*, 8 Watts (Pa.), 448; *Medlin v. Platte Co.*, 8 Mo. 235; s. c., 40 Am. Dec. 135; *Lee v. Alexander*, 9 B. Mon. (Ky.) 25; *Cutts v. U. S.*, 1 Gall. (U. S.) 69; *Barrington v. Bank of Washington*, 14 S. & R. (Pa.) 405; *Lubbering v. Kohlbrecher*, 22 Mo. 596.

The alteration of a bond by an officer or his deputy who is by law the mere custodian of it will not destroy its validity. *State v. Berg*, 50 Ind. 496. See *Dover v. Robinson*, 64 Me. 183.

The insertion by another of the name of an additional grantee without the consent of the original grantee is a mere spoliation which does not affect the rights of the latter even as against a *bona-fide* purchaser from the person whose name was so inserted, unless the real grantee has been guilty of fraud or negligence whereby the purchaser was misled. *John v. Hatfield*, 84 Ind. 75.

3. *Blair v. Bank of Tennessee*, 11 Humph. (Tenn.) 84; *Newell v. Mayberry*, 3 Leigh. (Va.) 250; s. c., 23 Am. Dec. 261; *Kincannon v. Carroll*, 9 Yerg. (Tenn.) 11; s. c., 30 Am. Dec. 391; *English v. Breneman*, 5 Ark. 377; s. c., 41 Am. Dec. 96; *Humphreys v. Crane*, 5 Cal. 173; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165; s. c., 23 Am. Dec. 674.

The fact of the alteration in a material part of an instrument is sufficient to destroy the identity of the instrument even when made with an honest intent and under a mistaken idea of right.

**Change of Parties.**—Any change in the personality, number, or relations of the parties to an instrument is as a general rule a material alteration.<sup>1</sup>

State Savings Bank *v.* Shaffer, 9 Neb. 1; s. c., 31 Am. Rep. 395; Booth *v.* Powers, 56 N. Y. 22; Fay *v.* Smith, 1 Allen (Mass.), 477; s. c., 79 Am. Dec. 752; Evans *v.* Foreman, 60 Mo. 449; German Bank *v.* Dunn, 62 Mo. 79; Moore *v.* Hutchinson, 69 Mo. 429; Draper *v.* Wood, 112 Mass. 315; s. c., 17 Am. Rep. 92.

One who has been intrusted with a promissory note by the maker to negotiate it has no implied authority to make alterations in any material part of the instrument. He cannot even make an alteration favorable to the maker. Coburn *v.* Webb, 56 Ind. 96; Lemay *v.* Williams, 32 Ark. 166.

And the fact that the agent is one of the joint makers does not alter the principle. Schnewind *v.* Hackett, 54 Ind. 248.

1. 2 Daniel on Neg. Instr. § 1387.

An alteration in the name of the payee is in a material part of the note. So held in Stoddard *v.* Penniman, where in a note which read "payable to myself" the word "myself" was erased and another name substituted. 108 Mass. 366; s. c., 11 Am. Rep. 363; Patch *v.* Washburn, 16 Gray (Mass.), 82; Brown *v.* Butler, 99 Mass. 179; Clapp *v.* Rice, 13 Gray (Mass.), 403; Cumberland Bank *v.* Hall, 1 Hals. (N. J.) 262; Davis *v.* Bauer, 41 Ohio St. 257; Broughton *v.* Fuller, 9 Vt. 373; Bell *v.* Makyn, 29 N. Western Repr. (Iowa), 331.

A change in the name of a maker or a surety or an indorser is a material alteration. Broughton *v.* Fuller, 9 Vt. 373; German Bank *v.* Dunn, 62 Mo. 79; Stoddard *v.* Penniman, 108 Mass. 366; s. c., 11 Am. Rep. 363; First Nat. Bank *v.* Fricke, 75 Mo. 178; s. c., 42 Am. Rep. 395.

The act of an indorsee of negotiable paper in changing a special indorsement to himself so that it shall be in blank cannot alter the title by which he holds the paper. Minor *v.* Bewick, 55 Mich. 491.

The addition of the name of a maker to an instrument already signed by several makers is a material alteration. It discharges the original makers and binds the additional signer. Hamilton *v.* Hooper, 46 Iowa, 515; Dickerman *v.* Miner, 43 Iowa, 508; Hall *v.* McHenry, 19 Iowa, 521; Wallace *v.* Jewell, 21 Ohio (N. S.) 163; Lunt *v.* Silver, 5 Mo.

App. 186; Haskell *v.* Champion, 30 Mo. 136; Henry *v.* Coats, 17 Ind. 161; Shipp *v.* Suggett, 9 B. Mon. (Ky.) 5. Compare Brownell *v.* Winnie, 29 N. Y. 400; Mersman *v.* Werges, 112 U. S. 139.

In this last case it was held that the addition of a wife's name to a note by the partner of her husband without the knowledge or consent of either husband or wife was immaterial, the note being secured by a mortgage on her land executed by herself and her husband.

The addition of a name as a maker when the instrument is signed by only one maker is in some cases regarded as a material, in others as an immaterial, alteration. In the latter case the party whose name is added is regarded as a guarantor. Partridge *v.* Colby, 19 Barb. (N. Y.) 248; McVean *v.* Scott, 46 Barb. (N. Y.) 379; Muir *v.* Demaree, 12 Wend. (N. Y.) 468; Chappell *v.* Spencer, 23 Barb. (N. Y.) 584; Brownell *v.* Winnie, 29 N. Y. 400; McCaughey *v.* Smith, 27 N. Y. 39; Card *v.* Miller, 1 Hun (N. Y.), 504; Miller *v.* Finley, 26 Mich. 249; Gano *v.* Heath, 36 Mich. 441; Sullivan *v.* Rudisill, 63 Iowa, 158.

Where a mortgagee fraudulently obtained the signature of a wife to a mortgage which was originally executed by the husband alone, with the understanding that the wife was not to join him, and the mortgagee so altered the mortgage and acknowledgment as to make it a mortgage executed by them jointly, it was held to be a material alteration which avoided the mortgage. Cutler *v.* Rose, 35 Iowa, 456.

The addition of new sureties without the consent of the original surety is a material alteration which discharges the not consenting surety. Bowers *v.* Briggs, 20 Ind. 139; McVean *v.* Scott, 46 Barb. (N. Y.) 379.

But it does not discharge the principal. Miller *v.* Finley, 26 Mich. 249. But see Ward *v.* Hackett, 30 Minn. 150.

The erasure of the name of one obligee or obligor and the substitution of another avoids a bond or other written instrument as to the parties not assenting. Smith *v.* Weld, 2 Pa. St. 54; Dolbier *v.* Norton, 17 Me. 307; Davis *v.* Coleman, 7 Ired. (N. Car.) 424; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; State *v.* Polke, 7 Blackf. (Ind.) 27; Briggs *v.* Glenn, 7 Mo. 572; Barrington *v.* Bank of Washington, 14 S. & R. (Pa.) 405; Harper *v.*

*Alterations Changing the Character of the Instrument.*—An alteration in a written instrument which has the effect of changing its character is material. So making a joint and several note from a joint note by interlining the words "jointly and severally," or changing a joint and several note to a joint note by changing the words "I promise" to "We promise."<sup>1</sup>

State, 7 Blackf. (Ind.) 61; Gillett v. Sweat, 1 Gilm. (Ill.) 475; Martin v. Thomas, 24 How. (U. S.) 315; Smith v. U. S., 2 Wall. (U. S.) 219.

And the same principle holds good as to sureties. State v. Polke, 7 Blackf. (Ind.) 27; McCramer v. Thompson, 21 Iowa, 244; State v. Craig, 58 Iowa, 238; Hall v. McHenry, 19 Iowa, 521; Farmers & Traders' Bank v. Lucas, 26 Ohio, 385.

The erasure of the word "surety" added to the name of one of the subscribers was held to be immaterial in some cases. Vance v. Collins, 6 Cal. 436.

But in other cases to be material. Rogers v. Tapp, C. L. J. (Tex.) vol. 14, p. 38.

Writing the word "security" over an indorser's name without his authority is a material alteration and discharges the indorser. Robinson v. Reed, 46 Iowa, 219.

An alteration which has the effect of changing an indorser into a guarantor is material. Belden v. Hann, 61 Iowa, 42.

Or of changing an indorser into a payee. Aldrich v. Smith, 37 Mich. 468.

In general, any alteration which enlarges the liabilities of the obligors or sureties is material. White v. Johns, 24 Minn. 387; Rudesill v. County Court of Jefferson, 85 Ill. 446.

Although the addition of the name of a witness to a note as a general rule is not a material alteration in States where an unwitnessed note is barred by the statute of limitations by a less number of years than a witnessed note, such addition will be material. Eddy v. Bond, 19 Me. 461; s. c., 36 Am. Dec. 767; Thornton v. Appleton, 29 Me. 298; Brackett v. Mountfort, 11 Me. 115; Willard v. Clarke, 7 Metc. (Mass.) 435; Smith v. Dunham, 8 Pick. (Mass.) 246; Wheelock v. Freeman, 13 Pick. (Mass.) 165; s. c., 23 Am. Dec. 674; Com. v. Emigrants' Bank, 98 Mass. 12; Homer v. Wallis, 11 Mass. 309; s. c., 6 Am. Dec. 169.

Adding the name of a witness to a bond or other sealed instrument already witnessed avoids it. Adams v. Frye, 3 Metc. (Ky.) 107; Marshall v. Gongler, 10 S. & R. (Pa.) 164; Henning v. Werkheiser, 8 Pa. St. 518.

Not so when there is no fraudulent in-

tent. Adams v. Frye, 3 Metc. (Mass.) 103; Blackwell v. Lane, 4 Dev. & B. L. (N. Car.) 113; s. c., 32 Am. Dec. 675.

Where attesting witnesses to a bond saw only one of the two obligors attach his signature to it and signed a general attestation, it was held that if it was done innocently and without any fraudulent intent it would not avoid the deed. Foust v. Reno, 8 Pa. St. 378; Fritz v. Commissioners, 17 Pa. St. 130.

Tearing off the name of a subscribing witness is a material alteration. Sharpe v. Bagwell, 1 Dev. Eq. (N. Car.) 115.

1. Draper v. Wood, 112 Mass. 315; s. c., 17 Am. Rep. 92; Humphreys v. Guilford, 13 N. H. 385; s. c., 38 Am. Dec. 499; Hemmenway v. Stone, 7 Mass. 58; Eckert v. Louis, 84 Ind. 99.

Alterations which make a non-negotiable note negotiable, or the reverse, or which change the manner of negotiability, are material. So will the addition of the words "to bearer" or "to order," or the substitution of the words "to bearer" for "to order," make a negotiable instrument void. Bruce v. Westcott, 3 Barb. (N. Y.) 274; Booth v. Powers, 56 N. Y. 22, 30; Johnson v. Bank of U. S., 2 B. Mon. (Ky.) 310; State v. Stratton, 27 Iowa, 420; Needles v. Shaffer, 60 Iowa, 65; Brown v. Straw, 6 Neb. 536; McAuley v. Gordon, 64 Ga. 221; Scott v. Walker, Dudley (Ga.), 243; Union Nat. Bank v. Roberts, 45 Wis. 373; Pepoon v. Stagg, 1 Mott & McC. (S. Car.) 102; Davis v. Carlisle, 6 Ala. 707; Toomer v. Rutland, 57 Ala. 379; McCoy v. Lockwood, 71 Ind. 319; Cochran v. Nebeker, 48 Ind. 459; Marshal v. Drescher, 68 Ind. 359; Mech. Bank v. Valley Packing Co., 70 Mo. 643; Belknap v. Bank of N. A., 100 Mass. 376; Jones v. Fales, 4 Mass. 245; Morehead v. Parkersburgh Nat. Bank, 5 W. Va. 74.

It has been held, however, that changing the words "to order" for "to bearer" is not a material alteration. Flint v. Craig, 59 Barb. (N. Y.) 319.

Nor that it would invalidate a bill of exchange to add after the name of the payee the words "or bearer." McLaughlin v. Venine, 2 Wy. 1.

And it will not be a material alteration to add the words "or bearer" to a note which no words can make negotiable; as,



*Place of Payment.*—An alteration in the place of payment of a promissory note is material, and avoids it as to parties not consenting, even in the hands of a *bona-fide* holder for value who has no notice of the alteration. Where the maker so alters the instrument without the consent of the indorser, the latter will be discharged; and if made by the payee without the knowledge or consent of the maker, it will discharge him.<sup>1</sup>

*Time of Payment.*—A change in the time of payment of a negotiable instrument is a material alteration, and it does not matter whether such change delays or accelerates the payment.<sup>2</sup>

*Alteration in Principal.*—Any alteration in the amount of the principal is material, whether it increases or decreases the amount.<sup>3</sup>

a note expressly made subject to a condition. *Goodenow v. Curtis*, 33 Mich. 505.

Adding a seal to the signature of the maker of a note, or to the signature of one of several makers of a note, or detaching the seal of a bond, has the effect of changing the character of the instrument, and is a material alteration which avoids it. *U. S. v. Linn*, 1 How. (U. S.) 104; *Marshall v. Gongler*, 10 S. & R. (Pa.) 164; *Vaughan v. Fowler*, 14 S. Car. 355; s. c., 37 Am. Rep. 731; *Piercy v. Piercy*, 5 W. Va. 199; *Biery v. Haines*, 5 Whart. (Pa.) 563; *Powers v. Ware*, 2 Pick. (Mass.) 451; *Rawson v. Davidson*, 49 Mich. 607.

A defacement of the seal of a bond avoids the instrument, if done by the obligee. *Evans v. Williamson*, 79 N. Car. 86.

1. *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391; s. c., 10 Am. Dec. 239; *White v. Haas*, 32 Ala. 430; s. c., 70 Am. Dec. 548; *Nazro v. Fuller*, 24 Wend. (N. Y.) 374; *Whiteside v. Northern Bank of Ky.*, 10 Bush (Ky.), 501; *Townsend v. Star Wagon Co.*, 10 Neb. 615; *Bank of Ohio Valley v. Lockwood*, 13 W. Va. 392; *Sudler v. Collins*, 2 Hous. (Del.) 538; *Morehead v. Parkersburgh Nat. Bank*, 5 W. Va. 74; *Hill v. Cooley*, 46 Pa. St. 259; *Oakey v. Wilcox*, 3 How. (Miss.) 330; *Charlton v. Reed*, 61 Iowa, 166; *Adair v. Egland*, 58 Iowa, 314; *McCoy v. Lockwood*, 71 Ind. 319.

Where, however, a negotiable instrument has been made payable at a particular town or city, without designating a specified place, it will be no material alteration for the acceptor to insert the name of a bank or other business place as the place of payment, provided such bank is situated in the same town or city. *Troy City Bank v. Lauman*, 19 N. Y. 477; *Niagara Dist. Bank v. Fairman*, 31 Barb. (N. Y.) 403; *Shuler v. Gillette*, 12

Hun (N. Y.), 280; *Walker v. Bank of State*, 13 Barb. (N. Y.) 636; *Todd v. Bank of Ky.*, 3 Bush (Ky.), 626.

2. *Wyman v. Yeomans*, 84 Ill. 403; *Lisle v. Rogers*, 18 B. Mon. (Ky.) 528; *Hocker v. Jamison*, 2 Watts & S. (Pa.) 438; *Heywood v. Perrin*, 10 Pick. (Mass.) 228; *King v. Hunt*, 13 Mo. 97; *English v. Breneman*, 5 Ark. 377; s. c., 41 Am. Dec. 96.

The same principle will be applied to deeds and other sealed instruments. *Stayner v. Joice*, 82 Ind. 35; s. c., 47 Am. Dec. 299; *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119; s. c., 47 Am. Dec. 299.

An alteration which changes the time of payment only for a single day is material. *Kennedy v. Lancaster Co. Bank*, 18 Pa. St. 347; *Stephen v. Graham*, 7 S. & R. (Pa.) 505; s. c., 10 Am. Dec. 485.

3. *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Goodman v. Eastman*, 4 N. H. 455; *Stephens v. Graham*, 7 S. & R. (Pa.) 505; s. c., 10 Am. Dec. 485; *Hewins v. Cargill*, 67 Me. 554; *State Savings Bank v. Shaffer*, 9 Neb. 1; *Chism v. Toomer*, 27 Ark. 108; *Ætna Bank v. Winchester*, 43 Conn. 391; *Portage Co. Bank v. Lane*, 8 Ohio St. 405; *Greenfield Bank v. Stowell*, 123 Mass. 196; s. c., 25 Am. Rep. 67; *Woolfolk v. Bank of America*, 10 Bush (Ky.), 504.

If made by one of several makers of a note it will discharge the others if not consenting. *Greenfield Bank v. Stowell*, 123 Mass. 196; s. c., 25 Am. Rep. 67; *Hewins v. Cargill*, 67 Me. 554.

An indorsement of a pretended partial payment, before or at the time of its delivery to the payee, was held to be a material alteration which discharges the surety. *Johnston v. May*, 76 Ind. 293.

But, where, pending a suit upon a note, an agreement was entered into that the holder should credit \$50 on the note, if the balance was paid at a certain date,

*Consideration.*—Inserting or erasing words expressive of a stated consideration is a material alteration.<sup>1</sup>

*Description of Property.*—Any alteration in the description of property, by which payment is secured, in a mortgage or other written instrument, avoids the instrument.<sup>2</sup>

*Alterations in Interest.*—An alteration making a note bear interest which it originally did not, or in general any alteration regarding the interest, is material.<sup>3</sup>

and a payment of \$50 was indorsed on the note; but where the maker failed to pay at the appointed time and the indorsement of credit was erased, it was held not to avoid the note. *Chamberlin v. White*, 79 Ill. 549.

Inserting, erasing, or altering words describing the medium of payment is material, and avoids a negotiable instrument, as where the words "gold" or "specie" are inserted or erased after dollars. *Bogarth v. Breedlove*, 39 Tex. 561; *Darwin v. Rippey*, 63 N. Car. 318; *Church v. Howard*, 17 Hun (N. Y.), 5; *Springfield Bank v. Merrick*, 14 Mass. 322.

And where, in an application for a loan from an insurance agency, the agent through whom the loan was negotiated changed the words "in drafts to order of H. G. A." to "current funds," after the applicant had signed the application, and went to the Home Office, collected the funds, and absconded, the alteration was held material so as to avoid the instrument and absolve the applicant. *Angle v. Northwestern Ins. Co.*, 92 U. S. 330.

The same principle applies where the amount is payable in merchandise. Any alteration in the description of the goods will invalidate the instrument. As inserting the word "young" before "merchandise neat stock." *Martindale v. Follett*, 1 N. H. 95. Or "good hard" before "wood." *Schwalm v. McIntyre*, 17 Wis. 232.

An alteration in the amount of a check avoids it. A bank which pays a check which it had certified, but which, either before or after the certification, was altered by raising the amount, is not estopped from recovering back the money paid. The bank is not bound to know anything more than the drawer's signature, and in the absence of any circumstance which inflicts injury upon another party there is no reason why the bank should not be reimbursed. Its certification of the check does not preclude it from showing an alteration. *Nat. Bank of Commerce v. Nat. Mech. Bank Assoc.*, 55 N. Y. 211; s. c., 14 Am. Rep. 232; *Security Bank v. Bank*, 67 N. Y. 458;

*Marine Bank v. City Bank*, 59 N. Y. 67; *Espy v. Bank of Cincinnati*, 18 Wall. (U. S.) 604; *Redington v. Woods*, 45 Cal. 406; *Nat. Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Third Nat. Bank v. Allen*, 59 Mo. 310; *Parke v. Roser*, 67 Ind. 500. But compare *Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 189; *Helwege v. Hibernia Nat. Bank*, 28 La. Ann. 520.

1. *Low v. Argrove*, 30 Ga. 129; *Benjamin v. McConnell*, 4 Gill (Ill.), 536; s. c., 46 Am. Dec. 474; *Wait v. Pomeroy*, 20 Mich. 425.

An increase of the consideration of a mortgage by a mortgagee after delivery, without the knowledge of the mortgagor, avoids it. *Johnson v. Moore*, 33 Kan. 90.

2. *Marcy v. Dunlap*, 5 Lans. (N. Y.) 365. In this case a married woman executed a mortgage, to secure a debt of her husband, upon property which she supposed belonged to her. After delivery the plaintiff discovered that the property was described by the wrong number, and applied to defendants' attorney to have it rectified. Without the knowledge of defendant, but by his attorney, and in the presence of plaintiff's attorney, the alteration was made. *Held*, that the alteration avoided the mortgage.

An officer taking the acknowledgment of a deed or mortgage cannot, after the execution of the instrument, change the description of the premises mortgaged or conveyed without the assent of the mortgagor or grantor, even to make the description conform to the contract as he understood it. *Perean v. Frederick*, 17 Neb. 117; *Enterprise Transit Co. v. Sheedy*, 103 Pa. St. 492; s. c., 49 Am. Rep. 130.

Inserting words making a note a charge upon the separate estate of a married woman avoids it. *Reeves v. Pierson*, 23 Hun (N. Y.), 185; *Taddiken v. Cantrell*, 69 N. Y. 597.

3. *Washington Savings Bank v. Ecky*, 51 Mo. 272; *Fulmer v. Seitz*, 68 Pa. St. 237; s. c., 8 Am. Rep. 172; *Neff v. Horner*, 63 Pa. St. 327; s. c., 3 Am. Rep. 555; *Kountz v. Kennedy*, 63 Pa. St. 187; s. c., 3 Am. Rep. 541; *McGrath v. Clark*, 56

*Date.*—An alteration in the date of a negotiable instrument avoids it as against prior parties and sureties even in the hands of an innocent holder for value.<sup>1</sup>

N. Y. 34; s. c., 15 Am. Rep. 372; Schwarz v. Oppold, 74 N. Y. 307; Kennedy v. Crandell, 3 Lans. (N. Y.) 1; Coburn v. Webb, 56 Ind. 96; Dietz v. Harder, 72 Ind. 208; Locknane v. Emmerson, 11 Bush (Ky.), 69; Warpole v. Ellison, 4 Houst. (Del.) 322; Davis v. Henry, 13 Neb. 497; Waterman v. Vose, 43 Me. 504; Lewis v. Shepherd, 1 Mackey (D. C.), 46; Fay v. Smith, 1 Allen (Mass.), 477; s. c., 79 Am. Dec. 752; Kennedy v. Moore, 17 S. Car. 464; Brown v. Jones, 3 Port. (Ala.) 420; Lamar v. Brown, 56 Ala. 157; Holmes v. Trumper, 22 Mich. 427; s. c., 7 Am. Rep. 661.

Where, after a party has signed a note as accommodation indorser, the words "interest on this note has been paid to maturity" are without his knowledge stricken out, he cannot be held on the note. Hert v. Oehler, 80 Ind. 83.

So is altering the rate of interest in a note material. Moore v. Hutchinson, 69 Mo. 429; Ivory v. Michael, 33 Mo. 398; Evans v. Foreman, 60 Mo. 449; Whitmer v. Frye, 10 Mo. 348; Schneewind v. Hackett, 54 Ind. 248; Hart v. Clouser, 30 Ind. 210; Bowman v. Mitchell, 79 Ind. 84; Harsh v. Klepper, 28 Ohio St. 200; Lee v. Starbird, 55 Me. 491; Kilkelly v. Martin, 34 Wis. 525; Holmes v. Trumper, 22 Mich. 427; s. c., 7 Am. Rep. 661; Craighead v. McLoney, 99 Pa. St. 211.

Increasing the rate of interest in a note before delivery by one joint-payee avoids it as to a surety not assenting. Thompson v. Massie, 41 Ohio St. 307.

Changing the time when interest should be paid avoids it. Neff v. Horner, 63 Pa. St. 327; Benedict v. Miner, 58 Ill. 19; Boalt v. Brown, 13 Ohio N. S. 364; Franklin Life Ins. Co. v. Courtney, 60 Ind. 134; Dewey v. Reed, 40 Barb. (N. Y.) 16; Glover v. Robbins, 49 Ala. 219; Fay v. Smith, 1 Allen (Mass.), 477; s. c., 79 Am. Dec. 752; Draper v. Wood, 112 Mass. 315; s. c., 17 Am. Rep. 92; Blakeley v. Johnson, 13 Bush (Ky.), 197; s. c., 26 Am. Rep. 250; Patterson v. McNeeley, 16 Ohio St. 348; Capital Bank v. Armstrong, 62 Mo. 59; Brooks v. Allen, 62 Ind. 401. But compare Leonard v. Phillips, 39 Mich. 182.

Where a certificate of deposit was given "payable thirty days after date, with — per cent per annum," and there was no agreement to pay ten per cent, and the holder, when about to sell it to plaintiff, and to aid such sale, represented that the

agreement was for ten per cent, and that the blank was left by mistake, whereupon, in his presence and that of plaintiff, plaintiff's agent inserted the figures "10" in the blank, and plaintiff took the certificate, the alteration was held to be fraudulent and to avoid the certificate. Woodworth v. Anderson, 63 Iowa, 503.

The addition of the words "at ten per cent" to a bond without the consent of the parties is a material alteration and vacates the same. Long v. Mason, 84 N. Car. 15.

1. Britton v. Dierker, 46 Mo. 591; Brown v. Straw, 6 Neb. 536; Overton v. Mathews, 35 Ark. 147; s. c., 37 Am. Rep. 9; Wood v. Steele, 6 Wall. (U. S.) 80; Aubuchon v. McKnight, 1 Mo. 312; s. c., 13 Am. Dec. 502; Lisle v. Rogers, 18 B. Mon. (Ky.) 528; Bank of Commonwealth v. McChord, 4 Dana (Ky.), 191; Stephen v. Graham, 7 S. & R. (Pa.) 505; s. c., 10 Am. Dec. 485; English v. Breneman, 5 Ark. 377; s. c., 41 Am. Dec. 96; Crawford v. West Side Bank, 100 N. Y. 50.

Altering the date of a note already due, so as to make it payable at a future date, will avoid it as to parties not assenting. Owings v. Arnot, 33 Mo. 406.

A promissory note providing for interest after maturity was by agreement of the parties thereto dated at a time subsequent to the real date of its execution; but a subsequent holder, without the knowledge or consent of the maker, struck out the agreed date and inserted the true one. Held, to be a material alteration. Hamilton v. Wood, 70 Ind. 306.

Where a promissory note was delivered to the payee with a blank for the date, and with authority to fill up the blank, and where the payee filled up the blank, and afterward, while the note was yet in his possession, changed the date and indorsed it to a bona-fide holder for value, the note was held to be invalidated as to the maker by the alteration. Mitchell v. Ringgold, 5 Harr. & J. (Md.) 159; s. c., 5 Am. Dec. 433.

This principle extends to the place of date. So held where the addition of the words "Washington, D. C." was made to the signature of the maker of a note really made in Pennsylvania with intent to make it negotiable according to the law of the District of Columbia. Commercial Farmers' Bank v. Patterson, 2 Cranch. C. Ct. 346; Mahaiwe Bank v. Douglass, 31 Conn. 170.

**Memoranda.**—In general, erasing, cutting off, or adding any memorandum which affects the note in a material part is material and will avoid a note.<sup>1</sup>

**In General.**—In general it can be said that any alteration which affects or alters the rights or obligations of any of the parties to a written instrument or which alters it to such an extent that it is no longer the contract which the parties signed, is material.<sup>2</sup>

1. *Benedict v. Cowden*, 49 N. Y. 396; s. c., 10 Am. Rep. 382; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165; s. c., 23 Am. Dec. 674; *Wait v. Pomeroy*, 20 Mich. 425; *Johnson v. Heagan*, 23 Me. 329; *Palmer v. Sargent*, 5 Neb. 233; s. c., 25 Am. Rep. 479.

Where a note is written on the same paper with a contract or an account stated, modifying the note or its consideration, and the note is torn off and transferred as a separate instrument, it is a material alteration. *Davis v. Henry*, 13 Neb. 497; *Scofield v. Ford*, 26 Iowa, 370; *State v. Stratton*, 27 Iowa, 420; s. c., 1 Am. Rep. 282; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165; s. c., 23 Am. Dec. 674; *Cochran v. Nebeker*, 48 Ind. 459.

But if a memorandum be so attached to a note that it can easily be separated without defacing the note, the note will not be avoided. *Zimmermann v. Rote*, 75 Pa. St. 188; *Noll v. Smith*, 64 Ind. 511; *Cornell v. Nebeker*, 58 Ind. 425. But compare *Wait v. Pomeroy*, 20 Mich. 425; *Benedict v. Cowden*, 49 N. Y. 396; *Gerrick v. Glines*, 56 N. H. 9.

The addition of a memorandum to a note by which it is materially affected will also avoid it. So where a memorandum was attached to the foot of a note stating that it was secured by a mortgage, the payee, in discovering that the note was not so secured, may rescind the contract and demand his money at once. *Shaw v. Meth. E. Society*, 8 Metc. (Mass.) 223.

Words on the back of a note are not *prima facie* a part of the body thereof, but are presumed to be written after the note is completed. Any alteration in such memorandum need not be explained in a suit on the note, unless it be shown that they form part thereof. *Bay v. Shrader*, 50 Miss. 326; *Krouskop v. Shoutz*, 51 Wis. 204; *Com. v. Ward*, 2 Mass. 397.

Technical indorsements on the back of a note, or a memorandum annexing a condition to the payment, which was shown to have been on the instrument when delivered, form a substantial part of it, and an erasure of them will avoid the note. *Mech. Bank v. Valley Pack-*

*ing Co.*, 70 Mo. 643; *McElroy v. Baldwin*, 7 Mo. 587; *Blake v. Coleman*, 22 Wis. 415.

Detaching a memorandum from a promissory note will, however, be a material alteration only when it affects the note in a material part. The maker of a promissory note after signing, but before delivery, added the words "upon condition." The payee afterward detached the words. *Held*, that the words were immaterial and void of legal meaning, and that the alteration also was immaterial. *Palmer v. Sargent*, 5 Neb. 233; s. c., 25 Am. Rep. 479.

A testator left in his note-book a note for \$20,000, payable to his grandson. On the stub was, besides the date, the amount, and the name of the payee, the following memorandum: "To make the amount the same as C. W. C." The grandson tore off the stub and negotiated the note. *Held*, that the tearing off of the memorandum was not a material alteration, it being proved that C. W. C. had also received a present of \$20,000. *Cowee v. Cornell*, 75 N. Y. 91.

A party signed a bond with a condition, and the condition was afterward detached without the knowledge or consent of the obligor, so as to make his undertaking to pay appear absolute. *Held*, to be a material alteration which avoided the bond even in the hands of a *bona-fide* holder. *Longwell v. Day*, 1 Mich. (N. P.) 286.

2. Where a bill of sale is wilfully altered by a vendee so as to include property not exempt from execution, such bill of sale is not admissible in evidence to the jury. The alteration renders the instrument null and void. *Babb v. Clemson*, 10 S. & R. (Pa.) 419; s. c., 13 Am. Dec. 684.

The addition of the words "without defalcation or set-off" is a material alteration and avoids a note. *Davis v. Carlisle*, 6 Ala. 707.

Writing "waiver of demand and notice" over the name of an indorser and without his authority, is material, and discharges the indorser. *Farmer v. Rand*, 16 Me. 453.

Adding the words "with difference"

4. **Whether Material or Not.**—*Question of Law and of Fact.*—It is a matter of law, and consequently for the court to decide, whether an alteration is material or not; but whether an alteration has been made, and by whom and when, are matters of fact for the jury.<sup>1</sup>

**Burden of Proof.**—Whether, on the production of a written instrument which obviously has been altered, it is incumbent on the party offering it in evidence to explain this appearance or not, is a vexed question. The books are full of diverse decisions. Four different rules are generally stated: 1. That an alteration apparent on the face of the writing raises no presumption either way, but the question is for the jury; 2. That it raises a presumption against the writing, and requires, therefore, some explanation to render it admissible; 3. That it raises such a presumption when it is suspicious, otherwise not; 4. That it is presumed in the ab-

exchange," although done without a fraudulent intent and under a mistake of right, is material. *Merrick v. Boury*, 4 Ohio St. 60.

If a petition for a road is altered, after signature, in a part not material nor affecting the general object sought by the petitioner, though without the knowledge of one of them, he is not discharged from his liability to contribute to the expenses for which he would otherwise be liable. But he will be discharged if the alteration is material, so that the party is thereby injuriously affected or his expectations defeated. *Jewett v. Hodgdon*, 3 Greenl. (Me.) 103; *Irvin v. Turnpike Co.*, 2 P. & W. (Pa.) 466; s. c., 23 Am. Dec. 53; *Patridge v. Balard*, 2 Me. 50; *Jewett v. Cornforth*, 3 Me. 107.

Inserting in a bond for title a provision that the purchaser shall have immediate possession is a material alteration, and avoids the bond if done by the obligee without the assent of the obligor, even though the addition is according to the actual contract. *Kelley v. Trumble*, 74 Ill. 428.

An alteration in a tax-collector's bond, made without the knowledge of the obligor, to have it correspond with a reassessment and reduction for overlay, is material, and prevents any action on it. *Doane v. Eldridge*, 82 Mass. 254.

A bond given by a sewing-machine agent to his principal and signed by a surety contained the condition that the agent should have on hand at one time no more than six sewing-machines. Afterward, without the consent of the surety, the contract between the agent and his principal was altered, and he was allowed to have more than six machines on hand. *Held*, that this alteration of

the contract discharged the surety. *Victor Sewing Machine Co. v. Scheffler*, 61 Cal. 530.

A guarantor upon a contract of agency cannot be held if after signing a draft of the agreement to be submitted to the principal the latter so alters it as to enlarge the agent's liability, as by requiring him to become responsible for more property or less salable property than at first contemplated. *Osborne v. Van Houten*, 45 Mich. 444.

Where the administrator of a creditor draws an order on a debtor to pay a certain sum, which will be credited on a certain debt, the debtor has no right, without the consent of the administrator, to alter the order so as to make the payment on another debt, and if he pays the order, it will be applied in law to the debt designated by the drawer in the order. *Long v. Miller*, 93 N. Car. 233.

1. *Stahl v. Berger*, 10 S. & R. (Pa.) 170; s. c., 13 Am. Dec. 666; *Stephens v. Graham*, 7 S. & R. (Pa.) 508; s. c., 10 Am. Dec. 485; *Bowers v. Jewell*, 2 N. H. 543; *Steele v. Spencers*, 1 Peters (U. S.), 552; *State v. Dean*, 40 Mo. 464; *Keen's Exr. v. Monroe*, 75 Va. 424; *Jones v. Alley*, 4 Iowa, 181; *Oliver v. Hawley*, 5 Neb. 439; *Huston v. Plato*, 3 Colo. 402; *Overton v. Mathews*, 35 Ark. 147; *Rogers v. Vosburgh*, 87 N. Y. 228; *Cass County Bank v. Morrison*, 17 Neb. 341; s. c. 52 Am. Rep. 417; *Western Building Assoc. v. Fitzmaurice*, 7 Mo. App. 283; *Briscoe v. Reynolds*, 51 Iowa, 673; *Palmer v. Sargent*, 5 Neb. 233; s. c., 25 Am. Rep. 476; *Haynes v. Haynes*, 33 Ohio St. 598; *Newell v. Mayberry*, 3 Leigh (Va.), 250; s. c., 23 Am. Dec. 261; *Ramsey v. McCue*, 21 Gratt. (Va.) 349.

sence of explanation to have been made before delivery, and therefore requires no explanation in the first instance. It is impossible to fix a general rule to control all cases.<sup>1</sup>

*Common-law Rule.*—It seems to have been the rule at common law that if an obvious alteration or interlineation appeared in a deed it would nevertheless, in the absence of any opposing testi-

1. *Neil v. Case*, 25 Kans. 510; s. c., 37 Am. Rep. 259.

McCrary, C. J., says in the case of *Cox v. Palmer*: "Upon this question there is an apparent conflict of authority. I think, however, it is apparent only, and not real. There are cases in which it has been held that an interlineation is presumably an unauthorized alteration of the instrument after execution, and that the burden is upon the party offering the instrument in evidence to show the contrary. There are also cases in which interlineations have been held to be *prima facie bona fide*, and that the burden is upon the party attacking the instrument to show that it was altered after execution. But I think that one rule governs in all the cases, and it is this: If the interlineation is in itself suspicious, as if it appears contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith and before execution." *Cox v. Palmer*, 1 McCrary (U. S.), 431; citing *Stoner v. Ellis*, 6 Ind. 152; *Huntington v. Finch*, 3 Ohio St. 445; *Nichols v. Johnson*, 10 Conn. 192; *Burnham v. Ayer*, 35 N. H. 351; *Beaman v. Russell*, 20 Vt. 205; s. c., 49 Am. Dec. 775. And see also *Wharton's Law of Ev.* § 629; *Bailey v. Taylor*, 11 Conn. 531; s. c., 29 Am. Dec. 321; *Hayden v. Goodnow*, 39 Conn. 164; *Sharpe v. Orme*, 61 Ala. 263; *White v. Hass*, 32 Ala. 430; s. c., 70 Am. Dec. 548; *Corcoran v. Doll*, 32 Cal. 89; *Paramore v. Lindsey*, 63 Mo. 63; *Mathews v. Coalter*, 9 Mo. 705; *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *McCormick v. Fitzmorris*, 39 Mo. 34; *First Nat. Bank*

*v. Franklin*, 20 Kans. 264; *Welsh v. Couborn*, 3 Houst. (Del.) 647; *Bank of Cass County v. Morrison*, 17 Neb. 341; s. c., 52 Am. Rep. 417; *Maybee v. Sniffen*, 2 E. D. Sm. (N. Y.) 1; *Farnsworth v. Sharp*, 4 Sneed (Tenn.), 55; *Brown v. Phelon*, 2 Swan (Tenn.), 629; *Bumpass v. Timms*, 3 Sneed (Tenn.), 459; *Boothby v. Stanley*, 34 Me. 515; *Davis v. Jenney*, 1 Metc. (Mass.) 221; *Vose v. Dolan*, 108 Mass. 155; *Sayre v. Reynolds*, 5 N. J. L. 737; *Cumberland Bank v. Hall*, 1 Halst. (N. J.) 262; *Simpson v. Stackhouse*, 9 Pa. St. 186; s. c., 49 Am. Dec. 228; *Stevens v. Martin*, 18 Pa. St. 101; *Farmers' Ins. Co. v. Blair*, 82 Pa. St. 33; *Ramsey v. McCue*, 21 Gratt. (Va.) 349; *Monroe v. Eastman*, 31 Mich. 283; *Wells v. Moore*, 15 Tex. 521; *Muckleroy v. Bethany*, 27 Tex. 551.

In *Sharpe v. Orme*, 61 Ala. 263, the effect of interlineations apparent on the face of a deed was considered. It was held that if they were made before or concurrently with the execution of the deed and its acknowledgment, they are as operative as if originally incorporated therein; but, if material alterations are made after delivery, a new attestation or acknowledgment is essential to make them operative; and that the time, to which the inquiry as to the making of the interlineations should be restricted, is the acknowledgment or attestation of the execution. When the interlineations are in the handwriting of the grantor, and are for the purpose of correcting imperfect descriptions of particular parcels of lands, the presumption is they were made before or concurrently with the acknowledgment of execution; and if there is any evidence tending to repel this presumption, the question of fact must be determined by the jury. These rules govern when the effect of the alterations, if operative, is to enlarge the title or estate conveyed. *Webb v. Mullins*, 78 Ala. 111.

Oral evidence is always competent to impeach the validity of a written instrument on the ground of a fraudulent alteration. In a civil action, a preponderance of the evidence is all that is necessary to establish the fraudulent alteration of the writing sued on. *Coit v. Churchill*, 61 Iowa, 296.

mony, be presumed to have been made before the deed was finally executed, because the law will never presume fraud or forgery in any one; and so it is yet held in many cases, not only as regards deeds, but also in regard to negotiable instruments.<sup>1</sup>

*Rule as to Negotiable Instruments.*—The rule in regard to negotiable instruments seems to be more strict against the holders. Where an alteration is apparent upon the face of the instrument the holder ought to explain why he took it branded with marks of suspicion, and the very fact that he received it is presumptive evidence that it was unaltered at the time. A different principle applies to deeds and other written contracts, and the exception is made in respect to negotiable paper because, being intended for circulation, the greater strictness and watchfulness is necessary.<sup>2</sup>

1. Parsons on Contr. 722, note y; Paramore v. Lindsey, 63 Mo. 63; Gooch v. Bryant, 13 Me. 386; Beaman v. Russell, 20 Vt. 205; s. c., 49 Am. Dec. 775; Cumberland Bank v. Hall, 1 Halst. (N. J.) 215; Wickes v. Caulk, 5 H. & J. (Md.) 36; Clark v. Rogers, 2 Greenl. (Me.) 143; Boothbey v. Stanley, 34 Me. 515; North River Meadow Co. v. Shrewsbury Church, 22 N. J. L. 424; Stoner v. Ellis, 6 Ind. 152; French v. State, 12 Ind. 670; s. c., 74 Am. Dec. 229; Munroe v. Eastman, 31 Mich. 283; Sirrine v. Briggs, 31 Mich. 443; Stewart v. Preston, 1 Fla. 10; s. c., 44 Am. Dec. 621; Hoey v. Jarman, 39 N. J. L. 523; Herrick v. Malin, 22 Wend. (N. Y.) 388; Holton v. Kemp, 81 Mo. 661; Morris v. Vanderen, 1 Dal. (U. S.) 67; Dangel v. Levy, 1 Idaho, N. S. 722.

Lord Campbell, C. J., in Doe v. Catamore, 16 Q. B. 745, says: "A deed cannot be altered after it is executed without fraud or wrong, and the presumption is against fraud or wrong."

The alteration of a judgment record, if probably made with the knowledge of the parties or their attorneys, as by lines cancelling a paragraph, will be presumed to have been legitimately made before the approval of the record by the judge. Lutz v. Kelly, 47 Iowa, 307.

Where an initial of a middle name was written and erased, the presumption is that the alteration was made before the deed was executed, unless the deed is denied on oath. Banks v. Lee, 73 Ga. 25.

2. Daniel on Neg. Instr. §§ 1417, 1418; Simpson v. Stackhouse, 9 Barr. (Pa.) 186; s. c., 49 Am. Dec. 228; Humphreys v. Guillo, 13 N. H. 385; s. c., 38 Am. Dec. 499; Hills v. Barnes, 11 N. H. 395; Elbert v. McClelland, 8 Bush (Ky.), 577; Wilson v. Henderson, 9 Smedes & M. (Miss.) 375; s. c., 48 Am. Dec. 716; Page v. Danaber, 43 Wis. 221; Commercial Bank v. Lum, 7 How. (Miss.)

414; Wheat v. Arnold, 36 Ga. 479; Paine v. Edsell, 19 Pa. St. 178; Clark v. Eckstein, 22 Pa. St. 507; s. c., 62 Am. Dec. 307; Dodge v. Haskell, 69 Me. 429; Heffner v. Wenrich, 32 Pa. St. 423; Norfleet v. Edwards, 7 Jones (N. Car.), 455; Stephens v. Graham, 7 S. & R. (Pa.) 505; s. c., 10 Am. Dec. 485; Wilde v. Armsby, 6 Cush. (Mass.) 314; Hunt v. Gray, 35 N. J. L. 227; Hill v. Cooley, 46 Pa. St. 259; Mouchet v. Cason, 1 Brev. (S. Car.) 307; Davis v. Carlisle, 6 Ala. 707; White v. Hass, 32 Ala. 430; s. c., 70 Am. Dec. 548; Fontaine v. Gunter, 31 Ala. 258; Kennedy v. Lancaster Co. Bank, 18 Pa. St. 347; Daniel v. Daniel, Dudley (Ga.) 239; Chism v. Toomer, 27 Ark. 108; Willett v. Shepard, 34 Mich. 106; Simpson v. Davis, 119 Mass. 269.

It has, however, also been decided in various cases that alterations in deeds, like in negotiable instruments, must be explained by the party claiming under it. Morris v. Vanderen, 1 Dall. (U. S.) 67; U. S. v. Linn, 1 How. (U. S.) 104; Ackers v. Ledyard, 8 Barb. (N. Y.) 514; Jackson v. Jacoby, 9 Cow. (N. Y.) 125; Smith v. McGowan, 3 Barb. (N. Y.) 404; Jackson v. Osborn, 2 Wend. (N. Y.) 555; Dow v. Jewell, 18 N. H. 340; s. c., 45 Am. Dec. 371; Herrick v. Malin, 22 Wend. (N. Y.) 388; Barrington v. Bank of Washington, 14 S. & R. (Pa.) 405; Van Horn v. Bell, 11 Iowa, 465; s. c., 79 Am. Dec. 506; Hodge v. Gilman, 20 Ill. 437; Heffelfinger v. Shutz, 16 S. & R. (Pa.) 44; Robinson v. Myers, 67 Pa. St. 9; Piercey v. Piercey, 5 W. Va. 199; Keen's Exr. v. Monroe, 75 Va. 424; Millikin v. Martin, 66 Ill. 13; Wicker v. Pope, 12 Rich. (S. Car.) 387.

A bail bond from which the name of a surety has been erased is not admissible until the erasure has been satisfactorily explained by the State. Kiser v. State, 13 Tex. App. 201.

*Alterations not Apparent upon Inspection.*—But where an alteration is not apparent upon inspection, the burden of proof that there is an alteration is upon the one who alleges it.<sup>1</sup>

**5. Filling Up Blanks.**—*Blanks Inadvertently but Negligently Left.*—It is the general rule that where one writes out a note or other instrument so as to leave spaces which can easily be filled without exciting suspicion, and such note or other instrument is altered by filling in these spaces, he will have to suffer the consequences of his negligence, and be liable to a *bona-fide* holder for value on the altered instrument.<sup>2</sup>

When the grantee in a deed admits having altered it after execution, but alleges that he did so with the grantor's consent, the burden of proof rests upon him. *Havens v. Osborn* 36 N. J. Eq. 426.

A sealed note was offered in evidence with a blot, made by ink of a color different from that with which the note and the indorsements were written, over the seal of one of the defendants, an indorser. There was no evidence to show how the seal was effaced, nor by whom. *Held*, that the burden of proof to show the circumstances under which the alteration was made rested upon the holder. *Organ v. Allison*, 9 Baxt. (Tenn.) 459.

In an action for damages for breach of covenant of a lease, it appeared that the lease had been altered in a material part, which enured to the benefit of the lessee. *Held*, that it should not have been admitted in evidence until the lessee gave some testimony explanatory of the alteration. *Burgwin v. Bishop*, 91 Pa. St. 336.

Where a mortgage is lost and a certified copy offered in evidence, such copy cannot be impeached on the ground of an alteration of the instrument before recording, except upon clear and convincing evidence. *Blasey v. Delius*, 86 Ill. 558.

Where an insurance policy appeared to have been altered, proof that the alteration had been made by an agent of the company, who took the insurance and gave the renewal receipt, was held to be sufficient evidence to permit the policy to go to the jury as evidence. *German F. Ins. Co. v. Gerber*, 4 Ill. App. 222.

Where once it appears that a note is altered after execution, the presumption is that such alteration was made by the holder or by one under whom he claims; and the burden of proof to remove such presumption is on the holder. *Eckert v. Louis*, 84 Ind. 99.

Alterations in an ancient deed are held, in view of their nature and the appearance of the document, to be made at the

time it was drafted, and such a deed is admissible in evidence without explanation of the alteration. *Russell v. Peyton*, 4 Ill. App. 473. See also *BILLS AND NOTES; DEEDS*.

1. *Meikel v. State Savings Institution*, 36 Ind. 355; *Brown v. Phelan*, 2 Swan (Tenn.), 629; *Beaman v. Russell*, 20 Vt. 205; s. c., 49 Am. Dec. 775; *Bailey v. Taylor*, 11 Conn. 531; s. c., 29 Am. Dec. 321; *McCormick v. Fitzmorris*, 39 Mo. 34; *Pullen v. Hutchinson*, 12 Shepl. (Me.) 249; *Muckleroy v. Bethany*, 27 Tex. 551.

An indictment for altering an accountable receipt for money, so as to give it the form of a promissory note, is not good unless it state or show what the obligation of the receipt was, so that it may appear that the legal effect of it has been changed by the alteration. *State v. Riebe*, 27 Minn. 315.

So may the presumption be rebutted where the alteration is against the interests of the party claiming under the instrument, or if it is immaterial. *Greenl. on Evidence*, § 564; *Hefelfinger v. Shultz*, 16 S. & R. (Pa.) 44; *Cumberland Bank v. Hall*, 1 Halst. (N. J.) 215; *Bailey v. Taylor*, 11 Conn. 531; s. c., 29 Am. Dec. 321; *Huntington v. Finch*, 3 Ohio St. 445; *Pullen v. Shaw*, 3 Dev. (N. Car.) 238.

In other cases all alterations are presumed to have been made after execution of the instrument, if nothing is proved to the contrary. *Burnham v. Ayer*, 35 N. H. 351; *Cole v. Hills*, 44 N. H. 227; *Dow v. Jewell*, 18 N. H. 340; s. c., 45 Am. Dec. 371.

2. *Isnard v. Towes*, 10 La. Ann. 103; *Young v. Lehman*, 67 Pa. St. 82; *Toomer v. Rutland*, 57 Ala. 379; *Van Duzer v. Howe*, 21 N. Y. 538; *Zimmerman v. Rote*, 75 Pa. St. 188; *Brown v. Reed*, 79 Pa. St. 370; s. c., 21 Am. Rep. 75; *Blakeley v. Johnson*, 13 Bush (Ky.), 204; *Redlich v. Doll*, 54 N. Y. 234; *Kitchen v. Place*, 41 Barb. (N. Y.) 465; *Yocum v. Smith*, 63 Ill. 321; s. c., 14 Am. Rep. 120; *Visher v. Webster*, 8 Cal. 109; *Rainbolt v. Eddy*, 34 Iowa, 440.



**Not Liable.**—The reverse doctrine has, however, also been held. In *Holmes v. Trumper* the court said: "If promissory notes were only given by first-class business men, who are skilful in drawing them up in the best possible manner to prevent forgery, it might be well to adopt the high standard of accuracy and perfection which the argument in behalf of the plaintiff would require. But for the great mass of people such a standard would be altogether too high, and would tend to encourage forgery by the protection it would give to forged paper."<sup>1</sup>

**Negotiable Instruments Delivered in Blank.**—Where a party to a negotiable instrument intrusts it to the custody of another with blanks not filled up, whether it be for the purpose of accommodating the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blank and perfect the instrument; and as between such parties and innocent third parties the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody.<sup>2</sup>

So where one left a blank space between the written word "hundred" and the printed word "dollars," and this space was after delivery filled with the word "fifty," the maker was held to be liable for the full amount. *Garrard v. Hadden*, 67 Pa. St. 82.

And where material words in a promissory note were written in pencil and afterward erased, the maker was held liable on the note as altered on account of negligence. *Harvey v. Smith*, 55 Ill. 224; *Seibel v. Vaughan*, 69 Ill. 257.

An indorser who signs a note so loosely drawn as to easily admit of alteration, and in a manner not calculated to place a man of ordinary prudence on the alert, will be held liable like the maker if such a note is so altered. *Capital Bank v. Armstrong*, 62 Mo. 59.

But where one signed a contract by which he was to become an agent for a washing machine, which contract was so cunningly framed that by cutting it in two parts the part containing his signature formed a promissory note for two hundred and fifty dollars, he was held not to be liable. *Brown v. Reed*, 79 Pa. St. 370; s. c., 21 Am. Rep. 75.

1. *Holmes v. Trumper*, 22 Mich. 427; s. c., 7 Am. Rep. 661; *Greenfield Savings Bank v. Stowell*, 123 Mass. 106; s. c., 25 Am. Rep. 67; *Worrall v. Gheen*, 39 Pa. St. 388; *Goodman v. Eastman*, 4 N. H. 455; *Bruce v. Westcott*, 3 Barb. (N. Y.) 374; *Wade v. Withington*, 1 Allen (Mass.), 561; *Washington Savings Bank v. Ecky*, 51 Mo. 272; *Knoxville Bank v. Clarke*, 51 Iowa, 264.

Where this doctrine is held it is a matter for the jury whether the instrument was delivered as an incomplete paper with the blanks to be filled, or not. *Abbott v. Rose*, 62 Me. 194; s. c., 16 Am. Rep. 427.

2. *Bank of Pittsburgh v. Neal*, 22 How. (U. S.) 96; *Goodman v. Simonds*, 20 How. (U. S.) 343; *Violett v. Patton*, 5 Cranch. (U. S.) 142; *Huntingdon v. Bank*, 3 Ala. 186; *Davidson v. Lanier*, 71 U. S. 441; *Bank v. Kimball*, 10 Cush. (Mass.) 373; *Douglas v. Scott*, 8 Leigh. (Va.) 43; *Weyerhauser v. Dun*, 100 N. Y. 150; *Mitchell v. Culver*, 7 Cow. (N. Y.) 336; *Bank of Commonwealth v. McChord*, 4 Dana (Ky.), 191; *Hull v. Com. Bank*, 5 Dana (Ky.), 258; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11; *Orrick v. Colston*, 7 Gratt. (Va.) 189; *Putnam v. Sullivan*, 4 Mass. 45; *Fullerton v. Sturges*, 4 Ohio St. 529; *Torry v. Fisk*, 10 S. & M. (Miss.) 590; *Norwich Bank v. Hyde*, 13 Conn. 279; *Robertson v. Smith*, 18 Ala. 220; *Moodye v. Threkeld*, 13 Ga. 55; *Toomer v. Rutland*, 57 Ala. 379; *Spitler v. James*, 32 Ind. 202; *Michigan Bank v. Eldred*, 9 Wall. (U. S.) 544.

Where one indorses for the accommodation of the maker a promissory note in which the place of payment is left blank, it will be presumed that he knew that unless the blank were filled it could not be used for the purpose intended, and that he authorized the maker to fill in the place of payment. *Wessell v. Glenn*, 108 Pa. St. 104.

Where one of the makers of a note in-

*In any Material Part.*—It is immaterial whether a negotiable instrument was left blank as regards date, amount, or any other material part. The implied authority to fill the blanks makes the signer liable to a *bona-fide* holder for value, even if the one who filled up the blanks had exceeded his authority. So held where he was authorized to fill the blank left for the amount for a certain sum and he inserted a greater.<sup>1</sup>

trusted with it by the other for delivery consents to the filling of a blank, thereby fixing the place of payment, and delivers the same so changed, the note will not be rendered void from such alteration. *Canon v. Grigsby*, 116 Ill. 151.

A merchant left his signature with his clerk, with authority to use it as an indorsement of a note to be written on the other side of the paper for another person's signature. The other person procured the said signature from the clerk by fraud and wrote a note on the other side and put it into circulation. *Held*, that the merchant was liable as an indorser to a *bona-fide* holder for value. *Putnam v. Sullivan*, 4 Mass. 45.

Although a negotiable instrument has been delivered with a blank space sufficient to insert additional words without exciting suspicion, this alone will not authorize *per se* the holder to insert the words. So held where the words "or order" were inserted in a space left open for the purpose, but inserted without the maker's knowledge or consent. *Bruce v. Westcott*, 3 Barb. (N. Y.) 374.

And the same was held where in a note a space was left between the words "at" and "Covington, Ind.," which space was filled in with the words "the Farmers' Bank" without the consent of the maker. *Cronkhite v. Nebeker*, 81 Ind. 319.

It depends on the intention of the maker whether the payee of a note has the right to fill up a blank or not, and this intention is sometimes implied. The payee of a note which has been delivered as an incomplete note may fill in the blanks without invalidating the note. *Gillespie v. Kelly*, 41 Ind. 158; s. c., 13 Am. Rep. 313; *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391; s. c., 10 Am. Dec. 239; *Clute v. Small*, 17 Wend. (N. Y.) 238; *Nazro v. Fuller*, 24 Wend. (N. Y.) 374; *Marshall v. Drescher*, 68 Ind. 359. And see *Worden v. Salter*, 90 Ill. 160.

But where the maker regarded the note as complete, the payee has no such right. *Marshall v. Drescher*, 68 Ind. 359; *Cornell v. Nebeker*, 58 Ind. 425; *Gothrump v. Williamson*, 61 Ind. 599; *Worrell*

*v. Gheen*, 39 Pa. St. 388; *Goodman v. Eastman*, 4 N. H. 455; *Bruce v. Westcott*, 3 Barb. (N. Y.) 374; *Washington Savings Bank v. Ecky*, 51 Mo. 272; *Ivory v. Michael*, 33 Mo. 398; *Presbury v. Michael*, 33 Mo. 542; *Wade v. Withington*, 1 Allen (Mass.), 561; *Fay v. Smith*, 1 Allen (Mass.), 477; s. c., 79 Am. Dec. 752; *Draper v. Wood*, 112 Mass. 315; s. c., 17 Am. Rep. 92; *Wood v. Steele*, 6 Wall. (U. S.) 80; *Lisle v. Rogers*, 18 B. Mon. (Ky.) 528; *McGrath v. Clark*, 56 N. Y. 34; s. c., 15 Am. Rep. 372; *Hert v. Oehler*, 80 Ind. 83; *McCoy v. Lockwood*, 71 Ind. 319.

1. *Diercks v. Roberts*, 13 S. Car. 338; *Van Duzen v. Howe*, 21 N. Y. 531; *Griggs v. Howe*, 21 Barb. (N. Y.) 100; *Smith v. Lockridge*, 8 Bush (Ky.), 423; *Young v. Ward*, 31 Ill. 223; *Clower v. Wynn*, 59 Ga. 246; *Goodman v. Simonds*, 20 How. (U. S.) 343; *Mech. & Farmers' Bank v. Schuyler*, 7 Cow. (N. Y.) 337; *Patterson v. Bovard*, 6 Leg. Gaz. 54 (1874); *Fullerton v. Sturges*, 4 Ohio St. 529; *Bank v. Curry*, 2 Dana (Ky.), 143; *Shultz v. Astley*, 2 Bing. N. Cas. 544.

Even where the amount was indicated by the marginal figures and he altered the figures to correspond with the larger amount inserted in the blank. *Schryver v. Hawkes*, 22 Ohio St. 308.

In the same manner the date may be filled in. *Page v. Morrell*, 3 Abb. (N. Y.) App. Dec. 433; *Redlich v. Doll*, 54 N. Y. 234; *Frank v. Lilienfeld*, 33 Gratt. (Va.) 377; *Overton v. Mathews*, 35 Ark. 154; *Snyder v. Van Doren*, 46 Wis. 602.

Or the place of payment. *Redlich v. Doll*, 54 N. Y. 234; *Marshall v. Drescher*, 68 Ind. 359; *Spitler v. James*, 32 Ind. 202.

Or the rate of interest. *Rainbolt v. Eddy*, 34 Iowa, 440; s. c., 11 Am. Rep. 152; *Visher v. Webster*, 8 Cal. 109.

Where a blank was left for the name of the promisor, other parties may sign the paper, and words may be inserted making the instrument joint or several, and the original signer will be liable on it. *Snyder v. Van Doren*, 46 Wis. 602.

The holder of a negotiable instrument with a blank for the name of the payee

*A Different Character.*—Filling up the blanks in such a manner as to give the instrument a character entirely different from the intention of the signer, and against his express stipulation, will not invalidate the instrument in the hands of a *bona-fide* holder without notice, if nothing on the face of the paper indicates such changes.<sup>1</sup>

*Paper in Hands of Original Payee.*—Although a negotiable instrument filled up in excess of authority will be good in the hands of a *bona-fide* holder for value and without notice, the party who exceeded his authority in filling up the blank cannot recover upon it. It will be void as to him, even to the extent of his authority.<sup>2</sup>

has an implied authority to fill it up with his own name. But he must fill it up before he can sue upon the instrument. *Brummel v. Enders*, 18 Gratt. (Va.) 895; *Frank v. Lillienfield*, 33 Gratt. (Va.) 377; *Gothrapt v. Williamson*, 61 Ind. 599; *Rich v. Starpack*, 51 Ind. 87; *Briscoe v. Reynolds*, 51 Iowa, 673; *Greenhow v. Boyle*, 7 Blackf. (Ind.) 56; *Seay v. Bank of Tennessee*, 3 Sneed. (Tenn.) 568; *Dunham v. Clogg*, 30 Md. 184; *Nelson v. Cowing*, 6 Hill (N. Y.), 336; *Pindar v. Barlow*, 31 Vt. 529; *Hardy v. Morton*, 66 Barb. (N. Y.) 527; *Dinsmore v. Duncan*, 57 N. Y. 573; *Sittig v. Birkestack*, 38 Md. 158; *Van Etta v. Evenson*, 28 Wis. 33; s. c., 9 Am. Rep. 486; *Armstrong v. Harshman*, 61 Ind. 52; *Ives v. Farmers' Bank*, 2 Allen (Mass.), 236.

And where a note is delivered with a blank space for the name of the payee, and afterward indorsed in blank, the holder may insert the name of the indorser as payee and complete the indorsement by making it payable to himself. *Elliott v. Chesnut*, 30 Md. 562.

The holder of a paper indorsed in blank may write over the indorser's name directions to whom it shall be paid and anything consistent with the indorser's liability; but he may not write "demand and notice waived," for this would enlarge his liability. *Andrews v. Simms*, 33 Ark. 771.

But if such indorsement is intended for a guarantee, words importing a contract of guarantee may be written over it. *Scott v. Calkin*, 139 Mass. 529.

1. *Orrick v. Colston*, 7 Gratt. (Va.) 189; *Spitler v. James*, 32 Ind. 202; *Gillespie v. Kelly*, 41 Ind. 158; s. c., 13 Am. Rep. 313; *Mahaiwe Bank v. Douglass*, 31 Conn. 170.

Where a paper signed in blank was given as a mere memorandum, but filled in as a negotiable note and discounted,

the holder was held liable. *Ives v. Farmers' Bank*, 2 Allen (Mass.), 236; *Brummel v. Enders*, 18 Gratt. (Va.) 897.

But where A wrote his name upon a piece of blank paper at the request of B, who afterward without the knowledge or consent of A wrote a promissory note over the signature, and transferred the same for value to an innocent holder, the note was held to be a forgery and A not liable. *Caulkins v. Whisler*, 29 Iowa, 495.

2. *Van Duzer v. Howe*, 21 N. Y. 531; *Putnam v. Sullivan*, 4 Mass. 45; *Davidson v. Lanier*, 4 Wall. (U. S.) 441; *Toomer v. Rutland*, 57 Ala. 379.

So where a paper signed in blank was intended to be a bill of exchange, and was filled in so as to make it a negotiable note, the maker was held not to be responsible before negotiation. *Luellen v. Hare*, 32 Ind. 211.

And in case the blanks have been filled in in excess of authority, the signer will be liable to a *bona-fide* holder for value only when the holder has no notice of such excess. *Emmons v. Meeker*, 55 Ind. 321; *Snyder v. Van Doren*, 46 Wis. 602; *Wagner v. Diedrich*, 50 Mo. 484; *Clower v. Wynn*, 59 Ga. 246; *Davidson v. Lanier*, 4 Wall. (U. S.) 441; *Johnson v. Blasdale*, 1 S. & M. (Miss.) 17; s. c., 40 Am. Dec. 85; *Hemphill v. Bank of Alabama*, 6 S. & M. (Miss.) 44; *Green v. Kennedy*, 6 Mo. App. 577; *Holland v. Hatch*, 15 Ohio St. 464; *Hill v. Sweetser*, 5 N. H. 168; *Bank v. Phillips*, 17 Mo. 29.

It has been held, however, that, where a holder for value has notice of the fact that blanks have been filled in in excess of the authority of the agent, the instrument will not be void to him *in toto*, but only to the extent of the excess. *Johnson v. Blasdale*, 1 S. & M. (Miss.) 17; s. c., 40 Am. Dec. 85; *Goss v. Whitehead*, 33 Miss. 213.

*Additional Stipulations not Allowed.*—The implied authority to fill in the blanks does not include the right to alter any of the material parts of the instrument, as expressed in the written or printed parts, by erasure, nor to fill in the blanks with terms not in accordance with the conditions as expressed in such printed or written parts. In such a case even a *bona fide* holder could not recover.<sup>1</sup>

*Filling Blanks in Deeds.*—A deed executed and delivered with a blank space for the name of the grantee conveys nothing, and the title will not pass where one who is a *bona fide* purchaser of the estate described in the deed fills in the blank with his own name without any authority of the grantor.<sup>2</sup>

1. *Angle v. N. W. Mut. Life Ins. Co.*, 92 U. S. 331; *McCoy v. Lockwood*, 71 Ind. 319; *Goodman v. Simonds*, 20 How. (U. S.) 343.

Neither can conditions be inserted not expressed in the written or printed part as delivered by the signer. *Coburn v. Webb*, 56 Ind. 96; *Ivory v. Michael*, 33 Mo. 400; *McGrath v. Clark*, 56 N. Y. 34.

An accommodation indorser signed a note in blank, to be used as security, but no blank was left for interest. *Held*, that the insertion of the words "the note from and after its maturity shall draw 10 per cent interest," was unauthorized, and a material alteration. *Wyerhauser v. Dun*, 100 N. Y. 150. But compare *Merriam v. Rockwood*, 47 N. H. 81; *Dear-dorff v. Foresman*, 24 Ind. 481.

Where an agent was intrusted with the filling up and negotiation of a blank bill of exchange, and he inserted the words "without relief from valuation or appraisalment laws," the bill was held to be void. The clause is not a completion, but an alteration. *Holland v. Hatch*, 11 Ind. 497; s. c., 71 Am. Dec. 363. But compare *Holland v. Hatch*, 15 Ohio St. 464.

Where one signed his name in blank, intending it to serve as an indorsement for a note, and the note was filled up over his name, and a seal attached to it, it was held that attaching the seal avoided the instrument. *Smith v. Carder*, 33 Ark. 709. See also *BILLS AND NOTES*.

2. *Arguello v. Bours*, 8 Pac. Rep. (Cal.) 49; *Visen v. Rice*, 33 Tex. 139.

A deed executed with a blank for the name of the grantee conveys nothing until the blank is filled up by one who has authority to insert the name. *Allen v. Withrow*, 110 U. S. 119.

The authority to fill the blank must be given by the grantor, but may be given by parol or be implied. *Ex-p. Kirwin*, 8 Cow. (N. Y.) 118; *Vliet v. Camp*, 13

Wis. 189; *Van Etta v. Evenson*, 28 Wis. 33; s. c., 9 Am. Rep. 486; *Ragsdale v. Robinson*, 48 Tex. 379; *Clark v. Allen*, 34 Iowa, 190; *Pence v. Arbuckle*, 22 Minn. 417; *Field v. Stagg*, 52 Mo. 534; *Vose v. Dolan*, 108 Mass. 155; *State v. Young*, 23 Minn. 551.

In other cases it is held that the authority to fill in material blanks in a sealed instrument must be given under seal. *Ingram v. Little*, 14 Ga. 173; s. c., 58 Am. Dec. 549; *Preston v. Hull*, 33 Gratt. (Va.) 600; s. c., 14 Am. Rep. 153; *Cross v. State Bank*, 5 Ark. 525; *Upton v. Archer*, 41 Cal. 85. See also *AGENTS* (Appointment of).

But his authority must be strictly followed. So may an agent to whom a grantor delivered a deed, blank as to the name, upon the grantor's authority fill in the name of the grantee with whom the grantor had contracted; but he may not, even upon the request of the grantee, insert another name. *Schintz v. McManamy*, 33 Wis. 299.

Where A executed a note and a mortgage, leaving a blank in each for the name of the payee and mortgagee, and delivered them to B as his agent to enable him to raise money thereon; and where B procured C to advance the money and inserted his name in the blanks, it was held that both instruments were valid, without a new execution and delivery. *Van Etta v. Evenson*, 28 Wis. 33; s. c., 9 Am. Rep. 486.

But where a wife executed a mortgage with a blank for the name of the mortgagee, and failing to secure money on it inserted his father's name without her knowledge or consent, it was held that the mortgage had no effect. *Trundy v. Erkenbrack*, cited by *Barnard, P. J.*, in *Chauncey v. Arnold*, 24 N. Y. 330.

The same principle holds good to other blanks. A mortgage on a crop to secure supplies was executed with a blank

*Blanks in Bonds.*—A bond left with a blank for the name of the obligee is a nullity. It imposes no liability upon the obligor, and confers no rights on him who receives it; and an agent authorized by parol cannot insert the name.<sup>1</sup>

**6. Recovery on Original Consideration.**—Where a written instrument has been altered without any fraudulent intent the payee may recover on the original consideration.<sup>2</sup>

*Fraudulent Intent.*—The holder of an altered written instrument can have no recourse to the original consideration for which it was given if the alteration has been made by him or with his consent for any fraudulent purpose.<sup>3</sup>

*Rights of Third Parties.*—Where an alteration was made without any fraudulent intent of the party claiming under it, but by transfer or otherwise a return to the original consideration would

for the date before the crop was planted, and with an agreement to date and acknowledge it after the crop should be planted. The supplies were furnished by the mortgagee. *Held*, that the insertion of the subsequent date by the mortgagee was not unauthorized, and the mortgage valid in equity as of its actual date; notwithstanding the subsequent refusal of the mortgagor to date and acknowledge it as agreed. *Lemay v. Johnson*, 35 Ark. 225.

Many authorities hold, however, that a deed executed and delivered with a material part left blank cannot be completed so as to convey an estate. *Chase v. Palmer*, 29 Ill. 306; *Whitaker v. Miller*, 83 Ill. 381; *Cross v. State Bank*, 5 Ark. 525; *Viser v. Rice*, 33 Tex. 139; *Heath v. Nutter*, 50 Me. 378; *Wunderling v. Cadozan*, 50 Cal. 613; *Burns v. Lynde*, 6 Allen (Mass.), 305; *Ingram v. Little*, 14 Ga. 173; s. c., 58 Am. Dec. 549; *Lindsley v. Lamb*, 34 Mich. 509. See also DEEDS.

1. *Preston v. Hull*, 23 Gratt. (Va.) 600.

A bond signed by the defendant before the name of the obligee, or the amount thereof is inserted, is not the deed of the defendant, and cannot be recovered upon, although payments have been made thereon. *Barden v. Southerland*, 70 N. C. 528.

A blank paper was signed and sealed by a principal and three others as sureties, and left with the principal to be filled up and signed by him. He did fill it up, and delivered it to the obligee named therein. *Held*, not to bind the sureties, but that it was the bond of the principal who filled up the blanks and delivered it. *Penn v. Hamlett*, 27 Gratt. (Va.) 337.

The treasurer of a board of education wrote a bond, which was signed by his

sureties, after which he filled up the amount of the penalty, and delivered it to the board, who had no notice that the amount had been filled in after the bond was signed. The treasurer then received large amounts of money on the strength of the bond, and defaulted. After the defalcation the sureties took some mortgages and other securities. *Held*, that this acted as a ratification of the action of the treasurer in filling up the amount after they had signed the bond, and they were liable on it. *Bartlett v. Board of Education*, 59 Ill. 364. See also BONDS.

2. *Gorden v. Robertson*, 48 Wis. 493; *Wallace v. Wallace*, 8 Ill. App. 69; *Matteson v. Ellsworth*, 33 Wis. 499; s. c., 14 Am. Rep. 766; *Merrick v. Boury*, 4 Ohio St. 60; *Krause v. Myer*, 32 Iowa, 566; *Hunt v. Gray*, 35 N. J. L. 227; s. c. 10 Am. Rep. 232; *Morrison v. Huggins*, 53 Iowa, 76; *Clute v. Small*, 17 Wend. (N. Y.) 238; *State Savings Bank v. Shaffer*, 9 Neb. 1; s. c., 31 Am. Rep. 395; *Booth v. Powers*, 56 N. Y. 22; *Vogle v. Ripper*, 34 Ill. 100; *Sullivan v. Rudisill*, 63 Iowa, 158; *Clough v. Seay*, 49 Iowa, 111; *Lewis v. Schenck*, 3 C. E. Green (N. J.), 459; *Eckert v. Pickel*, 59 Iowa, 545.

3. *Wallace v. Wallace*, 8 Ill. App. 69; *Newell v. Mayberry*, 3 Leigh. (Va.) 250; s. c., 23 Am. Dec. 261; *Kennedy v. Crandell*, 3 Lans. (N. Y.) 1; *Meyer v. Huneke*, 55 N. Y. 412; *Smith v. Mace*, 44 N. H. 553; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165; s. c., 23 Am. Dec. 674; *Booth v. Powers*, 56 N. Y. 22; *Citizens' Bank v. Richmond*, 121 Mass. 110.

A fraudulent intent will, however, not be presumed. *Matteson v. Ellsworth*, 33 Wis. 499; s. c., 14 Am. Rep. 766; *Krause v. Meyer*, 32 Iowa, 566; *Morrison v. Huggins*, 53 Iowa, 76.

prejudice the rights of third parties, a recovery upon the original consideration will not be allowed.<sup>1</sup>

*Merger.*—In case of merger of the original consideration in the written instrument, as where the instrument is under seal, return to the original consideration cannot be had after the instrument is once executed and delivered.<sup>2</sup>

7. *Ratification of Alterations.*—A ratification of the alteration by the parties to the altered instrument will restore it as altered, without a new consideration.<sup>3</sup>

1. *Merrick v. Boury*, 4 Ohio St. 60; *Chadwick v. Eastman*, 53 Me. 16.

2. *Whitmer v. Frye*, 10 Mo. 348; *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119; s. c., 47 Am. Dec. 209; *Mills v. Starr*, 2 Bailey (S. Car.). 359.

A parol promise by a purchaser of land to pay for the same is merged in the note given for the consideration at the time of the agreement; and where the note becomes void by reason of alteration the holder cannot recover upon the original consideration. *Wheelock v. Freeman*, 13 Pick. (Mass.) 165; s. c., 23 Am. Dec. 674.

3. *Pelton v. Prescott*, 13 Iowa, 567; *King v. Hunt*, 13 Mo. 97; *Grimstead v. Briggs*, 4 Iowa, 559; *Humphreys v. Guillon*, 13 N. H. 385; s. c., 38 Am. Dec. 499; *Penny v. Corwaithe*, 18 Johns. (N. Y.) 499; *National State Bank v. Rising*, 4 N. Y. 793; *Morrison v. Smith*, 13 Mo. 234; s. c., 53 Am. Dec. 145; *Goodspeed v. Cutler*, 75 Ill. 534; *Stewart v. First Nat. Bank*, 40 Mich. 348; *Prouty v. Wilson*, 123 Mass. 297.

Such ratification may be by parol. Thus where three notes drawn to the order of the same seven payees were indorsed by all seven, including B., G., and S.; but after one note had been negotiated B. and G. were, with the consent of all the others except S., allowed to have their names erased from the three notes, and S. being informed thereof recognized his liability. *Held*, that S. thereby ratified the alteration of the first note and authorized the negotiation of the two other notes with the same change. *Stewart v. First Nat. Bank*, 40 Mich. 348; *Hill v. Scales*, 7 Yerg. (Tenn.) 410.

It has been held, however, that a parol ratification of an alteration in a deed or other sealed instrument does not restore it. *Cleaton v. Chambliss*, 6 Rand. (Va.) 86; *Sans v. People*, 8 Ill. 327.

Ratification of an alteration may also be implied, and whether the alteration has been ratified or not is a question for the jury. *Benedict v. Miner*, 58 Ill. 19; *Woodworth v. Bank of America*, 19

*Johns.* (N. Y.) 391; s. c., 10 Am. Dec. 239; *Clute v. Small*, 17 Wend. (N. Y.) 238; *Bowers v. Jewell*, 2 N. H. 543; *Stahl v. Berger*, 10 S. & R. (Pa.) 170; s. c., 13 Am. Dec. 666; *Overton v. Matthews*, 35 Ark. 147; *Prouty v. Wilson*, 123 Mass. 297; *Stewart v. First Nat. Bank*, 40 Mich. 348.

A partial payment made after the alteration of a promissory note, and with full knowledge of the fact, will imply a ratification of the alteration. *Evans v. Foreman*, 60 Mo. 449.

Where the sureties of an administrator's bond were informed of an alteration in it shortly after it was made, and permitted the administration to proceed thereunder for a number of years without objection, the jury were authorized to infer a ratification of the alteration. *Jackson v. Johnson*, 67 Ga. 167.

Requesting and obtaining an extension of time for the payment of a promissory note which has been materially altered by substituting the name of a new payee in place of the original name, after knowledge of such alteration, is such a ratification of the alteration as will bind the maker requesting the extension. *Bell v. Mahin*, 29 N. West. Rep. (Iowa) 331.

Two parties desirous of purchasing certain personal property, filled up two notes for the price, bearing six per cent interest, and prepared a bill of sale of the property, with a warranty showing the giving of the notes at six per cent interest. One of the makers took these instruments to the seller, who refused to take notes bearing that rate of interest, and it was then agreed by such maker to change the rate of interest to seven per cent in both the notes and the bill of sale, which was done and the purchase concluded. The other maker of the notes afterward saw and read the bill of sale, which showed the notes bore interest at seven per cent, and he failed to rescind the contract and return the property. *Held*, that if the maker last mentioned knew of the alteration of the notes, and did not in a reasonable time

*Implied Ratification.*—An implied ratification must, however, be clearly shown. So where the name of a payee was erased and another name substituted, and the maker afterward saw the note and made no objection, but there was evidence to show that his attention was only called to the signature, this was held not to be a ratification.<sup>1</sup>

**8. Alterations in Wills.**—In the absence of proof to the contrary, unattested and unexplained alterations, apparent upon the face of a will, are presumed to have been made after execution. Such alterations will not invalidate the will if the original intention of the testator can be ascertained; and it is for the jury to establish the will as it read when executed.<sup>2</sup>

rescind the contract for that reason, by offering to return the property, he must be treated as having ratified the alteration, and was bound by it. *Canon v. Grigsby*, 116 Ill. 151.

1. *German Bank v. Dunn*, 62 Mo. 79.

Even where the maker after noticing the alteration offered to give another note at sixty days in place of it, the court did not regard this as a ratification of the alteration. *Kilkelly v. Martin*, 34 Wis. 525.

And in case of a surety, discharged by a material alteration in a note, a subsequent promise by him to pay will not bind him unless made upon some new consideration. *Warren v. Fant*, 79 Ky. 1.

One of the makers of a joint note has no implied authority to ratify an alteration for the others, not even where he as agent for the others has been entrusted with the note to deliver it to the payee. *Schnewind v. Hackett*, 54 Ind. 248.

2. *Haynes v. Haynes*, 33 Ohio St. 598; *Dyer v. Erving*, 2 Demarest (N. Y.), 160.

The amount of a pecuniary legacy as originally written was \$5000, but had been changed by erasures and by marks in ink of another color to \$2000. *Held*, that the will as originally written should be received for probate. *Wetmore v. Carryl*, 5 Redf. (N. Y.) 544.

Where the date of a will admitted to probate appears to have been changed from 1875 to 1873, and the record elsewhere shows that the testator died prior to 1875, the change or correction will be presumed to have been made at the time the instrument was executed. *Martin v. King*, 72 Ala. 354.

Where, however, the alteration is attested in the statutory way or otherwise sufficiently explained, the will may be admitted to probate as altered. So where a testator, after executing a will, made erasures and corrections with a lead-pencil in his brother's presence, saying, "It

will be a good will, anyhow, even if I do not prepare another one before I die," the corrected will was held to be properly admitted to probate. *Re Fuquett's Will*, 11 Phila. (Pa.) 541.

A will was written on the first and third pages of a sheet of paper, and signed at the end of the third page. In a devise to A, written on the third page, numbered "4th," certain words describing the property devised were erased and the words "see next page" were interlined. On the fourth page of the same sheet of paper was written an unsigned clause numbered "4th," making a bequest to A, and also additional bequests to other beneficiaries. The scrivener who drew the will testified that the erasure and interlineation were made by him by the testator's direction, and he identified the writing on the fourth page as the subject of the said reference in the will, and as having been written by him at the testator's direction prior to the signing by the testator. *Held*, that the writing on the fourth page was to be read into the will as constituting the fourth clause thereof, and that the entire instrument with said clause incorporated therein should be admitted to probate as the testator's will. *Baker's Appeal*, 107 Pa. St. 381.

Alterations, however, made by a testator which alter the will so as to dispose of more property or to increase legacies; in general, any alteration that amounts to a new devise, requires a re-execution and attestation. A will so altered by the testator, if not re-executed and attested, will be effective only as if unaltered. This does not apply, however, to erasures or interlineations which act as a revocation of the will as a whole or in part. *Eschbach v. Collins*, 61 Md. 478; s. c., 48 Am. Rep. 123; *McPherson v. Clark*, 3 Bradf. (N. Y.) 92; *Borden v. Borden*, 2 R. I. 94; *Overall v. Overall*, Litt. Sel. Cas. (Ky.) 504; *Tudor v. Tudor*, 17 B.

## ALTERING—ALWAYS—AMALGAMATE.

**ALTERING.**—The act of changing.<sup>1</sup>

**ALWAYS.**—The usual meaning of this word, viz., at all times, continually, continuously, has been modified and limited, where used in a statute, to the period of time to which the statute especially referred.<sup>2</sup>

**AMALGAMATE—AMALGAMATION.** (See also CONSOLIDATION.)—This word is used in England, as consolidation in America, of the merger of one incorporated company or society into another. It is generally effected under the Companies Act, 1864, the property and business of one company being transferred to the other, and the stockholders of the old company becoming stockholders in the new.<sup>3</sup>

Mon. (Ky.) 383; *In re Kirkpatrick*, 22 N. J. Eq. 463; *Wright v. Wright*, 5 Ind. 389.

A testator having made his will, devising the lands then in his possession to his four sons, subsequently acquired other lands. By erasures and interlineations in his will he devised all the lands of which he should die seized, and had these alterations signed by two witnesses. As the law required an attestation of three witnesses, it was held that the alterations could not operate, but that the will should be effective as originally executed. *Jackson v. Holloway*, 7 Johns. (N. Y.) 395.

So where one had devised his estate to one person and afterward attempted to transfer it by an interlineation which was not properly attested, the will was held to be valid only as originally made. *Wolf v. Bollinger*, 62 Ill. 368.

But where a testator altered a will by drawing ink lines through two entire clauses, without making an attempt to dispose otherwise of the property originally disposed of by those clauses, the altered will was sustained. *Bigelow v. Giltott*, 123 Mass. 102; s. c., 25 Am. Rep. 32. See also WILLS.

**Authorities for Alteration of Instruments.**—*Daniel on Neg. Instr.*; *Greenl. on Evidence*; *Wharton's Law of Evidence*.

1. *Slaughter v. The State*, 7 Tex. Ap. 124.

**Altering Bills.**—By cutting bank-bills into slips with intent to paste the slips together and increase the number of the original bills, a person cannot be indicted under a statute to prevent the altering of bills. *Commonwealth v. Hayward*, 10 Mass. 35.

**Building, Altering, Repairing, or Ornamenting.**—These words do not include the furnishing materials and labor necessary to place a lightning-rod on a house. *Dayhuff v. Dayhuff*, 81 Ill. 498.

**Altering Highways.**—A provision forbidding the altering of highways has to

do with altering their course; it does not prevent a change of grade. *Harrison v. The Board of Supervisors, etc.*, 51 Wis. 646.

Altering means altering where the public has placed them, not to take them up and put them in a new place. *Warren R. Co. v. State*, 5 Dutches (N. J.), 356.

2. Thus where section 1166 (5) of the Tennessee code provided that "every railroad company shall keep the engineer, fireman, or some other person upon the locomotive always upon the lookout ahead, etc.," it was held that the use of this word "always" was not to be construed as requiring for the exoneration of the company, in a suit against them for killing a horse, that somebody on the locomotive must throughout the whole trip have been literally always upon the lookout. It is sufficient if the precaution was being observed when the accident happened. *Louisville & Nashville R. Co. v. Stone*, 7 Heisk. (Tenn.) 468.

3. In such a case, however, it was held that a clause in the articles of association of a company registered under the Companies Act, 1862, authorizing the directors to "amalgamate, etc.," did not empower them to compel a dissentient shareholder to become a member in a new company, *Wood, V. C.*, saying: "I think it is impossible to give to the word 'amalgamate' the force which is contended for. It is difficult to say what the word 'amalgamate' means. I confess at this moment I have not the least conception of what the full legal effect of the word is. We do not find it in any law dictionary or expounded by any competent authority. But I am quite sure of this, that the word 'amalgamate' cannot mean that the execution of a deed shall make a man a partner in a firm in which he was not a partner before, under conditions of which he was in no way cognizant, and which are not the same as



**AMBASSADOR.** (See also **CONSUL**.)—The commissioner who represents one country in the seat of government of another; and as such representative he is exempt, together with his family, secretaries, and servants, from the local jurisdiction, not only in civil but also in criminal cases. In England his exemption depends principally on the stat. 7 Anne, c. 12. Where such an ambassador involves himself in commercial relations much inconvenience arises, the better opinion being that even in that case he is exempt from the local jurisdiction. But an ambassador may waive his privilege in all these respects and submit himself to the jurisdiction. Such an ambassador is, however, amenable in his own country to the national jurisdiction thereof; and in fact it is because he carries with him into the foreign country the territory of his own country that he is exempted from the local jurisdiction.<sup>1</sup>

Whether the exemption operates to deprive a creditor of his real (as opposed to a mere personal) right is a disputed question.<sup>2</sup>

those contained in the former deed." "But I think this much may be said, that persons who execute these deeds ought to know that the word 'amalgamate' is not a word by which, having subscribed to company A, they may be compelled to become subscribers to company B. It is just possible that directors may, under this clause, be justified in transferring all the assets of a dissentient shareholder to another company, but it does not appear to me that these words go to anything like the extent of saying that the applicants in this case shall be put on the list of a totally different concern, to being members of which concern they entirely object. *In re* Empire Assurance Corp. *ex parte* Bagshaw, L. R. 4 Eq. Cas. 341, 347, 348.

1. U. S. Rev. Stat. §§ 4062-4065 enacts that whoever assaults or in any way offers violence to the person of a public minister shall be imprisoned for not more than three years and fined at the discretion of the court; that all process civil or criminal against such minister or his servants shall be void, and that every person by whom such process is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer executing it, shall be imprisoned not more than three years and fined at the discretion of the court. But the penalty will not apply where the person against whom the process is issued is a citizen or inhabitant of the United States, and the process is founded upon a debt contracted before he entered the service of the public minister, or unless the name of the servant has, before the issuing of the process, been registered in the Department of State and transmitted by the Secretary of State to the marshal

of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office. See 1 Op. Atty.-Genl. 26-71, 5 Op. Atty.-Genl. 69; *Ex parte* Cabrera, 1 Wash. (U. S.) 232; U. S. v. Lafontaine, 4 Cranch. C. C. 173.

If a public minister assaults, he loses his privilege if he is assaulted in turn by the party aggrieved. U. S. v. Ortega, 4 Wash. (U. S.) 531. See U. S. v. Liddle, 2 Wash. (U. S.) 205; U. S. v. Benner, 1 Bald. (U. S.) 234.

An ambassador's house, equipage, etc., are entitled to the same protection as his person. U. S. v. Hand, 2 Wash. (U. S.) 435.

If an ambassador voluntarily submits to arrest, he cannot waive his privilege, and his arrest will still be illegal. U. S. v. Benner, 1 Bald. (U. S.) 234.

On an application by a person indicted for an offence committed while president of a national bank for *certiorari* to bring up the indictment on the ground that when the alleged offence was committed he was a political agent of a foreign government, the application was refused when it appeared that his own government had requested his resignation prior to the finding of the indictment, although it was not actually given till subsequent thereto, and that the political department of the Government of the United States had refused him the privilege of free entry of goods usually accorded to a diplomatic representative. *Ex-p.* Hitz, 111 U. S. 766.

An action cannot be brought, in a State court, against a firm, on a firm debt, where a foreign minister is a partner. *In re* Tracy, 46 N. Y. Super. Ct. 48.

2. See case of the U. S. Ambassador to Prussia. *Wheaton Internat. L.* 307-318.

**AMBIGUITY.** (See also ABBREVIATIONS.)

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| 1. <i>What is an Ambiguity.</i>            | 4. <i>Effect of Evidence.</i>              |
| 2. <i>Patent Ambiguity.</i>                | 5. <i>Ambiguity of Intermediate Class.</i> |
| <i>Evidence not Admissible to Explain.</i> | 6. <i>Wills.</i>                           |
| 3. <i>Latent Ambiguity.</i>                | 7. <i>Conveyances.</i>                     |
|  | 8. <i>Contracts.</i>                       |

1. **Definition.**—Duplicity, indistinctness, or uncertainty of meaning of an expression used in a written instrument.<sup>1</sup> The effect of words that have either no definite sense, or else a double one.<sup>2</sup>

Ambiguity does not include inaccuracy, or such uncertainty as arises from the use of peculiar words, or of common words in a peculiar sense.<sup>3</sup>

1. Bouvier's Law Dict.

2. *Ellmaker v. Ellmaker*, 4 Watts (Pa.), 89.

A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read; nor can they be ambiguous merely because the court which is called upon to explain them may be ignorant of a particular fact, art, or science which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow that the question whether a will is ambiguous might be dependent, not upon the propriety of the language the testator has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess; nay, the technical precision and accuracy of a scientific man might occasion his intestacy—a proposition too absurd for an argument. Wigram on Extrin. Ev. (O'Hara's Ed.) §§ 200, 201.

3. Bouvier's Law Dict.

A distinction must be taken between inaccuracy and ambiguity of language. Language may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate. If, for instance, a testator having one leasehold house in a given place, and no other house, were to devise his freehold house there to A. B., the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker, of Dale, the son of Thomas, and there were two persons to whom the entire description accurately

applied, this description, though accurate, would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient merely by the rejection of words of surplusage are cases in which no ambiguity really exists. The meaning is certain, notwithstanding the inaccuracy of the testator's language. A judge in such cases may hesitate long before he comes to a conclusion; but if he is able to come to a conclusion at last, with no other assistance than the light derived from a knowledge of those circumstances to which the words of the will expressly or tacitly refer, he does in effect declare that the words have a legal certainty—a declaration which of course excludes the existence of any ambiguity. The language may be inaccurate; but if the court can determine the meaning of this inaccurate language, without any other guide than a knowledge of the simple facts, upon which, from the very nature of language in general, its meaning depends, the language, though inaccurate, cannot be ambiguous. The circumstance that the inaccuracy is apparent upon the face of the instrument cannot, in principle, alter the case. Wigram on Extrin. Ev. (O'Hara's Ed.) §§ 202-205.

The case of *Miller v. Travers*, 8 Bing. 244, is a leading case on this subject. Tindal, the chief justice of the Common Pleas, and Lyndhurst, the chief baron of the Exchequer, were called in to assist Brougham, the Lord Chancellor, in the case. Their joint opinion was delivered by Tindal. The case was this: The testator, by his will duly executed, devised "all his freehold and real estates whatsoever, situate in the county of Limerick and in the city of Limerick," to certain trustees therein named and their heirs. At the time of making the will he had no real estate in the county of Limerick, but

In ascertaining the intention of a testator as expressed in his will, or of the parties to a contract, a distinction is made between *patent* and *latent* ambiguities. If the court, aided by evidence of all the material circumstances in the case, finds that the language of the testator has failed to sufficiently identify the intended beneficiary or the subject-matter of the bequest, the case is one of *patent* ambiguity. If, on the other hand, the court, so aided, finds the language of the testator *prima facie* clear and conclusive as to his intent, but that the evidence before it makes doubtful the identity of the person or thing referred to, the ambiguity is *latent*.<sup>1</sup>

he had a small real estate in the city of Limerick and considerable real estate in the county of Clare. The plaintiff concluded that he was at liberty to show by his parol evidence that the real estate in the city of Limerick was inadequate to meet the charges of the will, and that the testator intended his estates in Clare also to pass under the same devise. He offered to prove by parol that the estates in the county of Clare were devised to him in the draft of the will; that the draft was sent to a conveyancer to make certain alterations not affecting the estates in the county of Clare; and that by mistake he erased the words "county of Clare," and that the testator afterwards executed the will without noticing the erasure. The court held that the evidence was inadmissible. In delivering judgment the chief justice said that cases of latent ambiguity range themselves into two separate classes: "The first class is when his description of the thing devised or of the devisee is clear upon the face of the will, but upon the death of the testator it is found that there are more than one estate or subject-matter of devise, or more than one person, whose description follows out and fills the words used in the will. The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular." The court then proceeded as follows: "But the case now before the court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect or, indeed, any description of the estates in Clare. The present case is rather one in which the plaintiff does not endeavor to apply the description contained in the will to the estates in Clare, but; in order to make out such intention, is compelled to introduce new words and a new description into the body of the will itself.

. . . This, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will itself. It is not simply removing a difficulty arising from a defective or mistaken description: it is making the will speak upon a subject on which it is altogether silent, and is, in effect, filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator which he is supposed to have omitted."

1. Best on Ev. (Chamberlayne's Ed.) 232, note b. See *Palmer v. Abce*, 50 Iowa, 429; *Peisch v. Dickson*, 1 Mason (U. S.), 9.

Patent ambiguities are to be dealt with by the court. Latent ambiguities are for the jury to determine. *Smith v. Thompson*, 8 C. B. 44; *Bruff v. Conybeare*, 13 C. B. 263; *Hills v. London Gas Co.*, 27; *L. J. Exch.* 60; *Harvey v. Vandegrift*, 89 Pa. St. 346; *Greenleaf on Ev.* § 280.

If a statement by which the plaintiff says he has been deceived is ambiguous, the plaintiff is bound to state the meaning which he attached to it, and cannot leave the court to put a meaning upon it. The prospectus of a company stated that the present value of the turnover or output of the entire works was more than a million sterling per annum. The plaintiff complained that that was untrue, but declined to state the meaning which he attached to the words "turnover or output," except that he understood them in their ordinary meaning. *Held*, that the expression was ambiguous, and that as the plaintiff did not state in what sense he understood it, he could not rely upon the misstatement as a ground of action. *Smith v. Chadwick*, L. R. 20 Ch. 27; s. c., 5 Am. & Eng. Corp. Cas. 23.

**2. Patent Ambiguity.**—This is an ambiguity which arises upon the words of the will, deed, or other instrument, as looked at in themselves, and before they are attempted to be applied to the object or to the subject which they describe. Thus, if a blank is left, or if there is an obvious uncertainty or inconsistency in the instrument, this is a patent ambiguity.<sup>1</sup>

**Ambiguity upon the Factum.**—By ambiguity upon the *factum* is meant, not an ambiguity upon the construction, as whether a particular clause shall have a particular effect, but an ambiguity as to the foundation itself of the instrument, or a particular part of it, as whether the testator meant a particular clause to be part of the instrument, or whether it was introduced with his knowledge; whether a codicil was meant to republish a former or subsequent will, or whether the residuary clause, or any other passage, was accidentally omitted. *Eatherly v. Eatherly*, 1 Coldw. (Tenn.) 461; s. c., 78 Am. Dec. 499.

1. *Chambers v. Ringstaff*, 69 Ala. 140; *Nashville L. Ins. Co. v. Mathews*, 8 Lea (Tenn.), 499; *Palmer v. Abce*, 50 Iowa, 429.

**Ambiguitas patens**, says Lord Bacon, cannot be holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of the lower account in law, for that were to make all deeds hollow, and subject to averment; and so, in effect, to make that pass without deed which the law appoints shall not pass but by deed. (Bac. Max. reg. 23; *Doe d. Tyrrell v. Lyford*, 4 M. & S. 550; *Cholmondeley v. Clinton*, 2 Mer. 343; *Judgm. Doe d. Gord v. Needs*, 2 M. & W. 139). And this rule, as above stated and explained, applies not only to deeds, but to written contracts in general. (*Hollier v. Eyre*, 9 Cl. & Fin. 1.) And especially to wills. On this principle, a devise to "one of the sons of I. S."—who had several sons—cannot be explained by parol proof. (*Strode v. Russell*, 2 Vern. 624; *Cheyney's Case*, 5 Rep. 68; *Castleton v. Turner*, 3 Atk. 257; *Harris v. Bishop of Lincoln*, 2 P. Wms. 136, 137; *Doe d. Winter v. Perratt*, 7 Scott N. R. 36.) And if there be a blank in the will for the devisee's name, parol proof cannot be admitted to show what person's name the testator intended to insert. (*Baylis v. A. G.*, 2 Atk. 239; *Hunt v. Hart*, 3 Bro. C. C. 311, cited 8 Bing. 254.) It being an important rule that, in expounding a will, the court is to ascertain, not what the testator actually intended as contradistinguished from

what his words express, but what is the meaning of the words he has used. (*Doe d. Gwillim v. Gwillim*, 5 B. & Ad. 129.) If the Statute of Frauds merely had required that a nuncupative will should not be set up in opposition to a written will, parol evidence might in many cases be admissible to explain the intention of the testator, where the person or thing intended by him is not adequately described in the will; but if the true meaning of that statute be that the writing which it requires shall itself express the intention of the testator, it is difficult to understand how the statute can be satisfied by a writing merely, if the description it contains have nothing in common with that of the person intended to take under it, or not enough to determine his identity. To define that which is indefinite is to make a material addition to the will. (*Wigram Extrin. Ev.*, 3d Ed. 120, 121.) In accordance with these observations, where a testator devised his real estates "first to K, then to —, then to L, then to M," etc., and the will referred to a card as showing the parties designated by the letters in the will, which card, however, was not shown to have been in existence at the time of the execution of the will, it was held clearly inadmissible in evidence; the court observing that this was a case of a patent ambiguity, and that, according to all the authorities on the subject, parol evidence to explain the meaning of the will could not legally be admitted. (*Clayton v. Nugent*, 13 M. & W. 200.)

If, then, a testator's words, aided by the light derived from the circumstances with reference to which they were used, do not express the intention ascribed to him, evidence to prove the sense in which he intended to use them is, as a general proposition, inadmissible; in other words, the judgment of a court in expounding a will must be simply declaratory of what is in the will. (*Wigram, Extrin. Evid.*, 3d Ed. 87 *et seq.*) And to make a construction of a will where the intent of the testator cannot be known has been designated as *intentio ceca et sicca*. (*Taylor v. Web, Styles*, 319.) The devise, therefore, in cases falling within the scope of the above observa-

*Ambiguitas patens—Continued.*

tion, will, since the will is insensible and not really expressive of any intention, be void for uncertainty. (*Gloucester v. Osborn*, 1 H. L. Cas. 272.)

The rule as to patent ambiguities, which we have just been considering, is by no means confined in its operation to the interpretation of wills; for instance, where a bill of exchange was expressed in figures to be drawn for 245/., and in words for two hundred pounds, value received, with a stamp applicable to the higher amount, evidence to show that the words "and forty-five" had been omitted by mistake was held inadmissible. (*Saunderson v. Piper*, 5 Bing. N. C. 425.) For, the doubt being on the face of the instrument, extrinsic evidence could not be received to explain it. The instrument, however, was held to be a good bill for the smaller amount, it being a rule laid down by commercial writers that, where a difference appears between the figures and the words of a bill, it is safer to attend to the words. (*Id.* 431, 434.) But, although a patent ambiguity cannot be explained by intrinsic evidence, it may in some cases be helped by construction, or a careful comparison of other portions of the instrument with that particular part in which the ambiguity arises; and in others it may be helped by a right of election vested in the grantee or devisee. (*Duckmanton v. Duckmanton*, 5 H. & N. 219.) The power being given to him of rendering certain that which was before altogether uncertain and undetermined. For instance, where a general grant is made of ten acres of ground adjoining or surrounding a particular house, part of a larger quantity of ground, the choice of such ten acres is in the grantee, and a devise to the like effect is to be considered as a grant. (*Hobson v. Blackburn*, 1 My. & K. 571, 575.) And if I grant ten acres of wood where I have one hundred, the grantee may elect which ten he will take; for, in such a case, the law presumes the grantor to have been indifferent on the subject. (*Bac. Max. reg. 23*.) So, if a testator leaves a number of articles of the same kind to a legatee, and dies possessed of a greater number, the legatee, and not the executor, has the right of selection. (*Jacques v. Chambers*, 2 Colly. 435.) On the whole, then, we may observe, in the language of Lord Bacon, that all ambiguity of words within the deed, and not out of the deed, may be helped by construction, or, in some cases, by election, but never by averment, but rather shall make the deed void for

uncertainty. (*Bac. Max. reg. 23*; *Wigram, Extrin. Ev.* 3d Ed. 83, 101.) The general rule, however, as to patent ambiguity must be received with this qualification, viz., that extrinsic evidence is unquestionably admissible for the purpose of showing that the uncertainty which appears on the face of the instrument does not, in point of fact, exist; and that the intent of the party, though uncertainly and ambiguously expressed, may yet be ascertained, by proof of facts, to such a degree of certainty as to allow of the intent being carried into effect. (2 *Phill. Evid.*, 10th Ed., 389.) In cases falling within the scope of this remark, the evidence is received, not for the purpose of proving the testator's intention, but of explaining the words which he has used. Suppose, for instance, a legacy "to one of the children of A," by her late husband B; suppose, further, that A had only one son by B, and that this fact was known to the testator; the necessary consequence, in such a case, of bringing the words of the will into contact with the circumstances to which they refer must be to determine the identity of the person intended, it being the form of expression only, and not the intention, which is ambiguous; and evidence of facts requisite to reduce the testator's meaning to certainty would not, it should seem, in the instance above put, be excluded; though it would be quite another question if A had more sons than one, or if her husband were living. (*Wigram, Ex. Ev.* 3d Ed. 66.) "In the case of a patent ambiguity," remarks I. Plumer (*Colpoys v. Colpoys*, 1 Jac. R. 463, 464; *Collision v. Curling*, 9 Cl. & Fin. 88), "that is, one appearing on face the of the instrument, as a general rule a reference to matter *dehors* the instrument is forbidden. It must, if possible, be removed by construction and not by averment. But in many cases this is impracticable. Where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed, if in such cases the court were to reject the only mode by which the meaning could be ascertained, viz., the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common-sense and the law (which are seldom at variance) warrant the departure from the general rule, and call in the light of extrinsic evidence." *Broom's Leg. Max.* (8th Am. Ed.) 608.

Extrinsic evidence is not admissible to remove a patent ambiguity, and the instrument is inoperative and void.<sup>1</sup>

1. *Pickering v. Pickering*, 50 N. H. 349; *Webster v. Atkinson*, 4 N. H. 21; *Bartlett v. Nottingham*, 8 N. H. 300; *Greenleaf v. Kilton*, 11 N. H. 531; *Brown v. Brown*, 43 N. H. 25; *Pingry v. Watkins*, 17 Vt. 479; *Pitts v. Brown*, 49 Vt. 86; *Blossburg, etc., R. Co. v. Tioga R. Co.*, 1 Abb. Dec. (N. Y.) 149; *Mann v. Mann*, 1 Johns. Ch. (N. Y.) 231; 14 Johns. 1; s. c., 7 Am. Dec. 416; *Mumford v. Hallett*, 1 Johns. (N. Y.) 433; *Jackson v. Sill*, 11 Johns. (N. Y.) 201; s. c., 6 Am. Dec. 363; *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 189; *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285; *Hall v. Leonard*, 1 Pick. (Mass.) 27; *Comstock v. Van Deusen*, 5 Pick. (Mass.) 163; *Brown v. Saltonstall*, 3 Metc. (Mass.) 423; *Tucker v. Seamen's Aid Soc.*, 7 Metc. (Mass.) 188; *Storer v. Freeman*, 6 Mass. 435; s. c., 4 Am. Dec. 155; *King v. King*, 7 Mass. 496; *Revere v. Leonard*, 1 Mass. 93; *Bigelow Collamore*, 5 Cush. (Mass.) 226. *Ayres v. Weed*, 16 Conn. 291; *Comstock v. Hadlyme*, 8 Conn. 254; s. c., 22 Am. Dec. 100; *Avery v. Chappell*, 6 Conn. 270; s. c., 16 Am. Dec. 53; *McDermot v. U. S. Ins. Co.*, 3 S. & R. (Pa.) 604; *Duncan v. Duncan*, 2 Yeates (Pa.) 302; *Little v. Henderson*, 2 Yeates (Pa.) 295; *Horner v. Stillwell*, 35 N. J. L. 307; *Waldron v. Waldron*, 45 Mich. 350; *Crooks v. Whitford*, 47 Mich. 283; *Hollen v. Davis*, 59 Iowa, 444; s. c., 44 Am. Rep. 688; *Richmond, etc., Co. v. Farquar*, 8 Blackf. (Ind.) 89; *Walston v. White*, 5 Md. 297; *Clark v. Lancaster*, 36 Md. 196; *Hamilton v. Cawood*, 2 H. & McH. (Md.) 437; s. c., 1 Am. Dec. 378; *Hunt v. Gist*, 2 H. & J. (Md.) 498; *Fenwick v. Floyd*, 1 H. & J. (Md.) 172; *Dashiel v. Atty-Gen.*, 6 H. & J. (Md.) 1; 5 H. & J. (Md.) 392; s. c., 9 Am. Dec. 572; *Bowyer v. Martin*, 6 Rand. (Va.) 525; *Jennings v. Brizeadine*, 44 Mo. 332; *King v. Fink*, 51 Mo. 209; *Campbell v. Johnson*, 44 Mo. 247; *Marshall v. Gridley*, 46 Ill. 247; *Purinton v. N. Ill. R. Co.*, 46 Ill. 297; *Panton v. Tefft*, 22 Ill. 366; *Griffith v. Furry*, 30 Ill. 251; *Harris v. Dinkins*, 4 Desaus. (S. Car.) 60; *Mithoff v. Byrne*, 20 La. Ann. 363; *Chambers v. Ringstaff*, 69 Ala. 140; *Johnson v. Ballew*, 2 Port. (Ala.) 29; *McGuire v. Stevens*, 42 Miss. 724; *Peach-er v. Strauss*, 47 Miss. 358; *Nashville L. Ins. Co. v. Mathews*, 8 Lea (Tenn.), 499; *Betts v. Demumbrune*, *Cooke* (Tenn.), 39; *Breckinridge v. Duncan*, 2 A. K. Marsh (Ky.), 50; s. c., 12 Am. Dec. 359; *Worman v. Teagarden*, 2 Ohio St. 380; *Morris v. Edwards*, 1 Ohio, 189; *McNair v. Toler*,

5 Minn. 435; *Brauns v. Stearns*, 1 Oregon, 367; *Deery v. Cray*, 10 Wall. (U. S.) 263; *Patch v. White*, 1 Mackey (D. C.), 468; s. c., 117 U. S. 210; *Smith v. Thompson*, 8 C. B. 44, 59; *Sotilichos v. Kemp*, 3 Exch. 105; *Doe v. Westlake*, 4 B. & A. 57; *Brodie v. St. Paul*, 1 Ves., Jr. 326. *Compare* 1 Jarmin on Wills (Bigelow's Ed.), \*429, 430; *Fish v. Hubbard*, 21 Wend. (N. Y.) 651; *Ely v. Adams*, 19 Johns. (N. Y.) 313; *Morris v. Edwards*, 1 Ohio, 189; *Panton v. Tefft*, 22 Ill. 366; *Com. v. Blaine*, 4 Binn. (Pa.) 186; *Doe d. Good v. Needs*, 2 M. & W. 129; *Doe d. Smith v. Jersey*, 2 B. & B. 553; *Fonereau v. Poyntz*, 1 B. C. C. 472; *Colpoys v. Colpoys*, Jac. 451.

Where the description in a deed read "38 degrees" instead of "38 perches," held, that the ambiguity was patent, and parol evidence to explain it was inadmissible. *Clarke v. Lancaster*, 36 Md. 196. See *Peacher v. Strauss*, 47 Miss. 358; *Horner v. Stillwell*, 35 N. J. L. 307.

Where a deed, for description of the property, refers to a map, the map is to be considered with the deed in construing it, and if, from the face of such deed and map, it appears that there are two lots to which the description in the deed equally applies, the ambiguity is patent, and resort cannot be had to parol to show which lot was intended to be conveyed. *Brandon v. Leddy*, 7 Pac. Repr. (Cal.) 33.

A promissory note was in the following form:

"\$200.00.

"TAMA CITY, IOWA, July 27th, 1875.

"Fifteen months after date I promise to pay to the order of Richard Thomas, and in case of his death to J. D. Merritt, ——— dollars, at the Banking House of Carmichael, Bropks & Co., for value received, with interest at ten per cent per annum. FRED. T. DAVIS.

"Due October 27th, 1876."

Held, that parol proof could not be introduced to explain the ambiguity. *Hollen v. Davis*, 59 Iowa, 444; s. c., 44 Am. Rep. 688.

In the following note, "One day after date we promise to pay to D. F. or order four hundred and fifty-six  $\frac{11}{16}$  dollars, for value received, ten per cent," held, that the words "ten per cent" make a case of patent ambiguity in the note, which cannot be explained by parol evidence. *Griffith v. Furry*, 30 Ill. 251.

Where an instrument is drawn in the name of A. but executed by B, it is a

**3. Latent Ambiguity.**—This is an ambiguity which arises not upon the words of the will, deed, or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe.<sup>1</sup>

patent ambiguity. *Brauns v. Stearns*, 1 Oregon, 367.

A testator requested his executors "to sell and dispose of the following-described land," but left out the description. *Held*, that evidence that he owned a parcel of land not specifically disposed of was not admissible for the purpose of supplying the missing description. *Crooks v. Whitford*, 47 Mich. 283.

A testator wrote his will in various pages of a book at different times, part of it being executed and attested in 1820, and the remainder in 1827. No devisees were mentioned by name, but the testator's real estates were devised "first to K., then to —, then to L., then to M." etc. On a slip of paper pasted into the book, and forming part of the will at the time of the attestation in 1820, the testator stated that "the key and index to the letter, initials," etc., were in a writing-case, in the drawer of his writing-desk, on a card. The testator died on the 11th of December, 1828, and on that day a card, in his handwriting and signed by him, was found in the writing-desk, dated January 30th, 1828, as follows: "K. signifies Eleanor Mary East; L. signifies Gilbert East Clayton; M. signifies second son of William Robert Clayton; N. signifies eldest son of Richard Rice Clayton." Two years before his death, a card with writing on it had been seen by a person lying before the testator, together with the book containing the will, which appeared to be similar to the card and writing thereon found after his death. *Held*, that the will disclosed, on the face of it, a patent ambiguity; and that the card, which was not in existence at the date of the will, was not admissible as a declaration of the intention of the testator, nor was it receivable as secondary evidence of another card, supposing any such card to have existed at the time of his will. *Clayton v. Nugent*, 13 M. & W. 200; 13 L. J. Exch. 363.

A testatrix whose will was on a printed form, after directing payment of her debts by her executrix, gave all her property "unto —, to and for her own use and benefit absolutely, and I nominate and constitute and appoint my niece, Catherine Hellard, to be executrix of this my last will." *Held*, that the words must be read consecutively, and so read that there was a good gift of the

residue to Catherine Hellard. To construe a will the court may look at the original will as well as the probate copy. *Re Harrison, Turner v. Hellard*, L. R. 30 Ch. 390.

Where a suit was brought upon two notes for equal amounts and a *not. pros.* was entered as to one, but as to which it was not apparent from the record, and a suit was subsequently brought upon one of the notes; *held*, that the ambiguity upon the record was patent, and that evidence was not admissible to show to which of the notes the *not. pros.* had been intended to apply. *Bisbee v. Woodbury*, 8 Ill. App. 336.

**Under Georgia Code.**—The Code declares that "parol evidence is admissible to explain all ambiguities, both latent and patent." While a mistake in the name of a grantee of land from the State cannot be proved by parol when it is offered in evidence, yet where the grant described the grantee as "Ferrell" and the plat accompanying it described him as "Terrell," and each located him in a certain district, there was a patent ambiguity, and parol testimony was admissible to show that Ferrell was the name of the man living in that district, and that no such man as Terrell lived there. *Ferrell v. Hurst*, 68 Ga. 132.

The expression "value received" in a note is a patent ambiguity, and under the Georgia statute it may be explained, and failure of consideration shown by parol. *Pitts v. Allen*, 72 Ga. 69.

1. *Howard v. Amer., etc., Soc.*, 49 Me. 288; *Emery v. Webster*, 42 Me. 204; s. c., 66 Am. Dec. 274; *Storer v. Elliott Ins. Co.*, 45 Me. 175; *Jay v. East Livermore*, 56 Me. 107, 120; *Patrick v. Grant*, 14 Me. 233; *Haven v. Brown*, 7 Me. 421; s. c., 22 Am. Dec. 208; *Bell v. Woodward*, 46 N. H. 315; *French v. Hayes*, 43 N. H. 30; s. c., 80 Am. Dec. 127; *Hall v. Davis*, 36 N. H. 569; *Winkley v. Kaime*, 32 N. H. 268; *Tilton v. Am. B. Soc.*, 60 N. H. 377; *Att'y-Gen. v. Dublin*, 38 N. H. 459; *Goodhue v. Clark*, 37 N. H. 525; *Bartlett v. Remington*, 59 N. H. 364; *Button v. American, etc., Soc.*, 23 Vt. 336; *Simpson v. Dix*, 131 Mass. 179; *Keller v. Webb*, 125 Mass. 88; *Lovejoy v. Lovett*, 124 Mass. 270; *Hurley v. Brown*, 98 Mass. 545; *Stoops v. Smith*, 100 Mass. 63; *Putnam v. Bond*, 100 Mass. 58; *Miller v. Stephens*,

Latent ambiguities are of two kinds: first, where the description of the devisee or the property devised is clear upon the face of the will, but it turns out that there are more than one estate or more than one person to which the description applies; and, second, where the devisee or the property devised is imperfectly, or in some respects erroneously, described, so as to leave it doubtful what person or property is meant.<sup>1</sup>

100 Mass. 518; Pike v. Fay, 101 Mass. 134; Bodman v. Am. Trac. Soc., 9 Allen (Mass.), 447; Sargent v. Adams, 3 Gray (Mass.), 72; s. c., 63 Am. Dec. 718; Brown v. Brown, 8 Metc. (Mass.) 576; Waterman v. Johnson, 13 Pick. (Mass.) 261; Hotchkiss v. Barnes, 34 Conn. 27; Coit v. Starkweather, 8 Conn. 289; Brewster v. McCall, 15 Conn. 274; Clark v. Woodruff, 83 N. Y. 518; White's Bank v. Myles, 73 N. Y. 335; Knapp v. Warner, 57 N. Y. 668; Bridger v. Pierson, 45 N. Y. 601; Field v. Munson, 47 N. Y. 223; Griffiths v. Hardenburg, 41 N. Y. 464; Pollen v. Le Roy, 30 N. Y. 549; Blossom v. Griffin, 13 N. Y. 569; s. c., 67 Am. Dec. 75; Dubois v. Ray, 35 N. Y. 162; Galen v. Brown, 22 N. Y. 37; Tillotson v. Race, 22 N. Y. 122; Peters v. Porter, 60 How. Pr. (N. Y.) 422; Gallup v. Wright, 61 How. Pr. (N. Y.) 286; Trustees v. Colegrove, 4 Hun (N. Y.), 362; Pond v. Bergh, 10 Paige (N. Y.), 40; *In re* Ensign, 3 Demarest (N. Y.), 516; Seaman v. Hogeboom, 21 Barb. (N. Y.) 398; Thomas v. Truscott, 53 Barb. (N. Y.) 200; Ely v. Adams, 19 Johns. (N. Y.) 313; Jackson v. Perrine, 35 N. J. L. 137; Sandford v. Newark, etc., R. Co., 37 N. J. L. 1; Hartwell v. Camman, 10 N. J. Eq. 128; s. c., 64 Am. Dec. 448; Caley v. Phila., etc., R. Co., 80 Pa. St. 363; McCullough v. Wainright, 14 Pa. St. 171; Domestic App., 30 Pa. St. 425; Russell v. Wertz, 24 Pa. St. 337; Warfield v. Booth, 33 Md. 63; Fryer v. Patrick, 42 Md. 51; Hawkins v. Garland, 76 Va. 149; s. c., 44 Am. Rep. 158; Knick v. Knick, 75 Va. 12; Maund v. McPhail, 10 Leigh (Va.), 199; Elliott v. Horton, 28 Gratt. (Va.) 766; Wharton v. Eborn, 88 N. Car. 344; Hilliard v. Phillips, 81 N. Car. 99; Edwards v. Tipton, 77 N. Car. 222; Elfe v. Gadsden, 2 Rich. (S. Car.) 373; Chambers v. Ringstaff, 69 Ala. 140; Baucum v. George, 65 Ala. 259; Paysant v. Ware, 1 Ala. 160; Chambers v. Falkner, 65 Ala. 448; Wilson v. Horne, 37 Miss. 477; Nashville L. Ins. Co. v. Mathews, 8 Lea (Tenn.), 499; Wilson v. Robertson, 7 J. J. Marsh (Ky.), 78; Bell v. Boyd, 53 Ga. 643; Bowen v. Slaughter, 24 Ga. 338; s. c., 71 Am. Dec. 135; Crawford v. Brady,

35 Ga. 184; Doyle v. Estornet, 13 La. Ann. 318; Hildebrand v. Fogle, 20 Ohio, 147; Masters v. Freeman, 17 Ohio St. 323; Goff v. Roberts, 72 Mo. 570; She-walter v. Pirner, 55 Mo. 218; Shuetze v. Bailey, 40 Mo. 69; Mason v. Ryus, 26 Kans. 464; Hamman v. Keigwin, 39 Tex. 34; Slater v. Breese, 36 Mich. 77; Cornwell v. Cornwell, 91 Ill. 414; Ball v. Benjamin, 73 Ill. 39; School Trustees v. Rodgers, 7 Ill. App. 33; Martindale v. Parsons, 98 Ind. 174; Price v. Price, 89 Ind. 90; Reissner v. Oxley, 80 Ind. 580; Durland v. Pitcairn, 51 Ind. 426; Nilson v. Morse, 52 Wis. 240, 247; Begg v. Begg, 56 Wis. 534; Altschul v. San Francisco, etc., 43 Cal. 171; Board, etc., v. Keenan, 55 Cal. 642; Reamer v. Nesmith, 34 Cal. 624; Piper v. True, 36 Cal. 606; Jones v. Dove, 6 Ore. 188; Conlam v. Douli, 9 Pac. Repr. (Utah) 568; Moore v. U. S., 17 Ct. of Cl. 17; Pratt v. Cal. M. Co., 24 Fed. Repr. 869; s. c., 9 Sawy. (U. S.) 354; Pittsburg, etc., R. Co. v. Columbus, etc., R. Co., 8 Biss. (U. S.) 457; Starr v. Stark, 1 Sawy. (U. S.) 603; United States v. Peck, 102 U. S. 64; Chicago v. Sheldon, 9 Wall. (U. S.) 54; Blake v. Doherty, 5 Wheat. (U. S.) 359; Bank of U. S. v. Dunn, 6 Pet. (U. S.) 51; Reed v. Ins. Co., 95 U. S. 23; Charter v. Charter, L. R. 2 P. & D. 315; *In re* Nunn, L. R. 19 Eq. 331; Grant v. Grant, L. R. 5 C. P. 380, 727; *In re* Kilvert, L. R. 7 Ch. 170; 12 Eq. 183; Parsons v. Parsons, 1 Ves., Jr. 266; Careless v. Careless, 19 Vesey, Jr. 505, 601; Cheyney's Case, 5 Rep. 68; Raffles v. Wichelhaus, 2 H. & C. 906; Haigh v. Brooks, 10 A. & E. 390; Butcher v. Stewart, 11 M. & W. 857.

1. Patch v. White, 117 U. S. 221.

Where a deed of trust provides for a sale "at the court-house door at the city of J.," if it appears that at the time of the execution of the deed there were two houses in the city of J. called court-houses, parol evidence is admissible to show which was intended. Goff v. Roberts, 72 Mo. 570.

If land is conveyed to J. S. and there are two persons of that name, a father and son, there is no presumption that the father is intended; and evidence is ad-



**4. Effect of Evidence.**—Evidence is received, not for the purpose of importing into the writing an intention not expressed therein, but simply with the view of elucidating the meaning of the words employed; and, in its admission, the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view; the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to be written.<sup>1</sup>

missible to show who is the grantee. *Simpson v. Dix*, 131 Mass. 179. See *Grant v. Grant*, L. R. 5 C. P. 380, 727; *Charter v. Charter*, L. R. 2 P. & D. 315; *Begg v. Begg*, 56 Wis. 534.

. When a mortgagee is described as the president of a corporation, both in the mortgage and in the secured note, and it is doubtful from the face of the papers whether they were intended for his benefit in his individual capacity, or in his official character as the representative of the corporation, parol evidence is admissible in equity to remove the uncertainty. *Chambers v. Falkner*, 65 Ala. 448.

Where an instrument has no punctuation marks, and is in consequence susceptible of two readings which differ in the sense, parol evidence is admissible to explain its meaning. *Graham v. Hamilton*, 5 Ired. (N. Car.) 428.

Where a plaintiff in an execution gave to a deputy-sheriff a writing stating that he wished him to show the defendant as much indulgence as could with safety to himself be shown, and without hazarding the debt, *held*, that the writing, being in itself ambiguous parol evidence of the conversation between the plaintiff and the officer at the time, and of collateral extraneous facts to ascertain the nature and extent of the indulgence which the officer was to show, was admissible. *Ely v. Adams*, 19 Johns. (N. Y.) 313.

The prospectus of a company which was being formed to take over iron-works contained a statement that "the present value of the turnover or output of the entire works is over £1,000,000 sterling per annum." If that statement meant that the works had actually in one year turned out produce worth at present prices more than a million, or at that rate per year, it was untrue. If it meant only that the works were capable of turning out that amount of produce, it was true. In an action of deceit for fraudulent misrepresentation, whereby the plaintiff was induced to take shares, he swore in answer to interrogatories that he "understood the meaning" of the statement

"to be that which the words obviously conveyed," and at the trial was not asked either in examination or cross-examination what interpretation he had put upon the words. *Held*, by the Earl of Selborne, L. C., and Lords Blackburn and Watson, affirming the decision of the Court of Appeal, that the statement taken in connection with the context was ambiguous and capable of the two meanings; that it lay on the plaintiff to prove that he had interpreted the words in the sense in which they were false, and had in fact been deceived by them into taking the shares, and that as he had as a matter of fact failed to prove this the action could not be maintained. *Smith v. Chadwick*, L. R. 9 App. Cas. 187; s. c., 5 Am. & Eng. Corp. Cas. 23.

**Statutes.**—If a statute be so vague in its terms as to convey no definite meaning to the court or a ministerial officer, it is void. An act of assembly prohibited the sale of liquor "within three miles of Mt. Zion church in Gaston county," and it appeared on trial of an indictment for its violation that there were two churches of that name in the county. *Held*, the act is ambiguous and inoperative. *State v. Partlow*, 91 N. Car. 550. See also **STATUTES** (Construction of.)

1. *Hughes v. Wilkinson*, 35 Ala. 453; *Guilmartin v. Wood*, 76 Ala. 204; *Waldron v. Waldron*, 45 Mich. 350; *Crawford v. Jarrett*, 2 Leigh. (Va.) 630; *Clarke v. Lancaster*, 36 Md. 196; *Cooper v. Berry*, 21 Ga. 526; *Hill v. Felton*, 47 Ga. 455; *Epperson v. Young*, 8 Tex. 135; *Franklin v. Mooney*, 2 Tex. 452; *Donley v. Tindall*, 32 Tex. 43; *Dorr v. School Dist.*, 40 Ark. 237; *Gallup v. Wright*, 61 How. Pr. (N. Y.) 286; *Peters v. Porter*, 60 How. Pr. (N. Y.) 422; *Bell v. Holford*, 1 Duer (N. Y.) 58; *Den v. Cubberly*, 12 N. J. L. 308; *Evans v. Griscom*, 42 N. J. L. 579; s. c., 36 Am. Rep. 542; *Pickering v. Pickering*, 50 N. H. 349; *Bergin v. Williams*, 138 Mass. 544; *Bradley v. Packet Co.*, 13 Pet. (U. S.) 89; *Thorington v. Smith*, 8 Wall. (U. S.) 1; *Hanner v. Moulton*, 23 Fed. Repr. 5; *Charter v. Charter* L. R. 7 H. L. 364.

A mere mistake is not a latent ambiguity. Where there is no latent ambiguity then no extrinsic evidence can be received.<sup>1</sup>

Where an instrument in writing is ambiguous, the intention of the parties to it is to be ascertained from the entire instrument, not from particular words or phrases without reference to the context. The instrument must operate according to the intention of the parties unless it be contrary to law. Where the meaning is doubtful, the circumstances at the making of the instrument, and the subsequent acts of the parties, are to be considered in determining the sense of the words. *Berridge v. Glassey*, 112 Pa. St. 442.

If by the aid of such evidence a surveyor can find the land so ambiguously described, the deed will be sufficient. *Dorr v. School Dist.*, 40 Ark. 237.

Devise of "all that my farm and plantation near Cropwell, conveyed to me by the heirs of my deceased wife, and where my son Thomas now resides, containing about eighty-five acres, more or less." The testator owned two parcels of land near Cropwell, the one a farm containing about seventy-two and sixty-two hundredths acres, which had been conveyed to him by the heirs of his deceased wife, and the other containing fourteen and seventy-three hundredths acres, which had been conveyed to him by one Abel Lippincott. These two parcels adjoined each other, and had been rented and cultivated together for many years. Thomas resided on the first-named parcel, but cultivated and used both. *Held*, that only those premises which had been conveyed to the testator by the heirs of his deceased wife passed under the devise. *Evans v. Griscom*, 42 N. J. L. 579; s. c., 36 Am. Rep. 542.

Evidence can be received to prove that a promise made in one of the Confederate States, and expressed in dollars, was in fact made for the payment of Confederate notes. Such evidence does not modify or alter the contract. It simply explains an ambiguity. *Thorington v. Smith*, 8 Wall. (U. S.) 1. See *Sexton v. Windell*, 23 Gratt. (Va.) 534, where the term used was "current funds." See *Thompson v. Sloan*, 23 Wend. (N. Y.) 71; s. c., 35 Am. Dec. 546.

Where a contract of sale was for "all white-oak timber large enough to make cross-ties on land." *Held*, that parol evidence was not admissible to show that white-oak timber which was much larger

than that used to make cross ties was not included. *Tatman v. Barrett*, 3 Houst. (Del.) 226.

Parol evidence is admissible to identify certain specifications referred to in a written contract to erect a building; and, when identified, they may be considered in connection with the contract on the issue whether the contract is void for uncertainty. *Bergin v. Williams*, 138 Mass. 544.

The plaintiff offered to take a lease of furnaces from the defendant, conditionally upon his being able to make arrangements with other persons as to ore. A loosely-drawn memorandum was shortly afterwards signed by the parties, substituting certain other rents for the rents mentioned in the letter, which in other respects was to form the basis of the agreement. The defendant, understanding that the lease was to begin immediately, offered possession to the plaintiff at once, but the plaintiff refused to take it, as he had not yet made arrangements for ores, and continued to treat the agreement as conditional on his making those arrangements. Ultimately the parties differed as to the covenants to be inserted in the lease, and the plaintiff commenced his action for specific performance. *Held*, that although where an agreement is clear the court must act upon its own view of the construction without regard to the view entertained by the parties, yet where a party has throughout insisted on one construction of an obscure agreement, he cannot get specific performance on the footing of the opposite construction. *Marshall v. Berridge*, L. R. 19 Ch. 233.

1. *Cheyney's Case*, 5 Rep. 68; *Doe v. Oxenden*, 3 Taunt. 147; *Smith v. Maitland*, 1 Ves., Jr. 362; *Chambers v. Minchin*, 4 Ves. 675, and note; *Doe v. Westlake*, 4 B. & Ald. 57; *Newburgh v. Newburgh*, 5 Madd. 364; *Clementson v. Gandy*, 1 Keen, 309; *Brown v. Saltonstall*, 3 Metc. (Mass.) 423; *Mann v. Mann*, 1 Johns. Ch. (N. Y.) 231; *Yates v. Cole*, 1 Jones Eq. (N. Car.) 110; *Walston v. White*, 5 Md. 297; *Cesar v. Chew*, 7 G. & J. (Md.) 127; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; *Kurtz v. Hibner*, 55 Ill. 514.

In *Miller v. Travers*, 8 Bing. 244, *Tindal*, Chief Justice of the Common Pleas, and *Lyndhurst*, Chief Baron of the Exchequer, were called in to assist *Brougham*, Lord Chancellor. Their joint

**5. Ambiguity belonging to an Intermediate Class.**—There is also an ambiguity recognized in cases involving principles which are scarcely referable to either latent or patent ambiguities. It arises when, on mere inspection, there does not appear to be any uncertainty or ambiguity, and frequently grows out of a careless use of language, and it sometimes results from the many shades of

opinion was delivered by Tindal, Chief Justice. The case was this: The testator devised all his freehold and real estate in the county of Limerick and city of Limerick. The testator had no real estate in the county of Limerick, but his real estate consisted of lands in the county of Clare, which were not mentioned in the will, and a small estate in the city of Limerick inadequate to meet the charges in the will. The devisee offered to show by parol evidence that the estates in the county of Clare were inserted in the devise to him, in the first draft of the will, which was sent to a conveyancer to make certain alterations not affecting those estates; that by mistake he erased the words "county of Clare," and that the testator, after keeping the will by him for some time, executed it without adverting to the alteration as to that county. The case was considered on the assumption that the extrinsic evidence, if admitted, would show that the county of Clare was omitted by mistake, and that the land in that county was intended to be included in the devise. But the evidence was held inadmissible to show that the testator intended to devise property which had been omitted by mistake.

So in *Box v. Barrett*, Law Rep. 3 Eq. 244. Lord Romilly, Master of the Rolls, said: "Because the testator has made a mistake you cannot afterwards remodel the will and make it that which you suppose he intended, and as he would have drawn it if he had known the incorrectness of his supposition."

In *Jackson v. Sill*, 11 Johns. (N. Y.) 201, which was an action of ejectment, the defendant claimed under the following devise to the testator's wife: "I also give to my said beloved wife the farm which I now occupy, together with the whole crops," etc. In a subsequent part of his will the testator mentioned said premises as his lands. It turned out that the premises in controversy were, at the time the will was made, and at the death of the testator, in the possession of one Salisbury under a lease for seven years. The plaintiff offered testimony to show that the testator intended to devise the premises as a part of the farm which he

occupied himself and of which he died possessed. Chief Justice Thompson, afterwards a justice of this court, in delivering judgment, said: "I think it unnecessary to notice particularly the evidence offered; for it is obvious that, if it was competent, especially that of Mr. Van Vechten, it would have shown that the premises were intended by the testator to be devised to the defendant Sill. The will was drawn, however, by Mr. Van Vechten under a misapprehension of facts, and under a belief that the testator was in the actual possession of the premises. It is, therefore, a clear case of mistake, as I apprehend, and under this belief I have industriously searched for some principle that would bear me out in letting in the evidence offered; but I have searched in vain, and am satisfied the testimony cannot be admitted in a court of law without violating the wise and salutary provisions of the statute of wills, and breaking down what have been considered the great landmarks of the law on this subject."

In *Tucker v. Seaman's Aid Society*, 7 Metc. (Mass.) 188; the testator gave a legacy to the "Seaman's Aid Society in the city of Boston," which was the correct name of the society. The legacy was claimed, however, by another society called the Seaman's Friend Society. Chief Justice Shaw, in stating the case, said: "It is also, we think, well proved by the circumstances which preceded and attended the execution of the will, as shown by extrinsic evidence, that it was the intention of the testator to make the bequest in question to the 'Seaman's Friend Society,' and at the time of the execution of the will he believed he had done so;" "that the testator was led into this mistake by erroneous information honestly given to him by Mr. Baker who drew his will;" "that the testator acted on this erroneous information—erroneous as to his real purpose, as it now appears by the evidence—and made the bequest to the Seaman's Aid Society by their precise name and designation." The court, therefore, held that there was simply a mistake and no latent ambiguity, and that extrinsic evidence was inadmissible.

meaning that usage and provincial habit accord to the same word or expression. Out of this has grown a seeming modification of the old rule as to patent ambiguity, which has been characterized as an intermediate class of cases partaking of the nature of both latent and patent ambiguities. In such case parol evidence may be admitted to show the circumstances under which the contract was made, and the subject-matter to which the parties referred.<sup>1</sup>

6. **Wills.**—A latent ambiguity in a will which may be removed by extrinsic evidence may arise (1) either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or (2) when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator.<sup>2</sup>

1. *Chambers v. Ringstaff*, 69 Ala. 140; *Fish v. Hubbard*, 21 Wend. (N. Y.) 651; *Peisch v. Dickson*, 1 Mason (U. S.), 9.

A description of lands in a conveyance, by sections, township, and range, without mention of the State, county, land-district, or government survey in which the lands lie, may be aided by oral testimony showing that when the conveyance was made the grantor owned and resided on lands in a given county, in this State, which were known by the same numbers as those employed in the conveyance. Aided by such proof, and in absence of proof that the grantor owned or claimed other lands falling within the same description, it becomes the duty of the court to pronounce the conveyance valid. *Chambers v. Ringstaff*, 69 Ala. 140.

A notice of protest was in the following form:

"December 23, 1871. Please take notice that M. D. S. and C. F. A.'s note, dated Baltimore, September 20, 1871, payable ninety days after date to the order of R. S. for \$340, payable at Third National Bank, and by you indorsed, is delivered to me by the cashier of the Western Bank of Baltimore for protest, and the same not being paid, payment thereof having been demanded and refused, is protested, and will be returned to the cashier, and that you will be held liable for the payment thereof." *Held*, that parol proof was admissible to show that the note was presented on the 22d of December. *Reynolds v. Appleman*, 41 Md. 615.

Where an alleged order is ambiguous upon its face, parol evidence is admissible to explain it. *Gallagher v. Black*, 44 Me. 99.

Where a date is written so ambigu-

ously that it cannot be determined, parol evidence is admissible to explain it. *Fenderson v. Owen*, 54 Me. 372.

2. *Patch v. White*, 117 U. S. 210; *Howard v. Amer.*, etc., Soc., 49 Me. 288; *Wood v. White*, 32 Me. 340; s. c., 52 Am. Dec. 654; *Pickering v. Pickering*, 50 N. H. 349; *Tilton v. Am. B. Soc.*, 60 N. H. 377; s. c., 49 Am. Rep. 321; *Goodhue v. Clark*, 37 N. H. 525; *Webster v. Atkinson*, 4 N. H. 21; *Winkley v. Kairne*, 32 N. H. 268; *Hinckley v. Thatcher*, 139 Mass. 477; s. c., 52 Am. Rep. 719; *Cleverly v. Cleverly*, 124 Mass. 314; *Warren v. Gregg*, 116 Mass. 304; *Bodman v. Amer. T. Soc.*, 9 Allen (Mass.), 447; *Amer. T. Soc. v. Pratt*, 9 Allen (Mass.), 109; *Wilson v. Fasket*, 6 Metc. (Mass.) 400; *Storer v. Freeman*, 6 Mass. 440; s. c., 4 Am. Dec. 155; *Stackpole v. Arnold*, 11 Mass. 27; *Townsend v. Downer*, 23 Vt. 225; *Button v. Amer. T. Soc.*, 23 Vt. 336; *Brainard v. Cowdry*, 16 Conn. 1; *Bond's App.*, 31 Conn. 183; *Dunham v. Averill*, 45 Conn. 61; *Beardsley v. Amer.*, etc., Soc., 45 Conn. 327; *Doolittle v. Blakesley*, 4 Day (Conn.), 265; s. c., 4 Am. Dec. 218; *Lefevre v. Lefevre*, 59 N. Y. 434; *St. Luke's Home*, etc., v. Association, etc., 52 N. Y. 191; *White v. Hicks*, 33 N. Y. 383; *Jackson v. Sill*, 11 Johns. (N. Y.) 201; s. c., 6 Am. Dec. 363; *Mann v. Mann*, 1 Johns. Ch. (N. Y.) 231; s. c., 7 Am. Dec. 416; *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 189; *Doe v. Roe*, 1 Wend. (N. Y.) 541; *Connolly v. Pardon*, 1 Paige (N. Y.), 291; s. c., 19 Am. Dec. 433; *Asylum v. Emmons*, 3 Bradf. Sur. (N. Y.) 144; *Den v. Cubberly*, 12 N. J. L. 208; *Evans v. Griscom*, 40 N. J. L. 549; s. c., 37 Am. Rep. 542; *Hand v. Hoffman*, 3 Halst. (N. J.) 71; *Taylor v. Tolen*, 38 N. J. Eq. 91; *Vernor v. Henry*,

3 Watts (Pa.), 385; *Best v. Hammond*, 55 Pa. St. 409; *Comfort v. Mather*, 2 W. & S. (Pa.) 450; s. c., 37 Am. Dec. 523; *Newell's App.*, 24 Pa. St. 197; *Brownfield v. Brownfield*, 12 Pa. St. 136; s. c., 51 Am. Dec. 590; *Tyson v. Tyson*, 37 Md. 567; *Mitchell v. Mitchell*, 6 Md. 224; *Hawkins v. Garland*, 76 Va. 149; s. c., 44 Am. Rep. 158; *Richards v. Miller*, 62 Ill. 417; *Rutherford v. Morris*, 77 Ill. 397; *Chambers v. Watson*, 60 Iowa, 339; s. c., 46 Am. Rep. 70; *Fraim v. Millison*, 59 Ind. 123; *Webster v. Morris*, 28 N. W. Repr. (Wis.) 353; *Merrick v. Merrick*, 37 Ohio St. 126; s. c., 41 Am. Rep. 493; *Black v. Hill*, 32 Ohio St. 313; *Edwards v. Richards*, *Wright (Ohio)*, 597; *Waldron v. Waldron*, 45 Mich. 350; *Gilliam v. Chancellor*, 43 Miss. 437; *Riggs v. Myers*, 20 Mo. 239; *Lowe v. Carter*, 2 Jones Eq. (N. Car.) 377; *Clarke v. Cotton*, 2 Dev. Eq. (N. Car.) 301; s. c., 24 Am. Dec. 279; *Patterson v. Leith*, 2 Hill Ch. (S. Car.) 16; *Tudor v. Terrel*, 2 Dana (Ky.), 47; *Breckinridge v. Duncan*, 2 A. K. Marsh. (Ky.) 50; s. c., 12 Am. Dec. 359; *Haydon v. Ewing*, 1 B. Mon. (Ky.) 113; *In re Kilvert's Trust*, L. R. 12 Eq. 183; 7 Ch. 170; *Gordon v. Gordon*, L. R. 5 H. L. 254; *Hensman v. Fryer*, L. R. 2 Eq. 627; 3 Ch. 420; *In re De Rosaz*, L. R. 2 C. P. 66; *In re Wolverton*, L. R. 7 Ch. 197; *In re Engle*, L. R. 11 Eq. 578; *Grant v. Grant*, L. R. 5 C. P. 380, 727; *Wells v. Wells*, L. R. 18 Eq. 504; *Webber v. Webber*, L. R. 16 Eq. 515; *In re Blackwell*, L. R. 2 P. 72; *In re Blower*, L. R. 11 Eq. 97, 6 Ch. 351; *Weeds v. Bristow*, L. R. 2 Eq. 332.

A. made a will, in which, after saying, "and touching [my] worldly estate," "I give, devise, and dispose of the same in the following manner," he devised certain specific lots with the buildings thereon, respectively, to each of his near relations, and, amongst others, to his brother H. a lot described as "lot numbered 6, in square 403, together with the improvements thereon erected." He then devised to his infant son as follows: "the balance of my real estate, believed to be and to consist in lots numbered six, eight, and nine, etc.," describing a number of lots, but not describing lot No. 3, in square 406 hereafter mentioned. *Held*, (1) that the testator intended to dispose of all his real estate, and thought he had done so; (2) that in the devise to H. he believed he was giving him one of his own lots; (3) that evidence might properly be received to show that the testator did not, and never did, own lot No. 6, in square 403, which had no improvements thereon; but did own lot No.

3, in square 406, which had a house thereon, occupied by his tenants; and that this raised a latent ambiguity; and that this evidence, taken in connection with the context of the will, was sufficient to show that there was an error in the description, and that the lot really devised was lot No. 3, in square 406. *Patch v. White*, 117 U. S. 210. See *Allen v. Lyons*, 2 Wash. (U. S.) 475; *Riggs v. Myers*, 20 Mo. 239; *Winkley v. Kairne*, 32 N. H. 268. Compare *Kurtz v. Hibner*, 55 Ill. 514; s. c., 8 Am. Rep. 665, and note.

Where a testator devised "all interest in the following described real estate to W., "Sixty acres, Se. 25, toon 7; forty acres, Se. 24, toon 6; Jasper County, State of Iowa," *held*, that "Se." meant "section," and should be so read, and that it was competent, for the purpose of applying the devise to its subject-matter, to prove by parol in what township and range in Jasper County the testator owned 60 acres of land in section 25, and in what township and range he owned 40 acres in section 24, and that he owned no other land in Jasper County. *Chambers v. Watson*, 60 Iowa, 339; s. c., 46 Am. Rep. 70.

A woman devised to her husband the undivided half of certain descriptions of land, referred to as "containing 240 acres," and she made the devise subject to a right reserved by her grantor to occupy one half of the dwelling-house thereon. She devised the other undivided half to her children. The descriptions were according to the government subdivisions, but embraced only 140 acres, which was only a part of 240 acres actually granted to her in one compact body, and no other disposition was made of the rest of this grant. The dwelling-house was not upon the 140 acres devised. *Held*, that the testator's evident intent was to devise the entire 240 acres. *Waldron v. Waldron*, 45 Mich. 350.

A devised his lands to B for life, in the following words: "All the . . . real estate I may die seized of." He owned 160 acres of land, and no more, one half of which was in section 27 and the other moiety was the east half of the northeast quarter of section 28. He devised the portion in section 27, by a correct description, to C, at the death of B, charged with certain legacies, and devised the portion in section 28 to D, at the death of B, charged with certain legacies; but by mistake in the particular description of the land devised to D, the word "south" was inserted instead of "north." *Held*, that so much of the description as

is erroneous should be rejected, and that the land will pass to D, on the death of B, by the other provisions of the will. *Merrick v. Merrick*, 37 Ohio St. 126; s. c., 41 Am. Rep. 493. Compare *Judy v. Gilbert*, 77 Ind. 96; s. c., 40 Am. Rep. 289.

On a devise to B., widow, for life, and her three daughters, Mary, Elizabeth, and Ann, in fee, an illegitimate daughter, named Elizabeth, claimed as being the only Elizabeth answering the description at the time of the will being made, a legitimate daughter, Elizabeth, having been dead six years previously. *Held*, that parol evidence was admissible to show that the testator intended his legitimate daughter as devisee, and that he did not know of her death. *Doe d. Thomas v. Benyon*, 12 A. & E. 431.

A testator devised a house to "my sister, Mary Frances Tyrwhitt Drake." He afterwards gave the residue of his real and personal property to three other persons, and "my niece Mary Frances Tyrwhitt Drake," equally to be divided between them. He had no sister, but only a sister-in-law, and no niece, bearing exactly these names. *Held*, that extrinsic evidence was admissible to explain the ambiguity that the evidence of the solicitor as to what had been his instructions to prepare the will was properly rejected, and that the will was as to this fourth share of the residue void for uncertainty. *Drake v. Drake*, L. R. 8 H. L. 172.

A. devised as follows: "I give and bequeath to my son Edward Fleming all that dwelling-house (now in the occupation of my son John), during his natural life, and at his death to descend to my grandson, Henry Fleming, and his heirs forever." The testator had two grandsons named Henry Fleming, the plaintiff, who was the son of the testator's son Edward, and the defendant, who was the son of the testator's son John. *Held*, that the proof of that fact raised an ambiguity in the will as to which of his two grandsons the testator meant, and that parol evidence was admissible to explain it. *Fleming v. Fleming*, 1 H. & C. 242.

A testator appointed as one of his executors Francis Courtenay Thorpe, of Hampton, gentleman. There was living a youth of twelve years of age to whom the name and description applied. The court refused to admit evidence to show that the testator intended the father of the youth, whose name was Francis Corbet Thorpe. *Peel*, In goods of, 2 L. R. P. 46.

A testator appointed his "said nephew, Joseph Grant, executor" of his will. His

wife's nephew of that name had resided with him for many years, and managed his business. There was also living a nephew (a brother's son) of the like name. Both claimed probate of the will. *Held*, that parol evidence was admissible to show the relation and circumstances in which the respective parties stood to the testator, and the sense in which he habitually used the word "nephew" when referring to his wife's nephew. And the evidence showing that the wife's nephew was the person meant, probate of the will was decreed to him accordingly. *Grant v. Grant*, 2 L. R. P. 8; s. c., 5 L. R. C. P. 727. Compare *Wells v. Wells*, L. R. 18 Eq. 504.

Where a legatee can be identified, a misnomer will not defeat his bequest, as where legacies were given to testator's nephews, Harmon Baldwin and Joseph Baldwin, he having a nephew Samuel Harbourne Baldwin, who is usually called "Harbourne," and a nephew Josiah M. Baldwin, usually called "Josie," and so of partial mistakes in the titles of corporation legatees. *Taylor v. Tolen*, 38 N. J. Eq. 91.

A testator left £600 to the children of his daughter by any other husband than "Mr. Thomas Fisher, of Bridge Street, Bath." At the date of the will there was a Thomas Fisher living in Bridge Street, Bath, who was married and had a son, Henry Tom Fisher, who sometimes lived with his father, and who paid his addresses to the daughter, and, after the testator's death, married her. On the question whether their child was entitled to the £600, *held*, that evidence of the above facts was admissible to show who was meant by the testator. *In re Wolvertton*, L. R. 7 Ch. 197.

Parol evidence is admissible to show that by a bequest to the testator's "daughter Elizabeth," he intended an informally adopted daughter, he having no daughter by that name. *Ex parte Cahn*, 3 Redf. Sur. (N. Y.) 31.

A testator bequeathed to a nephew and niece by name, and then "to all and every the children of my late nephew M. I., and my niece E. W., share and share alike. In a codicil he referred to "the legacy left to my niece E. W." The testator's brother M. I. had died, leaving children, one of whom, M. I., having had a son born in England, had gone to America; and the testator knew these facts, but believed that his nephew M. I. was, or might be, dead. *Held*, that the bequest was to the living nephew and not the dead brother, and evidence of intention otherwise was not admissible.

**7. Conveyances.**—In construing a deed, an ambiguity in the description of the premises conveyed may be explained by parol evidence;

Further, that the gift was to E. W. and not to her children. *In re Ingle*, L. R. 11 Eq. 578.

Where the testator said in his will, "I give to each of my namesakes, S. G. son of S. G. S., S. G. son of S. G. W., S. G. son of S. G., and S. G. son of Captain J. F. S., a bond of \$1000 of S. S. railroad." *Held*, extraneous evidence is admissible to show that no person answering the description of "S. G., son of Captain J. F. S., existed or was intended as the object of the testator's bounty, but that a person known to testator as "S. G., son of Captain J. F. H.," was intended as the object of his bounty. *Hawkins v. Garland*, 76 Va. 149; s. c., 44 Am. Rep. 158. See *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 189; 4 Paige (N. Y.), 271; *Connolly v. Pardon*, 1 Paige (N. Y.), 291; s. c., 19 Am. Dec. 433; *In re Cahn*, 3 Redf. Sur. (N. Y.) 31; *Stokeley v. Gordon*, 8 Md. 496; *Hall v. Leonard*, 1 Pick. (Mass.) 27; *Vernor v. Henry*, 3 Watts (Pa.), 385.

Where a testator devised to his daughter "the south-west quarter of the north half of section 14, town 8, range 2, west, the remaining lands owned by me to be divided between the four boys," it was *held*, that there was no ambiguity on the face of the will, the inference therefrom being that he had but four sons; but on proof that the testator had seven sons, an ambiguity was made apparent, and, being a latent one, was explainable by parol evidence. *Bradley v. Rees*, 113 Ill. 327.

So where a testator, after a specific devise of land to his daughter, added, immediately after, these words: "The remaining lands owned by me to be equally divided between the four boys," and the proof showed that he had at the time seven sons, four of whom were minors, residing with him, and the other three being men, and living in their own homes, apart from the father, it was *held*, that parol proof not only of the previous facts known to the testator, and of present circumstances, under which he made his will, but also his declarations made at the time of making the will, as well as before and after, might be resorted to, to remove the ambiguity, if any, and to fix the objects of his bounty. *Bradley v. Rees*, 113 Ill. 327.

A gift "to the Rochester, N. Y., Theological Seminary, and to Hamilton Theological Seminary, \$10,000," is a gift of that amount to each. *Taylor v. Tolen*, 38 N. J. Eq. 91.

There was a bequest to the "Omro and Algoma Cemetery Association." There was no such association, but there was an "Omro Cemetery Association" and "The Union Cemetery Association," in the same place. Extrinsic evidence was admitted, and the latter association held to be the object of the bounty. *Webster v. Morris*, 28 N. W. Repr. (Wis.) 353.

A testator by his will gave the residue of his estate "equally to the Authorized Agents of the Home and Foreign Missionary Societies to aid in propagating the Holy religion of Jesus Christ." *Held*, that extrinsic evidence of the facts known to the testator at the time he executed the will, the names by which he was accustomed to call the missionary societies, or by which they were usually called and known in the religious society with which he worshipped, the interest shown by him in any particular missionary society, and the contributions which he made for missionary purposes, was admissible to aid in identifying the societies intended by the will. *Hinckley v. Thatcher*, 139 Mass. 477; s. c., 52 Am. Rep. 719.

A legacy being provided for "the Bible Society," parol evidence is competent to show what society was meant, and evidence that an annual contribution was taken for one of them in the testator's church is competent. *Tilton v. Am. Bible Soc.*, 60 N. H. 377; s. c., 49 Am. Rep. 321. See *Button v. Amer. T. Soc.*, 23 Vt. 336; *Jackson v. Goes*, 13 Johns. (N. Y.) 518; s. c., 7 Am. Dec. 399; *Pritchard v. Hicks*, 1 Paige (N. Y.), 270; *Wusthoff v. Dracourt*, 3 Watts (Pa.), 240; *Gass v. Ross*, 3 Sneed (Tenn.), 211; *Pinson v. Ivey*, 1 Yerg. (Tenn.) 296.

In 1868 a testatrix bequeathed a sum to the treasurer for the time being of the fund for the relief of the clergy of the diocese of W. Said diocese in 1868 included the archdeaconries of W. and C., but until 1837 included only the archdeaconry of W. Until 1837 there was a society of the diocese for the above purpose, and this society, when the diocese was enlarged, was restricted to the archdeaconry of W. There was a similar society in the archdeaconry of C. The testatrix and her parents had contributed to the society in the archdeaconry of W., but not to the other society. *Held*, that the sum must be paid to the W. society. *In re Kilvert's Trusts*, L. R. 7 Ch. 170; s. c., L. R. 12 Eq. 183.

and where the description is by metes and bounds, evidence of the situation and locality of the premises, and of their identity, according to the description in the conveyance, is admissible.<sup>1</sup>

1. *Baldwin v. Shannon*, 43 N. J. L. 596; *Den v. Cubberly*, 12 N. J. L. 308; *Hartwell v. Camman*, 10 N. J. Eq. 128; s. c., 64 Am. Dec. 448; *Koch v. Dunkel*, 90 Pa. St. 264; *Iron City, etc., College v. Kerr*, 3 Brews. (Pa.) 196; *Lovejoy v. Lovett*, 124 Mass. 270; *Thornell v. Brockton*, 141 Mass. 151; *Almy v. Daniels*, 4 Atl. Repr. (R. I.) 754; *Hall v. Davis*, 36 N. H. 569; *Pierce v. Brew*, 43 Vt. 292; *Hotchkiss v. Barnes*, 34 Conn. 27; *Ely v. Adams*, 19 Johns. (N. Y.) 313; *Commissioners v. Presbyterian Church*, 30 Kans. 620; *Schuetze v. Bailey*, 40 Mo. 69; *McPike v. Allman*, 53 Mo. 551; *Shewalter v. Pirner*, 55 Mo. 218; *Wellons v. Jordan*, 83 N. Car. 371; *Farmer v. Batts*, 83 N. Car. 387; *Steadman v. Taylor*, 77 N. Car. 134; *Edwards v. Tipton*, 77 N. Car. 222; *Sikes v. Shows*, 74 Ala. 382; *Humes v. Bernstein*, 72 Ala. 546; *Clements v. Pearce*, 63 Ala. 284; *Jenkins v. Cooper*, 50 Ala. 419; *Baucum v. George*, 65 Ala. 259; *Meyer v. Mitchell*, 75 Ala. 475; *Doe v. Jackson*, 1 Smed. & M. (Miss.) 494; *McLeroy v. Duckworth*, 13 La. Ann. 410; *Terry v. Berry*, 13 Nev. 514; *Wofford v. McKinna*, 23 Tex. 44; s. c., 76 Am. Dec. 53; *Swayne v. Vance*, 28 Ark. 282; *Cato v. Stewart*, 28 Ark. 146; *Black v. Hill*, 32 Ohio St. 313; *Barton v. Anderson*, 104 Ind. 578; *Lyman v. Gedney*, 114 Ill. 388; *McLennan v. Johnston*, 60 Ill. 306; *Cassitt v. Hobbs*, 56 Ill. 231; *Clark v. Powers*, 45 Ill. 283; *Bybee v. Hageman*, 66 Ill. 519; *Billings v. Kankakee Coal Co.*, 67 Ill. 489; *Fisher v. Quackenbush*, 83 Ill. 310; *Harris v. Doe*, 4 Blackf. (Ind.) 369; *Beal v. Blair*, 33 Iowa, 318; *Lloyd v. Bunce*, 41 Iowa, 660; *Austrian v. Davidson*, 21 Minn. 117; *Morgan v. Burrows*, 45 Wis. 211; *Begg v. Begg*, 56 Wis. 534; *Raymond v. Coffey*, 5 Oregon, 132; *Piper v. True*, 36 Cal. 607; *Armijo v. N. Mex. Town Co.*, 5 Pac. Repr. (N. Mex.) 709; *Blair v. Bruns*, 8 Pac. Repr. (Colo.) 569; *Deery v. Cray*, 10 Wall. (U. S.) 263; *B. of U. S. v. Dunn*, 6 Pet. (U. S.) 51; *Peisch v. Dickson*, 1 Mason (U. S.), 9; *Cleveland v. Smith*, 2 Story (U. S.), 278, 287.

Where a deed is ambiguous as to the quantity and interest intended to be conveyed, it presents a question of law to be determined by the court, but where the *locus* of the property is called in question by a suggestion outside of the instrument of conveyance, it is competent to introduce parol evidence to identify it. *Cato v. Stewart*, 28 Ark. 146.

Evidence of practical location is permissible where there is an ambiguity in the description of premises granted. *Baldwin v. Shannon*, 43 N. J. L. 596.

When a tract of land is described in a conveyance as the "Douglass Gold Mine, in Talladega Co., Alabama," without other words of description, parol evidence is admissible to identify it as the land sued for, which was once bought at a sheriff's sale by one Douglass, under whom plaintiff claims by mesne conveyances, and to whom it was conveyed by deed, in which it was described by its government numbers. *Baucum v. George*, 65 Ala. 259.

At the trial of a writ of entry, if the rights of the parties depend upon the construction of a deed, in which one of the monuments is described as a lane running in a certain direction, and it appears that there are two lanes running in that direction, each of which is consistent with some parts of the description in the deed, and each is inconsistent with other parts, oral evidence is admissible to show which lane was intended as the monument, and, if conflicting, is properly submitted to the jury. *Thornell v. Brockton*, 141 Mass. 151.

A contract for the sale of land, described therein as "sixty acres Comida and Cone bottom, also ten acres hillside woodland adjoining the Mitchell tract," unaided by extraneous evidence of identification of the land intended to be sold, is void for uncertainty. It is, however, competent to show by parol evidence, in aid of such contract, that, in pursuance of its terms, the land intended to be sold was pointed out and designated by the parties, and that the purchaser was placed in possession thereof; and when thus aided, the ambiguity is cured, and the land identified by the acts and conduct of the parties. *Meyer v. Mitchell*, 75 Ala. 475.

When the premises conveyed are described in the deed as "Lot No. 2, of square No. 8, in the town of R., being twenty feet in front, and running back one hundred and ten feet," and it is shown that the lot is in fact thirty feet front, parol evidence is admissible to show that the part sold and intended to be conveyed, and of which possession was delivered to the grantee, was the twenty feet front on the east side of the lot. *Sikes v. Shows*, 74 Ala. 382.

A deed for land described as "part of



lot number 70, fronting on Gallatin street 50 feet, and extending eastwardly 73 feet," being further described as "the property of J. & Co., the dimensions of lot 70 being shown, extrinsic evidence would be admissible to show that J. & Co. only owned a part of said lot corresponding with the dimensions given in the deed, and to identify that portion. *Humes v. Bernstein*, 72 Ala. 546.

The Wyandotte City Company laid out the city of Wyandotte. On the plat made and filed appear three lots marked "church lots." All the tracts dedicated as church lots, except the one in controversy, were conveyed to other churches. On the records of the company, and at a date subsequent to those of the resolutions granting the other lots, is a resolution that "a church lot be appropriated to the Presbyterian church." This resolution appears by the records to have been made on the application of Mr. Goodrich, a member of that church. Subsequent application by parties representing other churches for this lot were refused on the ground, as stated by the officers of the company, that it had been reserved and appropriated to the Presbyterian church. A paper soliciting subscriptions for the building of a church was circulated by the pastor of this church, and subscriptions taken. This lot was spoken of as the site of the building, and plans discussed with reference to the peculiar slope of the ground. No conditions appear on the record in the above resolution granting a church lot to the Presbyterian church. The tract was never listed for taxation. *Held*, that a finding of the trial court that this lot was unconditionally appropriated and reserved to the Presbyterian church must be sustained. *Commissioners v. Presbyterian Church*, 30 Kans. 620.

Where there is a latent ambiguity in the description in a conveyance, as an omission to refer to any meridian, or the wrong number of the township, parol evidence is admissible to correct it. *Dougherty v. Purdy*, 18 Ill. 206; *Terry v. Berry*, 13 Nev. 514; *Bybee v. Hageman*, 66 Ill. 519; *Billings v. Kankakee Coal Co.*, 67 Ill. 489. *Compare* *Judy v. Gilbert*, 77 Ind. 96; s. c., 40 Am. Rep. 289.

The defendant agreed in writing to convey to the plaintiff "a certain parcel of real estate situated in D., known as the A. farm, and bounded as follows, namely, as is bounded in a deed from" a person named to the defendant. On a bill in equity for specific performance, it appeared that the deed to the defendant included seven parcels of land separately described, none of which was designated

in the deed as the A. farm; that A. died, many years before, seized of land which included six of the seven parcels; that three of these formed part of his homestead, and the other three were about a mile off, and that the seventh parcel was not shown to have belonged to A.; that the deed to the defendant was made at the request of the plaintiff, and for his benefit, he paying part of the consideration; and that the defendant paid the remainder of the consideration, and orally promised the plaintiff, upon the payment of this sum and interest, to convey the premises to him, and to give him a bond for a deed. *Held*, that these facts were admissible in evidence, and that the defendant was bound to convey all the land conveyed to him by the deed of the third person. C. conveyed to J. "a tract of land called the T. lot, and described in two deeds, one from A. to S., dated June 23, 1862, and recorded book 656, page 145, the other in a deed from said S. to said A., and dated October 17, 1862, and recorded book 665, page 564." At the time of the conveyance, C. owned six acres of the T. land, which was wild land. It had been conveyed to her in two parcels, which abutted on each other, with no fence between them. C.'s title to the first parcel was by deed from A. to S., dated June 23, 1862, and recorded book 656, page 145, and by deed from S. to C., dated October 17, 1862, and recorded book 655, page 564. C.'s title to the second parcel was by deed from A. to C., dated June 23, 1862, and recorded book 656, page 146. *Held*, that both parcels passed by the deed of C. to J. *Aldrich v. Aldrich*, 135 Mass. 153.

A sheriff's deed which so vaguely describes the land that it cannot be ascertained, from its face, which of two parcels in which the judgment debtor had an interest was intended to be sold, is void for uncertainty. *Mason v. White*, 11 Barb. (N. Y.) 173. See *Bartlett v. Judd*, 21 N. Y. 200; s. c., 78 Am. Dec. 131.

If the description in the conveyance is equally applicable to two different tracts, or interests in the same tract, parol evidence is admissible to explain which was intended. *Fisher v. Quackenbush*, 83 Ill. 310.

The property agreed to be conveyed was described only as "a house on Church Street." Parol evidence was admitted showing the circumstances of possession, ownership, the situation of the parties, their relation as to each other and to the property, "as they were when the negotiations took place and the

**8. Contracts.**—Where a written contract is ambiguous in its meaning, evidence of what is said and done at the time of its execution is competent, not to add to or change it, but to explain it. Therefore all evidence relating to a custom of any kind of trade, trademarks, usages, entries, or abbreviations is admissible when the ambiguity is occasioned by a reference to such terms.<sup>1</sup>

writing was made." *Mead v. Parker*, 115 Mass. 413; s. c., 15 Am. Rep. 110; *Hurley v. Brown*, 98 Mass. 545.

Where A executed a mortgage to B, embracing four different parcels or clusters of land, and in respect to the first three of these there was a description of land, or a reference to deeds, which were designated, sufficient to enable one to ascertain the boundaries of a larger quantity of land originally owned by A, from which he had conveyed certain portions or lots, but in respect to the fourth parcel the land was described as "all the land owned by me in my New City, so called, in said L.," which description included certain lots previously conveyed to C and D, but the deeds of which had not been recorded at the time the mortgage was recorded, *held*, that the intention of the mortgagor was to include only such land as he owned at the time of the execution of the mortgage, and did not include the lots previously conveyed to C. and D. *Fitzgerald v. Libby*, 7 N. East. Repr. (Mass.) 917.

Where land is described on a tax duplicate and in a tax deed in abbreviated terms, parol evidence is admissible to explain, consistently with such terms, as to what land they refer. *Barton v. Anderson*, 104 Ind. 578.

In an action to recover on an insurance policy for a loss sustained by the burning of a certain barn, where the defence set up was breach of warranty on plaintiff's part in representing that the title to the property was in himself when he had no title thereto, and plaintiff, to make out his title, introduced a bill of sale as follows: "For a valuable consideration the Spring Valley Water-works grants and conveys unto John Claffey the Wolfe houses, but reserves the right to use the same until the first day of November, A.D. 1877;" it appearing on the trial that the barn insured, together with other houses, were built by a Mr. Wolfe,—*held*, the fact of the word "houses" being used in the bill of sale makes it plain that more than one house was by it conveyed to the plaintiff; and such an ambiguity existed in that instrument as warranted an explanation by parol testimony to determine whether or

not the term "the Wolfe houses" included the barn in question. *Claffey v. Hartford Ins. Co.*, 8 Pac. Repr. (Cal.) 711.

Where property is conveyed to a person and there are two persons answering to the name, parol evidence is admissible to show which was intended. *Begg v. Begg*, 56 Wis. 534; *Begg v. Anderson*, 64 Wis. 207; *Simpson v. Dix*, 131 Mass. 179; *Grant v. Grant*, L. R. 5 C. P. 380. 727.

1. *Knick v. Knick*, 75 Va. 12; *Talbott v. Richmond*, etc., R. Co., 31 Gratt. (Va.) 685; *Calbreath v. Virginia*, etc., Co., 22 Gratt. (Va.) 697; *Warfield v. Booth*, 33 Md. 63; *Smith v. Farmers' Ins. Co.*, 89 Pa. St. 287; *McMasters v. Penna. R. Co.*, 69 Pa. St. 374; *Brown v. Brooks*, 25 Pa. St. 210; *Willis v. Fernald*, 33 N. J. L. 206; *Suffern v. Butler*, 21 N. J. Eq. 410; *N. J. Zinc Co. v. Baston*, etc., Co., 15 N. J. Eq. 418; *Collender v. Dinsmore*, 55 N. Y. 200; s. c., 62 Am. Dec. 130; *Field v. Munson*, 47 N. Y. 221; *Dana v. Fiedler*, 12 N. Y. 40; *Harris v. Rathbun*, 2 Abb. Dec. (N. Y.) 326; *Arthur v. Roberts*, 60 Barb. (N. Y.) 580; *Howlett v. Howlett*, 56 Barb. (N. Y.) 467; *Stroud v. Frith*, 11 Barb. (N. Y.) 300; *Goodrich v. Stevens*, 5 Lans. (N. Y.) 230; *De Wolf v. Crandall*, 1 Sweeny (N. Y.), 556; *Collins v. Driscoll*, 34 Conn. 43; *Hatch v. Douglas*, 48 Conn. 116; s. c., 40 Am. Rep. 154; *Keller v. Webb*, 125 Mass. 88; *Dudley v. Vose*, 114 Mass. 34; *Sweet v. Shumway*, 102 Mass. 365; *Page v. Cole*, 120 Mass. 37; *Stoops v. Smith*, 100 Mass. 63; *Eaton v. Smith*, 20 Pick. (Mass.) 150; *Proctor v. Hartigan*, 139 Mass. 554; *Kinney v. Flynn*, 2 R. I. 319; *Farmers', etc., Bank v. Day*, 13 Vt. 36; *Lancey v. Phoenix Ins. Co.*, 56 Me. 562; *Callahan v. Stanley*, 57 Cal. 476; *Johnson v. N. W. Ins. Co.*, 39 Wis. 88; *Bancroft v. Grover*, 23 Wis. 463; *Washington Ins. Co. v. St. Mary's Sem.*, 52 Mo. 480; *Quarry Co. v. Clements*, 38 Ohio St. 587; s. c., 43 Am. Rep. 442; *Ins. Co. v. Thorp*, 22 Mich. 146; *Des Moines v. Hinkley*, 62 Iowa, 637; *Walrath v. Whittekind*, 26 Kans. 482; *Lyon v. Lenon*, 106 Ind. 567; *Martindale v. Parsons*, 98 Ind. 174; *Lonerger v. Stewart*, 55 Ill. 44; *Adams Ex. Co. v. Boskowitz*, 107 Ill. 660; *Allan v. Comstock*, 17 Ga. 554; *Boykin v. Bank*, 72 Ala. 263; s. c., 47 Am. Rep.

408; *Jones v. Anderson*, 76 Ala. 427; *Hightower v. Maull*, 50 Ala. 495; *Hite v. State*, 9 Yerg. (Tenn.) 357; *Bryan v. Harrison*, 76 N. Car. 360; *Richards v. Schlegelmich*, 65 N. Car. 151; *Dunkart v. Rinehart*, 89 N. Car. 354; *Craig v. Pervis*, 14 Rich. Eq. (S. Car.) 150; *Goddard v. Bulow*, 1 N. & McC. (S. Car.) 45; s. c., 9 Am. Dec. 663; *Stewart v. Smith*, 59 Tenn. 231; *Hueske v. Broussard*, 55 Tex. 201; *Ullman v. Babcock*, 63 Tex. 68; *Donley v. Tindall*, 32 Tex. 43; *Perry v. Smith*, 34 Tex. 277; *Brauns v. Stearns*, 1 Oregon, 367; *West v. Smith*, 101 U. S. 263; *Atlantic R. Co. v. Bank*, 19 Wall. (U. S.) 548; *Robinson v. U. S.*, 13 Wall. (U. S.) 363; *Salmon Falls Co. v. Goddard*, 14 How. (U. S.) 446; *Bradley v. Washington, etc.*, Co. 13 Pet. (U. S.) 89; *Rhoder v. Cleveland, etc.*, Co. 17 Fed. Repr. 426; *Ridgway v. Wharton*, L. R. 6 H. L. 238; *Bauman v. James*, L. R. 3 Ch. 508; *Long v. Millar*, L. R. 4 C. P. 450; *Cave v. Hastings*, L. R. 7 Q. B. 125; *Shardlow v. Cotterell*, L. R. 18 Ch. 28, 20. Ch. 90. See cases cited *ante*, p. 530.

Where a contract concerning a particular business is ambiguous, it will be presumed that it was made with reference to the ordinary course of such business, and evidence showing such course is admissible. *Lyon v. Lenon*, 106 Ind. 567; *Loneragan v. Stewart*, 55 Ill. 44; *Johnson v. Ins. Co.*, 39 Wis. 87; *McMasters v. Penna. R. Co.*, 69 Pa. St. 374; *Brown v. Brooks*, 25 Pa. St. 210; *Page v. Cole*, 120 Mass. 37; *Collender v. Dinsmore*, 55 N. Y. 200; *Allan v. Comstock*, 17 Ga. 554; *Collins v. Driscoll*, 34 Conn. 43; *Robinson v. U. S.*, 13 Wall. (U. S.) 363.

Where a clause in the specifications, the basis of a building contract, recites that "the entire walls of the building, inside and outside, are to be painted," and it is claimed and denied that the meaning is that the plaster as well as the wood-work is to be painted, and an expert testifies that the meaning of the clause would "depend on the conversation," the language of the clause is sufficiently ambiguous to warrant the admission of extraneous evidence to explain its meaning. *Beason v. Kurz*, 29 N. W. Repr. (Wis.) 230.

**Negotiable Instruments.**—In a suit against one not a party to a promissory note which bore eight per cent interest, but who signed the following indorsement thereon: "Accepted, payable ninety days from January 13, 1870, with interest at ten per cent per annum," the petition alleged that the plaintiff, relying on the acceptance and assumption of

payment, released the original maker. *Held*, the true meaning of the indorsement being, from the language used, doubtful, the time of payment being changed and the rate of interest increased, parol evidence would have been admissible to explain whether the intention of the parties was to create an original contract or a guaranty of payment. *Hueske v. Broussard*, 55 Tex. 201.

It was held that these words in a note, "with interest at the rate of one M. per centum," could be explained by parol testimony, showing that the letter "M." meant "mill." *United States v. Hardyman*, 13 Pet. (U. S.) 178.

An acknowledgment of indebtedness in these letters and words, "I. O. U. the sum of \$160, which I shall pay on demand to you." It was held that parol evidence was admissible to show the person to whom it was addressed. *Kinney v. Flynn*, 2 R. I. 319.

A promissory note payable "seventy-five after date," negotiable and payable in bank, construed to be payable seventy-five days after date; and parol evidence was held admissible, in aid of the evident omission, showing the character of negotiable paper, as to length of time of maturity, which the banks in the city would accept. *Boykin v. Bank*, 72 Ala. 263; s. c., 47 Am. Rep. 408.

In action on a sealed note, signed by three makers, in the following words: "One day after date we, or either of us, promise to pay six hundred ninety-eight dollars and eighty-nine cents, with interest annually, for value received of him, as witness we set our hands and seals, September 7, 1864," parol testimony may be introduced to show who was the payee. *Barkley v. Tarrant*, 20 S. Car. 574; s. c., 47 Am. Rep. 853.

There was a mortgage on lot 13 to secure a series of five notes of \$80 each, one of which became due each year during a period of five years, and a similar mortgage on lot 14 by the same person to the same creditor, of the same date, to secure another series of five notes precisely like the first series. P. took a conveyance of both lots, with a clause therein, thus: "Subject to a mortgage, dated February 1st, 1873, on each lot, to secure five notes for \$80 each, the first due February 1st, 1874, and annually thereafter, the first with ten per cent interest, the others with six per cent interest, all of which the grantee, by the acceptance of this deed, assumes and agrees to pay." It appeared that P. had paid the first five notes presented to him, being the two

**Negotiable Instruments—Continued.**

first due charged on lot 13, and the three first due charged on lot 14. *Held*, that the written contract of P. to pay, above recited, was ambiguous as to whether P. was to pay all the notes or only five of them, and therefore, to aid in construing it, parol evidence was admissible to prove that his grantor represented to him, when he purchased, that there were only five notes secured on both lots, and that these only he agreed to pay, having no knowledge that there were more. *Held*, also, that P., having paid as above, was not liable to any personal judgment, though a foreclosure for the unpaid notes was proper. *Martindale v. Parsons*, 98 Ind. 174.

**Clerical Errors.**—A blank receipt of the United States Express Co. for goods to be forwarded was changed by erasing the words "United States" and inserting over the same the word "Adams," and signed by the agent of the Adams Express Co., which company received the goods described in the receipt, but the clause in the receipt as to the limitation of the company's liability was left unchanged, so that it read, "the United States Express Co. are not to be held liable," etc. *Held*, that the law, in the absence of proof *dehors* the receipt, would not determine whether such limitation clause related to the Adams or the United States Express Co., and that the true intent of the parties giving or receiving such receipt must be determined from circumstances to be proved. *Adams Ex. Co. v. Boskowitz*, 107 Ill. 660.

In an action to recover the price of certain manufactured goods, the words, "Please send us pice of counter-screen like draught," and signed by the defendant, do not constitute a valid written order; and a case of incurable uncertainty being presented, it will not be submitted to the jury to determine whether the letters "pice" mean "piece" or "price." *Cheney-Bigelow Wire Works v. Sorrell*, 8 N. Eastern Repr. (Mass.) 332.

**Technical Words.**—Where, under the signature of an attorney to a receipt given by him to his client for a claim left with him for collection, a memorandum in the attorney's handwriting is made in these words, "I collect for 5 per cent when not litigated, 10 per cent when litigated, on the amount recovered," *held*, that as the word "recovered" is as apt to express the idea of money realized as judgment obtained, the memorandum is open to explanation

by parol proof. *Gunn v. Clendenin*, 68 Ala. 294.

The meaning of words in a particular part of the country, or among certain classes of men, may be shown. *Thompson v. Sloan*, 23 Wend. (N. Y.) 21; s. c., 35 Am. Dec. 546; *Thorington v. Smith*, 8 Wall. (U. S.) 1; *Sexton v. Windell*, 23 Gratt. (Va.) 534.

In an action on a written contract to furnish stone for a county bridge, to be paid for "at \$4.50 per perch," the contract was silent as to the number of cubic feet in a perch, and the evidence of the usage of the trade failed to show there was any uniform rule on the subject, such evidence being conflicting as to whether 16½ or 25 cubic feet made a perch. *Held*, that upon this state of proof, and in the absence of a statutory provision defining the quantity in a perch of masonry, the negotiations of the parties, in which it was verbally agreed that the stone was to be furnished at eighteen cents per cubic foot, and that the attorney who wrote the contract, of his own motion, expressed this agreement in the written contract, by converting the feet into perch of 25 feet each, at the agreed rate per foot, are admissible. Such evidence does not vary the terms of the written contract, but enables the court to construe it in the sense intended by the parties. *Quarry Co. v. Clements*, 38 Ohio St. 587; s. c., 43 Am. Rep. 442.

So where there was a sale, by written contract, of "winter strained lamp-oil," equal to a sample exhibited, the proof showed there were two kinds of such oil, one sperm-oil, the other whale-oil, the latter of which was inferior in quality. Evidence was held admissible to show that, in conversation at the time the contract was made, this was explained to the purchaser, and that he was then informed that it was not sperm-oil he was selling. *Hart v. Hammett*, 18 Vt. 127.

The plaintiffs agreed to sell to the defendants a water-wheel "and place the same in position," but the defendants refused payment upon the ground that the wheel had not been properly placed and did not, in fact, perform the work stipulated for. *Held*, that the term "placed in position" was so indefinite that the defendant was at liberty to show what was meant thereby; the writing, by such parol evidence, not being added to or varied, but only rendered intelligible. *Harris v. Moore*, 10 Ontario App. 10.

By written contract, S. agreed to saw lumber for H. "at the price of two dol-

**Technical Words—Continued.**

lars per thousand feet," without indicating the rule or mode by which the lumber should be measured. At the time the contract was made there existed two rules or modes of measurement, well known and understood by those engaged in the business of sawing lumber, and differing in results; one being to measure the logs before sawing them, and then, by calculation, to ascertain what quantity of lumber they would produce when sawed into inch boards; and the other, to estimate the lumber by actual measurement after sawing. *Held*, that the words, "at the price of two dollars per thousand feet," created a latent ambiguity in the contract, and that, in an action on the contract, parol evidence was admissible to show the rule or mode of measurement in reference to which the parties contracted. *Smith v. Aikin*, 75 Ala. 209.

In a written contract between a wholesale house and a customer for the purchase of specific articles, the following language occurred descriptive of the thing bought: "15 bbls. T. J. Monarch \$2.50, 1880, laid in Laredo direct from distillery, same as gauger leaves it." *Held*, it was competent to show by parol that it described fifteen barrels of whisky of the T. J. Monarch brand, manufactured in 1880, at the price of \$2.50 per gallon. *Ullman v. Babcock*, 63 Tex. 68.

Parol evidence is admissible to explain the meaning, among men engaged in the timber business, of the words, "hewn timber, to average one hundred and twenty feet, and to class B No. 1 good," as used in a written contract, and to show that the terms are applied only to square timber, and do not include timber hewn octagonally for use as spars. *Jones v. Anderson*, 76 Ala. 427.

The plaintiff's agent at G. shipped two carloads of shingles on defendants' cars. The shipping bill was in the usual form, and requested defendants to receive the undermentioned property, etc., addressed to N. (the plaintiff), Wyoming, to be sent subject to their tariff, etc. Then, in the appropriate columns, followed the description of a carload of shingles, giving the number of the car, etc. Then under this were the words, "To Henry James, Mitchell," and then another carload of shingles was described. Parol evidence was admitted at the trial to show that the meaning of the shipping bill was that the first-named carload was to go to the plaintiff at Wyoming, and the other to Henry James at Mitchell, and that

the agent so told the defendants' station agent when shipping the goods. *Held*, that the evidence was properly admitted. *Dyment v. Northern, etc., R. Co.*, 11 Ontario Rep. C. P. Div. 343.

A contract wherein the vendor agrees to sell to the vendee "any of my black-walnut trees, not exceeding fifteen in number, that will girth eight feet six inches in circumference and under ten feet, at two dollars each; and all trees measuring ten feet in circumference and upwards, at two dollars and a half each," giving the right of way across the vendor's land to fell and remove the timber, is sufficiently definite to admit parol proof of the property sold. Where the plaintiff vendee brought an action for specific performance against the vendor and those to whom he subsequently contracted to convey the land whereon the trees were standing, it was held competent to inquire whether the vendor had a tract of land on which such trees were to be found; and if he had, the identity of the trees could be ascertained by the terms of description in the contract. If there were more than fifteen such trees on the land, the contract was ineffectual to pass title to any, on account of the uncertainty as to which trees were meant. But in this case, the proof that there were not fifteen trees on the land which answered the description in the contract removes such uncertainty and establishes the title in the vendee. *Dunkart v. Rineheart*, 89 N. Car. 354.

A note was made payable to O. C. Cole, "cashier," without indicating the bank of which he was "cashier." *Held*, that parol testimony was allowable to show that he was "cashier" of plaintiffs' bank, and that in taking the paper he was acting as "cashier" and agent of that corporation. *Baldwin v. Bank of Newbury*, 1 Wall. (U. S.) 534; *Haile v. Peirce*, 32 Md. 327.

The defendant wrote the plaintiffs, who were stock brokers in the city of New York: "I want to buy, say, one hundred shares Union Pacific stock on margin. Will you take \$1000 first mortgage New York & Oswego R. and do it?" The plaintiffs replied that they would, and at once bought the stock, and soon after sold it by the defendant's order at a profit. Other stocks were afterwards bought and sold by the plaintiffs for the defendant under the same arrangement, resulting in a final loss exceeding the value of the security held, and the plaintiffs sued for the balance.

**AMEND.** See **AMENDMENT.****Technical Words—Continued.**

*Held*, that evidence was admissible on the part of the plaintiffs to show the meaning of the words "on margin," that term being used by stock brokers and having acquired a special and well-understood meaning in their business. *Hatch v. Douglas*, 48 Conn. 116; s. c., 40 Am. Rep. 154.

In an action by the payee against the acceptor of an order, above whose acceptance were written the words, "To be paid out of the last payment," a written contract, existing at the time of the acceptance, between the acceptor and the drawer, for the erection of a house, and a conversation, before the acceptance, between the parties to the order and the acceptor's architect, referring to the contract, are admissible in evidence to aid in the construction of the order. *Proctor v. Hartigan*, 139 Mass. 554.

Where checks were drawn "to be paid as soon as we settle with the county," it was competent, for the interpretation of these words, to show by parol that it was understood by the drawers, drawee, and payees that the checks were to be paid out of a particular fund due the drawers from the county, and which the drawers had previously assigned to the drawee of the checks as security for advances. *Des Moines v. Hinkley*, 62 Iowa, 637.

Where a written contract contained the words, "payable in trade," *held*, that parol evidence was admissible to show the meaning of the parties. *Dudley v. Vose*, 114 Mass. 34.

**Abbreviations.**—Evidence tending to explain the sense in which the parties were in the habit of using particular abbreviations and characters, and to show their conventional meaning, is admissible, but not to show the intention of a party in making use of them. *Jaqua v. Witham, etc., Co.*, 106 Ind. 545.

In relation to the abbreviations on a tax duplicate, the treasurer and a deputy auditor were both permitted to testify that "ft." meant "feet," that "Washt. St." meant "Washington Street," that "S. W. cor." meant southwest corner," and that "out. 66" stood for "out-lot 66." *Barton v. Anderson*, 104 Ind. 578; *Chambers v. Watson*, 60 Iowa, 339; s. c., 46 Am. Rep. 79.

**Insurance.**—Where the general terms and scope of a policy of insurance are such as to cover a loss, conditions in the

policy restricting liability so expressed as to be capable of two meanings should be held to have the meaning most favorable to the insured. *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; s. c., 48 Am. Rep. 205.

An application for fire insurance contained the question, "Is property encumbered? if so, state amount." The answer was written, "No morg. judgment." At the time there were nine judgments against the assured. Company claimed answer to mean, "No mortgage and no judgments." The assured claimed that it meant, "No mortgage but judgments." *Held*, that parol testimony was admissible to show that the claim of the assured was correct. *Smith v. Farmers' Ins. Co.*, 89 Pa. St. 287. See, as regards ambiguity in insurance matters, *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 531; *Fabbri v. Phoenix Ins. Co.*, 55 N. Y. 129; *Planters' Ins. Co. v. Deford*, 38 Md. 382; *Frederick Co. Ins. Co. v. Deford*, 38 Md. 404.

A time policy of marine insurance on A's ship from the 20th of May, 1878, to the 28th of May, 1879, contained the words, "Warranted no St. Lawrence between the 1st of October and the 1st of April." The vessel was lost on the voyage home. The underwriters refused A's claim for a total loss on the ground of breach of warranty, inasmuch as the vessel had navigated in the Gulf of St. Lawrence during the prescribed period. A contended that the above words referred exclusively to the River St. Lawrence. Admittedly no general custom of merchants could be proved; but the facts established that the great river which discharges the waters of the North American lakes, and the gulf into which it flows, both bear the name of "St. Lawrence;" that the navigation of both, though of the gulf in a less degree than of the river, was within the prohibited period dangerous. *Held*, reversing the decision of the court below, that the evidence disclosed no ambiguity or uncertainty sufficient to prevent the application of the ordinary rules of construction; and according to those rules the whole St. Lawrence navigation, both gulf and river, is within the fair and natural meaning of these negative words, and therefore prohibited during the months in question. *Birrell v. Dryer*, L. R. 9 H. L. 345.

**AMENDMENT.**<sup>1</sup> (See also APPEAL; BAIL; COSTS; CRIMINAL LAW; EQUITY; EXECUTION; JUDGMENT; PLEADING; PRACTICE; PROCESS; RECORD; TRIAL; VERDICT; WRIT.)

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|------------------------|--|
| 1. Definition.         | 7. Defects Cured by Verdict.                 |
| 2. The Modern Rule.    | 8. Time within which Amendments can be Made. |
| 3. General Principles. | 9. Terms.                                    |
| 4. Of Process.         | 10. Practice.                                |
| 5. In Pleading.        |  |
| 6. Of the Record.      |  |

1. **Definition.**—An amendment is the correction, by permission of the court, express or implied,<sup>2</sup> of an error committed in the progress<sup>3</sup> of a cause.

2. **The Modern Rule.**—The principle generally prevailing to-day is that all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties, and administering justice.<sup>4</sup>

1. Amendments to constitutions are outside the scope of this work. Amendments in legal proceedings are alone considered here.

2. This includes both amendments made as of course, and those made by agreement of the parties.

3. *I.e.*, both in pleading and in everything else that is done in the cause.

4. *Blenkhorn v. Penrose*, 43 L. Times, 668.

**Growth of the Principle.**—In early days but little amendment was allowed in common-law actions. Original writs had to be absolutely free from falsity or error, and could be excepted to for any defect, *e.g.*, a spurious seal, an erasure where the names of persons, places, or things were written (an erasure in the legal part was not so important), a misdescription of the parties as to title, name (even in a single letter), or residence, an alteration of the date, or a failure to observe the proper order of writs. 1 Reeves Eng. Law, 333, 461.

In Wales, however, the principle, *qui cadit a syllaba, cadit a tota causa*, was forbidden (by st. 12 Edw. I.) to be applied, and reasonable amendments were allowed.

Amendments to other parts of the record could be made, but only during the term. *Blackmore's Case*, 8 Co. 156, a; *Phillips v. Smith*, 1 Str. 136.

In the early pleadings, which were oral, all errors were at once objected to by the opposite party, and rectified on the spot. See an instance in 2 Reeves' Eng. Law, 345, of five pleas in abatement, successively made and overruled, before the general issue was pleaded.

The slightest defect in the record after

it had been made up, even if only a misspelling or other mistake of the clerk, was cause for a writ of error. Originally, indeed, it seems that a court's power over its own records was complete, as well after they had been made up as before, so that if any mistake were made by the clerk in entering the judgment, it could be rectified by the minutes or by the recollection of the court itself. So, too, if a continuance or essoin were wrongly entered, for this was the court's own fault. *Comyn's Dig.*, Amend. A; *Blackmore's Case*, 8 Co. 156, b.

This power having been sometimes used for unauthorized ends, and even to cover up the misbehavior of the judges themselves, Edward I. forbade the judges to make the record "a warranty for their own wrong," or to make any erasure or amendment of their rolls, or to record them contrary to their original enrolment. 3 Black. Com. 408.

This was done in the tract of Britton, composed apparently by royal authority, being written as if promulgated by the king. The manifest object was to prevent a false or faulty record from being used to pervert the truth, as well as to prevent a record rightly made up from being tampered with for any evil purpose, but the practical effect was to prevent all amendments whatever. The heavy penalties that had attended transgressions of the rule made the judges refuse to touch any record once made up, so that the slightest mistake, if only in a syllable or a letter, and no matter through whose fault it occurred, was fatal.

The evils of this strictness necessitated the statutes of amendment, commonly called statutes of *jeofails*, from *jeo faille*.

**3. General Principles.**—The right of amendment is established by statute in each State, but there are certain principles which underlie all these statutes and control their operation.

the pleader's acknowledgment of his error. The first was 14 Edw. III. c. 6, which enacted that no process should be annulled or discontinued for error of the clerk in writing one syllable too much or too little. It was held not to affect original writs, but only process in the strictest sense, *i. e.*, judicial writs. See Blackamore's Case, 8 Co. 156, a, where it is admitted that process was also used in a wider sense, to mean all the proceedings in an action. As the act said, "error of the clerk," the party's own act, or that of his counsel, could not be amended, *e. g.*, the omission of the verification in a plea. Y. B. 27 Hen. VI., 10; 3 Reeves' Eng. Law, 471.

The act was, however, held to apply to whole words, "for if a letter or syllable fail in a word, it is no word, wherefore if all the word fail, it may be amended as well." See Y. B. 40, Edw. III. 34, b, cited in Blackamore's Case, 8 Co. 156, a, where one of the judges stated that he had gone to the council and "demanded of them who made the statute" whether it applied to whole words. Apparently the rule that the framers of an act cannot be heard to explain it, is modern.

Stat. 9 Hen. V. c. 4 allowed amendments to be made after judgment as well as before, so long as the record was before the court. It was re-enacted with fuller provisions in stat. 8 Hen. VI. c. 12, to the effect that for error assigned in any record, process, or warrant of attorney, original or judicial writ, panel, or return, in any places of the same rased or interlined, or in any addition, subtraction, or diminution of words, letters, titles, or parcel of letters found therein, no judgment should be reversed or record annulled; but that the judges of the court should have power, with their clerks, to examine the same, and reform and amend (in affirmance of the judgment of such records and processes) all that which to them, in their discretion, seemed to be misprision of the clerks. It did not extend to cases of the omission of names and titles from originals and some other writs. 3 Reeves' Eng. Law, 279.

Many amendments could not be made after the term. The judges could not in another term amend any default of their own in giving judgment; and they refused to amend a declaration that varied from a writ, except by assent of parties, because it was a declaration of a preced-

ing term. They made a distinction between the roll and record, holding that the record was during the term in the breast of the justices, and not in the roll, which might be amended during the term; but after the term the roll became the actual record. 3 Reeves' Eng. Law, 472.

Stat. 32 Hen. VIII. c. 30 was another advance, extending to any mispleading, lack of color, etc., or any other default or negligence of any of the parties, their counsellors or attorneys. 4 Reeves' Eng. Law, 266.

It was followed by 18 Eliz. c. 14; 21 Jac. I. c. 13; 16 and 17 Car. II. c. 8; 4 and 5 Anne, c. 16; 9 Anne, c. 20; and 5 Geo. I. c. 13, and various modern acts, both in England and America, with the general effect of allowing every facility for reasonable amendment.

The acts cited above referred only to civil actions, for in criminal cases amendments were much longer forbidden, every exception being allowed as in favor of liberty. Stat. 37 Hen. VIII. c. 8 made the omission of the usual weapons mentioned under *vi et armis* in an indictment immaterial, but until this century no other reform in this matter was made.

In equity amendments were always liberally allowed in the interest of justice, though with reasonable restrictions both as to the terms on which and the time within which they were granted, *e. g.*, there could be no proceedings on an amended bill until the costs of the former proceeding had been paid, nor could a bill which had been dismissed upon the merits be amended in a part. Viner's Abr. Chancery (E. b.), 9, 11.

From these beginnings the practice of allowing amendments has developed and spread both in England and America, so that in all our courts, as well those retaining the old forms of pleading and procedure as those where more modern systems prevail, the rule given in the text is practically recognized and followed.

The court is authorized to make any amendment, either in form or substance, from the inception to the final termination of a suit, where the process is not itself a mere nullity, and in case the motion for that purpose be made in fit time. Anthony v. Beebe, 7 Ark. 447.

The right of amendment is unlimited under such regulations as to costs as the court may prescribe. Thomas v. Horn, 21 Ga. 177.



No amendment which is unfair to the opposite party will be allowed.<sup>1</sup>

It follows from this that no new cause of action can be added or substituted by an amendment,<sup>2</sup> and that, where such an amendment is allowed, the defendant must not be prejudiced thereby.<sup>3</sup>

Any amendment, substantial or formal, is allowed as of right. *Camp v. Bancroft*, 25 Ga. 74.

Amendments may be made in chancery at any time. *Jeff. Co. v. Ferguson*, 13 Ill. 33.

All courts possess the inherent power to allow amendments. *Tatern v. Potts*, 5 Blackf. (Ind.) 534.

No length of time divests the court of its authority to allow amendments. *Lewis v. Ross*, 37 Me. 230.

It is the duty of the court to allow amendments. *Harrington v. Slade*, 22 Barb. (N. Y.) 162.

Courts have power to allow amendments, notwithstanding that such amendments may affect existing rights. *Green v. Cole*, 13 Ired. Law (N. Car.), 421. See also *Lestrade v. Barth*, 17 Cal. 285; *Killen v. Listrunk*, 7 Ga. 281; *McArtee v. Engart*, 13 Ill. 442; *Wilson v. Johnson*, 1 Greene (Iowa), 147; *Shepherd v. Brenton*, 15 Iowa, 84; *Boston v. Otis*, 20 Pick. (Mass.) 38; *Balch v. Shaw*, 7 Cush. (Mass.) 282; *Deut v. Coleman*, 18 Miss. 83; *Shields v. Taylor*, 13 Miss. 128; *Stephens v. Bank*, 31 Miss. 438; *Hollister v. Judges*, 8 Ohio St. 201; *Hester v. Hapgood*, 3 Hill (S. Car.), 195; *Bard v. Young*, 2 Overt. (Tenn.) 54; *Childress v. Mayor*, 3 Sneed (Tenn.), 347; *Shieffelin v. Whipple*, 10 Wis. 81; *Gillett v. Robbins*, 12 Wis. 319.

1. *Kille v. Ege*, 82 Pa. St. 102.

Where A's two judgments constituted first and third liens on land, and B's judgment a second lien, and A, intending to revive his senior judgment, by mistake described the second one, it was held that he could not amend to B's prejudice. *Duffy v. Houtz*, 105 Pa. St. 96.

2. The cases recognizing this principle are very numerous. See *Collette v. Goode*, L. R. 7 Ch. D. 502; s. c., 38 L. T. 779; *Clark v. York*, 47 L. T. 381; *Ward v. Patton*, 75 Ala. 207; *White v. Moss*, 67 Ga. 89; *F. & M. Bank v. Israel*, 6 Ser. & Raw. (Pa.) 293; *Diehl v. McGlue*, 2 Raw. (Pa.) 337; *Wager v. Chew*, 15 Pa. 323; *Tatham v. Ramey*, 82 Pa. 130; *Royse v. May*, 93 Pa. 454; *Silver v. Jordan*, 139 Mass. 280; *Carpenter v. Huffstetter*, 87 N. Car. 273; *Shen. Valley R. v. Griffith*, 76 Va. 913; *Wilkinson v. Wilkinson*, 59 Wis. 64; *Codrington v. Mott*, 14 N. J.

Eq. 430; *Oglesby v. Attrill*, 14 Fed. Rep. 214; *Mahan v. Smitherman*, 71 Ala. 563; *Peck v. Still*, 3 Conn. 157; *Atkinson v. Clapp*, 1 Wend. (N. Y.) 71; *Smurthwaite v. Richardson*, 15 Com. B. N. S. 463; *Snyder v. Harper*, 24 W. Va. 206; *Brodek v. Hirschfield*, 57 Vt. 12.

This is especially the case after issue joined. Where the bill affirmed a contract and sought specific performance, and the plaintiff asked to amend by charging that the contract was fraudulent and should be avoided, the court said: "After issue joined, the plaintiff cannot make a new case totally inconsistent with that made by the bill as originally framed." *Codrington v. Mott*, 14 N. J. Eq. 430.

This rule is strictly observed in criminal law. In an indictment for stealing "gold and silver coin," the amount proved to have been stolen did not raise the case above petty larceny, and amendment charging theft of "bank-bills," to an amount that would warrant a verdict of grand larceny, was inadmissible. *People v. Poucher*, 30 Hun (N. Y.), 576.

Where a criminal offence against a person is charged, the indictment cannot be so amended as to make out an offence against a different person from the one originally stated. *State v. Morgan*, 35 La. Ann. 1139.

3. In England the rules in force since the Judicature Acts give the courts so wide a discretion in the matter of amendments that an amendment which raises a new case is allowed where the circumstances warrant it. *Budding v. Murdoch*, L. R. 1 Ch. D. 42.

The proper way in which to introduce a new cause of action in a case at law is by obtaining leave, on notice to the defendant to amend the writ of summons. *Moore v. Atwill*, 8 L. R. Ir. 245.

In Kentucky it has been held that if an amendment introducing a new cause of action be admissible, the party must elect upon which cause he intends to proceed. *Humphrey v. Hughes*, 79 Ky. 487.

In Texas such an amendment is allowed, but it must be such as not to prejudice the other party; it cannot relate back to the bringing of the suit, so as to avoid the statute of limitations, and the costs already accrued must be paid. *Henderson v. Kissam*, 8 Tex. 52; *Wil-*

The question of what constitutes a new cause of action has given rise to many decisions.<sup>1</sup>

*liams v. Randon*, 10 Tex. 74; *Ayres v. Cayce*, 10 Tex. 99; *McLane v. Paschal*, 62 Tex. 102.

Also the facts must show some good reason for the amendment. *Halcomb v. Kelly*, 67 Tex. 618.

1. In *Walker v. Fletcher*, 74 Me. 142, an action for negligently burning "ash lumber," an amendment substituting "birch" was allowed.

In *Connell v. Putnam*, 58 N. H. 335, a declaration charging the defendant with wrongfully and injuriously keeping a vicious horse was amended so as to charge him with negligently allowing his horse to go at large without a keeper.

In *Redstrake v. Surroy*, 3 Atl. Rep. 693, the bill charged fraud in certain conveyances, which was denied in the answer, and an agreement set up. The bill was then amended, striking out the charge of fraud and inserting the agreement, and praying for a discovery and account.

*Rice v. Caudle*, 71 Ga. 605, was an action on an open account. An amendment setting up the contract out of which the account grew was allowed.

*Schreckengast v. Ealy*, 16 Neb. 510, was an action for breach of promise of marriage. It appearing that the defendant was under age when the original promise was made, an amendment stating a ratification and other promises after he attained his majority was held good.

*Cramer v. Lovejoy*, 48 N. Y. S. C. 581, was an action on a promissory note. At the second trial the plaintiff was allowed to amend to an action for money lent with an allegation that the note was given as security. *Held*, that this would not have been error, had the court required the plaintiff to pay the costs.

In *Kellogg v. Kimball*, 142 Mass. 124, the declaration contained one count in tort and another in contract, and was demurred to because the two counts did not refer to the same cause of action. The plaintiff was allowed to strike out the count in tort and substitute another based on the same cause of action as the count in contract.

In *Adams v. Phillips*, 75 Ala. 561, an amendment showing part payment, so as to take the case out of the statute of frauds, was allowed.

In *Mahan v. Smitherman*, 71 Ala. 563, it was held that common counts might be added on amendment when it is not intended to introduce a new cause of ac-

tion, but merely as a varying form of the defendant's liability.

*Lyon v. Talmage*, 1 Johns. Ch. (N. Y.) 184, 188, states the rule in equity: "If the bill be found defective in its prayer for relief, or in proper parties, or in the omission or statement of a fact or circumstance connected with the substance of the case, but not forming the substance itself, the amendment is usually granted."

In *Hardin v. Boyd*, 113 U. S. 756, there was a bill in equity for the cancellation of a title-bond, an account, and to quiet title. It was amended so as to pray for an alternative decree for the payment of the balance of the purchase-money and a lien to secure it. The court said: "The amendment had no other effect than to make the bill read just as it might have been originally prepared consistently with established rules of equity practice. It suggested no change or modification of its allegations, and in no just sense made a new case. . . . In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would govern all cases."

In *Smith v. Sherman*, 52 Mich. 637, a bill to set aside a deed, as in fraud of the rights of judgment creditors, omitted to aver that they had levied, and this was amended.

To a bill to discharge a mortgage the mortgagee answered that a small amount was still due. The mortgagor amended to a bill to redeem. *Harrigan v. Bacon*, 57 Vt. 644.

"In actions *ex contractu*, so long as the plaintiff adheres to the original instrument or contract on which the declaration is founded, an alteration of the grounds of recovery on that instrument or contract, or of the modes in which the defendant has violated it, is not an alteration of the cause of action." Hence, in an action of covenant, amendments of the declaration assigning new breaches of the same instrument on which the original counts were founded, and alleging performance on the part of the plaintiff in another mode than was alleged in the original counts, were allowed. *Coxe v. Tilghman*, 1 Whart. (Pa.) 282.

Where the plaintiff had declared in *indebitatus assumpsit*, with the common money counts, he was allowed to add other counts charging the defendant as guarantor and indorser of a check. *Caldwell v. Remington*, 2 Whart. (Pa.) 132.

A new defence may be added by amendment.<sup>1</sup>

In some States no amendment altering the form of action is allowed,<sup>2</sup> but the usual rule is otherwise, provided the cause of action remain unchanged.<sup>3</sup>

Clerical mistakes in the names of parties may be amended like other clerical mistakes.<sup>4</sup>

Names of parties may be added, struck off, and changed, so long as the cause of action remains the same.<sup>5</sup>

The plaintiff, in an action for money had and received was allowed to amend so as to declare in tort for deceit. *Smith v. Bellows*, 77 Pa. St. 441.

To a count for goods sold and delivered to B, an amendment was allowed averring a sale to B, and a delivery by his order to C. *Bardsley v. Kern*, 39 Leg. Int. (Pa.) 131.

In *May v. Footner*, 5 El. & Bl. 505, property in land being in question, an amendment changing the averment of the plaintiff's possession to an averment of the possession of a tenant was allowed.

1. In *Brown v. Bosworth*, 62 Wis. 542, it is said that any amendment to the answer is permissible provided the facts introduced constitute a defence, and though they may be inconsistent with the grounds of the defence first stated, or depart from them, or bring in a new and distinct defence. "Any defence is pertinent to the action."

Between individuals, the statute of limitations cannot be set up by amendment to the answer. *Plumer v. Clarke*, 59 Wis. 646.

But in suits against counties it may. *Baker v. Supervisors*, 39 Wis. 444; *Capron v. Supervisors*, 43 Wis. 614; *Wis. Cent. R. v. Lincoln Co.*, 57 Wis. 137.

A qualified denial of the plaintiff's right of action may be made absolute on amendment. *Laird v. Briggs*, L. R. 19 Ch. D. 20; s. c., 45 L. T. 238.

The fact that the statement of defence is evasive, and amounts to an admission of the substantial truth of what is charged in the statement of claim, is no reason for not allowing it to be amended. *Tidesley v. Harper*, L. R. 10 Ch. D. 393; s. c., 39 L. T. 552. See also *Green v. Serin*, L. R. 13 Ch. D. 589; s. c., 41 L. T. 724.

When the plaintiff has been allowed to amend in an important point, the defendant can set up any legal defence by way of amendment. *Gill v. Young*, 88 N. Car. 58.

2. This is the rule in Alabama (*Mahan v. Smitherman*, 71 Ala. 563), in Missouri (*Parker v. Rodes*, 79 Mo. 88), and apparently in Wisconsin (*Hollehan v. Roughan*, 62 Wis. 64).

In *U. S. v. Collier*, 6 O. St. 61, after a failure in a proceeding according to the code, it was held that the plaintiff could not amend to a form of action not under the code.

In *Fraedrich v. Flieth*, 64 Wis. 184, it was held that the plaintiff could not amend an action at law into a suit in equity.

3. In *Redstrake v. Ins. Co.*, 44 N. J. L. 294, an action of *assumpsit* was changed to covenant even after the case had gone to the Supreme Court, as it was held that the real controversy was not affected.

In *Hastings v. Cropper*, 3 Del. Ch. 165, a bill for an injunction was changed so as to pray for an interpleader. Instances need not be repeated, as this is usually provided by statute.

4. The amendment of a writ by striking out the middle letter in the defendant's name will not dissolve an attachment of personalty when the suit is between the original parties, and no rights of third persons intervene. *Wentworth v. Sawyer*, 76 Me. 434. So when a middle letter is added to a name. *Dietrich v. Wolffsohn*, 136 Mass. 335.

Both the Christian and surname may be amended, in case of a mistake, without limit as to time. *Ward v. Stevenson*, 15 Pa. 21.

The Christian name of a defendant may be added by amendment, he having been sued by his surname only. *Porter v. Hildebrand*, 14 Pa. St. 129.

The misnomer of a corporation may be amended, the true party having been served and taken defence. *Marsh v. Wilkesbarre*, 1 Luz. L. Reg. (Pa.) 173.

5. Use plaintiffs may be brought in by amendment. *Braswell v. McDaniel*, 74 Ga. 319.

The use plaintiff's name may be struck out where the legal plaintiff is really use plaintiff. *Miller v. Pollock*, 99 Pa. St. 202.

A defendant may be made plaintiff against his co-defendants. *Gill v. Young*, 88 N. Car. 58.

A plaintiff suing as heir-at-law may amend so as to sue as executor. *Hines v. Rutherford*, 67 Ga. 606.

Whether an amendment should relate back to the date of the matter amended so as to prevent the plea of the statute of limitations from being set up, is a point on which the authorities are divided. Where the cause of action is the same it seems just that it should have this effect.<sup>1</sup>

No exact rule as to the limits of the right to amend can be stated. Courts have a considerable discretion in the matter, especially in England.<sup>2</sup>

Where a mother sued in her children's behalf without designating herself as next friend or guardian, this was amended. *Sick v. Ass'n*, 49 Mich. 50.

A non-joinder of parties is amendable. *Steed v. McIntyre*, 68 Ala. 407.

A suit brought in the name of the assignee of a chose in action is amendable by placing on record the name of a legal party. *Downey v. Garard*, 24 Pa. St. 52; *Barnhill v. Haigh*, 53 Pa. St. 165.

Where a private party sues on an official bond in his own name, the commonwealth may be made the legal party plaintiff by amendment. *Clement v. Com'th*, 95 Pa. St. 107.

An amendment may be allowed making a third party a defendant upon proper notice to him, if justice requires it, and a trilateral controversy may be conveniently tried in one suit. *Owen v. Weston*, 4 Atl. Rep. 801.

Names of parties cannot be amended so as to vary the cause of action. *Peck v. Still*, 3 Conn. 157; *Atkinson v. Clapp*, 1 Wend. (N. Y.) 71.

1. In *Smith v. Bellows*, 77 Pa. St. 411, the plaintiff, who had paid for a share in oil land, at the request of the defendant, a director of the company, sued for money had and received. He was allowed to amend and declare in tort for deceit, although the statute had then run. See also *Clement v. Commonwealth*, 95 Pa. St. 107.

In *Leeds v. Lockwood*, 96 Pa. St. 464, a plaintiff in ejectment had described the wrong property, and was allowed to amend, but not so as to avoid the bar of the statute. The reason for the decision is not clear, for the authorities and statutes cited by court and counsel do not seem strictly in point. If the amendment did not change the cause of action, then, according to *Smith v. Bellows*, *supra*, the statute did not affect the matter; but if the cause of action was changed, the amendment should not have been allowed. See *Tyrrill v. Lamb*, 96 Pa. St. 464.

In *Adams v. Phillips*, 75 Ala. 561, an amendment which took the case out of the operation of the statute of frauds was

allowed to relate back so as to avoid the bar of the statute of limitations, as no new matter or claim was introduced.

In *Cornish v. Hockin*, 1 El. & Bl. 602, by a clerical error the date of the first summons was misrecited in a pluries summons. This was amended after the statute had been pleaded, and apparently so as to defeat that plea.

Where, however, the date of a writ has been wrongly stated in the writ itself, this is not amendable so as to deprive the defendant of a plea of the statute. *Clark v. Smith*, 2 Hurlst. & Nor. 753; *Campbell v. Smart*, 5 Com. B. 196; s. c., 17 L. Jour. C. P. 63.

In *Heath v. Whidden*, 29 Me. 108, and *Sanger v. Newton*, 134 Mass. 308, it was held that the amendment related back, irrespective of the statute of limitations. But the contrary was held in *Crofford v. Cothan*, 2 Sneed (Tenn.), 492, and *Pridgin v. Strickland*, 8 Tex. 427.

It has been held that a new count in ejectment setting up a demise from a different party cannot be added by amendment so as to relate back. *Sicard v. Davis*, 6 Pet. 124; *Wilkes v. Elliott*, 5 Cr. C. Ct. 611.

In *Miller v. McIntyre*, 5 Cr. C. Ct. 61, it was held that an amendment to a bill in equity, bringing in new parties, did not relate back.

2. The following are a few examples of the limits of this right in addition to those already shown:

A court cannot falsify its own record, as by making it appear that an infant defendant appeared by his guardian when, in point of fact, he appeared by attorney. *Carr v. Cooper*, 1 Best & Sm. 230.

So where there was a clerical error both in a writ and in the copy served, the court amended the writ, but not the copy served. Lord Campbell, C. J., said: "The copy served on the defendant is not part of our record; and we should be ordering a fiction by making it appear that he had been served with the indorsement as amended; which I abstain from doing." *Cornish v. Hockin*, 1 El. & Bl. 602.

Pleas in abatement are not amendable,

**4. Of Process.**—As a general rule, there must be something by which to amend the process. With this limitation nearly all defects can be amended.<sup>1</sup> (See also PROCESS.)

**5. In Pleading.**—The various kinds of amendments to pleadings<sup>2</sup>

because they are dilatory and not to the merits. *Atkinson v. —*, 2 Chitty, 5.

A writ returnable on a *dies non* has been held void and not amendable. *Kenworthy v. Peppiat*, 4 Barn. & Ald. 288.

The affidavit in support of a criminal information is not amendable. *Rex v. Baxton*, 9 Dowl. 1021; *U. S. v. Tureaud*, 20 Fed. Repr. 621.

A judgment entered by consent can only be amended by consent. *McEachern v. Kerchner*, 90 N. Car. 177.

A judgment entered by mistake of the plaintiff or his attorney for too small an amount cannot be amended after other parties have paid money on the strength of it. *Gray v. Robinson*, 90 Ind. 527; *Selz v. Bank*, 60 Wis. 246.

A supplemental complaint, showing a cause of action that accrued since the action was begun, is not allowed. *Holly v. Graf*, 29 Hun (N. Y.), 443. To the same effect, *McCaslan v. Latimer*, 17 S. Car. 123.

If there is nothing to amend by, no important amendment can be made. Hence, where the declaration, summons, and service were lost, they could not be supplied by parol evidence. *Bailey v. Palmer*, 5 Ark. 208.

When no cause of action is shown, no amendment will be allowed. *Hart v. Bowie*, 34 La. Ann. 323.

Nor to raise what would probably be a fruitless inquiry. *Yorkshire Co. v. Maclure*, L. R. 19 Ch. D. 489; s. c., 45 L. Times, 751; *Griswold v. Sedgwick*, 1 Wend. (N. Y.) 131.

An amendment sought merely to give the party the right to open and conclude to the jury will not be granted. *Hartman v. Ins. Co.*, 21 Pa. St. 466.

"As a general rule, leave to amend ought not to be refused unless the court is satisfied that the party is acting *mala fide*, or that his blunder has done some injury to the other side which cannot be compensated in damages." *Bramwell*, L. J., in *Blenkhorn v. Penrose*, 43 L. Times, 668.

Other relief, not asked for in the claim, will not be allowed by amendment when delay would thereby be caused to another action. *Cargill v. Bower*, L. R. 10 Ch. D. 502; s. c., 38 L. Times, 779.

It has been held discretionary with the court to allow new pleadings to be filed after issue joined. *Hoffman v. Rothenberger*, 82 Ind. 574.

So in regard to filing an amended answer, raising an issue antagonistic to that already raised. *Harvey v. Corcoran*, 60 Cal. 314.

Where a mistake is alleged, it must be clearly shown. *Brownlee v. Com'rs*, 101 Ind. 401. See also *Trumbo v. Finley*, 18 S. Car. 305; *Turnley v. L. & N. W. R.*, 16 Com. B. 575.

1. *E.g.*, in *Wesson v. Stalker*, 47 L. Times, 444, the copy of the writ served was tested as in 1880, instead of 1882. After a judgment by default there was a motion to set aside on the ground that the test was a material part, any error in which was fatal, so that the affidavit of service of a true copy was false. It was held a mere imperfection, amendable at any time.

In *Pleasants v. East Dereham*, 47 L. Times, 439, the summons purported to be tested by a chancellor not then in office. Held, a clerical error, which the judge had power to amend. So *Wakeling v. Watson*, 1 Crompt. & Jer. 467.

Where, in a suit by indorsee against maker, the copy of the note indorsed on the summons omitted the maker's name, it was amended, and the service held good on payment of costs. *Knight v. Pocock*, 17 Com. B. 177.

Where a suit against A and B had been dismissed as to B for want of service, and a judgment against A had been reversed, the complaint was amended and process served on B. *Clodfelter v. Hulett*, 92 Ind. 426.

2. Defective pleadings must be amended, and cannot be legalized. *People v. Mariposa Co.*, 31 Cal. 196.

See p. 551, n. 1, for cases of such amendments. To cite others:

Where evidence not within the issue is offered and admitted, the pleadings may be amended to conform to it. *Bank v. Stover*, 60 Cal. 387.

Where a verdict has been given for damages greater than those laid in the declaration, it may be amended. *Tebbs v. Barron*, 4 Man. & Gr. 844; *Eleston v. Deacon*, L. R. 2 C. P. 20.

Pending a suit on a note, a judgment in a former suit on the same note was made up and entered by the supreme court. It had effect from its original date, and an amended declaration was filed, counting on the judgment. *King v. Burnham*, 129 Mass. 598.

depend largely on the statutes of amendment and the forms of pleading in use in the respective States. (See also PLEADING.)

**6. Of the Record.**—Every court of record has, at common law, the power to amend its record, so as to make it conform to the fact.<sup>1</sup> (See also RECORD.)

**7. Defects Cured by Verdict.**—The general principle is that if the issue joined be such as necessarily required on the trial, proof of facts defectively or imperfectly stated or omitted in the pleadings, and without which proof it is not to be presumed that either the judge would direct the jury to give the verdict or the jury would have given it, such defects need not be amended, but are held to be cured by the verdict.<sup>2</sup> (See also VERDICT; PLEADING.)

**8. Time within which Amendments can be Made.**<sup>3</sup>—Subject to the rights of the opposite party, amendments to the pleadings can usually be made at any time before the jury have retired, or the hearing, if in equity, is at an end.<sup>4</sup>

Sometimes, however, no such amendment is allowed after issue joined.<sup>5</sup>

1. Pa. & N. Y. R. v. Bunell, 81 Pa. St. 414; King v. Bank, 9 Ark. 885; Hollister v. Judges, 8 O. St. 201; Hester v. v. Hapgood, 3 Hill (S. Car.), 195; Beard Young, 2 Overt. (Tenn.) 54.

After the record has ceased to be *in fieri*, and after the term, it cannot be amended by parol evidence. 90 Ind. 577.

But this rule does not usually obtain. See *post*, 3.

2. 1 Saunders, 228, a; Lebanon Bank v. Karmany, 98 Pa. St. 42; Mathias v. Sellers, 86 Pa. St. 486.

3. Formal amendments may be made at any time. Glasscock v. Glasscock, 8 Mo. 577.

Amendments may be granted at any stage of the trial, when necessary for the ends of justice. Lestrade v. Barth, 17 Cal. 285.

"The old notion that the record remains in the breast of the court only till the end of the term, has yielded to necessity, convenience, and common-sense." Rhoads v. Com'th, 15 Pa. St. 276.

4. Hill v. Chipman, 59 Wis. 211, was a case of breach of contract. After the plaintiff rested, the complaint was amended so as to allege readiness and willingness to perform.

In Herman v. Rinker, 106 Pa. St. 121, at the trial of a feigned issue, the plaintiff wished to amend the *narr* by striking out one of the defendants. Held, error not to allow this.

In Neal v. Spooner, 20 Fla. 38, the name of one of the plaintiffs was struck out, and that of his next friend substituted, at the trial.

In Georgia, on appeal trials, amend-

ments are allowed after the case has been submitted to the jury. Vance v. Crawford, 4 Ga. 445.

In Mississippi they are allowed at any time before verdict. Barker v. Justice, 41 Miss. 240.

In Harrigan v. Bacon, 57 Vt. 644, a bill to discharge a mortgage was, on the hearing, amended to a bill to redeem.

In Indiana no new issue can be raised after argument. Kerstetter v. Raymond, 10 Ind. 199.

The Delaware rule is that amendments can be made after issue joined, but not after argument. Wood v. Academy, 5 Houston (Del.), 513.

Where a bill to set aside a deed as in fraud of the rights of judgment creditors omitted to aver that they had levied, this was amended at the hearing. Smith v. Sherman, 52 Mich. 627.

In Roe v. Davies, L. R. 2 Ch. D. 729, the plaintiff was allowed to amend the bill, and go into further evidence, after the hearing had been fixed and accidentally postponed.

In a suit for importing articles infringing the plaintiff's patent, an amendment to show that the defendants were custom-house agents, engaged in getting the goods landed and stored, was allowed during the hearing. Nobel's Explosives Co. v. Jones, L. R. 17 Ch. D. 721; s. c., 42 L. T. 754.

After a cause has been referred to arbitrators, it is not too late to amend the bill of particulars. Hodson v. Steers, 1 Fos. & Fin. 484; Jones v. Corry, 6 Bing. N. Cas. 247; Blunt v. Cooke, 4 Man. & Gr. 458.

5. In Braucker v. Crozier, 16 L. T. 391,

Certain amendments may be made after judgment.<sup>1</sup>  
 No party guilty of laches will be allowed to amend.<sup>2</sup>

a replication of the statute of limitations was too late after issue joined.

In *Ritchie v. Van Gelden*, 9 Welsby Hur. & Gor. 762, a plea of "never lent" could not be amended to "lent for an unlawful purpose" after issue joined.

In *Hendriks v. Montagu*, L. R. 17 Ch. D. 642; s. c., 44 L. T. 89, an amendment raising a charge of fraud, which had not hitherto been made, was refused at the trial.

In *Hackett v. Lalor*, 12 L. R. Jr. 44, it was held that a statement of defence could not be set aside after issue joined.

Where the writ was not directed to the sheriff or coroner of any particular county, it could not be amended after plea in abatement, as such amendment would sweep away the defence set up. *Anthony v. Beebe*, 7 Ark. 447.

A case stated will not be amended by raising a point not raised by the parties, unless it has been omitted by error or through fraud. *Hills v. Hunt*, 15 Com. B. 1; *Pennington v. Cardale*, 10 Weekly Rep. 544; *Com'rs v. Jones*, 8 Com. B. N. S. 124.

1. Where an amendment changing a name had been allowed, but the clerk omitted to do it, it was permitted after judgment. *Sanford v. Willetts*, 29 Kan. 647.

In *McKinney v. Jones*, 55 Wis. 39, it was held that the complaint could be amended as well before as after judgment to correspond with the proofs.

In *Stuart v. Logansport*, 87 Ind. 584, the action had been dismissed as to some of the parties. After judgment the record was amended so as to show this.

In *Hill v. Hoover*, 5 Wis. 387, it was held that the supreme court had power, on a proper application, to correct its records, so as to make them conform to the truth of the case, at a term subsequent to the one at which the judgment was rendered.

In *Kirkpatrick v. Corning*, 29 N. J. Eq. 23, part of the bill had been held bad on demurrer above and below. After decree, the defective part was struck out on amendment, on motion of the defendants.

In *Winkley v. Winkley*, 44 L. T. 572, after judgment in partition, the statement of claim and order of sale were amended.

In *Cannan v. Reynolds*, 5 El. & Bl. 301, a judgment by default was set aside and ordered to be repaid, and the bill of

particulars amended, on payment of costs.

In *In re Blight*, 45 L. T. 531, an amendment raising new questions was refused after judgment.

In *Petrie v. Hannay*, 3 Durn. & East. 659, there had been a verdict on the general issue, but no notice had been taken of the issue on the statute of limitations. This was amended on payment of costs.

A verdict in replevin, not properly specific, can be amended. *Rees v. Morgan*, 3 Durn. & East. 349.

A judgment *de bonis propriis* may be amended to one *de bonis testatoris*. *Green v. Rennett*, 1 Durn. & East. 782. See also *Mellish v. Richardson*, 3 Barn. & Cress. 819; *Regina v. Nott*, 4 Ad. & Ell. N. S. 786; *Laing v. Whalley*, 3 Hurlst. & Nor. 901; *Hooper v. Laine*, 6 H. L. Cas. 443; *Paddon v. Bartlett*, 3 Ad. & Ell. 887; *Jackson v. Galloway*, 1 Man. Gr. & Sc. 281.

In *Webster v. Emery*, 10 Welsby Hur. & G. 901, a payment into court had been accepted by the plaintiff under a misapprehension. A repayment, and amendment of the declaration, were subsequently allowed.

In *Young v. Glascock*, 79 Mo. 574, an amendment to the answer was asked for, and the trial proceeded on the understanding that it should be made. After a motion in arrest of judgment was filed, the defendant offered to amend. The court said that it was too late. Held, that this was error.

The seal of the court may be added to a writ of execution after it has been executed. *Taylor v. Courtney*, 15 Neb. 190.

2. In *Jones v. Welling*, 16 Fed. Rep. 635, leave to amend was refused on this ground after the testimony had closed.

Also, when it was sought to maintain a new defence. *Elder v. Harris*, 76 Va. 187. See also *Bauer's Est.*, 13 Phila. (Pa.) 391; *Horton v. McCurdy*, 14 Phila. (Pa.) 221; *Williams v. Thompson*, 80 Ky. 325; *Fowble v. Rayberg*, 4 Ohio, 45; *Dawes v. Gooch*, 8 Mass. 488; *Sackett v. Thomson*, 2 Johns. (N. Y.) 206.

In *Staples v. Holdsworth*, 4 Bing. N. Cas. 717, a lapse of ten years was held not to show laches, the plaintiff having been beyond seas.

Municipal corporations are not held so strictly to promptness in this matter as individuals are. *Brooks v. N. Y.*, 12 Abb. N. Cas. (N. Y.) 350.

Amendments of any kind are very rarely made after appellate proceedings have been instituted.<sup>1</sup>

**9. Terms.**—When an amendment is applied for, the court will impose such terms as will, under the circumstances of the case, secure justice and prevent the other party from being prejudiced.<sup>2</sup>

Payment of the costs of the proceedings rendered nugatory by the amendment is a usual prerequisite.<sup>3</sup>

**10. Practice.**—Amendments are usually made on motion,<sup>4</sup> but the practice depends on statutory regulations. (See also PRACTICE.)

**AMERCEMENT.** (See also FINES; SHERIFF.)—A pecuniary penalty or fine imposed upon an offender at the discretion of the court.<sup>5</sup>

1. In *Hosmer v. Williams*, Wright (O.) 355, a change in the form of action was not allowed after writ of error.

In *Perry v. Plunkett*, 74 Me. 328, the case having gone to the supreme court on an agreed state of facts, no amendment was allowed.

In *King v. Bank*, 9 Ark. 185, a record erroneously showing that all the defendants' pleas, instead of some only, had been withdrawn, was amended after the defendants had taken a writ of error.

In *McLane v. Paschal*, 62 Tex. 102, after an appeal to the district court from an inferior court, an amendment to the answer was made, but struck out by the district judge. *Held*, that this was error, as the only criterion was whether or not it could have been admitted in the inferior court.

On appeal from the U. S. district court, the circuit court cannot allow an amendment which would bring before it parties not named in the appeal bond. *The City of Lincoln*, 19 Fed. Rep. 460.

2. *Rives v. Walthall*, 38 Ala. 329; *Mahone v. Williams*, 39 Ala. 202; *Chambliss v. Taber*, 26 Ga. 167; See *v. Bobst*, 9 Mo. 28.

But not for merely formal amendments. *Gale v. French*, 16 N. H. 95.

An amendment seeking to set up the defence of usury must be accompanied by tender of the sum lawfully due. *Post v. Boardman*, 1 Parke (N. Y.), 523; *Bank v. Beach*, 1 Pal. (N. Y.) 429.

3. *McLellan v. Osborne*, 51 Me. 118; *Keeler v. Shears*, 6 Wend. (N. Y.) 540; *Mobley v. Mobley*, 7 Rich. (S. Car.) 431; *Downer v. Thompson*, 6 Hill (N. Y.), 377; *Turner v. Hillerline*, 14 How. (N. Y.) 231; *Shanks v. Rae*, 19 How. (N. Y.) 540; *Benezin v. Lovelace*, Cam. & N. (N. Car.) 521; *Woods v. Durett*, 28 Tex. 429; *King v. Corke*, L. R. 1 Ch. D. 57; s. c., 33 L. Times, 375; *Cargill v. Bower*, L. R. 4 Ch. D. 78; s. c., 35 L. Times, 621.

But not where the need of the amendment is caused by the defendant's withholding information. *Nobel's Explosives Co. v. Jones*, 49 L. Jour. Chanc. 726; s. c., 4 L. Times, 756.

Where the variance between the allegation in the pleading and the proof is not material, and the adverse party could not have been misled thereby to his prejudice, the court should allow an amendment without costs. *Riddles v. Aikin*, 29 Mo. 453.

The payment is not a condition precedent unless so expressly stated in the order. *Winfield v. Dyer*, 1 Cranch C. Ct. 403; *Cutts v. Chapman*, 1 Cranch C. Ct. 570.

4. Amendments of pleadings should be made and allowed only by the court at bar, and upon application and order in term time; not by a single judge in vacation. *Den v. Hull*, 9 N. J. Law, 277.

A writ not running in the name of the State should be amended by the court of its own motion, or treated as amended. *Kahn v. Kuhn*, 44 Ark. 404.

5. *Rapalye and Lawrence Law Dict.*, *sub voce*.

Anciently there was an important distinction between an "amercement" and a fine. A fine was a certain punishment, growing expressly out of some statute, and was always imposed and assessed by the court; an amercement was imposed by the court in general terms (*quod sit in misericordia*, that the party be in mercy), and was afterwards assessed or affirmed (that is, moderated, and reduced to a certain sum) by the peers or equals of the party, who were hence called "affeerors." *Brook v. Hustler*, 1 Salk. 56; 3 Salk. 33.

The term "amercement" was also applied more particularly to pecuniary punishments imposed upon the officers of courts, as sheriffs and coroners, and the



**AMICABLE—AMICUS CURIAE—AMNESTY—AMONG.**

**AMICABLE.**—A technical word used in reference to an action instituted in court by consent of the parties.<sup>1</sup>

**AMICUS CURIAE.**—A friend of the court; one who suggests something for the information of a court.<sup>2</sup>

**AMNESTY** is the abolition or oblivion of the offence.<sup>3</sup>

**AMONG.**—To each one.<sup>4</sup>

word is still used in this sense. See title **SHERIFFS**. In other respects, however, no essential distinction remains between an amercement and a fine. Amercements, in their ancient technical sense, are entirely disused in modern practice. Burrill's Law Dict., *sub voce*.

1. **Amicable Action.**—"For the word 'amicable' is not of substance, the meaning being an action to be entered. Whether amicable or adverse could not be material, and was used only as that was the form of action that was then contemplated." Brackenridge, J., Bond v. Gardiner, 4 Binn. (Pa.) 269, 282.

**Amicable Compounders.**—The Louisiana civil code, under the title of "Arbitration," recognizes two classes of arbitrators: "the arbitrators, properly so called," and "the amicable compounders." Art. 3076. The following article defines the difference between them, as to the principles by which they are to be guided in the discharge of their duty: "The arbitrators," says article 3077, "ought to determine, as judges, agreeably to the strictness of the law. 'Amicable compounders,' are authorized to abate something of the strictness of the law, in favor of natural equity." Bird v. Laycock, 17 La. Ann. 171.

**Amicable Lawsuit.**—By the terms "arbitration" and "amicable lawsuit" as understood in their common and usual signification, the former means a reference or submission of a matter in dispute to the decision of one or more persons as arbitrators, whilst the latter, "an amicable lawsuit," is one instituted in a court of justice seriously, but in a friendly spirit, in order that some matter in controversy may, by a judicial decree, be settled definitely, as cheaply, and with as little delay as possible. Thompson & Co. v. Moulton, 20 La. Ann. 535.

2. This term is usually applied to a counsellor of a court, who being present, makes some suggestion to the court in regard to the matter pending. It is more rarely applied to counsel arguing in a cause. The case was elaborately argued by Fisher for the petitioner, and Fry, who was counsel in a similar case, as *amicus curia*. See *Ex parte Yeager*,

11 Grattan (Va.), 655; *Ex parte Randolph*, 2 Brock. (U. S.) 446, 461.

It is also applied to the parties to actions, suggesting or showing something for their own benefit. The Prince's Case, 8 Coke, 15, 29, a.

So of persons who have no right to appear in a suit, but are allowed to introduce evidence to protect their own interests. See *Bass v. Fontleroy*, 11 Texas, 698.

Finally, of any stranger, who being in court calls the court's attention to some error in its proceedings. *Falmouth v. Strode*, 11 Mod. 137; *Williams v. Blunt*, 2 Mass. 207, 215.

"Any one, as *amicus curia*, may make application for and in the behalf of an infant, though no relation." *Beard v. Travers*, 1 Ves., Sr. 313.

3. *State v. Blalock*, Phill. (N. Car.) 247; *Ex parte Law*, 37 Ga. 296. See *Knote v. U. S.*, 10 Ct. of Cl. 397; s. c., 95 U. S. 149.

Amnesty and pardon are very different. A pardon is granted to one who is certainly guilty, sometimes before, but usually after, conviction, and the court takes no notice of it unless pleaded, or in some way claimed, by the person pardoned; and it is usually granted by the crown or by the executive. But amnesty is to those who may be guilty, and is usually granted by Parliament or the legislature; and to whole classes before trial. Amnesty is the abolition or oblivion of the offence; pardon is its forgiveness. *State v. Blalock*, Phill. (N. Car.) 247. See *U. S. v. Wilson*, 7 Pet. (U. S.) 150.

The general amnesty granted by the President, Dec. 25, 1868, does not entitle one receiving its benefits to the proceeds of his property previously condemned and sold under the Confiscation Act of 1862, after such proceeds have been paid into the U. S. Treasury. *Knote v. U. S.*, 95 U. S. 149. See also, as regards the President's proclamation, *Carlisle v. U. S.*, 16 Wall. (U. S.) 147; *Gay's Gold*, 13 Wall. (U. S.) 358; *U. S. v. Klein*, 13 Wall. (U. S.) 128.

4. A direction by a testator to distribute his property among his children would

**AMOTION.** (See also DISFRANCHISEMENT; EXPULSION; OFFICERS OF MUNICIPAL CORPORATIONS; OFFICERS OF PRIVATE CORPORATIONS.)

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| 1. <i>Definition.</i>                               | 5. <i>Who has Power to Expel.</i>   |
| 2. <i>Right of Expulsion.</i>                       | 6. <i>Mode of Expulsion.</i>  |
| 3. <i>Limitations upon the Right of Expulsion.</i>  | 7. <i>In Expelling Corporator, Provisions of Charter and By-laws must be Complied with.</i> |
| 4. <i>Causes for Expulsion. General Principles.</i> | 8. <i>Remedy for Illegal Expulsion.</i>   |

1. **Definition.**—Amotion is the removal of an official agent of a corporation from the station assigned to him, before the expiration of the term for which he was appointed.

The term seems in strictness only to apply to officers; and, consequently, if an officer be removed for good cause he may still continue to be a member. Disfranchisement, on the other hand, applies to the removal or expulsion of members generally.<sup>1</sup> But amotion and disfranchisement are sometimes used as convertible terms.<sup>2</sup>

2. **Right of Expulsion.**—The right of expulsion of an officer for just cause is a common-law incident of all corporations;<sup>3</sup> and in

not authorize the distribution of all the property to one child, nor that one be wholly excluded. *Hudson v. Hudson's Adm.*, 6 Mumf. (Va.) 353.

**Among Valuable Papers.**—This phrase does not necessarily mean among the most valuable papers. *Winstead et ux. v. Bowman et al.*, 68 N. Car. 174.

1. 2 Bl. Com. 37. The word "disfranchisement" signifies taking a franchise from a man for some reasonable cause. *Symmers v. R.*, 2 Cowper, 489, 502.

Disfranchisement is defined to be the taking a franchise from a man for some reasonable cause. *People v. Med. Soc. of County of Erie*, 24 Barb. (N. Y.) 570, 578.

In strictness the term disfranchisement is applicable to members, while the term "amotion" is applied only to such members as are officers; and, consequently, if an officer be removed for good cause he may still continue to be a member of the corporation. *The Queen v. Saddler's Co.*, 10 H. L. Cas. 404; *Neale v. Hill*, 16 Cal. 145; *State v. Adams*, 44 Mo. 570.

2. 2 Kent's Com. 297.

3. Thus on the question whether the corporation of Ipswich had power to amove from the office of portman of the town or borough of Ipswich, Lord Mansfield said: "We think that from the reason of the thing, from the nature of the corporations, and for the sake of order and government, the power is incident, as much as the power of making

by-laws;" citing Lord Bruce's Case, 2 Strange, 819.

"The modern opinion has been that a power of amotion is incident to the corporation." *Rex v. Richardson*, 1 Burrows, 517; *Rex v. Ponsonby, Vesey, Jr. I.*

Where an act created the "Illinois State Hospital for the Insane," and incorporated certain individuals named, and their successors in office, as trustees, with the power of appointing a superintendent, who should be subject to removal only for infidelity to the trust reposed in him, or on account of incompetency, it was held that the trustees had the right to remove the superintendent for the causes specified, whenever either of those causes existed; and that had the law been silent as to the tenure of the office, and on the subject of removal, the court would not hesitate to hold that the power of amotion was incidental to that of appointment, and that the trustees might remove the superintendent without assigning any specific cause, whenever in their judgment the best interests of the institution should require it. *People v. Higgins*, 15 Ill. 110.

But a member of a corporation cannot be ejected until after he has an opportunity to be heard. *Southern Plank Road Co. v. Hixon*, 5 Ind. 165; *State v. Adams*, 44 Mo. 570.

The right cannot be exercised arbitrarily. *Evans v. Philadelphia Club*, 50 Pa. St. 107; *State v. Georgia Medical Soc.*, 33 Ga. 608.

case of mere ministerial officers, appointed *durante bene placito*, at the mere pleasure of those appointing them, without notice.<sup>1</sup>

The power of removal must be exercised for some reasonable cause. The members of an eleemosynary corporation cannot legally expel one of their members for using disrespectful and contemptuous language toward the rest, as by calling them sycophants, rascals, scoundrels, etc., and for neglecting to fulfil his duties as a member of one of their committees. *Fuller v. Plainfield Academic School*, 6 Conn. 546.

**Power of Expulsion conferred by Charter.**—Corporations whose chief purpose is that of gain have no power to expel their members, and thus to deprive them of their property rights, unless the power is expressly given by charter. *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Bagg's Lease*, 11 Co. 99. See *Hopkinson v. Exeter*, L. R. 5 Eq. 63.

Such a power is not often conferred on such corporations. It is, however, frequently conferred upon corporations whose primary purpose is not that of gain. The power is, of course, in such case wholly determined by the particular charter provisions. *Black & White Smith's Soc. v. Vandyke*, 2 Whart. (Pa.) 309; *Commonwealth ex rel. Bryan v. Pike Beneficial Assoc.*, 8 W. & S. (Pa.) 247; *Inderwick et al. v. Snell*, 2 McN. & G. 216.

This applies to benevolent societies, stock and other exchanges, literary, social, and like institutions, whose purposes are not primarily or exclusively those of gain; while the right to censure a member for improper conduct is incident to every corporation. *Smith v. Smith*, 3 Desaus. 557; *Com. v. Phila. Soc.*, 5 Binn. (Pa.) 486; *Society v. Com.*, 52 Pa. St. 125; *People v. Chicago Board of Trade*, 45 Ill. 112.

With regard to corporations or associations of any kind holding property, it cannot be pretended that a member can be expelled and thus deprived of his interest therein, in any case by a majority of the corporators, unless such power has been expressly conferred by the charter. *Angell & Ames on Corp.* § 410. See *People v. New York Cotton Exchange*, 8 Hun (N. Y.), 216; *People v. Board of Trade*, 80 Ill. 134; *People v. Mechanics' Aid Society*, 22 Mich. 86; *Hopkinson v. Exeter*, L. R. 5 Eq. 63; *Gardner v. Free-mantle*, 19 W. R. 256; *Dean v. Bennett*, L. R. 6 Ch. 489; *Fischer v. Keane*, 11 Ch. D. 353; *Dawkins v. Antrobus*, 41 Law T. (N. S.) 490; 17 Ch. D. 615.

As to the effect of an express provision of this kind, see *Hope v. International Financial Soc.*, W. N. (Eng.) 1876, p. 257, where even the express provisions of the articles of association were held inoperative to disfranchise a member who was seeking to restrain the company from making an improper application of the funds of the society. See also *State v. Adams*, 44 Mo. 570.

But all such provisions will be construed strictly. *State ex rel. Graham v. Chamber of Commerce*, 20 Wis. 63.

The court will not, however, review the action of the corporation in such case unless it appears to have been in bad faith. *People ex rel. Stevenson v. Higgins*, 15 Ill. 110; *Queen v. Governors of Darlington Free Grammar School*, 14 L. J. (Q. B.) 67.

1. *Willc. Mun. Corp.* 253.

Under the constitution of New York, which declares that "where the duration of any office is not prescribed by the constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment," it was held that commissioners for the erection of a public work, authorized by a special act of the legislature to be appointed by the governor, secretary of state, and comptroller, the duration of whose office is not prescribed by law, hold their offices during the pleasure of the authority making the appointment, and of course are subject to removal from office by the same authority. *People v. Comptroller of the State*, 20 Wend. (N. Y.) 595.

The power granted by the constitution to the governor to appoint necessarily carries with it, in all offices where the tenure is during pleasure, the incidental power of removal. *Com. v. Sutherland*, 3 S. & R. (Pa.) 144, 154; *Field v. Girard College*, 54 Pa. St. 233.

The grant of power to the executive to remove an officer for a certain cause implies authority to judge of the existence of that cause. *State v. Doherty*, 25 La. Ann. 119.

On the charter power of removal, without cause, at any time, of a police patrol appointed for a year, see *Chicago v. Edwards*, 58 Ill. 252.

The common council of a city incorporated under the general law for the incorporation of cities (Acts 1867, p. 33) may, under the eighth section of that act, remove from office a city attorney by the

**3. Limitations upon the Right of Expulsion.**—Where the right of disfranchisement exists, the only limit thereto is that it be done for a just and sufficient cause, and that the party to be expelled be duly notified to appear, and be afforded an opportunity to be heard.<sup>1</sup>

**4. Causes for Expulsion—General Principles.**—The following are said by the authorities to be causes for which any corporation not for gain is justified in expelling its members, viz.:

(1) An offence which, though it has no immediate relation to the corporate character, is of so infamous a nature as to render the offender unfit to exercise the franchise.

(2) An offence which is against the duty of the offender as a corporator, and which amounts to a breach of the tacit condition annexed to the franchise.

(3) An offence of a mixed nature, partaking of the character of both the sorts of offences above specified.<sup>2</sup>

vote of a mere majority (said section reading: "The city attorney, etc., shall hold office two years each, subject to removal by said city council at their pleasure"), where the removal is contemplated without any offence being charged, but simply at the pleasure of the council. *City of Madison v. Korbly*, 32 Ind. 74.

As to the validity of acts performed by an officer removed by appointment of another, it has been held that "a United States marshal is not removed by the appointment of another until he receives notice of such appointment; and all acts done by him before such notice are good." *Bowerbank v. Morris*, Wallace, 119. Cf. *Doolittle's Lessee v. Bryan et al.*, 14 Howard (U. S.), 563.

1. *Queen v. Sadler's Co.*, 10 H. L. Cas. 404; 3 Ellis & E. 42; 4 Best & Smith, 570; *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *Com. v. German Society*, 15 Pa. St. 251; *Black & White Smith's Soc. v. Vandyke*, 2 Whart. (Pa.) 309; *Green v. Bf. Meth. Ep. Soc.*, 1 S. & R. (Pa.) 254; *Com. v. Penn. Ben. Inst.*, 2 S. & R. (Pa.) 141; *Com. v. Guardians of Poor*, 6 S. & R. (Pa.) 469; *Com. v. Pike Ben. Soc.*, 8 W. & S. (Pa.) 247; *Washington Soc. v. Bacher*, 20 Pa. St. 425; *Fuller v. Plainfield Acad.*, 6 Conn. 532; *Barrows v. Med. Soc.*, 12 Cush. (Mass.) 402; *People v. St. Francis Ben. Soc.*, 24 How. Pr. (N.Y.) 216; *People v. N. Y. Com. Assoc.*, 18 Abb. Pr. (N.Y.) 271; *People v. Sailors' Snug Harbor*, 54 Barb. (N.Y.) 532; *Delacy v. Neuse River Co.*, 1 Hawks. 274; *State v. Georgia Med. Soc.*, 38 Ga. 608; *State v. Lusitanian Soc.*, 15 La. Ann. 73; *People v. Mech. Aid Soc.*, 22 Mich. 86; *State v. Chamber of Commerce*, 20 Wis. 68; *Soc. v. Com.*, 52 Pa. St. 125;

*Com. v. Soc.*, 2 Binn. (Pa.) 441; *Com. v. Franklin Ben. Soc.*, 10 Pa. St. 357; *Com. v. German Soc.*, 15 Pa. St. 251; *Evans v. Phila. Club*, 50 Pa. St. 107; *Cook v. College of Physicians*, 9 Bush (Ky.), 541.

But in *People v. Board of Trade*, 80 Ill. 134, it was said that the courts will not interfere to control the manner of enforcing the by-laws of purely voluntary associations, organized, not for the prosecution of a business, but only for inculcating certain principles among the members, such as a board of trade. An expelled member of such an association cannot be restored by *mandamus*. As to interference by *certiorari* or injunction, see *Gregg v. Med. Soc.*, 111 Mass. 185; *State v. Med. Soc.*, 38 N. J. L. 377; *Thompson v. Soc. of Tammany*, 17 Hun, 505; *Baxter v. Chicago Board of Trade*, 83 Ill. 146.

Members not acting in good faith for the interests of the corporation are not permitted to invoke the action of the courts as to corporate transactions. *Waterbury v. Express Co.*, 3 Abb. N. S. (N. Y.) 163; *State v. Lusitanian Soc.*, 15 La. Ann. 73.

2. Lord Mansfield in *Rex v. Richardson*, 1 Burr. 538; *Rex v. Mayor of Liverpool*, 2 Burr. 732; *Rex v. Mayor of Derby*, Cas. Temp. Hardw. 154; *Com. v. St. Patrick's Ben. Soc.*, 2 Binn. (Pa.) 539; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Society v. Com.*, 52 Pa. St. 125; *People ex. rel. Gray v. Medical Society*, 24 Barb. (N. Y.) 570; *aff.* 32 N. Y. (5 Tiff.) 187; *People ex. rel. v. N. Y. Com. Assoc.*, 18 Abb. Pr. (N. Y.) 271; *Fawcett v. Charles*, 13 Wend. (N. Y.) 473; *State ex. rel. v. Chamber of Commerce*, 20 Wis. 63; *State ex. rel. Danforth v. Kuehn*,

34 Wis. 229; *People ex rel. v. Board of Trade*, 45 Ill. 112. See *Roehler v. Mech. Aid Soc.*, 22 Mich. 86.

**Indictable Offences.**—Where the offence is of an indictable nature, the corporation cannot expel unless there has been a previous conviction before a jury. *Leech v. Harris et al.*, 2 Brewst. (Pa.) 571; *Comm. v. St. Patrick's Soc.*, 2 Binn. (Pa.) 448. See *Society for Visitation of Sick v. Meyer*, 52 Pa. St. 125.

**Breach of By-Laws.**—Where the by-laws are simply declaratory in their nature of what a member's duty would be without them, a breach of them is of course sufficient cause of disfranchisement. Sometimes, however, the by-laws go further and provide specific duties, a breach of which is to be visited with expulsion. *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. St. 264; *People ex rel. v. Medical Society*, 24 Barb. (N. Y.) 570; *Dawkins v. Antrobus*, L. R. 17 Ch. Div. 615.

Such by-laws are valid if they are reasonable. *Evans v. Philadelphia Club*, 50 Pa. St. 107. And not contrary to public policy. *People ex rel. v. Medical Society*, 24 Barb. (N. Y.) 570; *People ex rel. v. N. Y. Benevolent Society*, 3 Hun (N. Y.), 361.

A breach of duties prescribed by the by-laws before becoming a member of a corporation does not warrant expulsion. *People ex rel. v. Medical Society*, 32 N. Y. 187.

**Beneficial Associations.**—Any act which amounts to a fraudulent attempt to procure benefits not properly due warrants expulsion. *Woolsey v. Independent Order of Odd Fellows*, 1 Am. & Eng. Corp. Cas. 172; *Society for the Visitation of the Sick v. Commonwealth*, 52 Pa. St. 125; *Commonwealth v. Philanthropic Society*, 5 Binn. (Pa.) 486.

So also does a failure to pay dues. *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. St. 264; *Hussey v. Gallagher*, 61 Ga. 86. But see *People ex rel. v. Fire Department*, 31 Mich. 458.

So also does the incurring of a danger forbidden by the by-laws. *Franklin Beneficial Assoc. v. Commonwealth*, 10 Pa. St. 357.

Trivial causes are insufficient to warrant expulsion. *People ex rel. v. St. Francis Beneficial Society*, 24 How. Pr. (N. Y.) 216; *Commonwealth v. St. Patrick's Ben. Soc.*, 2 Binn. (Pa.) 440.

A refusal to pay dues after an illegal suspension does not warrant an expulsion. *People ex rel. v. N. Y. Ben. Soc.*, 3 Hun (N. Y.), 361.

**Social Clubs.**—The publication by a

member of a social club of a libellous pamphlet on another member warrants his expulsion. *Dawkins v. Antrobus*, L. R. 17 Ch. Div. 615.

But the striking of one member of a club by another in the bar-room on considerable provocation does not warrant expulsion. *Evans v. Philadelphia Club*, 50 Pa. St. 107; *H. Labouchere v. Earl of Wharcliffe*, L. R. 13 Ch. Div. 346; *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63.

**Commercial Societies.**—These are usually intended to maintain a high standard of honor in trade, or to regulate the transactions of business so as to promote the convenience of the members and of the community in general. Any departure from the strict code of honor in the transaction of business warrants expulsion from such a corporation. *Dickenson v. Chamber of Commerce*, 29 Wis. 45; *People ex rel. v. Board of Trade*, 45 Ill. 112; *People ex rel. Thacher v. N. Y. Comm. Assoc.*, 18 Abb. Pr. (N. Y.) 271; *Moxey's Appeal*, 9 Weekly Notes of Cases (Phila.), 441.

So a departure on the part of any of the members from the rules laid down for the transaction of business constitutes ground for expulsion. *State ex rel. v. Chamber of Commerce*, 47 Wis. 670; *People ex rel. v. N. Y. Board of Fire Underwriters*, 7 Hun (N. Y.), 248.

As a rule, a refusal to submit to the arbitration of a board nominated by the society does not constitute sufficient ground for expulsion, at least if the rule be unreasonable in its nature. *Savannah Cotton Exchange v. State*, 54 Ga. 668; *State ex rel. v. Chamber of Commerce*, 20 Wis. 63; *People ex rel. v. N. Y. Cotton Exchange*, 8 Hun (N. Y.), 216; *White v. Brownell*, 2 Daly (N. Y.), 329.

**Medical Societies.**—Any behavior grossly improper on the part of a medical man warrants expulsion from such societies. *Ex parte Paine*, 1 Hill (N. Y.), 665; *Barrows v. Medical Society*, 12 Cush. (Mass.) 402.

But it is not sufficient cause for expulsion that a member charges a less fee than is established by the society's tariff. *People ex rel. Gray v. Medical Society*, 32 N. Y. 187. Or that he has advertised a patent medicine. *People ex rel. v. Medical Society*, 32 N. Y. 187. Or that he has presented an insufficient diploma. *Fawcett v. Charles*, 13 Wend. (N. Y.) 473. And see *State v. Georgia Medical Society*, 38 Ga. 608.

**Religious Societies.**—The charters of such corporations usually specify that the members thereof shall be only persons.

**5. Who has Power to Expel.**—The power of disfranchisement and amotion, unless it has been expressly confided to a particular person or class, is to be exercised by the corporation at large, and not by the person or class in whom the right of appointing or admitting is vested.<sup>1</sup> Where the charter while giving the power of amotion is silent as to whom the power may vest in, the corporation may, by a by-law, place it in the hands of a select body.<sup>2</sup>

**6. Mode of Expulsion.**—This must be by an actual and formal vote of the body in whom the power is vested.<sup>3</sup>

of a particular religious body. *German Reformed Church v. Seibert*, 3 Pa. St. 282.

Where this is the case the corporation generally has power to decide who is a member of such religious body, and has full authority to expel for non-conformity or immorality. *Gartin v. Penick*, 9 Am. L. Reg. (N. S.) 210. See, however, *People ex rel. v. St. Stephen's Church*, 53 N. Y. 103; *Sale v. First Regular Baptist Church*, 1 Am. & Eng. Corp. Cas. 769.

**Other Societies.**—As to what constitutes sufficient cause for expulsion from societies other than the above, see *Commonwealth v. Guardians of the Poor*, 6 S. & R. (Pa.) 469; *Fuller v. Plainfield Academic School*, 6 Conn. 532; *Murdock's Case*, 7 Pick. (Mass.) 303; *People ex rel. v. Sailor's Snug Harbor*, 54 Barb. (N. Y.) 532.

**Social, Beneficial, and Commercial Societies in Illinois and Maryland.**—In those States the law seems to be that such societies may expel their members at pleasure, provided there is no *mala fides* and the court will not interfere. *Anacosta Tribe of Red Men v. Murbach*, 13 Md. 91; *People ex rel. Price v. Board of Trade*, 80 Ill. 134. But see *Baxter v. Board of Trade*, 83 Ill. 147; *Sturges v. Board of Trade*, 86 Ill. 441.

This is the present state of the law as to unincorporated societies. *Moxey's Appeal*, 9 Weekly Notes of Cases (Phila.), 441; *White v. Brownell*, 1 Daly (N. Y.), 329; *People ex rel. Dilcher v. St. Stephen's Church*, 53 N. Y. 103; *Smith v. Neilson*, 18 Vt. 511; *Innes v. Wylie et al.*, 1 Can. & K. 257; *Blisset v. Daniel*, 10 Hare, 493; *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63; *Fisher v. Keene*, L. R. 11 Ch. Div. 353; *Labouchere v. Earl of Wharcliffe*, L. R. 13 Ch. Div. 346; *Dawkins v. Antrobus*, L. R. 17 Ch. Div. 615.

1. *The King v. Lyme Regis*, Douglas, 153; *Rex v. Doncaster*, Say, 38, 249; *Rex v. Ponsonby*, 1 Kenyon, 29; *Rex v. Oxford*, Palm. 452.

2. At common law the corporate body

alone can expel. *Weber v. Zimmerman*, 22 Ind. 156.

The by-laws may, however, delegate such power to a select number of the members, as to a committee. *Haddock's Case*, T. Raym. 339; *Rex v. Knight*, 4 I. R. 429; *Green v. African Methodist Episcopal Soc.*, 1 S. & R. (Pa.) 254; *Hussey v. Gallagher*, 61 Ga. 86; *People ex rel. v. Board of Trade*, 45 Ill. 112; *People ex rel. v. N. Y. Commercial Assoc.*, 18 Abb. Pr. (N. Y.) 271; *White v. Brownell*, 2 Daly (N. Y.), 329. But see, *contra*, *State ex rel. v. Chamber of Commerce*, 20 Wis. 63, where such right is denied unless there be a provision in the charter allowing it.

The power of expulsion cannot in any case be delegated to a single officer. *Hibernia Fire Engine Co. v. Comm.*, 93 Pa. St. 264; *People ex rel. v. Fire Department*, 31 Mich. 458.

3. *State ex rel. Linley v. Bryce*, 7 Ohio, 414; *Harmstead v. Washington Fire Co. et al.*, 8 Phila. 331; *Sibley v. Carteret Club of Elizabeth*, 40 N. J. L. 295; *Delacey v. Neuse River Navigation Co.*, 1 Hawks (N. C.), 274; *Doremus v. Dutch Reformed Church*, 2 Green's Ch. (N. J.) 332.

The body must not be a prejudiced one. *Smith v. Nelson*, 18 Vt. 511.

Every member must be notified of the time and place of meeting. *Weber v. Zimmerman*, 22 Md. 156.

The trial must be fair and just. *Murdock's Case*, 7 Pick. (Mass.) 303; *Murdock v. Phillips Academy*, 12 Pick. (Mass.) 244; *State v. Adams*, 44 Mo. 570.

The offence must also be proved, even if the accused fails to appear or makes no defence. *People v. Young Men's Father Matthew Ben. Soc.*, 65 Barb. (N. Y.) 357.

Where a member has once been tried and acquitted, he cannot be again tried and expelled for the same offence. *Commonwealth v. Guardians of the Poor*, 6 S. & R. (Pa.) 469.

But if he has been tried and expelled irregularly, the corporation may proceed to try him anew, and to expel him in a

**7. In Expelling Corporator Provisions of Charter and By-laws must be Complied with.**—Where the power of expulsion is granted by the charter, and the method in which it shall be exercised is there laid down, the provisions of the charter must be strictly complied with.<sup>1</sup>

**8. Remedy for Illegal Expulsion.**—The remedy of a member who claims to have been illegally expelled from a corporation is a writ of *mandamus*.<sup>2</sup>

proper and legal manner. *State ex rel. v. Chamber of Commerce*, 47 Wis. 670.

**Non-user does not Forfeit Rights of Corporator.**—A mere non-user does not forfeit the right of a corporator in a body politic. *State v. Trustees of Vincennes University*, 5 Ind. 77.

Unless there be a specific provision to that effect in the charter. *Crocker v. Old South Society*, 106 Mass. 489.

1. *Commonwealth v. Pike Beneficial Society*, 8 W. & S. (Pa.) 247.

The by-laws may also prescribe the mode in which a member may be expelled. *Commonwealth v. German Society*, 15 Pa. St. 251; *State v. Trustees of Vincennes University*, 5 Ind. 77; *People ex rel. v. American Institute*, 44 How. Pr. (N. Y.) 468.

In such case the provisions of the by-laws must be strictly complied with. *Commonwealth v. Guardians of the Poor*, 6 S. & R. (Pa.) 469; *Washington Beneficial Society v. Bacher*, 20 Pa. St. 425; *Society for the Visitation of the Sick v. Commonwealth*, 52 Pa. St. 125; *Southern Plank Road Co. v. Hixon*, 5 Ind. 165; *Weber et al. v. Zimmerman*, 22 Ind. 156; *People ex rel. Godwin v. American Institute*, 44 How. Pr. (N. Y.) 468; *Savannah Cotton Exchange v. State*, 54 Ga. 668.

**2. Mandamus the Remedy for Illegal Expulsion.**—Where a member of a corporation is illegally expelled, his proper remedy is a writ of *mandamus* to restore him to his rights. *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. St. 264; *State v. Georgia Medical Society*, 33 Ga. 608; *Hussey v. Gallagher*, 61 Ga. 86; *State v. Lusitanian Portuguese Soc.*, 15 La. Ann. 73; *Sibley v. Carteret Club of Elizabeth*, 40 N. J. L. 295; *Union Church of Africans v. Saunders*, 1 Houst. (Del.) 100; *Delacey v. Neuse River Nav. Co.*, 1 Hawks. (N. Car.) 274; *People v. Mechanics' Aid Society*, 22 Mich. 86; *People v. Board of Trade*, 45 Ill. 112; *Fuller v. Plainfield Academic School*, 6 Conn. 532; *People v. Medical Society*, 24 Barb. (N. Y.) 570. But see *Cook v. College of Physicians*, 9 Bush (Ky.), 542.

The court is always slow to grant the writ. *Hussey et al. v. Gallagher*, 61 Ga. 86.

It will not do so if there be any other adequate remedy. *Harrison et al. v. Simonds et al.*, 44 Conn. 318.

**When Corporator is Entitled to Mandamus.**—In order to establish his right to a writ of *mandamus* in the above case the corporator must show that he has been legally elected. *Diligent Fire Engine Co. v. Commonwealth*, 75 Pa. St. 291.

And that he has actually been disfranchised. *Crocker v. Old South Society*, 106 Mass. 489; *People v. St. Stephen's Church*, 53 N. Y. 103.

A person who has brought a suit for damages for an illegal expulsion is held to have waived his right to a *mandamus*. *State v. Lipa*, 28 Ohio St. 668.

Where an opportunity is afforded to an expelled member to appeal from the action of the body expelling him to another erected by the corporation, he must do so before having resort to the courts. *German Reformed Church v. Seibert*, 3 Pa. St. 282; *White v. Brownell*, 2 Daly (N. Y.), 329.

**Practice in Mandamus Cases.**—The court will issue in the first instance a writ of alternative *mandamus*. *Sleeper v. Franklin Lyceum*, 7 R. I. 523.

The return to this must be full and certain, and, to warrant a judgment for respondent, must contain a perfect justification. *Green v. African M. E. Society*, 1 S. & R. (Pa.) 254; *Society for the Visitation of the Sick v. Commonwealth*, 52 Pa. St. 125; *People v. Mechanics' Aid Society*, 22 Mich. 86.

If the return is defective, no opportunity will be afforded to amend. *People v. American Institute*, 2 N. Y. Leg. Obs. 170.

The relator may elect either to rely on the insufficiency of the return, or to traverse it, but, having elected, is bound by the decision. *State v. Lusitanian Portuguese Society*, 15 La. Ann. 73.

**Relief in Equity**—Equity will not interfere to prevent the illegal expulsion of a member of a corporation. *Gregg v. Massachusetts Medical Society*, 111

## AMOTION—AMOUNT—AMOUNT IN CONTROVERSY.

**AMOUNT.**—This word is usually used in reference to the amount necessary to give jurisdiction on appeal or writ of error.<sup>1</sup> (See also **APPEAL**.)

**AMOUNT IN CONTROVERSY.**—The principal sum sued for, exclusive of costs.<sup>2</sup>

Mass. 185; *Sturges v. Board of Trade*, 86 Ill. 441; *Baxter v. Board of Trade*, 83 Ill. 147.

Equity will also decline to grant a mandatory injunction to restore an illegally expelled corporator. *Fisher v. Board of Trade*, 80 Ill. 85.

**What Court will Consider.**—Where a court is called to pass upon the question of the expulsion of a member of a corporation, it seems that the finding of the corporation that he has been guilty of the offence in question is conclusive. *State ex rel. v. Chamber of Commerce*, 47 Wis. 670; *Sale v. First Regular Baptist Church*, 1 Am. & Eng. Corp. Cas. 169; *Woolsey v. Independent Order Odd Fellows*, 1 Am. & Eng. Corp. Cas. 172.

Where the offence is not specified by the by-laws as a cause of expulsion, the court will simply consider whether or not it is so injurious to the interests of the corporation as to warrant the offender's expulsion. *Commonwealth v. Guardians of the Poor*, 6 S. & R. (Pa.) 469; *Barrows v. Medical Society*, 12 Cush. (Mass.) 402; *Fuller v. Plainfield Academic School*, 6 Conn. 532; *Savannah Cotton Exchange v. State*, 54 Ga. 668; *Fawcett v. Charles*, 13 Wend. (N. Y.) 473; *People ex rel. v. St. Stephen's Church*, 53 N. Y. 103; *People ex rel. v. N. Y. Cotton Exchange*, 8 Hun (N. Y.), 216; *Ex parte Paine*, 1 Hill (N. Y.), 665.

If the offence is specified in the by-laws as a cause of expulsion, the court will consider whether the duties imposed by the by-laws are reasonable, and whether their violation is so injurious to the corporation as to warrant the imposition of the penalty of expulsion. *People v. Board of Trade*, 45 Ill. 112; *Pulford v. Fire Department*, 31 Mich. 458; *Dickinson v. Chamber of Commerce*, 29 Wis. 45; *State v. Chamber of Commerce*, 20 Wis. 63; *State v. Chamber of Commerce*, 47 Wis. 670; *Hussey v. Gallagher*, 61 Ga. 86; *State v. Georgia Medical Society*, 38 Ga. 608; *Franklin Ben. Society v. Commonwealth*, 10 Pa. St. 357; *Commonwealth v. St. Patrick's Ben. Soc.*, 2 Binn. (Pa.) 440; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Society for the Visitation of the Sick v. Commonwealth*, 52 Pa. St. 125; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. St. 264; *People*

*v. N. Y. Benevolent Soc.*, 3 Hun (N. Y.), 361; *People v. N. Y. Board of Fire Underwriters*, 7 Hun (N. Y.), 248; *People v. Medical Society*, 32 N. Y. 187; *People v. Medical Society*, 24 Barb. (N. Y.) 570; *People v. Sailors' Snug Harbor*, 54 Barb. (N. Y.) 532; *People v. St. Francis Benevolent Association*, 24 How. Pr. (N. Y.) 216.

The court will also construe the meaning of the by-laws. *State v. Chamber of Commerce*, 20 Wis. 63; *Dickinson v. Chamber of Commerce*, 29 Wis. 45; *Franklin Beneficial Society v. Commonwealth*, 10 Pa. St. 357; *People v. N. Y. Commercial Assoc.*, 18 Abb. Pr. (N. Y.) 271.

And will decide whether the particular offence in question comes within the meaning of the by-laws. *State v. Georgia Medical Society*, 33 Ga. 608; *People v. Sailors' Snug Harbor*, 54 Barb. (N. Y.) 532.

Even though the by-law in question is in general reasonable, and the particular offence is within its scope, yet, if it be not injurious to the true interests of the corporation, the expulsion is not warranted. *People v. Mechanics' Aid Society*, 22 Mich. 86; *Evans v. Philadelphia Club*, 50 Pa. St. 107.

See, generally, *Sale v. First Regular Baptist Church*, 1 Am. & Eng. Corp. Cas. 169; *Woolsey v. Independent Order of Odd Fellows*, 1 Am. & Eng. Corp. Cas. 172.

**Authorities for Amotion.**—Dillon's *Mun. Corp.* (3d Ed.) § 238; *Bouvier's Law Lex.* (15th Ed.), "Amotion"; *Willc. Mun. Corp.* 270; 2 *Kyd on Corp.* 50-94; *Grant on Corp.* 250; *Glover on Corp.* ch. xvi. pp. 327, 328; *Angell & Ames on Corp.* § 408; *Burrill's Law Dict.*, "Amotion."

1. *Bach v. Jefferson*, 2 La. Ann. 163; *Winston v. U. S.*, 3 How. 771; *State of La. ex rel. v. The Judge, etc.*, 21 La. Ann. 65; *Gayarre v. Hays*, 21 La. Ann. 307.

**Whole Amount of Capital Stock.**—These words, as used in the act authorizing the taxation of stockholders in bank, have reference to the value of the stock, not the amount of nominal capital. *People ex rel. v. Commissioners*, 69 N. Y. 91.

2. *Bradley et al. v. Kent*, 22 Cal. 169; *Maxfield v. Johnson*, 30 Cal. 545; *La. ex rel. v. Lagarde*, 21 La. Ann. 18; *La.*



AMUSEMENT—ANALOGOUS—ANCESTOR—ANCHOR.

**AMUSEMENT.**—Diversion, recreation.<sup>1</sup>

**ANALOGOUS.**—Containing the material constituents.<sup>2</sup>

**ANCESTOR.** (See also DESCENT; HEIR; INHERITANCE; PREDECESSOR.)—One from whom an estate is inheritable.<sup>3</sup> The technical meaning of the word must be clearly distinguished from its use in common parlance.<sup>4</sup> Ancestor is, however, sometimes used to denote a person in the ascending line of kindred, and we have the distinguishing words "ancestral and collateral inheritances."<sup>5</sup>

**ANCHOR.**—An instrument for holding a vessel or other floating body. Used in law in the words, Anchor-watch, Anchorage, Lying at anchor.<sup>6</sup>

*ex rel. v. The Judge, etc.*, 22 La. Ann. 49; *Moore, etc., v. Boner*, 7 Bush (Ky.), 26; *Fink et al. v. Denny et al.*, 75 Va. 663.

1. A statute prohibiting any public show, amusement, etc., without a license does not apply to a school for instruction in dancing, although admittance thereto is paid for on each evening. *Am. v. Gee* and another, 6 Cush. (Mass.) 175.

But an aquarium filled with glass tanks for the exhibition of marine fish and animals is a place of amusement. *Warner v. The Brighton Aquarium Co.*, L. R. 10 Ex. 291.

2. A statute said analogous forms may be used, that is, those that contain every material constituent. *Smith v. The State*, 63 Ga. 58.

3. In interpreting the statute of 1831, regulating descents and the distribution of personal estates, in Ohio, the court said, *Warden, J.*: "That the word 'ancestor,' as used in this act, is not to be understood as when used in common parlance, is well settled in Ohio." "The ancestor meant by our statute is any one from whom the estate is inheritable, and the ancestor from whom it must in law be understood 'to have come to the intestate' is he from whom it was immediately inherited." *Prickett v. Parker*, 3 Ohio St. 394.

4. "In most of our English dictionaries the word 'ancestor' is defined to be 'one from whom a person descends,' and some of the law dictionaries agree substantially in this definition. But this is its popular and not its legal meaning. Mr. Burrill in his law dictionary defines it as, 'The person last seized of an estate of inheritance and from whom such estate is transmitted to the heir.' *Ruggles, C. J., McCarthy v. Marsh*, 1 Selden (N. Y.), 263, 275. See *Banks v. Walker*, 3 Barb. Ch. (N. Y.) 438.

The term "ancestor" means merely the person from whom the estate passes,

and not a progenitor as in popular acceptance. *Bailey v. Bailey*, 28 Mich. 185.

5. Stat. 3 and 4 William IV. c. 106; 1 Stephen's Com. 257, note (6); 4 Kent's Com. 404. "The term 'ancestor' is used in its proper sense, and designates the immediate and not the remote source of the intestate's title." "Ancestors, derived from *antecessores* designates the ascendants of the intestate in the right line, and does not include collateral relatives as brothers and sisters." *Valentine v. Wetherill*, 31 Barb. (N. Y.) 655. See *Pierson v. De Hart*, Pennington (N. J.), 363.

In Indiana the term "ancestor" has been defined as embracing all persons from whom a title by descent could be derived; that is, to be synonymous with "kindred," and not strictly correlative with "heir." *Greenlee v. Davis*, 19 Ind. 60.

It means any one from whom the estate is immediately inherited. *Murphy v. Henry*, 35 Ind. 442. See *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Clark v. Shailer*, 46 Conn. 119; *Buckingham v. Jacques*, 37 Conn. 402.

In Massachusetts the word "ancestor" as used in the statute of descents is declared to refer only to the ancestors in the direct ascending line. *Pratt v. Atwood*, 108 Mass. 40.

6. **Anchor-watch.**—Defined by Totten in the *Naval Text-book and Dictionary*, p. 443, as "a watch of three or four men kept constantly on deck, and stationed at one of the anchors, while riding at single anchor, to see that the stoppers, painters, cables, and buoy ropes are ready for immediate use;" by Dana in his *Dictionary of Sea Terms*, p. 129, as "a small watch of one or two men kept while in port." It is not the duty of such a watch to take any active measures to get his vessel out of the way of an approaching vessel in broad daylight when the ap-

**ANCIENT DOCUMENTS.—1. Definition.**—Those more than thirty years old.<sup>1</sup>

**2. Authentication.**—Ancient documents, on their face free from suspicion, and coming from a proper custody, are admissible in evidence without proof of authenticity.<sup>2</sup>

proaching vessel is under full command, nor even to hail the approaching vessel in order to avoid a collision. *The Lady Franklin*, 2 Lowell, 220.

**Anchorage.**—Defined by Lord Hale, *De Portibus Maris*, 74, to be "a prestation or toll for every anchor cast there, and sometimes though there be no anchor. Held to exist against a vessel anchoring even two miles from shore (otherwise than in case of necessity arising from distress), where the evidence showed a grant of legal origin of the bed of the sea anchored in for the purpose of oyster-dredging. *Free Fishers v. Gann*, 106 English Common Law Rep. 852.

**Lying at Anchor.**—A vessel fastened to a pier-head is not "lying at anchor," and therefore is not liable for wharfage under the provision of the act 1860 (chap. 254, Laws 1860, amended by chap. 405, Laws 1875) which authorizes the collection of "half the usual wharfage for every vessel lying at anchor within any slip, although the vessel, attached to an adjacent pier, occupies the greater part of the slip between the piers." *Walsh v. New York Floating Dry-dock Co.*, 77 N. Y. 448.

A vessel beached is not "lying at anchor," and her owner cannot recover for her destruction while so beached on a policy of insurance which covers her while plying, etc., or while "lying at anchor," or at any bulkhead, dock, or pier. 19 Hun (N. Y.), 284.

1. *Bouvier's Law Dict*; *Whitman v. Henneberry*, 73 Ill. 109; *M'Gennis v. Allison*, 10 Serg. & R. (Pa.) 197, 199; *Calthorpe v. Gough*, 4 T. R. 707, n. a., 709; *Jackson v. Blanshan*, 3 John. (N. Y.) 292, 298.

A deed only twenty-four years old is not "ancient." *Mapes v. Leal*, 27 Tex. 345.

Documents more than thirty years old at the date of the trial are "ancient," although less than thirty years old at the date of the commencement of the suit. *Gardner v. Grannis*, 57 Ga. 539; *Bass v. Sevier*, 58 Tex. 567.

To constitute a will "ancient," thirty years must have elapsed from the date of possession taken under it; thirty years from the date of its execution is not sufficient. *Jackson v. Blanshan*, 3 John. (N. Y.) 292, 298 (per Kent, C. J., and

*Van Ness*, J.; *Spencer*, J., diss.); *Shaller v. Brand*, 6 Binn. (Pa.) 435 (per Tilghman, C. J.; *Yeates*, J., diss.). *Contra*, *Calthorpe v. Gough*, 4 T. R. 707, n. a.

It seems well settled in this country that a document will not be treated as "ancient," and proof of authenticity or execution dispensed with, unless it is shown to be more than thirty years old. It is not enough that it purports to be more than thirty years old. *Fairly v. Fairly*, 38 Miss. 280; *Clark v. Owens*, 18 N. Y. 434; *Whitman v. Henneberry*, 73 Ill. 109. *Contra*, see *Anderson v. Watson*, 6 Bing. N. C. 296; *Davies v. Lowndes*, 7 Scott N. R. 213; 1 Stark Evid. (10th Am. ed.) 521; *Steph. Evid.* art. 88, which holds that it is enough if the document purport to be more than thirty years old.

In *Quinn v. Eagleston*, 108 Ill. 248, it was held that proof that the deeds in question, purporting to be "ancient," had been on record twenty-nine years, and that a deed subsequently dated, and dependent upon them, had been on record more than forty years, was sufficient proof that they were "ancient."

Where a document is old, but less than thirty years old, its execution must be regularly proved. But in such a case, if the document is attested and is proved by one of the witnesses, its age will tend to excuse the strictest accounting for the absence of the other witnesses. *Wallis v. Delancy*, 7 T. R. 266 n. See also *Jackson v. Burton*, 11 John. (N. Y.) 64; *Thomas v. Horlocker*, 1 Dall. 18. In *Everly v. Stoner*, 2 Yeates (Pa.), 122, proof of execution by the subscribing witnesses was dispensed with in case of a deed only twenty-eight years old, although no reason was given for not producing them.

2. *Beall v. Dearing*, 7 Ala. 124; *Doe v. Eslava*, 11 Ala. 1028; *Carter v. Chaudron*, 21 Ala. 72; *Doe v. Roe*, 31 Ga. 593; *Weitman v. Jhiot*, 64 Ga. 11; *Henthorn v. Doe*, 1 Blackf. Ind. 156; *Winston v. Gwathmey's Heirs*, 8 B. Mon. (Ky.) 19; *Hedger v. Ward*, 15 B. Mon. (Ky.) 106; *Crane v. Marshall*, 16 Me. 27; *Goodwin v. Jack*, 62 Me. 414; *Stockbridge v. Stockbridge*, 14 Mass. 257; *Tolman v. Emerson*, 4 Pick. (Mass.) 160; *Zeigler v. Houtz*, 1 Watts & S. (Pa.) 533; *Duncan v. Beard*, 2 Nott & McC. (S. Car.) 400; *Steph. Evid.* § 88; 1 Stark Evid. (10 Am.

Even in the case of attested documents, there need be no proof of execution, either by calling the attesting witnesses, or proving their handwriting, or otherwise.<sup>1</sup>

ed.) p. 521; 1 Greenl. Evid. § 141 n. (14th ed.); Bishop of Meath v. Marquess of Winchester, 3 Bing. (N. C.) 183.

The rule stated in the text applies to letters, receipts, etc., as well as to bonds, deeds, wills, and other formally executed documents. Thus, in *Beer v. Ward*, 1 Stark Evid. (10th Am. ed.) 521 n. p., an ancient letter was admitted in evidence without proof of the writer's signature. So ancient entries in a steward's book were admitted in evidence without proof of handwriting. *Wynne v. Tyrwhitt*, 4 B. & Ald. 376. Accord, see also *Bertie v. Beaumont*, 2 Price, 303; *Manby v. Curtis*, 1 Price, 225 (Ancient Receipts); *McReynolds v. Longenberger*, 57 Pa. St. 13 (Ancient Tax Receipt).

1. The attesting witnesses to an ancient document need not be called to prove it, although living. *Doe v. Woolley*, 8 B. & C. 22; *Winn v. Patterson*, 9 Pet. 663; *Barr v. Gratz*, 4 Wheat. 213. And within the jurisdiction of the court. *Jackson v. Christman*, 4 Wend. (N. Y.) 277; *Hanes v. Peck's Lessee*, Mart. & Yerg (Tenn.) 227. And even though in court. *Marsh v. Colnett*, 2 Esp. R. 665.

In legal phraseology the witnesses are said to be conclusively presumed to be dead. *Marsh v. Colnett*, 2 Esp. R. 665; 1 Stark. Evid. (10th Am. ed.) p. 521.

In *Tolman v. Emerson*, 4 Pick. (Mass.) 160, it was held that the subscribing witness to an ancient document must be called if living.

Proof of execution will be dispensed with, in case of ancient documents coming from proper custody, even in cases where the documents are not upon their face perfectly regular. There is said to be a legal presumption in favor of the valid execution of such documents. *Hogans v. Carruth* 19 Fla. 84; *Johnson v. Timmons*, 50 Tex. 521.

In *Hogans v. Carruth*, 19 Fla. 84, the signature of one of the grantors was in the handwriting of a third person, proved to have been present at the execution of the deed, and the court presumed, in favor of the validity of the deed, an oral direction by the grantor to sign and seal for him.

In *Fleming v. Bush*, 36 Hun (N. Y.), 456, an "ancient" deed executed by two out of three executors was presumed to be regular, the other executor having been presumed to have renounced or refused to

join in the deed. The valid execution of an "ancient" will was presumed in spite of a defective attestation clause. *Jackson v. Christman*, 4 Wend. (N. Y.) 277, 282.

Where an ancient parish certificate purported to be executed by A as churchwarden, held that the court would presume that A had been duly sworn as warden before executing the certificate. *Rex v. Inhabitants of Whitchurch*, 7 Barn. & Cr. 573.

Where a deed is more than thirty years old, a statute declaring that a certified copy of the record of any lost instrument shall be admitted in like manner as the original could be, admits a copy of the record without any proof of execution of the deed. The regular execution of the deed is apparently presumed from the copy of the record. *Holmes v. Coryell*, 58 Tex. 680.

Where a deed was required to be witnessed by two witnesses before it could be recorded, it was held that the court would assume, in favor of the validity of an ancient record of a deed, a copy of which showing but a single witness to the deed was offered in evidence, that the recording clerk had omitted the name of one witness. *Dodge v. Briggs*, 27 Fed. R. 160, 170.

A seal on an ancient document, purporting to be that of a corporation, need not be proved to have been such. *Hooper v. Auburn Water Works Co.*, 37 Hun (N. Y.), 568. But see *Rex v. Bathwick*, 2 B. & Ad. 639, 648.

The existence of a valid power of attorney will be presumed in favor of an ancient deed, purporting to be executed by an attorney. *Storey v. Flanagan*, 57 Tex. 649; *Johnson v. Timmons*, 50 Tex. 521; *Doe v. Phelps*, 9 John. (N. Y.) 169; *Doe v. Campbell*, 10 John. (N. Y.) 475.

In *Johnson's Admr. v. Timmons*, 50 Tex. 521, it was held that this presumption should be considered by the jury in passing upon the fact of the existence or non-existence of a legal power of attorney, and that it was not merely a legal presumption concerning merely the admissibility of the deed in evidence.

A deed by a married woman, insufficient on its face to convey her title, will not become effective as an ancient deed, by lapse of time. *Boyle v. Chambers*, 32 Mo. 46.

The presumption of due execution arising from the fact that a deed is more than

**3. Custody.**—The ancient document must come from a proper custody, but need not come from the most proper custody.<sup>1</sup>

**4. Possession.**—Proof of possession of property under or consistently with the ancient document, where such document relates to property, is not necessary to its admissibility in evidence without proof of execution.<sup>2</sup>

thirty years old, does not apply to an administrator's deed executed by order of court. *Fell v. Young*, 63 Ill. 106.

Where a copy of the record is sufficient proof of execution unless an affidavit of forgery is filed, the filing of such an affidavit does not compel the adverse party to prove the execution of an ancient deed. *Holmes v. Coryell*, 58 Tex. 680.

It has been said that some proof may be required of the authenticity of an ancient document. *Smith v. Rankin*, 20 Ill. 14; *Fogal v. Pirro*, 10 Bosw. (N. Y.) 100; s. c., 17 Abb. Pr. 113; *Clark v. Owens*, 18 N. Y. 434. Although strict proof is dispensed with. *Coulson v. Walton*, 9 Pet. 62.

In *Forbes v. Wale*, Wm. Blk. 532, it was held that an ancient bond for the payment of money, required proof of authenticity, there having been no payments of interest.

1. "Documents found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, or in the possession of persons having an interest in them, are in precisely the custody which gives authenticity to documents found within it." 1 Greenl. Evid. § 242. In *Bishop of Meath v. Marquess of Winchester*, 3 Bing. (N. C.) 183, Tindal, J. C., says that "it is obvious that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree, some being more so, some less; and in those cases (where the document does not come from the most proper custody) the proposition to be determined is, whether the actual custody is so reasonably and probably accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine." Accord, see *Tolman v. Emerson*, 4 Pick. (Mass.) 160, 162.

In *Williams v. Conger*, 49 Tex. 582, it was held that a power of attorney containing a power of substitution, found among the papers of the deceased's substituted agent, comes from proper custody.

An ancient document, preserved among certain manuscripts in the British Museum, does not come from a proper custody, and is inadmissible without authentication. *Swinerton v. Marquis of Stafford*, 3 Taunt. 91; but see *Goodwin v. Jack*, 62 Me. 414.

A deed thirty years old is admissible as evidence without proof of its execution; and when the only objection to its admissibility is the failure to prove its execution, the appellate court will presume, in favor of the ruling of the court below, that the paper came from the proper custody. *Alexander v. Wheeler*, 78 Ala. 167.

2. There is a conflict of authority on this point. The text is in accordance with the recent decisions of the supreme court of the United States in *Fulkerson v. Holmes*, 117 U. S. 389; s. c., 6 Supr. Ct. R. 780, and *Applegate v. Lexington and Carter County Mining Co.*, 117 U. S. 255; s. c., 6 Supr. Ct. R. 743, and with most of the more recent decisions. *Johnson's Admr. v. Timmons*, 50 Tex. 521; *Nowlin v. Burwell*, 75 Va. 551; *Caruthers v. Eldridge*, 12 Gratt. (Va.) 670; *Ensign v. McKinney*, 30 Hun (N. Y.), 249; *Harlan v. Howard*, 79 Ky. 373; *Gardner v. Grannis*, 57 Ga. 539; *Whitman v. Henneberry*, 73 Ill. 109; *Hewlett v. Cock*, 7 Wend. (N. Y.) 371; *Jackson v. Laroway*, 3 John. Cas. (N. Y.) 283; *Brown v. Wood*, 6 Rich. (S. Car.) Eq. 155; *Holton v. Lloyd*, 1 Molloy (Ir. Ch.), 30.

The following cases, on the contrary, hold that proof of possession, under or in accordance with the document, is indispensable to its admissibility in evidence without proof of execution: *Bell v. McCawley*, 29 Ga. 355; (see *Gardner v. Grannis*, 57 Ga. 539, *supra*;) *Thurston v. Masterson*, 9 Dana (Ky.), 228; *Burgin v. Caenault*, 9 B. Mon. (Ky.) 285; (see *Harlan v. Howard*, 79 Ky. 373, *supra*;) *Nixon v. Porter*, 34 Miss. 697; *Waldron v. Tuttle*, 4 N. H. 371; *Homer v. Cilley*, 14 N. H. 85; *Ridgely v. Johnson*, 11 Barb. (N. Y.) 527; *Jackson v. Luquere*, 5 Cow. (N. Y.) 221; *Willson v. Betts*, 4 Den. (N. Y.) 201; *Hoopes v. Auburn Water Works Co.*, 37 Hun (N. Y.), 568; *M'Gennis v. Allison*, 10 Serg. & R. (Pa.) 197; *Shaller v. Brand*, 6 Binn. (Pa.) 435;

**5. Handwriting—Comparison of Hands.**—When it becomes necessary to prove the handwriting of an "ancient" document this may be done by a "comparison of handwritings," even in those jurisdictions where this method of proof is not generally allowed.<sup>1</sup>

**6. Ownership—Old Documents constituting Acts of.**—Very old documents, such as leases, licenses, etc., purporting to constitute acts of ownership, are admissible to prove ownership.<sup>2</sup>

*Thompson v. Bullock*, 1 Bay (S. Car.), 364; *Middleton v. Mass*, 2 Nott. & McC. (S. Car) 55; *Lessee of Clarke v. Courtney*, 5 Pet. 319; *Bank of Middlebury v. Town of Rutland*, 33 Vt. 414; *Dishazer v. Maitland*, 12 Leigh. (Va.) 524.

In *Applegate v. Lexington*, etc., Mining Co., 117 U. S. 255, *supra*, Woods, J., delivering the opinion of the court, says: "The rule is that an ancient deed may be admitted in evidence, without direct proof of its execution, if it appears to be of the age of at least thirty years, when it is found in some proper custody, and either possession under it is shown, or some other corroborative evidence of its authenticity, freeing it from all just grounds of suspicion." This rule requires more than that the "ancient" document shall come from a proper custody: it requires some supplementary evidence of genuineness—either possession or something equivalent. Accord, see *Jackson v. Laroway*, 3 John. Cas. (N. Y.) 283; *Hewlett v. Cock*, 7 Wend. (N. Y.) 371.

In *Martin v. Rector*, 24 Hun (N. Y.), 27, it was held that an ancient deed was admissible after proof, either that it came from a proper custody, or that there had been thirty years' possession under it. Accord, see *Nowlin v. Burwell*, 75 Va. 551.

The true rule would seem to be that laid down in *Harlan v. Howard*, 79 Ky. 373, *supra*, that proof that the deed came from a proper custody is indispensable to its admissibility without proof of execution, but that proof of possession, or other equivalent proof, is not necessary; that proof of possession, etc., go to the weight of the evidence with the jury, and do not bear upon the question of admissibility. For it must be remembered that the fact that a document is "ancient" admits it in evidence without proof of execution, but does not conclusively establish it. The fact of execution is for the jury in the case of "ancient" and modern documents alike. *Harlan v. Howard*, 79 Ky. 373; *Hall v. Gittings*, 2 Harr. & J. (Md.) 112; *Johnson v. Timmons*, 50 Tex. 521.

In the case last cited it was said that

the presumption in favor of the regular execution of an "ancient" document was one of fact to be considered by the jury. See also *Hull v. Gittings*, 2 Harr. & J. (Md.) 112.

Where proof of possession is required as a prerequisite to admissibility, it has been held that possession for any particular period of time need not be proved. *Bank of Middlebury v. Town of Rutland*, 33 Vt. 414; *Waldron v. Tuttle*, 4 N. H. 371; *Ridgely v. Johnson*, 11 Barb. (N. Y.) 527. In *Nixon v. Porter*, 34 Miss. 697, it was held that possession for thirty years need not be proved. In *Homer v. Cilly*, 14 N. H. 85, it was held that possession for thirteen years under an ancient deed was not enough to dispense with proof of execution.

*Jackson v. Blanshan*, 3 John. (N. Y.) 292, 298; *Jackson v. Luquere*, 5 Cow. (N. Y.) 221; *Shaller v. Brand*, 6 Binn. (Pa.) 435, 439; *Nowlin v. Burwell*, 75 Va. 551, all seem to hold that proof of possession must be for thirty years to dispense with proof of execution. But that a proof of possession for a shorter time will somewhat relax the strictness of proof of execution. *Jackson v. Luquere*, 5 Cow. (N. Y.) 221.

Proof of possession of a part of the premises is sufficient. *Jackson v. Luquere*, 5 Cow. (N. Y.) 221.

Where proof of possession is required, an ancient document may be admitted at first without proof of possession, and proof of possession be afterwards supplied. *Hoopes v. Auburn Water Works Co.*, 37 Hun (N. Y.), 568; *Burgin v. Cae-nault*, 9 B. Mon. (Ky.) 285; *Shaller v. Brand*, 6 Binn. (Pa.) 435.

1. *Jackson v. Brooks*, 8 Wend. (N. Y.) 426; *Sweigart v. Richards*, 8 Pa. St. 436; *Cantey v. Platt*, 2 McCord (S. Car.), 260; *Doe v. Tarver*, Ryan & Moo. 141, 143; 20 Law Mag. 323; 2 Tayl. Evid. (7th Ed.) pp. 1553-1555.

2. *Malcomson v. O'Dea*, 10 H. of L. C. 593; *Rogers v. Allen*, 1 Camp. 309; *Doe v. Pulman*, 3 Q. B. 622; *Clarkson v. Woodhouse*, 3 Dougl. 189; *Bristow v. Cormican*, L. R. 3 App. Cas. 641; *Boston v. Richardson*, 105 Mass. 351.

This paragraph (OWNERSHIP — OLD

7. **Custody.**—Such documents must, however, come from a proper custody.<sup>1</sup>

### ANCIENT LIGHTS. See EASEMENT.

**AND.** (See also **OR.**)—A conjunctive particle used to connect words and sentences. It is often used interchangeably with *or*, the meaning being determined by the context.<sup>2</sup>

**DOCUMENTS CONSTITUTING ACTS OF)** has no logical connection with the preceding paragraphs of "ANCIENT DOCUMENTS." It relates to the purpose for which very old documents are admissible, *i.e.*, to prove ownership. What precedes relates merely to the authentication of ancient documents in order to render them admissible in evidence for any purpose.

In *Malcomson v. O'Dea*, 10 H. of L. Cas. 593, very old licenses to fish, granted by a municipal corporation, were held admissible in evidence to prove an exclusive right of fishing in the corporation.

In *Doe v. Pulman*, 3 Q. B. 622, a counterpart of a very old lease was admitted as evidence of title in lessor.

In *Boston v. Richardson*, 105 Mass. 351, an old license to erect a fish-stand upon a piece of land was held evidence tending to show title to the land in the licensor.

It is said that there must be some proof that such documents have been acted upon—such as proof of possession, or payment of rent under them—before they are admissible in evidence. 1 Greenl. Evid. § 143. But the better authority holds that such proof goes to the weight of such documents as evidence, not to their admissibility. *Malcomson v. O'Dea*, 10 H. of L. C. 593; *Rogers v. Allen*, 1 Camp. 309; *Bristow v. Cormican*, 3 App. Cas. 641; *Clarkson v. Woodhouse*, 3 Dougl. 189; *Boston v. Richardson*, 105 Mass. 351.

As to the age of a document admissible to show ownership, it would seem that such document must be older than an "ancient document," as that phrase is used in regard to proof of authenticity; *vide supra*. In most of the cases the documents admitted have been more than a hundred years old. In *Clarkson v. Woodhouse*, 3 Dougl. 189, a lease fifty years old was rejected, while leases eighty years old, or more, were admitted. The youngest document admitted on this ground was over sixty years old. *Boston v. Richardson*, 105 Mass. 351.

It seems settled that the document must be very old. *Bristow v. Cormican*, L. R. 3 App. Cas. 641. *Contra (semble)*, see *Steph. Evid.* § 5.

It is to be noted that the rule admitting very old documents, constituting acts of ownership, to prove ownership, is not an exception to the hearsay rule. Such documents are admissible because they constitute acts of ownership, not for any narrative or recital of facts they may contain. 1 Greenl. Evid. § 141.

In some States it has been held that old documents, not constituting acts of ownership, but containing information as to the location of private boundaries, are admissible. *Hathaway v. Evans*, 113 Mass. 264; *Morris v. Cullanan*, 105 Mass. 129; *Sparhawk v. Bullard*, 1 Metc. (Mass.) 95; *Dobson v. Finley*, 8 Jones L. (N. Car.) 495. These were all cases of recitals in old deeds.

In *Boston Water-Power Co. v. Hanlon*, 132 Mass. 483, ancient plottings for plans and field notes made by a surveyor were held inadmissible to prove boundaries. The case was distinguished from that of recitals in deeds on the ground that the latter are contained in documents which constitute transactions in reference to the land. But it seems that the admission of this kind of evidence cannot be explained in all cases upon the theory of *res gesta*. In *Drury v. Midland R. Co.*, 127 Mass. 571, an ancient map was admitted to show the boundaries of a tidal creek, since filled in, in a suit between private parties. See also *Adams v. Stannan*, 24 N. H. 405.

The rule in the text relates to the purpose for which old documents constituting acts of ownership are admissible. As to the necessity of proof of authenticity prior to their admissibility in evidence, the principles laid down under **ANCIENT DOCUMENTS—AUTHENTICATION**, *supra*—are applicable.

1. 1 Greenl. Evid. § 142; *Malcomson v. O'Dea*, 10 H. of L. C. 593; *Boston v. Richardson*, 105 Mass. 351; and see, further, **ANCIENT DOCUMENTS—CUSTODY**, *supra*.

2. The grammatical sense of words is not adhered to in the construction of either a deed or will where a contrary intent is apparent; and to give effect to the intention of parties the word "and" may be read "or." *Jackson v. Topping*, 1

Wendell (N. Y.), 383; s. c., 19 Am. Dec. 515. *Compare* Long Island R. Co. v. Conkling, 32 Barb. 385; Jackson v. Blanshau, 6 Johns. (N. Y.) 54; Roome v. Phillips, 24 N. Y. 463; Fairfield v. Morgan, 5 Bos. & Pull. 38; Davis v. Boardman, 12 Mass. 80; State v. Brandt, 41 Iowa, 593; State v. Smith, 46 Iowa, 670; Bedford v. Wheeler, 1 Bing. 276; Darling v. Homer, 16 Mass. 288; Boag v. Lewis, 11 U. C. Q. B. 357; Maberly v. Strode, 3 Vesey, Jr. 450; Bell v. Phyn, 7 Vesey, Jr. 453; Ray v. Euslin, 2 Mass. 554; Den v. Taylor, 2 South. (N. J.) 413.

Though the copulative "and" is frequently construed in a will as if the testator had used the disjunctive "or" when an intention to that effect can be made out. Weddell v. Mundy, 6 Vesey, Jr. 343.

Still, this construction is not to be made arbitrarily, nor in any case where it is not absolutely necessary to effectuate the testator's intention. Turner v. Moor, 6 Vesey, Jr. 560; Montagu v. Nuccella, 1 Russ. 171; Griffith v. Woodward, 1 Yeates, 316; Cheesman v. Wilt, 1 Yeates, 411; Usher v. Jessop, 12 East, 288; Ely v. Ely, 5 C. E. Green (N. J.), 44; Courter v. Stagg, 12 C. E. Green (N. J.), 305; Reed v. Braithwaite, L. R. 11 Eq. Cas. 514.

Thus where an insolvent act required the insolvent debtor to make affidavit that he had not at any time or in any manner whatever disposed of or made over any part of his estate for the future benefit of himself or family, an affidavit reading for the future benefit of himself and family was held insufficient. Hale v. Sweet, 40 N. Y. 97.

So under a contract to pay in sawing and lumber, where the parties cannot agree upon the proportion of each the court will apportion it equally, and will not hold the contract fulfilled by a payment in lumber or sawing at the option of either party. Fredenburg v. Turner, 37 Mich. 402.

Where a statute required that an affidavit under the attachment law should state that the attachment was not sued out for the purpose of injuring or harassing the said defendant, and an affidavit was made containing this language, "This attachment is not sued out for the purpose of injuring and harassing the said defendant," it was held that a motion to quash was properly sustained, the affidavit not being made in compliance with the statute. Moody v. Levy, 58 Tex. 532. *Compare* Com. v. Hadcraft, 6 Bush (Ky.), 91; Tompkins v. State, 4 Tex. App. 161.

This principle that "and" and "or" are convertible as the sense may require applies to their use in statutes. Townsend v. Read, 10 C. B. (N. S.) 308; Bayles v. Murphy, 55 Ill. 236; Eistfeld v. Kenworth, 50 Iowa, 389; Willinck v. Morris, 3 Yeates, 104; People v. Sweetser, 1 Dak. Ter. 308; Porter v. State, 58 Ala. 66; Collins Granite Co. v. Devereux, 72 Me. 422.

And this is the rule even in a criminal statute. State v. Myers, 10 Iowa, 448; Miller v. State, 3 Ohio St. 476; Streeter v. People, 69 Ill. 595. *Contra*, Buck v. Danzenbacker, 37 N. J. Law, 359, 361.

For examples of this rule in wills, see Sayard v. Sayard, 7 Greenleaf (Me.), 210; s. c., 22 Am. Dec. 191; Englefried v. Woelpart, 1 Yeates, 41; *In re* Merrick's Trusts, L. R. 1 Eq. Cas. 551.

For examples where the court has refused to read "and" as "or," see *In re* Sander's Trusts, L. R. 1 Eq. Cas. 675. *In re* Kirkbride's Trusts, L. R. 2 Eq. Cas. 400; Robb v. Belt, 12 B. Monroe (Ky.), 643; Doe v. Rawding, 2 B. & Ald. 441, 452.

And elsewhere (in a maritime contract).—Where a seaman's shipping articles specified a voyage to 'Curaçoa and elsewhere,' it was held that "and" was not disjunctive, and that the master had no election by which he might change the voyage to some other port than Curaçoa. Any other construction would be contrary to the provisions of the act of Congress which requires a specification of the voyage. "The terms 'and elsewhere,'" says Judge Winchester, "must therefore be construed as subordinate to the voyage specified, and can only authorize the pursuing such a course as may be necessary to accomplish the principal voyage, or, in other words, to import no more than the law would imply as incidental to the main contract. Opinion on the Construction of Maritime Contracts, 1 Hall's Am. Law Journal, 209.

And, in addition to that, at the commencement of a clause in a will, was held to import the introduction of new and distinct matter more clearly than the old word "item." Hart v. White, 26 Vt. 260.

And so forth, or &c., (in a plea), held to take the place of a *similiter*; being construed to mean "every necessary matter that ought to be expressed." Everitt v. De Groff, 1 Cowen (N. Y.), 213. See Sayer v. Pocock, Cowp. 407; Berton v. Mandell, Cro. Jac. 67; Harris' Case, Cro. Jac. 502; Reeder v. Bloom, 2 Bing. 384; Wilkes v. Williams, 8 Term Rep. 631; Bryan v. Bates, 15 Ill. 87.

**ANIMALS.** (See also ACCESSION; BAILMENTS; BOUNDARIES AND FENCES; FISHERIES; HIGHWAYS; MASTER AND SERVANT.)

1. *Property in Wild Animals.*
2. *Property in Domestic Animals.*
3. *Conversion of Animals.*
4. *Injuries to Animals.*
5. *Cruelty to Animals.*
6. *Trespassing Animals.*

*General Law.*

*What is Trespass.*

*When are Owners Liable for Trespassing Animals.*

*Who are Liable for Trespassing Animals.*

*Rights of Strangers in Regard to.*

7. *Vicious Animals.*
8. *Injuries by Wild Animals.*
9. *Injuries by Dogs.*
10. *Diseased Cattle.*
11. *Stray and Runaway Horses and Cattle.*
12. *Bailors of Animals.*
13. *Bailees of Animals.*

1. **Property in Wild Animals.**—Wild animals, or animals *feræ naturæ*, belong to no one as long as they are in their wild state, and property in them is acquired by occupancy only.<sup>1</sup>

But in a bond, where added to the name of one obligee, it was held ineffectual, because descriptive of neither class nor individual. *Ham's Admr. v. Tinchener*, 3 T. B. Monroe (Ky.), 196.

1. Bacon's Abr. 431, 432; 2 Blacks. Com. 390; *Pierson v. Post*, 3 Cal. (N. Y.) 175; s. c., 2 Am. Dec. 264.

A qualified property, however, may be obtained in them by a man's reclaiming them and making them tame by art, industry, and education, or by so confining them within his own immediate power that they cannot escape and use their natural liberty. 2 Blacks. Com. 391.

Bees are wild animals, and until hived and reclaimed no property can be acquired in them. Finding a tree on the land of another containing a swarm of bees, and marking the tree with the initials of the finder's name, even after he has received a license from the owner of the soil to take the bees, is not reclaiming the bees, nor does it vest in the finder any exclusive right of property in them; neither can he maintain trespass against a person who, under a subsequent license of the owner, cuts down the tree and carries away the bees. *Gillet v. Mason*, 7 Johns. (N. Y.) 16; *Ferguson v. Miller*, 1 Cow. (N. Y.) 243; s. c., 13 Am. Dec. 519; *Idol v. Jones*, 2 Dev. (N. Car.) L. 162.

He may, however, maintain an action against any one who, even under a subsequent license, interferes while he is actually engaged in cutting down the tree. *Adams v. Burton*, 43 Vt. 30, 36.

Hived bees are the property of the one who has reclaimed them, notwithstanding a temporary escape; and as long as the owner can identify them they belong to him, and not to the owner of the soil to which they escaped, although he can-

not enter the land to retake them without committing trespass. *Goff v. Kilts*, 15 Wend. (N. Y.) 550; *Wallis v. Mease*, 3 Binn. (Pa.) 546.

Wild geese tamed are also the property of the one who tamed them; and he can recover them when they stray away to the land of another. *Amory v. Flynn*, 10 Johns. (N. Y.) 102; s. c., 6 Am. Dec. 616.

Doves are wild animals and not the subject of larceny, unless they are in the owner's custody, as in a dove-house, or in the nest, before they are able to fly. *Com. v. Chace*, 9 Pick. (Mass.) 15; s. c., 19 Am. Dec. 349.

Partridges or pheasants hatched under a common hen are property as long as they remain with the hen. *R. v. Head*, 1 F. & F. 350; *R. v. Shickle*, 1 L. R. C. C. 158; *R. v. Cory*, 10 Cox C. C. 23.

So are pea-fowls and domestic turkeys. *Com. v. Beaman*, 8 Gray (Mass.), 497; *State v. Turner*, 66 N. Car. 618.

A Buffalo captured when a calf and so domesticated as to take food from its master's hand, and be easily driven, is a subject of property; its owner is liable for trespasses, and can recover for any injury done to it by another. *Ulery v. Jones*, 81 Ill. 403.

But fish, unless reclaimed, confined, or dead, and valuable for food, is not considered to be property. *State v. Krider*, 78 N. Car. 481.

Oysters, planted in a bed, clearly separated and marked out, are property; and one who takes them without leave of the owner is liable to an action therefor. *Fleet v. Hegeman*, 14 Wend. (N. Y.) 42; *Lowndes v. Dickerson*, 34 Barb. (N. Y.) 586; *Decker v. Fisher*, 4 Barb. (N. Y.) 592; *State v. Taylor*, 27 N. J. L. 117.

But where the buoys marking the bed were carried away and had not been re-



**2. Property in Domestic Animals.**—In animals which are of a tame and domestic nature a man may have an absolute property; because they continue perpetually in his occupation, and will not stray from his house or person unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property.<sup>1</sup>

placed for several years, and the spot on which the oysters were planted was opposite land owned by the defendant, it was held that the original owner could not maintain an action. *Brinckerhoff v. Starkins*, 11 Barb. (N. Y.) 248.

A sable caught in a trap was not considered to be property so as to sustain an action for larceny. *Norton v. Ladd*, 5 N. H. 203; s. c., 20 Am. Dec. 573.

Wild animals of which there can be no larceny, though reclaimed, are dogs, cats, bears, foxes, apes, monkeys, pole-cats, ferrets, squirrels, parrots, singing birds, martins, coons. 2 Bish. Cr. L. (7th Ed.) § 773.

It has also been held that a tame canary, mocking-bird, parrot, or other bird is the subject of property. *Manning v. Mitcherson*, 69 Ga. 447; s. c., 47 Am. Rep. 764; *Haywood v. State*, 41 Ark. 479.

Wild animals when captured and so under the control of the capturer that they cannot escape are the property of the one who captured them. *Bac. Abr.* 431; *State v. House*, 65 N. Car. 315; s. c., 6 Am. Rep. 744.

But merely pursuing and wounding them will not vest the property until they are actually secured. *Pierson v. Post*, 3 Cai. (N. Y.) 175; s. c., 2 Am. Dec. 264; *Buster v. Newkirk*, 20 Johns. (N. Y.) 75.

Where the plaintiff, while fishing, cast a seine around a shoal of mackerel with the exception of a small opening which the seine did not quite fill up, and where defendant entered and took the fish, it was held that plaintiff's possession was not complete so as to enable him to maintain an action for trespass. *Young v. Hichens*, 6 Cad. & El. N. S. 606.

If a whale is killed, anchored, and left with marks of appropriation, it is by law and by custom the property of the captors; and even if it should be found by the crew of another vessel at a different place from the one where it was left anchored, it will be the property of the captors. *Taber v. Jenny*, 1 Sprague (U. S.), 315; *Swift v. Gifford*, 2 Low. (U. S.) 110.

Although there is no property in unreclaimed wild animals, when they have been killed and some labor has been bestowed upon the carcass the product of

such labor, as the hide, becomes a subject of larceny. *Norton v. Ladd*, 5 N. H. 203; s. c., 20 Am. Dec. 573; *R. v. Gal-laers*, 1 Den. C. C. 501.

1. 2 Blacks. Com. 390.

Of all tame and domestic animals the brood belongs to the owner of the dam or mother. *Stewart v. Ball*, 33 Mo. 154; *Hanson v. Millett*, 55 Me. 184; *Hazel-backer v. Goodfellow*, 64 Ill. 238.

The increase of the increase *ad infinitum* belongs to the owner of the female animal. *Tyson v. Simpson*, 2 Hayw. (N. Car.) 147.

But where the dam or mother is hired out for a limited time, the increase belongs to the hirer, who by hiring becomes the temporary owner of the animal. *Putnam v. Wyley*, 8 Johns. (N. Y.) 432; s. c., 5 Am. Dec. 346; *Concklin v. Havens*, 12 Johns. (N. Y.) 314; *Stewart v. Ball*, 33 Mo. 154; *Hanson v. Millett*, 55 Me. 184.

Where a father gave to his son the use of a mare to put her to horse, the son to pay the charges, with the promise that the foal would be his, and he accordingly took the foal and had entire control over it, it was held that he was the rightful owner. *Leinnendoll v. Doe*, 14 Johns. (N. Y.) 222.

But a father who loans cows to his married daughter and retains the title in himself, so as to prevent the cows from being sold by an intemperate husband or his creditors, owns the increase. *Orser v. Storms*, 9 Cow. (N. Y.) 687; s. c., 18 Am. Dec. 543.

A mortgagee, under a mortgage upon live-stock is entitled to the increase of the stock, and a purchaser of the increase takes it subject to the mortgage. *Gundy v. Biteler*, 6 Ill. App. 510; *Kellogg v. Lovely*, 46 Mich. 131; s. c., 41 Am. Rep. 151; *Thorpe v. Cowles*, 55 Iowa, 408; *Evans v. Merriken*, 8 Gill. & J. (Md.) 39; *Forman v. Proctor*, 9 B. Mon. (Ky.) 124; *McCarty v. Blevins*, 5 Verg. (Tenn.) 195; s. c., 26 Am. Dec. 262; *Fonville v. Casey*, 1 Murph. (N. Car.) 389; s. c., 4 Am. Dec. 559. But see *Winter v. Lamphere*, 42 Iowa, 471.

A colt foaled while its dam is held under a bailment or executory contract of purchase, by the terms of which the title

**3. Action for Recovery.**—The owner of domestic or reclaimed wild animals has the right to use any of the remedies the law provides for the recovery of personal property illegally taken or detained from the owner.<sup>1</sup>

is to remain in the bailor or vendor until the agreed price is paid, is also subject to the terms of such contract. *Elmore v. Fitzpatrick*, 56 Ala. 400; *Kellogg v. Lovely*, 46 Mich. 131; s. c., 41 Am. Rep. 151.

Where a bequest for life has been made of live-stock, the increase belongs to the tenant for life, who in some cases is required to keep up the original stock for the remainderman. *Horry v. Glover*, 2 Hill Eq. (S. Car.) 521; *Saunders v. Haughton*, 8 Ired. Eq. (N. Car.) 217; s. c., 57 Am. Dec. 581; *Perry v. Terrell*, 1 Dev. & B. Eq. (N. Car.) 441; *Lewis v. Davis*, 3 Mo. 133; s. c., 23 Am. Dec. 698; *Majors v. Herndon*, 78 Ky. 123; *Smith v. Barham*, 2 Dev. Eq. (N. Car.) 420; s. c., 25 Am. Dec. 721; *Hunt v. Watkins*, 1 Humph. (Tenn.) 498; *Evans v. Iglehart*, 6 Gill. & J. (Md.) 171; *Cragg v. Riggs*, 5 Redf. (N. Y.) 82; *Forsy v. Luton*, 2 Head. (Tenn.) 183. But see *Flowers v. Franklin*, 5 Watts (Pa.), 265. See ACCESSION.

At common law there is only a species of property in a dog, but of a base nature, so that it cannot be the subject of larceny. "Those animals which do not serve for food and which therefore the law holds to have no intrinsic value, as dogs of all sorts and other creatures kept for whim or pleasure, though a man may have base property therein and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny." 4 Blacks. 236.

And the same rule was held to be good as to cats. *Wittingham v. Ideson*, 8 U. C. L. J. 14.

In the American courts dogs have also generally been held to be a species of property and entitled to less legal regard and protection than more harmless and useful animals, although an action for injury may be maintained by their owners. *Woolf v. Chalker*, 31 Conn. 121; *State v. McDuffie*, 34 N. H. 523; *Parker v. Mise*, 27 Ala. 480; *Dunlap v. Snyder*, 17 Barb. (N. Y.) 561; *Harrington v. Miles*, 11 Kans. 480; s. c., 15 Am. Rep. 355; *Wheatley v. Harris*, 4 Sneed (Tenn.), 468; *Dodson v. Mock*, 4 Dev. & Bat. L. (N. Car.) 146; s. c., 32 Am. Dec. 677; *Findlay v. Bear*, 8 S. & R. (Pa.) 571; *Putnam v. Payne*, 13 Johns. (N. Y.) 312; *Brown v. Carpenter*, 26 Vt. 638; *Blair v.*

*Forehand*, 100 Mass. 136; s. c., 1 Am. Rep. 94; *Perry v. Phipps*, 10 Ired. (N. Car.) 259; s. c., 51 Am. Dec. 387; *State v. Latham*, 13 Ired. (N. Car.) 33.

In some States where statutes provide that "all personal property" is subject to larceny, and where personal property has been defined as "goods and chattels," judicial decisions have included the dog as personal property, subject to larceny. *People v. Campbell*, 4 Park. Cr. C. (N. Y.) 386; *People v. Maloney*, 1 Park. Cr. C. (N. Y.) 598; *State v. Brown*, 9 Baxt. (Tenn.) 53; s. c., 40 Am. Rep. 81; *Harrington v. Miles*, 11 Kans. 480; s. c., 15 Am. Rep. 355; *Mayor v. Meigs*, 1 McArthur (D. C.), 53; *Heisrodt v. Hackett*, 34 Mich. 283; s. c., 22 Am. Rep. 529; *Mullaly v. People*, 86 N. Y. 365; *Longwell v. McMaster*, 10 Abb. (U. S.) 132.

In other States the common-law rule prevails, although a special tax may be collected from the owners of dogs. These special taxes upon dogs can, however, only be upheld on the ground that they are not revenue measures but police regulations. *State v. Doe*, 79 Ind. 9; s. c., 41 Am. Rep. 599; *Bright v. McCullough*, 27 Ind. 223; *Mitchell v. Williams*, 27 Ind. 62; *Haller v. Sheridan*, 27 Ind. 494; *Kinsman v. State*, 77 Ind. 132; *Ex p. Cooper*, 3 Tex. Ct. App. 489; s. c., 30 Am. Rep. 153; *State v. Marshall*, 13 Tex. 58; *Carter v. Dow*, 16 Wis. 298; *Tenny v. Lenz*, 16 Wis. 566; *Thorp v. Rutland & B. R. Co.*, 27 Vt. 140; *Morey v. Brown*, 42 N. H. 373; *Baker v. Panola County*, 30 Tex. 86; *State v. Holder*, 81 N. Car. 527; s. c., 31 Am. Rep. 515; *Ward v. State*, 48 Ala. 161; s. c., 17 Am. Rep. 31; *State v. Lymers*, 26 Ohio St. 400; s. c., 20 Am. Rep. 772.

1. *Com. v. Beaman*, 8 Gray (Mass.), 497; *Cummings v. Perham*, 1 Metc. (Mass.) 555; *State v. Taylor*, 27 N. J. L. 117; *Taber v. Jenny*, 1 Sprague (U. S.), 315; *Bourne v. Ashley*, 1 Low. (U. S.) 27; *Boggs v. Newton*, 2 Bibb. (Ky.) 221; *Williams v. Belthany*, 2 Const. Rep. (S. Car.) 415; *Eddy v. Davis*, 35 Vt. 247; *Butler v. Reynolds*, 3 T. & C. (N. Y.) 242; *Kimball v. Adams*, 3 N. H. 182; *Brown v. Smith*, 1 N. H. 36; *Amory v. Flynn*, 10 Johns. (N. Y.) 102; s. c., 6 Am. Dec. 316; *Verner v. Bosworth*, 28 Kans. 670.

So where a thief by food, voice, or other means entices a horse, hog, or any other animal away from the proper owner

4. **Actions for Injuries to Animals.**—The owner of an animal either domestic or wild, but reclaimed, has an action for damages against one who, either intentionally or negligently, injures, maims, or kills said animal.<sup>1</sup> (As to injuries to animals by the operation of

and brings it under his control, the owner shall have an action for larceny against the thief. *State v. Wisdom*, 8 Port. (Ala.) 511; *Mooney v. State*, 8 Ala. 328; *Hite v. State*, 9 Verg. (Tenn.) 198; *Kemp v. State*, 11 Humph. (Tenn.) 320; *State v. Martin*, 12 Ired. (N. Car.) 157; *Baldwin v. People*, 1 Scam. (Ill.) 304; *State v. Gazell*, 30 Mo. 92; *State v. Whyte*, 2 Nott & McC. (S. Car.) 174; *People v. Kaatz*, 3 Park. (N. Y.) Cr. 129.

A registered cattle-brand is *prima-facie* proof of ownership. *De Garca v. Galvan*, 55 Tex. 53; *Allen v. State*, 42 Tex. 517.

And therefore illegally marking or branding cattle with intent to defraud is a conversion of the cattle and indictable; but the intent to defraud must be shown, and it is not sufficient that the owner does not consent. *Fossett v. State*, 11 Tex. App. 40; *Morgan v. State*, 13 Fla. 671.

The offence of altering a brand on cattle may be committed by merely clipping the hair at the original brand. *Slaughter v. State*, 7 Tex. App. 123.

Putting a brand on an animal, additional to one already on it, is an alteration of the brand first put on, although the latter brand may not interfere with or change the figure of the first one; and the owner will be entitled to an action. *Linney v. State*, 6 Tex. 1; s. c., 55 Am. Dec. 756; *Atzroth v. State*, 10 Fla. 207; *Davis v. State*, 13 Tex. App. 215; *State v. Nichols*, 12 Rich. (S. Car.) 672.

Unlawfully branding a colt whose owner is unknown is indictable. *State v. Haws*, 41 Tex. 161.

Where a horse had been seized under pretence of necessity for the public service, and, after the exigency under which it was seized had passed, was demanded and refused to be delivered up, an action of trover would lie for his recovery. *Fryer v. McRae*, 8 Port. (Ala.) 187.

Hiring a horse to travel a certain distance and driving the horse a longer distance, or to another place than the one agreed upon, is such a conversion of the horse that an action will lie by the owner. *Disbrow v. Tenbroeck*, 4 E. D. Smith (N. Y.), 397; *Lucas v. Trumbull*, 15 Gray (Mass.), 306; *Fish v. Ferris*, 5 Duer (N. Y.), 49; *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Rotch v. Hawes*, 12 Pick.

(Mass.) 136; *Campbell v. Stakes*, 2 Wend. (N. Y.) 137; s. c., 19 Am. Dec. 561; *Towne v. Wiley*, 23 Vt. 355; s. c., 56 Am. Dec. 85; *Ray v. Tubbs*, 50 Vt. 688; s. c., 28 Am. Rep. 519; *Fisher v. Kyle*, 27 Mich. 454; *Woodman v. Hubbard*, 25 N. H. 67; s. c., 57 Am. Dec. 310.

But the owner may ratify the wrongful act by accepting compensation for the extradistance travelled. *Ritch v. Hawes*, 12 Pick. (Mass.) 126.

1. Not only the owner, but one who is in possession under such an arrangement that he is accountable for the animal or for any injury to it in any event, may sue to recover for any loss or injury done the property while it is so in his possession. In such a case the person in possession is treated as the owner and is entitled to all rights of an owner. *N. Y., Chicago, etc., R. Co. v. Auer*, 106 Ind. 219; *Welty v. Indianapolis, etc., R. Co.*, 105 Ind. 55; *Louisville, etc., R. Co. v. Goodbar*, 13 Am. & Eng. R.R. Cas. 599; s. c., 88 Ind. 213; *Fuller v. Curtis*, 100 Ind. 237; s. c., 50 Am. Rep. 786.

D. delivered certain sheep to A. under an arrangement whereby A. was to keep and care for them. He had the right at pleasure to return the identical sheep, and was to deliver one half the increase and one half the wool to D. If any of those originally delivered, or of the increase, died of disease or from natural causes, such loss of those delivered and of one half of the increase was to be borne by D., while A. was to account for the value of all that strayed away and were lost, or those that might be killed by dogs or otherwise injured. Before any had been returned, or any division of the increase, the flock escaped through a defective fence on the right of way of a railroad company, and a number were killed by the cars—being part of the original number and part of the increase. Held, that A. should be treated as the owner of all, and was entitled as such to recover their value from the railroad company. *N. Y., Chicago, etc., R. Co. v. Auer*, 106 Ind. 219.

So where a dog, followed by his master, was pursuing a fox and was accidentally shot by another party who claimed to have shot at the fox, but accidentally killed the dog, the owner was entitled to damages. *Wright v. Clark*, 50 Vt. 130; s. c., 28 Am. Rep. 496.

railroads, see FENCE LAWS; and as to injuries to animals by defects in highways, see HIGHWAYS.)

**5. Cruelty to Animals.**—In various States, and also in England, statutes have been enacted for the prevention of cruelty to

And where a hog, trespassing on the premises of a neighbor of the owner, injured his crops and was pursued and killed by the neighbor and his dogs, the owner of the hog was held to be entitled to damages for such killing. *Thompson v. State*, 67 Ala. 106; s. c., 42 Am. Rep. 101. See also *Ford v. Taggart*, 4 Tex. 492; *Mardru v. Sutton*, 2 Jones L. (N. Car.) 146; *Bost v. Mingues*, 64 N. Car. 44; *Hobson v. Perry*, 1 Hill (S. Car.), 277; *Champion v. Vincent*, 20 Tex. 811; *State v. Williamson*, 27 N. Western Rep. (Iowa) 259.

When trespassing animals are killed in a wanton, malicious, and deliberate way exemplary damages may be recovered. *Champion v. Vincent*, 20 Tex. 811; *Richardson v. Carr*, 1 Harr. (Del.) 142; s. c., 25 Am. Dec. 65; *Johnson v. Patterson*, 14 Conn. 1; s. c., 35 Am. Dec. 96.

A statute making it unlawful for stock to run at large is no defence for injuring stock running at large. *State v. Rivers*, 90 N. Car. 738; and see *Bost v. Mingues*, 64 N. Car. 44.

In Maine, where statutes make it an offence to kill or wound a "domestic animal," it was held that a dog is not a domestic animal. *State v. Harriman*, 75 Me. 562; s. c., 46 Am. Rep. 423. See also *U. S. v. Gideon*, 1 Minn. 292.

Injuries inflicted upon animals by negligence entitle the owner to an action for damages against the one who inflicts the injury. So held where the owner of a quantity of hay, who spilt some white-lead paint on it, tried to separate the damaged part and thought he had succeeded, when he sold the supposed undamaged part without giving notice of the facts to another whose cow died in consequence of eating thereof. *French v. Vining*, 102 Mass. 132; s. c., 3 Am. Rep. 440.

A common carrier's liability does not attach to a railway company that has contracted to move a menagerie in the latter's own cars controlled by its own agents, and, though operated by railway employees, run upon a time schedule to suit the menagerie. And a stipulation that the railway company shall not be liable for injuries to the menagerie caused by want of care in thus moving it may be upheld. *Coup v. Wabash, etc., R. Co.*, 56 Mich. 111.

But where there is contributory negligence on the part of the owner he cannot recover. The owner of a mare permitted her to feed in the same field with a bull of his neighbor, and the mare was gored by the bull. Held, that the owner of the bull was not liable in damages. *Carpenter v. Latta*, 29 Kans. 591.

And where two owners of adjoining lots, to avoid the expense of a partition-fence, agreed that they should use the lots jointly, and there was an unguarded pit in the lot of one of them in which the horse of his neighbor fell and was injured, the owner of the horse could not recover. *McGill v. Compton*, 66 Ill. 327.

Where one dog killed another, the owner of the dog which was killed, in order to be entitled to damages, must prove that his dog was not the aggressor regardless of the habits and character of the dogs. *Wiley v. Slater*, 22 Barb. (N. Y.) 506; and see *Wheeler v. Brant*, 23 Barb. (N. Y.) 324.

Where defendant's large dog while following her along the street ran into an adjoining yard and there seized and killed plaintiff's small dog, defendant was held not to be responsible for the killing of the dog, whatever the result might have been had the action been brought for trespass. *Buck v. Moore*, 35 Hun (N. Y.), 338.

The owner of trespassing animals cannot recover when, while so trespassing, they fall into an uninclosed pit or an unguarded well, or are in some other way injured or killed. *Knight v. Abert*, 6 Pa. St. 472; s. c., 47 Am. Dec. 478; *Turner v. Thomas*, 71 Mo. 596; *Hughes v. Hannibal, etc., R. Co.*, 66 Mo. 325; *Chicago, etc., R. Co. v. Patchin*, 16 Ill. 201; *N. Y., etc., R. Co. v. Skinner*, 19 Pa. St. 302; *Gillis v. Pennsylvania R. Co.*, 59 Pa. St. 129; *Bush v. Brainard*, 1 Cow. (N. Y.) 78; s. c., 13 Am. Dec. 513; *Hess v. Lupton*, 7 Ohio, 216; *Aurora, etc., R. Co. v. Grimes*, 13 Ill. 585; *Durham v. Musselman*, 2 Blackf. (Ind.) 96; s. c., 18 Am. Dec. 133; *Gribble v. Sioux City*, 38 Iowa, 390; *McGill v. Compton*, 66 Ill. 327; *Illinois, etc., R. Co. v. Carraher*, 47 Ill. 333; *Herold v. Meyers*, 20 Iowa, 378; *Leseman v. South Carolina R. Co.*, 4 Rich. (S. Car.) 413. But see *Young v. Harvey*, 16 Ind. 314.

animals. These statutes are so far similar in terms that a general statement about their requirements will be sufficient.<sup>1</sup>

**6. Trespassing Animals.**—At common law the rule prevails that every man is bound to keep his animals within his inclosure at his peril, and that he is liable in damages if he fails to do so and they escape on the property of others and do injury, whether such property be fenced or not; unless the trespass is committed upon property through defects in fences which the owner of such property is bound to maintain.<sup>2</sup>

1. Bishop on Statutory Crimes, § 1102. "If any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill, or cause or procure to be overdrawn, overloaded, tortured, tormented, or deprived of necessary sustenance, or be unmercifully or cruelly beaten, or needlessly mutilated or killed, as aforesaid, any domestic animal, every such offender shall for every such offence be deemed guilty of a misdemeanor." State v. Gould, 26 W. Va. 258.

Abandonment of a disabled animal, carrying animals in a cruel manner, transporting animals for more than twenty-four consecutive hours without unloading for rest, water and feeding during ten consecutive hours; poisoning or attempting to poison animals; throwing substances injurious to animals, as glass and nails, wilfully and maliciously in a public place; setting on foot fights between birds and animals; keeping a place where animals are fought, are generally made misdemeanors. People v. Tinsdale, 10 Abb. Pr. N. S. (N. Y.) 374; Broadway Stage Co. v. Society, etc., 15 Abb. Pr. N. S. (N. Y.) 51; People v. Brunnell, 48 How. Pr. (N. Y.) 435; Com. v. Wood, 111 Mass. 408; State v. Comfort, 22 Minn. 271; State v. Bocker, 32 Tex. 611; State v. Rector, 34 Tex. 565; State v. Avery, 44 N. H. 392; Rembert v. State, 56 Miss. 280; Com. v. Tilton, 8 Metc. (Mass.) 232; Dargan v. Davies, 2 Q. B. D. 118; Murphy v. Manning, 2 Ex. D. 307. Compare Pitts v. Millar, L. R. 9 Q. B. 380.

So is slaughtering with unnecessary cruelty. Davis v. Society, etc., 16 Abb. Pr. N. S. (N. Y.) 73; Grise v. State, 37 Ark. 456; Jones v. State, 9 Tex. App. 178; Colam v. Hall, L. R. 6 Q. B. 209. Compare Ross' Case, 3 City H. Rec. 191.

Torture, to become indictable, must produce pain or suffering. The mere tying of a brush or board to a horse's tail is not torture under a statute. State v. Pugh, 15 Mo. 510.

The ownership of the animal is immaterial. State v. Gould, 26 W. Va. 258; State v. Bocker, 32 Tex. 611; Damell v. State, 6 Tex. App. 482; Collier v. State, 6 Tex. App. 12; Turner v. State, 6 Tex. App. 586; Benson v. State, 1 Tex. App. 6; Com. v. McClellan, 101 Mass. 34; Com. v. Whitman, 118 Mass. 458; Com. v. Lufkin, 7 Allen (Mass.), 582; State v. Comfort, 22 Minn. 271; State v. Avery, 44 N. H. 392.

Using a dog in a treadmill is not cruelty under a statute. People v. Special Sessions, 4 Hun (N. Y.), 441.

Neither is pigeon-shooting for sport or as an exhibition of skill as a marksman. State v. Bogardus, 4 Mo. App. 215. See Paine v. Bergh, 1 C. C. R. (N. Y.) 160.

Where inflicting even severe pain on an animal becomes necessary, as striking a horse while in training or to save human life or limb, it will not be cruelty under a statute if done without malice and as reasonably as circumstances will permit. Walker v. Special Sessions, 4 Hun (N. Y.), 441; State v. Avery, 44 N. H. 392; Com. v. Lufkin, 7 Allen (Mass.), 579; Murphy v. Manning, 2 Ex. D. 307; Cornelius v. Grant, 7 Scotch Sess. Cas. 4th Ser. Just. 13.

A person has the right to protect his premises against the depredations of mischievous dogs, and for that purpose to use such means as are reasonably necessary, and if the depredating animal is thereby caught in a steel trap and mutilated, it would not be needless torture or mutilation under the statute. Hodge v. State, 11 Lea (Tenn.), 528.

2. 3 Blacks. Com. 211.

This common-law rule has obtained in some of our States; in others it has been more or less modified by statute. Michigan, etc., R. Co. v. Fisher, 27 Ind. 96; Indianapolis, etc., R. Co. v. Harter, 38 Ind. 557; Pittsburgh, etc., R. Co. v. Stuart, 71 Ind. 500; Myers v. Dodd, 9 Ind. 290; Hoover v. Wood, 9 Ind. 286; Cook v. Morea, 33 Ind. 497; Crisman v. Masters, 23 Ind. 319; Brady v. Ball, 14 Ind. 317; Sinram v. Pittsburgh, etc., R.

- Co., 28 Ind. 244; *Blizzard v. Walker*, 32 Ind. 437; Indianapolis, etc., R. Co. v. McClure, 26 Ind. 370; Lafayette, etc., R. Co. v. Shriner, 6 Ind. 141; *Williams v. New Albany*, etc., R. Co., 5 Ind. 111; Jeffersonville, etc., R. Co. v. Adams, 43 Ind. 403; Jeffersonville, etc., R. Co. v. Underhill, 48 Ind. 389; Cincinnati, etc., R. Co. v. Street, 50 Ind. 225; *Stone v. Kopka*, 100 Ind. 458; *Wells v. Beal*, 9 Kans. 597; *Baker v. Robbins*, 9 Kans. 303; *Larkin v. Taylor*, 5 Kans. 433; *Darling v. Rodgers*, 7 Kans. 592; *Powers v. Kindt*, 13 Kans. 74; *Rice v. Nagle*, 14 Kans. 498; Pacific R. Co. v. Brown, 14 Kans. 469; Louisville, etc., R. Co. v. Ballard, 2 Metc. (Ky.) 177; *Sherman v. Kilpatrick*, 58 Mich. 310; *Williams v. Michigan*, etc., R. Co., 2 Mich. 260; s. c., 55 Am. Dec. 59; *Aylesworth v. Herrington*, 17 Mich. 417; *Wood v. La Rue*, 9 Mich. 158; *Johnson v. Wing*, 3 Mich. 163; *Rust v. Low*, 6 Mass. 90; *Towne v. Nashua*, etc., R. Co., 124 Mass. 101; *Lyons v. Merrick*, 105 Mass. 71; *Eames v. Salem*, etc., R. Co., 98 Mass. 561; *Maynard v. Boston*, etc., R. Co., 115 Mass. 458; s. c., 15 Am. Rep. 119; *Melody v. Reab*, 4 Mass. 471; *Stackpole v. Healy*, 16 Mass. 33; s. c., 8 Am. Dec. 121; *Lyman v. Gipson*, 18 Pick. (Mass.) 422; *Holbrook v. McBride*, 4 Gray (Mass.), 215; *Darling v. Boston*, etc., R. Co., 121 Mass. 118; *McDonnell v. Pittsfield*, etc., R. Co., 115 Mass. 564; *Thayer v. Arnold*, 4 Metc. (Mass.) 589; *Bronson v. Coffin*, 108 Mass. 175; *Locke v. First Div.*, etc., R. Co., 15 Minn. 350; *Fritz v. First Div.*, etc., R. Co., 22 Minn. 404; Baltimore, etc., R. Co. v. Lamborn, 12 Md. 257; *Keech v. Baltimore*, etc., R. Co., 17 Md. 33; Baltimore, etc., R. Co. v. Mulligan, 54 Md. 487; *Richardson v. Milburn*, 11 Md. 340; *Vandegrift v. Rediker*, 22 N. J. L. 185; s. c., 51 Am. Dec. 262; *Price v. New Jersey*, etc., R. Co., 31 N. J. L. 229; *Brittin v. Van Camp*, 3 N. J. L. 662; *Chambers v. Matthews*, 3 Harr. (N. J.) 368; *Coxe v. Robbins*, 9 N. J. L. 384; *Avery v. Maxwell*, 4 N. H. 36; *Glidden v. Towle*, 31 N. H. 168; *Roby v. Reed*, 39 N. H. 461; *Giles v. Boston*, etc., R. Co., 55 N. H. 552; *Mayberry v. Concord R. Co.*, 47 N. H. 391; *Tewksbury v. Bucklin*, 7 N. H. 518; *Page v. Olcott*, 13 N. H. 399; *Lawrence v. Combs*, 37 N. H. 331; *Mills v. Stark*, 4 N. H. 512; s. c., 17 Am. Dec. 444; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161; *Makepeace v. Worden*, 1 N. H. 16; *Dean v. Sullivan R. Co.*, 22 N. H. 316; *York v. Davis*, 11 N. H. 241; *Bemis v. Connecticut*, etc., R. Co., 42 Vt. 375; *Jackson v. Rutland*, etc., R. Co., 25 Vt. 150; s. c., 60 Am. Dec. 246; *Hurd v. Rutland*, etc., R. Co., 25 Vt. 116; *Keenan v. Cavanaugh*, 44 Vt. 268; *Trow v. Vermont*, etc., R. Co., 24 Vt. 488; s. c., 58 Am. Dec. 191; *Sorenberger v. Houghton*, 40 Vt. 150; *Clark v. Adams*, 18 Vt. 425; s. c., 46 Am. Dec. 161; *Holden v. Shattuck*, 34 Vt. 336; *Wilder v. Wilder*, 38 Vt. 678; *Saxton v. Bacon*, 31 Vt. 540; *Town v. Lamphire*, 37 Vt. 52; *Tupper v. Clark*, 43 Vt. 200; *Tower v. Providence*, etc., R. Co., 2 R. I. 404; *Harrison v. Brown*, 5 Wis. 27; *Stucke v. Milwaukee*, etc., R. Co., 9 Wis. 202; *McCall v. Chamberlain*, 13 Wis. 640; *Hassa v. Junger*, 15 Wis. 598; *Staffard v. Ingersoll*, 3 Hill (N. Y.), 38; *Spinner v. N. Y.*, etc., R. Co., 67 N. Y. 153; *Wells v. Howell*, 19 Johns. (N. Y.) 385; *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.), 255; *Deyo v. Stewart*, 4 Denio (N. Y.), 101; *Shepherd v. Hees*, 12 Johns. (N. Y.) 433; *Griffin v. Martin*, 7 Barb. (N. Y.) 297; *Clark v. Browne*, 18 Wend. (N. Y.) 213; *Colden v. Eldred*, 15 Johns. (N. Y.) 220; *Holladay v. Marsh*, 3 Wend. (N. Y.) 142; s. c., 20 Am. Dec. 678; *Richardson v. Northrup*, 66 Barb. (N. Y.) 85; *Perkins v. Perkins*, 44 Barb. (N. Y.) 134; *Hardenburgh v. Lockwood*, 25 Barb. (N. Y.) 9; *Cowles v. Balzer*, 47 Barb. (N. Y.) 562; *Ryan v. Rochester R. Co.*, 9 How. Pr. (N. Y.) 453; *Marsh v. N. Y.*, etc., R. Co., 14 Barb. (N. Y.) 364; *Heath v. Coltenback*, 5 Iowa, 490; *Wagner v. Bissell*, 3 Iowa, 396; *Alger v. Mississippi*, etc., R. Co., 10 Iowa, 268; *Whitbeck v. Dubuque*, etc., R. Co., 21 Iowa, 103; *Duffus v. Judd*, 48 Iowa, 256; *Frazier v. Nortinus*, 34 Iowa, 82; *Broadwell v. Wilcox*, 22 Iowa, 568; *Hallock v. Hughes*, 42 Iowa, 516; *Little v. McGuire*, 38 Iowa, 560; *Little v. Lathrop*, 5 Me. 356; *Knox v. Tucker*, 48 Me. 373; *Bradbury v. Gilford*, 53 Me. 99; *Heath v. Ricker*, 2 Me. 408; *Cool v. Crommet*, 13 Me. 250; *Gooch v. Stephenson*, 13 Me. 371; *Eastman v. Rice*, 14 Me. 419; *Lord v. Wormwood*, 29 Me. 282; s. c., 50 Am. Dec. 586; *Perkins v. Eastern R. Co.*, 29 Me. 307; s. c., 50 Am. Dec. 589; *Webber v. Closson*, 35 Me. 26; *Sturtevant v. Merrill*, 33 Me. 62; *Adams v. McKinney*, Add. (Pa.) 258; N. Y., etc., R. Co. v. Skinner, 19 Pa. St. 298; *Gregg v. Gregg*, 55 Pa. St. 227; *Milligan v. Wehinger*, 68 Pa. St. 235; *Knight v. Abert*, 6 Pa. St. 472; s. c., 47 Am. Dec. 478; *Race v. Snyder*, 30 Leg. Int. (Pa.) 361; *Rangler v. McCreight*, 27 Pa. St. 95; *Mitchell v. Wolf*, 46 Pa. St. 147; *Fleming v. Ramsey*, 46 Pa. St. 252; *Stephens v. Shriver*, 25 Pa. St. 78.

In other States the common-law rule

*What is Trespass.*—Every unwarrantable entry by animals upon the land of another is a trespass, whether the land be inclosed or not.<sup>1</sup>

*When Owners of Animals are Liable for Injury or Damage done by Them.*—If domestic animals, such as oxen and horses, injure any one in person or property when they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury unless he knows they are accustomed to do mischief; and such knowledge must be alleged and proved. But if they are wrongfully in the place where they do mischief the

has been abrogated as not suited to the condition of new and sparsely settled countries. In *Macon, etc., R. Co. v. Lester*, 30 Ga. 914, the court held that "Such a law as this would require a revolution in our people's habits of thought and action. A man could not walk across his neighbor's uninclosed land, nor allow his horse, or his hog, or his cow to range in the woods nor to graze on the old fields or the 'wire-grass,' without subjecting himself to damages for a trespass. Our whole people with their present habits would be converted into a set of trespassers." *Little Rock, etc., R. Co. v. Finley*, 37 Ark. 562; *Waters v. Moss*, 12 Cal. 535; *Logan v. Gedney*, 38 Cal. 579; *Comerford v. Dupuy*, 17 Cal. 308; *Doherty v. Thayer*, 31 Cal. 141; *Richmond v. Sacramento, etc., R. Co.*, 18 Cal. 351; *Morris v. Fraker*, 5 Colo. 425; *Willard v. Mathesus*, 7 Colo. 76; *Studwell v. Ritch*, 14 Conn. 292; *Wright v. Wright* 21 Conn. 329; *Barnum v. Van Dusen*, 16 Conn. 200; *Hine v. Wooding*, 37 Conn. 123; *Bissel v. Southworth*, 1 Root (Conn.), 269; *Macon, etc., R. Co. v. Lester*, 30 Ga. 914; *Georgia R. Co. v. Neely*, 56 Ga. 540; *Central, etc., R. Co. v. Davis*, 19 Ga. 437; *Seeley v. Peters*, 10 Ill. 130; *Westgate v. Carr*, 43 Ill. 450; *Headen v. Rust*, 39 Ill. 186; *Stoner v. Shugart* 45 Ill. 76; *Chicago, etc., R. Co. v. Patchin*, 16 Ill. 201; *Alton, etc., R. Co. v. Baugh*, 14 Ill. 211; *Misner v. Lighthall*, 13 Ill. 609; *Ozburn v. Adams*, 70 Ill. 291; *D'Arcy v. Miller*, 86 Ill. 102; *Montgomery v. Handy*, 62 Miss. 16; *Vicksburg, etc., R. Co. v. Patton*, 31 Miss. 156; *New Orleans, etc., R. Co. v. Field*, 46 Miss. 573; *Gorman v. Pacific R. Co.*, 26 Mo. 441; *Hannibal, etc., R. Co. v. Kenney*, 41 Mo. 271; *McPheeters v. Hannibal, etc., R. Co.*, 45 Mo. 22; *Early v. Fleming*, 16 Mo. 154; *Tarwater v. Hannibal, etc., R. Co.*, 42 Mo. 193; *Canefox v. Crenshaw*, 24 Mo. 199; *Chase v. Chase*, 15 Nev. 259; *Laws v. North Carolina R. Co.*, 7 Jones L. (N. Car.) 468; *Nelson v. Stewart*, 2 Murphy (N.

Car.), 298; *McKay v. Woodle*, 6 Ired. L. (N. Car.) 352; *State v. Lamb*, 8 Ired. L. (N. Car.) 229; *Jones v. Witherspoon*, 7 Jones L. (N. Car.) 555; *Kerwhacker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172; *Cincinnati, etc., R. Co. v. Watterson*, 4 Ohio St. 424; *Cleveland, etc., R. Co. v. Elliott*, 4 Ohio St. 474; *Marietta, etc., R. Co. v. Stephenson*, 24 Ohio St. 48; *Cranston v. Cincinnati, etc., R. Co.*, 1 Handy (Ohio), 193; *Phelps v. Cousins*, 29 Ohio St. 135; *Campbell v. Bridwell*, 5 Oregon, 311; *Murray v. South Carolina R. Co.*, 10 Rich L. (S. Car.) 227; *Danner v. South Carolina R. Co.*, 4 Rich L. (S. Car.) 329; s. c., 55 Am. Dec. 678; *Wilson v. Wilmington, etc., R. Co.*, 10 Rich L. (S. Car.) 52; *Blaine v. Chesapeake, etc., R. Co.*, 9 W. Va. 252; *Baylor v. Baltimore, etc., R. Co.*, 9 W. Va. 270; *De-laney v. Erickson*, 11 Neb. 533; *Mobile, etc., R. Co. v. Williams*, 53 Ala. 595; *Jean v. Sandiford*, 39 Ala. 317; *Polk v. Lane*, 4 Yerg. (Tenn.) 36; *State v. Council*, 1 Tenn. 305. For fence-laws, see FENCE-LAWS.

1. 3 Blacks. Com. 209; *Wells v. Howell*, 19 Johns. (N. Y.) 385.

A person is equally answerable for the trespass of his cattle as of himself. 3 Blacks. Com. 211.

A trespass may be small, and still be a trespass in law; as where a horse outside a fence was fighting a horse inside. *Pettit v. May*, 34 Wis. 666; *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10.

And it does not matter if the owner of the cattle supposes that he has a right to pasture his cattle on another's land; it will be none the less a trespass. As where A and B owned adjoining lots not divided by a partition-fence and B allowed C's cattle to enter the lots, representing that he owned the whole, and C's cattle did damage in A's lot, C was held liable to A, although he believed that B had full authority to allow his cattle in the lots. *Daniels v. Aholtz*, 81 Ill. 440. See also TRESPASS.

owner is liable, though he had no notice that they were accustomed to do so before.<sup>1</sup>

1. *Decker v. Gammon*, 44 Me. 322; *Dunkle v. Kocker*, 11 Barb. (N. Y.) 387; *Chunot v. Larson*, 43 Wis. 536; s. c., 28 Am. Rep. 567; *Dolph v. Ferris*, 7 Watts & S. (Pa.) 367; s. c., 42 Am. Dec. 246; *Van Leuven v. Lyke*, 1 N. Y. 515; s. c., 49 Am. Dec. 346; *Beckett v. Beckett*, 48 Mo. 396; *Barnum v. Van Dusen*, 16 Conn. 200; *Moss v. Pardridge*, 9 Ill. App. 490; *Rust v. Low*, 6 Mass. 90; *Keliber v. Connecticut, etc.*, R. Co., 107 Mass. 411; *Shepherd v. Hees*, 12 Johns. (N. Y.) 433; *McDonell v. Pittsfield, etc.*, R. Co., 115 Mass. 564; *Cowles v. Balzer*, 47 Barb. (N. Y.) 562; *D'Arcy v. Miller*, 86 Ill. 102; *Goodman v. Gay*, 15 Pa. St. 188; s. c., 53 Am. Dec. 580; *Dickson v. McCoy*, 39 N. Y. 401; *Studwell v. Ritch*, 14 Conn. 292; *Page v. Hollingsworth*, 7 Ind. 317; *Osincup v. Nichols*, 49 Barb. (N. Y.) 147.

So where oxen break the plaintiff's close and kill his cow, the owner of the oxen will be liable in damages without proving that he knew they were accustomed to gore. *Angus v. Radin*, 5 N. J. L. 815; s. c., 8 Am. Dec. 626.

Where a young stallion was put in a lot surrounded by a fence as was "common among farmers, and usually considered safe," and the stallion leaped the fence and injured a person driving on the highway, it was a question for the jury whether such fence was sufficient to hold the stallion. *McIlvaine v. Lantz*, 100 Pa. St. 586; s. c., 45 Am. Rep. 400.

A bull escaped through a gap in the fence to a neighboring lot and killed plaintiff's horse. As the plaintiff was responsible for the defective fence, and it was not proved that defendant had previous knowledge of the vicious character of the bull, the plaintiff could not recover. *Scott v. Grover*, 56 Vt. 499; s. c., 48 Am. Rep. 814. And see *Weide v. Thiel*, 9 Ill. App. 223; *Baynes v. Chastain*, 68 Ind. 376.

This decision would have been different if the bull had broken into plaintiff's lot without any negligence on the part of the plaintiff. *Dolph v. Ferris*, 7 Watts & S. (Pa.) 367; s. c., 42 Am. Dec. 247.

If cattle escape through defendant's defective part of the fence, and also through a part of the fence which the plaintiff had kept in good repair, while some parts of plaintiff's fence were also defective, it is a question for the jury whether the defendant will be liable for damage done by his cattle which so es-

caped. *Noble v. Chase*, 60 Iowa, 261. And see *Rice v. Nagle*, 14 Kans. 498.

Where a stallion broke through the fence in a neighboring lot and damages were awarded for the breaking of the close, this did not bar an action for consequent damages in consequence of a mare, which was pasturing in the lot, being gotten with foal by the stallion; said fact not being known at the time. *Hagan v. Casey*, 30 Wis. 553.

Where the owner of an inclosure who was bound to repair his fence failed to do so, and his neighbor's cow strayed on his premises and was there bitten by a dog, he is liable in damages, although no action for trespass will lie. *Cate v. Cate*, 50 N. H. 144; s. c., 9 Am. Rep. 179.

In States where the common-law rule has been abrogated or so far modified that cattle are allowed to range at will, the owners of crops have no action for damages by trespassing cattle unless they can prove that their lots were at the time of the trespass inclosed by good and sufficient fences. *Morris v. Fraker*, 5 Colo. 425; *Cowerford v. Dupuy*, 17 Cal. 308; *Seeley v. Peters*, 10 Ill. 130; *Oil v. Rowley*, 69 Ill. 469; *Frazer v. Norrtinus*, 34 Iowa, 82; *Wells v. Beal*, 9 Kans. 597.

Where cattle got into the inclosure of defendant, which was surrounded by a fence not sufficiently high, the owner of the field can maintain no action for damages although the vicious habits of the cow were known. *Runyan v. Patterson*, 87 N. Car. 343; *Filmore v. Booth*, 29 Kans. 134. And see also *Mann v. Williamson*, 70 Mo. 661; *Chase v. Chase*, 15 Nev. 259; *Hinshaw v. Gilpin*, 64 Ind. 116. But see *Lyons v. Merrick*, 105 Mass. 71.

The owner of trespassing cattle was held not to be liable where the trespass could have been prevented if there had been material on the ground to close up the gap in the fence through which they came. *Little v. McGuire*, 38 Iowa, 560.

But even if the fences are defective the owner of a crop damaged by trespassing cattle can recover from the owner of the cattle if it is proved that he drove the cattle upon the premises and was guilty of wanton and wilful want of care. *Powers v. Kindt*, 13 Kans. 74.

Although liable for damages done by his cattle which broke through a fence, the owner of such cattle is not liable for damage done by other cattle trespassing



*Who are Liable for Trespasses of Animals.*—Those who have the care, control, and custody of animals, such as a depasturer of sheep or an agister of cattle and horses, are with the owner equally liable for trespasses and injuries by the animals under their care.<sup>1</sup>

*Rights of Strangers in regard to Trespassing Animals.*—Every man has a right to keep trespassing animals from his premises, but

through the hole his cattle made unless such cattle was under his control. *Durham v. Goodwin*, 54 Ill. 469.

1. *Barnum v. Van Dusen*, 16 Conn. 200; *Rossell v. Cottom*, 31 Pa. St. 525; *Tewksbury v. Bucklin*, 7 N. H. 518; *Lyons v. Merrick*, 105 Mass. 71; *Ward v. Brown*, 64 Ill. 307; s. c., 16 Am. Rep. 561; *Cook v. Morea*, 33 Ind. 497; *Frammell v. Little*, 16 Ind. 251; *Marsel v. Bowman*, 62 Iowa, 57; *Kennett v. Durgin*, 59 N. H. 560; *Moulton v. Moore*, 56 Vt. 700; *Weymouth v. Gile*, 72 Me. 446; *Marsh v. Jones*, 21 Vt. 378; s. c., 52 Am. Dec. 67; *Sheridan v. Bean*, 8 Metc. (Mass.) 284; s. c., 41 Am. Dec. 507; *Buddington v. Shearer*, 22 Pick. (Mass.) 427; *Smith v. Montgomery*, 52 Me. 178; *Smith v. Jaques*, 6 Conn. 530; *Noyes v. Colby*, 30 N. H. 143.

So is the owner of animals liable for all injuries caused by the carelessness of his servants, while they have the control of the animals within the scope of their employment or by his express orders. *McCahill v. Kipp*, 2 E. D. Smith (N. Y.), 413; *Hall v. Warner*, 60 Barb. (N. Y.) 198; *Street v. Laumier*, 34 Mo. 469; *Hummell v. Wester*, Bright (Pa.), 133; *Cohen v. Drydock*, etc., R. Co., 69 N. Y. 170; *Dimock v. Suffield*, 30 Conn. 129; *Stone v. Hills*, 45 Conn. 44; *Madrox v. Brown*, 71 Me. 432; s. c., 34 Am. Rep. 336; *Wright v. Wilcox*, 19 Wend. (N. Y.) 343; *Campbell v. Providence*, 9 R. I. 262.

But not for anything done by the servant outside of his authority or not within the scope of his employment. *Steele v. Smith*, 3 E. D. Smith (N. Y.), 321; *Welden v. Harlem R. Co.*, 5 Bosw. (N. Y.) 576; *Phelon v. Stiles*, 43 Conn. 426; *Cavanaugh v. Dinsmore*, 12 Hun (N. Y.), 465; *Sheridan v. Charlick*, 4 Daly (N. Y.), 338; *Howe v. Newmarch*, 12 Allen (Mass.), 49; *Bard v. Yohn*, 26 Pa. St. 482. See MASTER AND SERVANT.

B agreed to pasture A's cattle in his field, and afterward without A's knowledge agreed with C that the cattle should also run in C's field, which adjoined that of B. The cattle escaped through C's defective fence into the close of D adjoining, and did damage there. *Held*,

that A was not liable to D in trespass. *Ward v. Brown*, 64 Ill. 307; s. c., 16 Am. Rep. 561.

A tenant is liable for damages done by his stock while breaking through a defective partition-fence, which, according to an agreement between the landlord and his neighbor made before he leased the land, the landlord was under obligation to repair. *Baynes v. Chastain*, 68 Ind. 376.

And so when cattle is leased with a farm the tenant, and not the lessor, will be liable. *Van Slyck v. Snell*, 6 Lans. (N. Y.) 299.

The several owners of animals which had been jointly trespassing, although all liable for the damage done by their animals, cannot be sued jointly in one action for damages. *Cogswell v. Murphy*, 46 Iowa, 44; *Yeazel v. Alexander*, 58 Ill. 263; *Westgate v. Carr*, 43 Ill. 450; *Rowe v. Bird*, 48 Vt. 578; *Adams v. Hall*, 2 Vt. 9; s. c., 19 Am. Dec. 690; *Auchmutz v. Ham*, 1 Denio (N. Y.), 501; *Carroll v. Weiler*, 4 Thomp. & C. (N. Y.) 131; *Slater v. Mersereau*, 64 N. Y. 147; *Van Steenburgh v. Tobias*, 17 Wend. (N. Y.) 562; s. c., 31 Am. Dec. 310; *Partenheimer v. Van Order*, 20 Barb. (N. Y.) 479; *Chipman v. Palmer*, 9 Hun (N. Y.), 520; *Colegrove v. New Haven*, etc., R. Co., 6 Duer (N. Y.), 382; *Harden v. Boyce*, 59 Barb. (N. Y.) 425; *Russell v. Tomlinson*, 2 Conn. 206; *Buddington v. Shearer*, 20 Pick. (Mass.) 477; *Brady v. Ball*, 14 Ind. 317; *Denny v. Cornell*, 9 Ind. 73; *Little Schuylkill R. Co. v. Richards*, 57 Pa. St. 147. But see *Ozburn v. Adams*, 70 Ill. 291; *Remile v. Donahue*, 54 Vt. 555; *Kerr v. O'Connor*, 63 Pa. St. 341; *McAdams v. Sutton*, 24 Ohio St. 333, where it was held that under certain circumstances or by statute they may be jointly liable.

In order to fix the liability of each owner the jury are at liberty to adopt any reasonable rule in estimating the amount of damages done by each animal. *Buddington v. Shearer*, 22 Pick. (Mass.) 427; *Partenheimer v. Van Order*, 20 Barb. (N. Y.) 479; *Wilbur v. Hubbard*, 35 Barb. (N. Y.) 303; *Powers v. Kindt*, 13 Kans. 74; *Russell v. Tomlinson*, 2 Conn. 206.

he may use no more force than is necessary to drive them off; and drive them not farther than is necessary to keep them from his premises. He will not be responsible for any injury they may subsequently commit. He is responsible for any injury he may inflict wantonly and unnecessarily, and if he uses a dog to drive them off he must have due regard in the way of setting him upon the animals and to the size and character of the dog.<sup>1</sup>

**7. Vicious Animals.**—The owner or keeper of animals of a vicious disposition or mischievous habits, of which the owner had previous actual or implied notice, is bound at his peril to keep them at all times and in all places properly secured, and is responsible to any one who, without fault on his own part, is injured by them.<sup>2</sup>

1. *Amick v. O'Hara*, 6 Blackf. (Ind.) 258; *Clark v. Adams*, 18 Vt. 425; s. c., 46 Am. Dec. 161; *Davis v. Campbell*, 23 Vt. 236; *Humphrey v. Douglass*, 10 Vt. 71; 11 Vt. 22; s. c., 34 Am. Dec. 668; *Waterman v. Hall*, 17 Vt. 128; s. c., 42 Am. Dec. 484; *Smith v. Waldorf*, 13 Hun (N. Y.), 127; *Loomis v. Terry*, 17 Wend. (N. Y.) 496; s. c., 31 Am. Dec. 306; *McIntire v. Plaisted*, 57 N. H. 606; *Cory v. Little*, 6 N. H. 213; s. c., 25 Am. Dec. 458; *Gilson v. Fisk*, 8 N. H. 404; *Snap v. People*, 19 Ill. 80; *Painter v. Baker*, 16 Ill. 103; *Palmer v. Silverthorn*, 32 Pa. St. 65; *Richardson v. Carr*, 1 Harr. (Del.) 142; s. c., 25 Am. Dec. 65; *Ford v. Taggart*, 4 Tex. 492; *Bost v. Mingués*, 64 N. Car. 44; *Thompson v. State*, 67 Ala. 106; s. c., 42 Am. Rep. 101; *Wood v. La Rue*, 9 Mich. 158; *Story v. Robinson*, 32 Cal. 205; *James v. Caldwell*, 7 Yerg. (Tenn.) 38; *Jones v. Hood*, 4 Bush (Ky.), 80. But see *Totten v. Cole*, 33 Mo. 138; and see also *Tobin v. Deal*, 60 Wis. 87; s. c., 50 Am. Rep. 345.

But where the owner of a herd of ewes discovered a number of stray bucks among his ewes, tugging them out of season, and he killed them after making fruitless efforts to drive them away and to discover their owner, he was held justified in killing them. *Thomas v. State*, 14 Tex. Ct. App. 200.

Where one uses only such means as are necessary to drive trespassing cattle out of his fields, and if in so doing some of the cattle are mutilated, he will not be liable. *Avery v. People*, 11 Ill. App. 332; *Davis v. State*, 12 Tex. App. 11; *Davis v. Campbell*, 23 Vt. 236.

But where cattle got into the inclosure of defendant, which was not properly fenced, and he fired at them to frighten them, and accidentally killed a mule which he did not see, he was held responsible. *State v. Barnard*, 88 N. Car. 661.

A notice given that the owner of prem-

ises will kill all animals trespassing on his premises is a mere threat to do an illegal act, and will not justify any unnecessary injury to trespassing animals. *Clark v. Keliber*, 107 Mass. 406; *Johnson v. Patterson*, 14 Conn. 1; s. c., 35 Am. Dec. 96.

Scattering poison within one's inclosure for the purpose of poisoning the fowl of another if they should come there is not justifiable, and the owner of the fowl may recover for the fowl killed. *Johnson v. Patterson*, 14 Conn. 1; s. c., 35 Am. Dec. 96; *Matthews v. Fiestel*, 2 E. D. Smith (N. Y.), 90.

A person has, however, the right to protect his own property, and will not be responsible if he entraps a dog in a steel trap, whereby the dog is mutilated, if he has reason to believe that the dog has for some time made nightly invasions on his premises, disturbing his fowl, eating his eggs, and damaging and disturbing his property. *Hodge v. State*, 11 Lea (Tenn.), 528; s. c., 47 Am. Rep. 307.

The inhabitant of a dwelling-house has the right to kill a dog who is continually trespassing on his premises and disturbing his peace by day and night by barking and howling. Knowledge of the habits of the dog by the owner must, however, be proved. *Brill v. Flagler*, 23 Wend. (N. Y.) 354.

But a landowner has no right to kill a dog trespassing on his premises and doing no actual injury simply because the dog is suspected of previous misconduct on the same premises. *Brent v. Kimball*, 60 Ill. 211; s. c., 14 Am. Rep. 35.

Neither can he kill any animal for damages done in the past. *Bost v. Mingués*, 64 N. Car. 44; *Ulery v. Jones*, 81 Ill. 403.

2. *Lyons v. Merrick*, 105 Mass. 71; *Hewes v. McNamara*, 106 Mass. 281; *Wheeler v. Brant*, 23 Barb. (N. Y.) 324; *Rider v. White*, 65 N. Y. 54; s. c., 22

**8. Injuries by Wild Animals.**—If one keeps a lion, bear, or any other wild and ferocious animal, and such animal escapes from his con-

Am. Rep. 600; *Kelly v. Tilton*, 2 Abb. App. Dec. (N. Y.) 495; *Koney v. Ward*, 2 Daly (N. Y.), 295; *Oakes v. Spaulding*, 40 Vt. 347; *Coggsell v. Baldwin*, 15 Vt. 404; s. c., 40 Am. Dec. 636; *Murray v. Young*, 12 Bush (Ky.), 337; *McCaskill v. Elliott*, 5 Strobb. (S. Car.) 196; s. c., 53 Am. Dec. 706; *Pickering v. Orange*, 1 Scam. (Ill.) 338; *Keightlinger v. Egan*, 65 Ill. 235; *Laverone v. Mangianti*, 44 Cal. 138; s. c., 10 Am. Rep. 269; *Kertschacke v. Ludwig*, 28 Wis. 430; *Partlow v. Haggarty*, 35 Ind. 178.

But such previous knowledge must be alleged and proved. *Vrooman v. Lawyer*, 13 Johns. (N. Y.) 339; *Fairchild v. Bentley*, 30 Barb. (N. Y.) 147; *Wormley v. Gregg*, 65 Ill. 251; *Keightlinger v. Egan*, 65 Ill. 235; *May v. Burdett*, 9 Q. B. 101.

It may, however, be inferred from circumstances. *Rider v. White*, 65 N. Y. 54; s. c., 22 Am. Rep. 600; *Hudson v. Roberts*, 20 L. J. Exch. 299; *Simson v. London Gen. Omnibus Co.*, L. R. 8 C. P. 390.

The knowledge of the vicious habits of an animal need not refer to circumstances of exactly the same kind. All that the law requires to make the owner liable is a knowledge of facts from which he can infer that the animal is likely to commit an act of the kind complained of. *Kittredge v. Elliott*, 16 N. H. 77; s. c., 41 Am. Dec. 717; *Pickering v. Orange*, 2 Ill. 338; *Keightlinger v. Egan*, 65 Ill. 235; *Flansbury v. Basin*, 3 Ill. App. 531; *McCaskill v. Elliott*, 5 Strobb. (S. Car.) 196; s. c., 53 Am. Dec. 706; *Cockerham v. Nixon*, 11 Ired. (N. Car.) L. 270; *Partlow v. Haggarty*, 35 Ind. 178; *Laverone v. Mangianti*, 44 Cal. 138; s. c., 10 Am. Rep. 269; *Tupper v. Clark*, 43 Vt. 200; *Rider v. White*, 65 N. Y. 54; s. c., 22 Am. Rep. 600.

It is immaterial how many times an animal has shown vicious habits to the knowledge of the owner. One, two, and three instances have been held sufficient. *Woolf v. Chalker*, 81 Conn. 121; *Loomis v. Terry*, 17 Wend. (N. Y.) 496; s. c., 31 Am. Dec. 306; *Kittredge v. Elliott*, 16 N. H. 77; s. c., 41 Am. Dec. 717; *Buckley v. Leonard*, 4 Denio (N. Y.), 500; *Wheeler v. Brant*, 23 Barb. (N. Y.) 324; *Mann v. Weiland*, 81\* Pa. St. 243; *Coggsell v. Baldwin*, 15 Vt. 404; s. c., 40 Am. Dec. 686; *Smith v. Pelah*, 2 Str. 1264.

The degree of care required of the owner of animals in the keeping of them

depends on the circumstances under which they are kept, and it is a question for the jury whether sufficient care has been taken in keeping them secure. *Dickson v. McCoy*, 39 N. Y. 400; *Sullivan v. Scripture*, 3 Allen (Mass.), 564; *Frazer v. Kimler*, 2 Hun (N. Y.), 514; *Dolinger v. Fishback*, 12 Bush. (Ky.) 474; *Meredith v. Reed*, 26 Ind. 334; *Hewes v. McNamara*, 106 Mass. 281; *Ficken v. Jones*, 28 Cal. 618; *Bennett v. Ford*, 47 Ind. 264; *Griggs v. Fleckenstein*, 14 Minn. 81; *Shawhan v. Clarke*, 24 La. Ann. 390; *Hummell v. Wester*, 1 Bright (Pa.), 133.

So must the driver of a horse, although under ordinary circumstances only bound to use ordinary care, use greater care when in a crowded thoroughfare in a city or near a military encampment, where there is a concourse of people, than on a country road. *Powell v. Deveney*, 3 Cush. (Mass.) 300; *Howard v. North Bridgewater*, 16 Pick. (Mass.) 189; *Prideaux v. Mineral Point*, 43 Wis. 513; *McDonald v. Snelling*, 14 Allen (Mass.), 290; *Com. v. Worcester*, 3 Pick. (Mass.) 462; *Warner v. Morrison*, 3 Allen (Mass.), 564.

A keeper of bees was held not to be liable for injuries to a passing team where it was proved that the bees were kept in the same place for eight or nine years without ever molesting a horse before. The court held that the evidence rebutted the idea of any notice to the defendant, either from the nature of bees or otherwise, that it would be dangerous to keep them in that situation. *Earl v. Van Alstyne*, 8 Barb. (N. Y.) 630.

Plaintiff was injured by a bull led through a public street by defendant's servant. It was proved that after the accident defendant had said that his servant was careless in his manner of leading the bull through the streets. Held, that this evidence, together with defendant's implied knowledge of the vicious tendencies of a bull, might be taken as an admission that the bull needed to be controlled, and that the servant's care was negligent; and that the plaintiff was not guilty of contributory negligence in going to the assistance of the servant. *Linnehan v. Sampson*, 126 Mass. 506; s. c., 30 Am. Rep. 602.

In an action by a female plaintiff, who had received injuries from a buck in defendant's park, it was shown that the defendant allowed the buck to roam at large in the park with other deer; that he had notices posted in the park "Beware of the

finement and does mischief to another, the owner is liable to make satisfaction for the mischief so done, without further evidence of negligence in him; for every person who keeps such noxious and useless animals must keep them at his peril.<sup>1</sup>

buck," and that at the season of the year when the injuries were received bucks are dangerous. The plaintiff stated that she had often seen other people play with the deer in the park, and that she did not know deer were dangerous unless disturbed. *Held*, that under the circumstances she was entitled to an action. *Congress and Empire Spring Co. v. Edgar*, 99 U. S. 645.

And where a man tied his vicious bull on his own land within reach of a pathway which the public had been accustomed to use, although it was not a highway, he was held liable for injury to a passer on the pathway. *Glidden v. Moore*, 14 Neb. 84; s. c., 45 Am. Rep. 98.

The amount of damages which can be recovered from the owner of vicious or mischievous animals can, however, never be larger than the amount of damages actually sustained, without taking in consideration remote results. So where a hog has injured crops the owner of the crops can recover only so much damage as was actually done, and not the value of the crop at maturity. *Gresham v. Taylor*, 51 Ala. 505; *Richardson v. Northrup*, 66 Barb. (N. Y.) 85; *Seamans v. Smith*, 46 Barb. (N. Y.) 320; *Armstrong v. Smith*, 44 Barb. (N. Y.) 120.

Only on proof of malice or gross and criminal negligence, with wanton disregard of the rights of others, exemplary damages may be allowed. *Pickett v. Crook*, 20 Wis. 358; *Elliott v. Herz*, 29 Mich. 202; *Keightlinger v. Egan*, 65 Ill. 235; *Von Fragstein v. Windler*, 2 Mo. App. 598; *Meibus v. Dodge*, 38 Wis. 300; s. c., 20 Am. Rep. 6.

Although any one injured by an animal through the negligence of its owner or keeper has an action for damages against the owner, contributory negligence on the part of injured party will bar a recovery. *Drake v. Mount*, 33 N. J. L. 441; *Earhart v. Youngblood*, 27 Pa. St. 331; *Loker v. Damon*, 17 Pick. (Mass.) 284; *Shehan v. Cornwall*, 29 Iowa, 99; *Coggswell v. Baldwin*, 15 Vt. 404; s. c., 40 Am. Dec. 686; *Koney v. Ward*, 36 How. Pr. (N. Y.) 255; *Wheeler v. Brant*, 23 Barb. (N. Y.) 324; *Eberhart v. Reister*, 96 Ind. 478.

A man has a natural right to defend his domestic animals upon his own premises against the vicious attacks of other animals, but he must do so in a reasona-

ble way, and take in consideration the relative value of the animals. So held in an action for the killing of two Irish thoroughbred setter pups that attacked a thoroughbred Plymouth Rock hen, and for the killing of a hog which attacked a chicken. *Anderson v. Smith*, 7 Ill. App. 354; *Morse v. Nixon*, 6 Jones (N. Car.) 293; *Matthews v. Fiestel*, 2 E. D. Smith (N. Y.), 90; *Leonard v. Wilkins*, 9 Johns. (N. Y.) 232.

But where the owner of an ass, which he knew to be in the habit of pursuing and injuring stock, permitted him to run at large, when the ass attacked a cow, threw her down, and proceeded to stamp upon her, the owner of the cow was held justified in killing the ass to save the cow. *Williams v. Dixon*, 65 N. Car. 416.

And where a man shot four minks which were chasing his geese he was justified in so doing, although it was in a season of the year when it was unlawful to kill minks. *Aldrich v. Wright*, 53 N. H. 398; s. c., 16 Am. Rep. 339.

Injuries done by animals need not always be in consequence of their vicious character to make the owner liable. Any injury committed in playfulness will make him liable in damages. *Dickson v. McCoy*, 39 N. Y. 400. *State v. McDermott*, 7 Eastern Repr. (N. J.) 527.

Or where the mere unauthorized presence on a highway of an animal, as a hog, causes the injury by frightening a horse, the owner of the hog will be liable although he did not know that the hog was on the highway. *Jewett v. Gage*, 55 Me. 538.

1. *Norris' Peake on Evidence*, 486; *Earl v. Van Alstyne*, 8 Barb. (N. Y.) 630; *Van Leuven v. Lyke*, 1 N. Y. 516; s. c., 49 Am. Dec. 346; *May v. Burdett*, 9 Q. B. 101.

The keeping of wild animals for many purposes has, however, come to be recognized as proper and useful, and it seems safe to say that the liability of the owner or keeper for any injury done by them to the person or property of others must rest on the doctrine of negligence. A very high degree of care is demanded of those who have them in charge; but if, notwithstanding such care, they are enabled to commit mischief, the case should be referred to the category of accidental injuries, for which a civil action will not

**9. Injuries by Dogs.**—At common law the dog is considered a tame, harmless, and docile animal, and its owner not responsible for any vicious or mischievous act it may do, unless he had a previous knowledge of mischievous or vicious propensities of the dog.<sup>1</sup>

lie. *Cooley on Torts*, 349; *Scribner v. Kelley*, 38 Barb. (N. Y.) 14.

Where members of an unincorporated club kept a bear on their premises, and the bear slipped his collar and injured a man, who died in consequence, the members of the club were all held liable, including one who, being absent, knew nothing of the bear. *Vredenburg v. Behan*, 33 La. Ann. 627.

1. *Dearth v. Baker*, 22 Wis. 73; *Kertschacke v. Ludwig*, 28 Wis. 430; *Slinger v. Henneman*, 38 Wis. 504; *Fairchild v. Bentley*, 30 Barb. (N. Y.) 147; *Hinckley v. Emerson*, 4 Cow. (N. Y.) 351; s. c., 15 Am. Dec. 383; *Durden v. Barnett*, 7 Ala. 169; *Sherfey v. Bartley*, 4 Sneed (Tenn.), 58; *State v. McDermott*, 7 Eastern Repr. (N. J.) 527.

In many of the States, however, statutes have been passed holding the owners of dogs to a greater responsibility, and dispensing with *scienter* in many cases. *Smith v. Montgomery*, 52 Me. 178; *Orne v. Roberts*, 51 N. H. 110; *Mitchell v. Clapp*, 12 Cush. (Mass.) 278; *Pressey v. Wirth*, 3 Allen (Mass.), 191; *Brewer v. Crosby*, 11 Gray (Mass.), 29; *Woolf v. Chalker*, 31 Conn. 121; *Jones v. Sherwood*, 37 Conn. 466; *Fish v. Skut*, 31 Barb. (N. Y.) 333; *Osincup v. Nichols*, 49 Barb. (N. Y.) 145; *Auchmuty v. Ham*, 1 Den. (N. Y.) 495; *Fairchild v. Bentley*, 30 Barb. (N. Y.) 147; *Paff v. Slack*, 7 Pa. St. 254; *Campbell v. Brown*, 19 Pa. St. 359; *Kerr v. O'Connor*, 63 Pa. St. 341; *Smith v. Cansey*, 22 Ala. 568; *Swift v. Applebone*, 23 Mich. 252; *Elliott v. Herz*, 29 Mich. 202; *Job v. Harlan*, 13 Ohio St. 485; *Gries v. Zeck*, 24 Ohio St. 329; *Meracle v. Down*, 64 Wis. 323; *Chunot v. Larson*, 43 Wis. 536; s. c., 28 Am. Rep. 567. But see dissenting opinion of Ryan, C. J., in *Chunot v. Larson*.

A young girl recovered a verdict of \$1450, which by a statutory provision is to be doubled as the measure of damages, against the owner of a dog by which she was severely bitten, producing long and serious illness and injury. *Held*, not excessive. In such a case it is not error (1) to exclude a question to a physician, "if he thought there would be any difficulty, in the hands of a good physician, in having the little girl walk in a reasonable time;" (2) to admit evidence showing that the same dog had previously attacked and bitten another

girl; (3) to admit the testimony of a physician of another case; (4) to exclude a hypothetical question on cross-examination of a physician, in which the facts supposed had not at that time appeared in evidence; (5) to refuse to instruct the jury "that the plaintiff cannot recover damages except those caused by the bite of the dog, because nothing else is declared on." *Fitzgerald v. Dobson*, 3 N. Engl. Repr. (Me.) 394.

Where a dog is ferocious to the knowledge of his owner, who had sometimes confined and muzzled him, it is in an action for injury by the bite of such a dog not necessary to show that he had ever bitten anybody. *Gooden v. Blood*, 52 Vt. 251; s. c., 36 Am. Rep. 751; *Rider v. White*, 65 N. Y. 54; s. c., 22 Am. Rep. 600.

Nor is it material to show that a dog is generally good-behaved where it was proved that on two occasions he had shown a vicious character. *Mann v. Weiland*, 81\* Pa. St. 243; *Buckley v. Leonard*, 4 Denio (N. Y.), 500.

The owner of a dog in the habit of worrying and injuring the stock of others, who keeps it with notice thereof, is liable for the injury it commits. *Hinckley v. Emerson*, 4 Cow. (N. Y.) 351; s. c., 15 Am. Dec. 383.

Knowledge of the vicious habits of a dog by the agent or servant in charge is knowledge of the owner; and evidence to show that the agent had such knowledge is admissible in an action for damages against the principal. *Corliss v. Smith*, 53 Vt. 532; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518; s. c., 28 Am. Dec. 476. But see *Twigg v. Ryland*, 62 Md. 380; s. c., 50 Am. Rep. 226.

To make one liable for injuries inflicted by a vicious dog, he must be the owner or keeper. Any one harboring a dog and permitting him, so to say, as one of the family, is the owner or keeper; but not when he suffers a dog temporarily to stay at his premises, as the dog of a boarder or workman. *Frammell v. Little*, 16 Ind. 251; *Cummings v. Riley*, 52 N. H. 368; *Marsh v. Jones*, 21 Vt. 378; s. c., 52 Am. Dec. 67; *Wilkinson v. Parrott*, 32 Cal. 102; *Barrett v. Malden*, etc., R. Co., 3 Allen (Mass.), 101; *Auchmuty v. Ham*, 1 Den. (N. Y.) 495.

A dog kept by the superintendent of the stables of a horse railroad on the

**10. Diseased Cattle.**—It is not unlawful for the owner of cattle affected with a contagious disease to keep them on his own prem-

premises and with the knowledge and implied consent of the general superintendent of the company was considered the property of the company so as to make the company liable for injuries inflicted by the dog. *Barrett v. Malden, etc., R. Co., 3 Allen (Mass.), 101.*

But where a dog was kept and licensed by the superintendent of the poor-farm of a city with the knowledge of one of the overseers of the poor, and with his permission was allowed the run of the farm, and fed with food furnished by the city for the poor-farm, this did not make the city the keeper of the dog. *Collingill v. Haverhill, 128 Mass. 218.*

One member of a firm may be sued for as the keeper of a dog belonging to and kept by the firm, where the dog has done damage. *Grant v. Ricker, 74 Me. 487.* And see *Smith v. Jaques, 6 Conn. 530; Spalding v. Oakes, 42 Vt. 343; Brady v. Ball, 14 Ind. 317.*

One who knowingly and wrongly suffers a ferocious and vicious dog to go freely about his grounds and to inflict an injury is liable, although the injured person was guilty of some negligence. *Lynch v. McNally, 7 Daly (N. Y.), 132; Buckley v. Leonard, 4 Denio (N. Y.), 501; Carroll v. Staten Island R. Co., 58 N. Y. 136; s. c., 17 Am. Rep. 221.*

Offering a dog lying unfastened in front of its owner's store a piece of candy, with no knowledge of its vicious habits, is not such a contributory negligence that it will prevent plaintiff from claiming damages if he is bitten by the dog. *Lynch v. McNally, 73 N. Y. 347.*

And where a boy thirteen years old hit a dog with a stick to prevent him from crossing a narrow foot-bridge which the dog had a right to pass, and was bitten by the dog, it was held not to be contributory negligence in a boy of his age. *Plumley v. Birge, 124 Mass. 57; s. c., 26 Am. Rep. 645.* And see *Logue v. Link, 4 E. D. Smith (N. Y.), 63.*

In an action for damages for injuries to a child four years and eleven months by the bite of a dog, any injury to his nervous system or any loss in his mental or physical capacity may be taken in consideration to fix the amount of damages; and so it was proper to show the effect of the shock to the nervous system by proving that ever since the injury the child has shown signs of fright and excitement at the sight of any dog. *Roswell v. Leslie, 133 Mass. 589.* And see *Ballou v. Farnum, 11 Allen (Mass.), 73; Tyson v.*

*Booth, 100 Mass. 258; Coleman v. New York, etc., R. Co., 106 Mass. 160.*

A man may keep a dog for the necessary defence of his house, his garden, his fields or other property and may cautiously use him for that purpose at night-time; but if he permits a mischievous dog to be at large on his premises and a person is bitten by him in daytime, the owner is liable in damages, though the person injured be at the time trespassing on the grounds of the owner by hunting in his woods without license. *Loomis v. Terry, 17 Wend. (N. Y.) 496; s. c., 31 Am. Dec. 306.*

Principles of humanity may in no case be violated, or the owner of the dog will be held liable in damage. *Woolf v. Chalcker, 31 Conn. 121; Sherfey v. Bartley, 4 Sneed (Tenn.), 58; Kelly v. Tilton, 3 Keyes (N. Y.), 263; Logue v. Link, 4 E. D. Smith (N. Y.), 63; Meibus v. Dodge, 38 Wis. 300; s. c., 20 Am. Rep. 6; Sawyer v. Jackson, 5 N. Y. Leg. Obs. 380; Smith v. Place, 11 Pitts. Leg. J. 145.*

The owner of a dog which was left with a sleigh near the sidewalk was held liable for injuries to a child of seven years who meddled with the whip in the sleigh and was thrown down and bitten by the dog; it being proved that he had knowledge of the vicious habits of the dog, who was in the habit of attacking people while left to guard his team. *Meibus v. Dodge, 38 Wis. 300; s. c., 20 Am. Rep. 6.*

It would have been otherwise if the child had been in the care and custody of an adult. *Munn v. Reed, 4 Allen (Mass.), 431; Logue v. Link, 4 E. D. Smith, (N. Y.), 63.*

The owner of a watchdog kept chained by day and loosed at night is liable without further proof of *scienter* to one who was bitten by the dog while passing the premises on the highway at night. *Montgomery v. Koester, 35 La. Ann. 1091; s. c., 48 Am. Rep. 253.*

Also to one who was lawfully on his premises, where he neglected to tie the dog in the morning. *Goode v. Martin, 57 Md. 606; s. c., 40 Am. Rep. 448; Muller v. McKesson, 73 N. Y. 195; s. c., 29 Am. Rep. 123.*

Where dogs of several owners are found in company doing mischief, as killing sheep, each owner is responsible for the injury done by his own dog and no more. *Auchmuty v. Ham, 1 Denio (N. Y.), 495; Van Steenburgh v. Tobias, 17 Wend. (N. Y.) 562; s. c., 31 Am. Dec.*

ises, and he will not be liable if the disease is communicated to other cattle in adjoining lots if, while knowing of the diseased condition of his cattle, he is not negligent in the manner of keeping them.<sup>1</sup>

310; *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9; *Buddington v. Shearer*, 20 Pick. (Mass.) 477.

In order to identify dogs charged with killing sheep, evidence may be admitted that two dogs, one of which was known to have taken part in the killing, were seen in company with each other at another time. *Carroll v. Weiler*, 1 Hun (N. Y.), 605.

And they may be recognized by their barking. *Wilbur v. Hubbard*, 35 Barb. (N. Y.) 303.

To justify a man in killing the dog of another he must show that the animal was in the act of destroying his property, and that the killing was absolutely necessary to preserve his property or person. *Brown v. Hoburger*, 52 Barb. (N. Y.) 15; *Perry v. Phipps*, 10 Ired. L. (N. Car.) 259; s. c., 51 Am. Dec. 387; *Henckley v. Emerson*, 4 Cow. (N. Y.) 351; s. c., 15 Am. Dec. 383; *King v. Kline*, 6 Pa. St. 318; *Canefox v. Crenshaw*, 24 Mo. 199; *Brent v. Kimball*, 60 Ill. 211; s. c., 14 Am. Rep. 35; *Leonard v. Wilkins*, 9 Johns. (N. Y.) 233; *Bradford v. McKibben*, 4 Bush (Ky.), 545.

But where under the statute it is lawful for any person to kill a dog which has killed or maimed a sheep or other domestic animal, it is not necessary that the dog should be upon the premises of the owner of such animal, nor in the act of killing, nor that he should have killed more than one such animal, nor that the owner of the dog should have notice of the killing. *Carpenter v. Lippitt*, 77 Mo. 242; *Marshall v. Blackshire*, 44 Iowa, 475.

One may kill a dog that attacks him on the highway, or any furious or rabid dog. *Reynolds v. Phillips*, 13 Ill. App. 557; *Putnam v. Payne*, 13 Johns. (N. Y.) 312; *Perry v. Phipps*, 10 Ired. L. (N. Car.) 259; s. c., 51 Am. Dec. 387; *Brown v. Carpenter*, 26 Vt. 638; *Dunlap v. Snyder*, 17 Barb. (N. Y.) 561; *Maxwell v. Palmerston*, 21 Wend. (N. Y.) 407.

But he has no right to kill a dog on the owner's premises on the pretence that he is a nuisance and has on former occasions bitten other persons; and he will be liable in damages to the owner if he kill the dog on the owner's premises after the dog has been driven off and there is no longer any danger of his biting him at that time. *Perry v. Phipps*, 10 Ired. L.

(N. Car.) 259; s. c., 51 Am. Dec. 387. And see *Uhlein v. Cromack*, 109 Mass. 273.

Under statutes requiring dogs to be duly licensed and collared it is lawful for an officer, duly authorized to execute such regulations, to kill unlicensed dogs even on their owner's premises if the statute includes the words "whenever and wherever found." *Blair v. Forehand*, 100 Mass. 136; s. c., 1 Am. Rep. 94; *Morewood v. Wakefield*, 133 Mass. 240. But see *Bishop v. Fahay*, 15 Gray (Mass.), 61; *Kerr v. Seaver*, 11 Allen (Mass.), 151.

But the owner of a dog cannot be made liable to arrest, fine, and imprisonment under such act for refusing to license or collar his dog. *Mayor, etc., v. Meigs*, 1 McArthur (D. C.), 53; s. c., 29 Am. Rep. 578.

Although under some statutes and local police regulations it may be lawful to kill a dog not duly licensed, this will not exonerate the owner of a dog which kills another although the latter was not so licensed. *Heisrodt v. Hackett*, 34 Mich. 283; s. c., 22 Am. Rep. 529.

It is not a vicious habit in a dog to drive off trespassing cattle from his master's premises, and the owner of the cattle has no right to kill him while so doing unless the dog is a nuisance in the neighborhood. *Spray v. Ammermann*, 66 Ill. 309.

1. *Fisher v. Clark*, 41 Barb. (N. Y.) 329; *Mills v. New York, etc., R. Co.*, 41 N. Y. 619.

And even if he keeps them on a not inclosed part of his property where other cattle also have a right to come he will not be guilty of negligence if he gives the owners of such other cattle notice of the diseased condition of his cattle. *Walker v. Herron*, 22 Tex. 55.

This rule does not hold good in Illinois. *Mount v. Hunter*, 58 Ill. 246; *Herrick v. Gary*, 83 Ill. 85.

In case of trespass by diseased cattle, in consequence of which the disease is communicated to others, the owner will be liable even if he is unaware of the diseased state of his cattle. *Barnum v. Van Dusen*, 16 Conn. 200. But see *Noyes v. Colby*, 30 N. H. 143.

Where defendant allowed diseased sheep to escape through a defect in his part of a partition fence and to communicate the disease to plaintiff's sheep, he

**11. Stray and Runaway Horses and Cattle.**—In States where the common-law rule obtains that every man must fence his own cattle in and keep them safe or respond in damages for any injuries they may cause, the owners of stray horses and cattle are liable in dam-

will be liable, and the fact that the disease had been previously communicated to his sheep by one of plaintiff's sheep will not exonerate him. *Herrick v. Gary*, 83 Ill. 85.

E. was in the occupancy of the land of W. as a mere licensee, and pastured upon it a flock of sheep affected with an infectious disease. Immediately after E. took his sheep away W. moved upon the land with his sheep, and the disease was communicated to the sheep of W., who was ignorant of the nature of the disease and its mode of communication, but had been falsely informed by E. that there was no danger. *Held*, that E. was liable to W. in damages. *Eaton v. Winnie*, 20 Mich. 156; s. c., 4 Am. Rep. 377.

But where by a railroad accident a number of swine broke loose and were, under the directions of the manager of the railroad, driven into a neighboring barn-yard while the owner of the yard was absent, but who on his return did not object, but assisted in feeding them and also in reshipping them, and rendered a bill for food, services, and damages to grass; and where it was afterwards found that the swine were diseased, which disease was communicated to the swine of the owner of the yard,—he could not recover. *Hawks v. Locke*, 139 Mass. 205; s. c., 52 Am. Rep. 702.

The owner of animals affected with a contagious disease has no right to bring them in contact with other animals, as to water them at a public tank used by sound animals of other owners; or to bring a glandered horse upon the farm of another who has sound horses. If by any such means the disease should be communicated he will be liable in damages. *Mills v. New York*, etc., R. Co., 2 Rob. (N. Y.) 326; *Hite v. Blandford*, 45 Ill. 9.

Where under a statute it is unlawful to drive wilfully and knowingly diseased cattle, defendant's knowledge of the diseased state of his cattle must be shown. *Bradford v. Floyd*, 80 Mo. 207.

The sale of diseased animals where the vendor knows of the presence of the disease and fails to communicate his knowledge to the purchaser, or through fraudulent representations induces him to buy, makes the vendor liable for all the damage resulting from the spread of the disease among the purchaser's cattle, and it makes no difference whether the sale

was made by the vendor himself or through his agent. *Fultz v. Wycoff*, 25 Ind. 321; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518; s. c., 28 Am. Dec. 476; *Hite v. Blandford*, 45 Ill. 9.

The damages must, however, be a direct result of the sale of the diseased cattle, and not of some remote cause, as the breaking of the contract by a third party on account of the purchase of the diseased cattle. *Crain v. Petrie*, 6 Hill (N. Y.) 523; s. c., 41 Am. Dec. 765.

In States, as in Illinois, where it is prohibited by statute to import during certain seasons of the year a certain class of cattle, as Texas or Cherokee cattle, for the reason that those cattle at these seasons generally have a latent disease known as Texas fever, which they communicate to native herds, one driving such cattle into these States is liable for all damages resulting from such importation; and it does not matter whether the damage resulted from this particular kind of disease or not. *Sangamon Distilling Co. v. Young*, 77 Ill. 197.

But actual damage must have been done. It is not enough that the cattle is merely imported. *Davis v. Walker*, 60 Ill. 452; *Newkirk v. Milk*, 62 Ill. 173.

Where one received cattle from defendant and put them to pasture with his own cattle, and afterward discovered that some of them were diseased Texas cattle, and still kept them and bought some of them, it was held that he could recover only for damages done before he knew that the cattle were Texas cattle. *Harris v. Hatfield*, 71 Ill. 298.

These statutes have been doubted, but upheld in the State courts, and are declared unconstitutional in the U. S. Supreme Court. *Yeazel v. Alexander*, 58 Ill. 254; *Stevens v. Brown*, 58 Ill. 289; *Somerville v. Marks*, 58 Ill. 371; *Wilson v. Kansas City*, etc., R. Co., 60 Mo. 184; *Husen v. Hannibal*, etc., R. Co., 60 Mo. 226; *Railr. Co. v. Husen*, 95 U. S. 465. And see *Gilmore v. Railr. Co.*, 67 Mo. 323; *Urton v. Sherlock*, 75 Mo. 247.

To prove the value of cattle lost by disease in an uninhabited country where there is no market, evidence of their value in the nearest market may be received, although such market may be at a distance of 225 miles or more. *Sellar v. Clelland*, 2 Col. T. 532; *Cofield v. Clark*, 2 Col. T. 101.



ages for injuries done by them if they do stray away on account of their negligence. And so where horses run away through the negligence of their owner he will be liable.<sup>1</sup>

*Impounding Strays.*—A power to impound stray animals and to sell them after the lapse of a specified time in a specified manner is frequently conferred on municipalities. In order to render such impounding and sale valid, the municipality must comply strictly with the statutory provisions.<sup>2</sup>

1. *Barnes v. Chapin*, 4 Allen (Mass.), 444; *Lyons v. Merrick*, 105 Mass. 76; *Dickson v. McCoy*, 39 N. Y. 400; *Goodman v. Gay*, 15 Pa. St. 188; s. c., 53 Am. Dec. 589; *Fallon v. O'Brien*, 12 R. I. 518; s. c., 34 Am. Rep. 713; *Shawhan v. Clarke*, 24 La. Ann. 390; *Weldon v. Harlem R. Co.*, 5 Bosw. (N. Y.) 576; *Sullivan v. Scripture*, 3 Allen (Mass.), 564; *Kennedy v. Way*, Bright. (Pa.) 186; *Coles v. Burns*, 21 Hun (N. Y.), 246.

But where horses escaped from their inclosure against the will of their owner, and he went immediately in pursuit, it was held that under such circumstances they were not running at large. *Kinder v. Gillespie*, 63 Ill. 88.

But a mare with a colt at large on a highway are a public nuisance, and the owner is liable for damages whether the animal is vicious or not. *Baldwin v. Ensign*, 49 Conn. 113; s. c., 44 Am. Rep. 205.

A stolen horse left by the thief tied to a post on a public road is not an estray. *Hall v. Gildersleeve*, 36 N. J. L. 235.

Neither is an animal in its accustomed range, in States where they are allowed to roam at large, out of the custody of its owner or an estray. *Jones v. State*, 3 Tex. App. 498; *Shepherd v. Hawley*, 4 Oreg. 206; *Roberts v. Barnes*, 27 Wis. 422; *Walters v. Glats*, 29 Iowa, 437.

Cattle may lawfully be driven on the highway, and if they escape from their driver into unfenced fields or through defective fences their owner will not be liable for the damage they may do if they have been properly managed and the driver uses reasonable efforts to remove them from such fields. *Stackpole v. Healy*, 16 Mass. 33; *Lyman v. Gipson*, 18 Pick. (Mass.) 422; *Hartford v. Brady*, 114 Mass. 466; s. c., 19 Am. Rep. 377; *McDonald v. Pittsfield, etc.*, R. Co., 115 Mass. 564; *Thompson v. Corpstein*, 52 Cal. 653; *Little v. Lathrop*, 5 Greenl. (Me.) 356; *Lord v. Wormwood*, 29 Me. 282; s. c., 50 Am. Dec. 586; *Avery v. Maxwell*, 4 N. H. 36; *Mills v. Stark*, 4 N. H. 512; s. c., 17 Am. Dec. 444.

And where the owner of the fields on which they trespassed drove them into

the field of a third party the owner of the cattle shall not be liable. *Hartford v. Brady*, 114 Mass. 466; s. c., 19 Am. Rep. 377.

Neither is the owner of horses working at the highway and casually committing a slight trespass liable. *Cool v. Crummet*, 13 Me. 250.

A horse attached to a wagon was left standing unhitched in a street, and was struck by a broken telegraph-wire, which caused the horse to run away, resulting in his death. It was held that the negligence of the driver in leaving the horse unhitched was such that the owner could not recover. *Western Union Tel. Co. v. Quinn*, 56 Ill. 319; *McCahill v. Kipp*, 2 E. D. Smith (N. Y.), 413.

Plaintiff, without fault, while lawfully travelling in the highway, was injured by the defendant's horse, which had been so negligently hitched by his servant that it broke away and ran into the wagon in which plaintiff was riding. *Held*, that although it was proper to consider the character of the horse as bearing on the question of negligence, in such a case the question is not whether the defendant knew that the horse had a propensity to break his fastenings, but whether the servant, under the circumstances, exercised the care of a prudent man in hitching the horse. *Rumsey v. Nelson*, 58 Vt. 590.

Turning a horse loose in the streets of a populous city makes the owner liable for all injuries done by such horse, and that whether he knows that the horse is vicious or not. *Goodman v. Gay*, 15 Pa. St. 188; s. c., 53 Am. Dec. 589; *Barnes v. Chapin*, 4 Allen (Mass.), 444.

But where the owner of a runaway horse was not guilty of negligence he was held not to be liable to the owner of another horse and wagon injured by the runaway. *Shawhan v. Clarke*, 24 La. Ann. 390; *Weldon v. Harlem R. Co.*, 5 Bosw. (N. Y.) 576; *Sullivan v. Scripture*, 3 Allen (Mass.), 564; *Kennedy v. Way*, Bright. (Pa.) 186.

2. *Moore v. State*, 4 Am. & Eng. R. Cas. 485; s. c., 10 Lea (Tenn.), 35; *Rounds v. Stetson*, 45 Me. 296; *Rounds v. Mansfield*, 88 Me. 586; *Gilmore v.*

**12. Bailors of Animals.**—The owner of animals is bound to bring to the notice of those dealing with his animals, as bailees for hire, farriers, agisters, keepers of boarding-stables, etc., any vicious trick or habit his animals may have, as biting and kicking in horses, horning in cattle, biting in dogs; else he will be liable for any injury inflicted upon such persons in consequence of such vicious habits.<sup>1</sup>

**13. Duties and Liabilities of Bailees.**—A bailee for hire, as an agister, engages by his contract to agist cattle, to exercise ordinary care in the keeping of them, or such a care as a man of ordinary prudence would use in the performance of the same duty toward his own property.<sup>2</sup>

Holt, 4 Pick. (Mass.) 258; Osgood v. Green, 33 N. H. 318; Bills v. Kinson, 1 Foster (N. H.), 448; Mayor, etc., v. Omburg, 22 Ga. 67; Adams v. Adams, 13 Pick. (Mass.) 384; Smith v. Huntingdon, 3 N. H. 76; Clark v. Lewis, 35 Ill. 417; Willis v. Legris, 45 Ill. 289; Friday v. Floyd, 63 Ill. 50; White v. Tallman, 2 Dutch (N. J.), 67; Knoxville v. King, 7 Lea (Tenn.), 441. Compare Slessman v. Crozier, 80 Ind. 487.

But this power cannot be exercised without previous actual or constructive notice to the owner and the establishment of the forfeiture by legal proceedings. Rosebaugh v. Saffin, 10 Ohio, 32; Jarman v. Patterson, 7 Monroe (Ky.), 647; McKee v. McKee, 8 B. Monr. (Ky.) 433; Heise v. Columbia, 6 Rich. (S. Car.) 404; Whitfield v. Longest, 6 Ired. L. (N. Car.) 288; Donovan v. Vicksburg, 29 Miss. 247; Poppen v. Holmes, 44 Ill. 362; Daist v. People, 51 Ill. 286; Kinder v. Gillespie, 63 Ill. 88; Cincinnati v. Buckingham, 10 Ohio, 257; Cotter v. Doty, 5 Ohio, 395; Varden v. Mount, 78 Ky. 86.

Notice by public advertisement is deemed sufficient. There is no necessity for personal notice. Shaw v. Kennedy, N. Car. Term R. 158; Helen v. Noe, 3 Ired. L. (N. Car.) 493; Whitfield v. Longest, 6 Ired. L. (N. Car.) 168; Gilchrist v. Smidling, 12 Kans. 263; Goose-link v. Campbell, 4 Iowa, 296; Phillips v. Allen, 41 Pa. St. 481. Compare Willis v. Legris, 45 Ill. 289; Bullock v. Geomble, 45 Ill. 218; Poppen v. Holmes, 44 Ill. 360.

Fines may be imposed upon the owners of cattle found straying within municipal limits, and in default of payment of the fine sale or forfeiture of the cattle may be ordered. Kennedy v. Sowden, 1 McMull. L. (S. Car.) 325; Crosby v. Warren, 1 Rich. L. (S. Car.) 385; White v. Tallman, 2 Dutch (N. J.), 67; Mayor of Mobile v. Yuille, 3 Ala. 137; Roberts v. Ogle, 30 Ill. 359; Waco v. Powell, 32 Tex. 258; Municipality v. Blanc, 1 La.

Ann. 385; Kinder v. Gillespie, 63 Ill. 88. See MUNICIPAL CORPORATIONS.

1. Keshan v. Gates, 2 Thomp. & C. (N. Y.) 288; Campbell v. Page, 67 Barb. (N. Y.) 113; Hadley v. Cross, 34 Vt. 586.

But this does not extend to injuries inflicted in consequence of habits which are not dangerous *per se*, as when a horse is in the habit of pulling back upon the halter when restless. Keshan v. Gates, 2 Thomp. & C. (N. Y.) 288.

In letting a horse the owner impliedly undertakes that the animal shall be capable of performing the journey for which he is let; and if without fault of the hirer he becomes disabled by lameness or sickness, any expense the hirer may have to incur can be recouped against the charges of the bailor. Leach v. French, 69 Me. 389; s. c., 31 Am. Rep. 296; Horne v. Meakin, 115 Mass. 326; Hadley v. Cross, 34 Vt. 586.

One who hires out horses is not responsible to a third party for damages done by the reckless driving or other negligence of the hirer; and so in case of a borrowed horse. Bard v. Yohn, 26 Pa. 482.

But when he intrusts his wagon and horse to an obviously incompetent person, as a mere boy, he is liable. Herlihy v. Smith, 116 Mass. 265; Mooers v. Larry, 15 Gray (Mass.), 451.

2. Phelps v. Paris, 39 Vt. 511; Rey v. Toney, 24 Mo. 600; s. c., 69 Am. Dec. 444; McCarthy v. Wolfe, 40 Mo. 520; Winston v. Taylor, 28 Mo. 82; s. c., 75 Am. Dec. 112.

He must keep his grounds properly inclosed. Cecil v. French, 4 Mart. N. S. (La.) 256; s. c., 16 Am. Dec. 171.

A horse-trainer, farrier, or veterinary surgeon has a lien on animals on which he has bestowed skill or labor. Harris v. Woodruff, 124 Mass. 205; Grinnell v. Cook, 3 Hill (N. Y.), 485; s. c., 38 Am. Dec. 663; Lord v. Jones, 24 Me. 439; s. c., 41 Am. Dec. 391.

**ANNEXED—ANNEXATION.** (See also **FIXTURE**.)—Attached to, added to, connected with. The fastening of chattels to the freehold,

So where an agister agreed to pasture sheep for a certain sum and allowed them to escape through a defective fence, which he was bound to maintain, into the field of his neighbor, where the sheep caught the "scab" from his neighbor's sheep, he was held responsible for the damages. *Sargent v. Slack*, 47 Vt. 674; s. c., 19 Am. Rep. 136.

The agistment or other bailment of cattle does not relieve their owner from liability for damage done by their straying from the bailee's pasture. *Blaisdell v. Stone*, 60 N. H. 507.

He is responsible for the acts of his servants; and where an animal intrusted to his care is injured by an act of his servant while in his employment, he will be liable though he may have given no express assent to the use of the animal. *Sinclair v. Pearson*, 7 N. H. 219.

Where loss or injury occurs and no negligence on the part of the bailee is shown, he will not be liable. So where A sold a cow to B and B asked and received permission to leave her for a while in A's pasture, and the cow disappeared although the fences were in good order, B had to bear the loss. *Race v. Hansen*, 12 Ill. App. 605.

So is a trainer to whom a horse is delivered to be broken bound only to ordinary care. *Francis v. Shrader*, 67 Ill. 272.

At common law an agister or stable-keeper has no lien on animals intrusted to his care unless by special contract. *Miller v. Marston*, 35 Me. 153; s. c., 56 Am. Dec. 694; *Grinnell v. Cook*, 3 Hill (N. Y.), 485, 491; s. c., 38 Am. Dec. 663; *Whitlock v. Heard*, 13 Ala. 776; s. c., 48 Am. Dec. 73; *Bissell v. Pearce*, 28 Gray (Mass.), 183; *Goodrich v. Willard*, 7 Gray (Mass.), 184; *Lewis v. Tyler*, 23 Cal. 364; *Wills v. Barrister*, 36 Vt. 220.

In New Hampshire, Massachusetts, Maine, Vermont, Connecticut, New York, New Jersey, Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Kentucky, Tennessee, Missouri, California, Oregon, Nevada, Colorado, Dakota, Montana, and Wyoming statutes have been enacted giving to ranchmen, stable-keepers, agisters, or keepers of horses and cattle a lien thereon for their charges for pasturing and board, and a special lien for livery-stable keepers in Pennsylvania, Wisconsin, Minnesota, Iowa, Delaware, Virginia, Alabama, Florida, and New

Mexico. In Ohio, Nebraska, North Carolina, Kentucky, Tennessee, Arkansas, Dakota, Georgia, Alabama, Mississippi, and South Carolina the owner of a stud-horse or jackass to which mares or jennets are turned has a lien for his charges on the colts or issue; and in Nebraska, North Carolina, Dakota, Georgia, Alabama, Mississippi, and South Carolina this extends to the owners of bulls. *Stimson's Am. Statute Law*, § 4642; *Smith v. Marden*, 60 N. H. 509.

Where one borrows or hires a horse he is also bound to use the same care which any prudent man takes in the use of his horse. He is bound to drive it moderately and to supply it with suitable food; to abstain from using it when exhausted, and if possible give it proper medical aid when sick. *Carrier v. Dorrance*, 19 S. Car. 30; *Whitehead v. Vanderbilt*, 10 Daly (N. Y.), 214; *Edwards v. Carr*, 13 Gray (Mass.), 234; *Eastman v. Sanborn*, 3 Allen (Mass.), 594; *Banfield v. Whipple*, 10 Allen (Mass.), 27; *Thompson v. Harlow*, 31 Ga. 348; *Rowland v. Jones*, 73 N. Car. 52; *McNeills v. Brooks*, 1 Yerg. (Tenn.) 73; *Graves v. Moses*, 13 Minn. 335; *Buis v. Cook*, 60 Mo. 391; *Vaughan v. Webster*, 5 Harring. (Del.) 256; *Jackson v. Robinson*, 18 B. Mon. (Ky.) 1; *Wentworth v. McDuffie*, 48 N. H. 402; *Collins v. Bennett*, 46 N. Y. 490; *Harrington v. Snyder*, 3 Barb. (N. Y.) 380; *Mellon v. Salisbury*, 13 Johns. (N. Y.) 211; *Austin v. Miller*, 74 N. Car. 274; *Mooers v. Larry*, 15 Gray (Mass.), 451.

It has also been held, however, that one who borrows a horse without hire must use extraordinary care. *Hagebush v. Ragland*, 78 Ill. 40.

But where one had a horse for which he had no use and offered it to another to do his work in consideration of its feed and keeping, this was not such a "borrowing" as would make the bailee liable if he could not prove extraordinary care. *Chamberlain v. Cobb*, 32 Iowa 161.

One who hires a horse is bound only to ordinary care in using it; and if he uses such care he will not be liable if the horse during such reasonable use is lamed or injured. *Milton v. Salisbury*, 13 Johns. (N. Y.) 211; *Harrington v. Snyder*, 3 Barb. (N. Y.) 381; *Waldo v. Beckwith*, 1 New Mex. 97.

But if he hires the horse for a definite time and uses it after this time has expired, he will be liable for any injury it

## ANIMALS—ANNEXED—ANNOUNCED.

or the letting them into it, which gives them the character of fixtures.<sup>1</sup>

**ANNOUNCED.**—To give public notice of; to proclaim; to declare; to publish; to pronounce; to declare by judicial sentence.<sup>2</sup>

may receive during such extra use; and the same principle holds good if he drives it beyond the distance agreed upon. *Stewart v. Davis*, 31 Ark. 518; *Fisher v. Kyle*, 27 Mich. 454; *Ray v. Tubbs*, 50 Vt. 688; *Disbrow v. Tenbroeck*, 4 E. D. Smith (N. Y.), 397; *Mayor of Columbus v. Howard*, 6 Ga. 213; *Lucas v. Trumbull*, 15 Gray (Mass.), 306.

And so must the horse be used for the purpose for which it was hired and for no other. *Buchanan v. Smith*, 10 Hun (N. Y.), 474; *Mayor of Columbus v. Howard*, 6 Ga. 218; *McNeills v. Brooks*, 1 Yerg. (Tenn.) 73; *Lockwood v. Bull*, 1 Cow. (N. Y.) 322; s. c., 13 Am. Dec. 539; *Duncan v. Railr. Co.*, 2 Rich. (S. Car.) 613; *Rotch v. Hawes*, 12 Pick. (Mass.) 136; s. c., 22 Am. Dec. 414.

Where one hires a horse and receives special instructions from the owner about its use, he must comply with the instructions or he will be liable for loss caused by disregarding them; and this holds specially good for a borrower. *Cullen v. Lord*, 39 Iowa, 302.

A horse hired on a Sunday to go a certain distance was driven several miles beyond, causing its death. The bailor recovered its value in an action for trover notwithstanding the statute prohibited all secular business on Sunday. It was held that such over-driving was independent of the contract. *Frost v. Plumb*, 40 Conn. 111; s. c., 16 Am. Rep. 18; *Woodman v. Hubbard*, 25 N. H. 67; s. c., 57 Am. Dec. 310. See BAILMENTS; HIGHWAYS.

**Authorities for Animals.**—Bacon's Abr.; Blacks. Com.; Norris' Peake on Evidence; Cooley on Torts; Bishop Crim. Law.

1. Under the Maine statute (R. S.), c. 108, § 2, which requires that where a specific demand only is submitted to arbitration it shall be "annexed" to the agreement and signed by the party making it, it was held that where the submission recited the demand, it was "annexed" within the terms of the statute, and that as the demand submitted was specified in the submission and the submission was signed by the plaintiff, the demand was signed. *Deering v. Saco*, 68 Me. 322.

So in Massachusetts a statute requiring a magistrate's certificate to be annexed to a deposition (Gen. Sts. c. 131, §

26) was held to be satisfied by the magistrate's inclosing certain books referred to in the deposition in an envelope or wrapper, together with the deposition, and sealing them up and directing them to the clerk of the court. *Shaw v. McGregory*, 105 Mass. 96.

Where the affidavit to foreclose a mortgage was written on the back thereof, it was "annexed" thereto within the meaning of the law. *Lilly v. Willis*, 73 Ga. 139.

But, "the laying of a loose paper within the folds of a writ does not make it any part of the writ, nor can it be said with any propriety of language to be 'annexed' to the writ. The removal of such paper by the plaintiff would not be a mutilation of his writ, nor render him amenable to any one." *Saco v. Hopkinton*, 29 Me. 268.

Where an agreement referred to a clause in a former agreement and provided that it should extend to the new agreement as if it had been repeated therein, held, that the clause referred to could not be considered as "annexed to" the new agreement so as to make an additional stamp necessary, on the ground of the agreement with the clause containing more than 1080 words. *Atwood v. Small*, 7 B. & C. 390.

**Annexed to the freehold.**—An expression used to define a fixture. "By the expression 'annexed to the freehold' is meant fastened to, or connected with, it; mere juxtaposition, or the laying of an object, however heavy, on the freehold, does not amount to annexation." *Merritt v. Judd*, 14 Cal. 59. See the case of *Elwes v. Mawe*, 3 East., 38; s. c., 2 Smith's Leading Cases, (8th Am. Ed.) 169.

2. Where the court had directed the clerk to make an entry in a cause, setting forth the finding of the court, and subsequently allowed the plaintiff to dismiss his complaint and erased the entry, it was held error, inasmuch as the finding of the court had been "announced," and therefore the action of the court was in contravention of the statute which forbids that an action shall be dismissed except at any time before the finding of the court is announced. (2 R. S. 1876, p. 184, § 363). *Walker v. Heller*, 56 Ind. 298.

**ANNUITY.** (See, for construction of contract or will granting: BONDS; CONTRACTS; DEEDS; DEVISES; LEGACIES; TRUSTS; WILLS. For the right to interest on arrears: INTEREST. For powers and duties of executors or administrators in payment of: EXECUTORS. When taxable: TAXES. As to creditors of annuitant: ATTACHMENT; CREDITOR'S SUIT.)

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|--|-------------------------------------|
| 1. <i>Definition.</i>                      | 5. <i>Apportionment.</i>            |
| 2. <i>Nature:</i>                          | 6. <i>Validity.</i>                 |
| <i>Distinguished from Rent-charge.</i>     | 7. <i>Consideration—Assignment.</i> |
| <i>An Annuity is mere Personality.</i>     | 8. <i>Payment.</i>                  |
| 3. <i>A Charge upon what.</i> [ment.]      | 9. <i>Remedies.</i>                 |
| 4. <i>Annuities granted by Will—Abate-</i> | 10. <i>Determination.</i>           |

**1. Definition.**—An annuity is a yearly payment of a certain sum of money granted to another in fee, or for life, or for years, charging the person of the grantor only.<sup>1</sup>

An annuity is a stated sum, payable annually.<sup>2</sup>

An annuity is an annual duty charged upon the person of the grantor only.<sup>3</sup>

**2. Nature.**—*Distinguished from a Rent-charge.*—An annuity is different from a rent-charge, with which it is often confounded. An annuity is a yearly sum, or an annual duty, charged against the person of the grantor only; whereas a rent-charge issues out of lands, and is a charge against them in the hands of a purchaser.<sup>4</sup>

*An Annuity is mere Personality.*<sup>5</sup>—At common law an annuity was considered personal property. One incident alone it had in common with realty,—that if granted with words of inheritance, it was an hereditament; and if it descended to the heir, it was called personal inheritance or personal fee; but if an annuity was a granted to A “for ever,” it went to the personal representatives of A, for there were no words of inheritance.<sup>6</sup>

1. Co. Litt. 144 b; 3 Kent Com. (13th Ed.) \*460; Watson's Comp. of Equity, vol. i. p. 8.

2. Adjudged Words and Phrases (Winfield); Pearson v. Chase; 10 R. I. 456; Booth v. Ammerman, 4 Bradf. (N. Y.) 129.

3. Horton v. Cook, 10 Watts (Pa.), 124; Co. Litt. 441 b.

But when it is an interest on a mere debt, such payment is not an annuity, as where a bond was given for £2000, £40 being the interest on the principal at £4 per cent, payable half-yearly during the obligee's life, the principal to be payable within twelve months after his death, it was held not to be an annuity bond, but “merely a stipulation for the payment of interest for the forbearance of a certain sum of money.” Watson's Compendium of Eq. vol. i. p. 8; Winter v. Mousely, 2 Barn. & Ald. 802.

4. 2 Blackst. Com. (Sharswood) 40; Bouvier's Law Dict., “Annuity;” Horton

v. Cook, 10 Watts (Pa.), 127; Co. Litt. 144; Co. Litt. 20 a; 3 Kent. Com. \*460; Wagstaff v. Lowerre, 23 Barb. (N. Y.) 216; Wait's Actions and Defence, 324.

“A devise in the following words, ‘I give and bequeath to my daughter A the sum of \$60 as an annuity to be paid to her out of the profits of my real estate annually, creates an annuity and not a rent-charge.’ Robinson v. Townsend, 3 Gill & Johns. (Md.) 413.

5. Am. Law Mag. for Oct. 1843, “Personal Hereditaments;” Aubin v. Daly, 4 Barn. & Ald. 59; The Law of Wills (Redfield, 3d Ed.), vol. iii. p. \*182.

6. Watson's Comp. of Eq. vol. i. p. 8; Earl of S. v. Buckley, 2 Ves. Sen. 179; Bouvier's Law. Dict., “Annuities;” Co. Litt. 2 a, 20 a, n. 4; 3 Kent Com. \*460; 2 Blackst. Com. (Sharswood) 40, note 40; 1 Wms. Exrs. 722; Taylor v. Martindale, 12 Sim. 158; Parsons v. Parsons, L. R. 8 Eq. 260, in which the words “his heirs”

**3. A Charge upon What.**—An annuity is a charge against the personal estate only of the grantor; but it is a charge upon the real estate also, if upon construction of the instrument granting the annuity it appear that such was the intention.<sup>1</sup> An annuity may be charged on the land alone, in which case there will be no personal liability on the part of the devisee. To charge real estate with the payment of annuities, the intention of the testator must be declared in express terms or inferred by clear implication. "Liens by implication are not favored by the law." Expressions that would give rise to such an inference are, for example, "to be paid out of the land devised," or to be paid by the devisee "upon his coming into possession of the property," or if the devise were "after paying the annuity." But no particular form of words is necessary to create a charge upon the realty.<sup>2</sup>

A devise of real estate, after a direction for the payment of legacies, creates a charge upon the realty.<sup>3</sup> Where an annuity is charged by will against several different pieces of real estate devised to one person, "the right to enforce the charge against any or all of the property devised can be waived only by agreement" of the annuitant, and deeds and mortgages to which the

in a grant of an annuity to A and his heirs were considered words of substitution.

Since an annuity was personalty, a wife had no dower in it, nor a husband curtesy; it was not an hereditament within the statute of mortmain; it could not be conveyed by way of user for want of seizin; it was not entailable under the statute *de donis*; an assize did not lie for it; it did not escheat; but as an hereditament it was forfeited for treason, and also was not assets for the payment of debts, as it went to the heir and not to the executor; the Statute of Frauds, so far as it related to real estate, did not affect it; and the judgments and executions applicable to real estate had no application to an annuity, etc. 2 Blackst. Com. 40, n. 40; Co. Litt. 2 a, n. 1; Hargrave, 20 a, 32 a; 3 Kent Com. \*460; Bouvier's Law. Dict., "Annuities;" Horton v. Cook, 10 Watts (Pa.), 127.

1. See RENT-CHARGE.

2. Owens v. Claytor, 56 Md. 129.

The testator devised to her son J. a portion of her interest in a certain property, and her remaining interest to her son F., and in a subsequent clause gave an annuity to her niece as follows: "It is likewise my will that each of my sons, F. and J., shall pay to my said niece the sum of \$30 per annum in equal instalments every two months." The court held that there was no charge on the real estate, that no such intention appeared, that no expressions (quoting those in the

text above) from which such an intention could be inferred were used by the testator, and that it was "a mere charge on the devisees in respect of the land devised to them, and not a charge on the land itself," but their personal liability. West v. Biscoe, 6 H. & J. 468; Kemp v. McPherson, 7 H. & J. 320; Spence v. Robins, 6 G. & J. 507; Tolson v. Tolson, 10 G. & J. 159; Luckitt v. White, 10 G. & J. 480; Snively v. Bevans, 1 Md. 208; Greenwood v. Greenwood, 5 Md. 334; Budd v. Williams, 26 Md. 265; Budd v. Garrison, 45 Md. 418; Ogle v. Tayloe, 49 Md. 158.

But the *corpus* will be charged where the intention so appears. Shermerhorne v. Shermerhorne, 6 Johns. Ch. (N. Y.) 70; Baker v. Baker, 6 H. of L. 616; Degraw v. Cleason, 11 Paige (N. Y.), 136; Nash v. Taylor, 83 Ind. 349; Lupton v. Lupton, 2 Johns. Ch. (N. Y.) 614; Ripple v. Ripple, 1 Rawle (Pa.), 386; Davis' App., 83 Pa. St. 348; Gilbert's App., 85 Pa. St. 347; Quinby v. Frost, 61 Me. 77; Heslop v. Gatton, 71 Ill. 528; Lindsey v. Lindsey, 45 Ind. 552. See RENT-CHARGE.

3. Nash v. Taylor, 83 Ind. 349, where it was held that "where a testator directs that his legacies and debts shall be first paid, and then devises real estate, a charge is created." Newman v. Newman, 1 Vern. 45; Harris v. Ingeldew, 1 P. Wms. 91; Reynolds v. Reynolds' Exrs., 16 N. Y. 257; 3 Jarman on Wills (5th Am. Ed.) 404.

annuitant is not a party have no effect.<sup>1</sup> "And where lands are charged, a subsequent mortgagee or purchaser takes subject to the charge. Equity will enforce such a charge upon the lands in the hands of subsequent grantees."<sup>2</sup> The devisee may become personally liable for the payment of an annuity when the condition of the devise is that the devisee shall pay the annuity, and upon acceptance of the devise he becomes liable.<sup>3</sup>

An annuity may be charged on both the personal and real estate of the testator,<sup>4</sup> and the personal estate is the primary fund for its payment, if sufficient.<sup>5</sup>

The old rule of chancery, that when an annuity was payable out of rents and profits the *corpus* of the estate also was liable, has been modified. The intention of the testator governs in all cases; so that a direction to pay an annuity out of the rents and profits charges only the rents and profits, and not the *corpus* of the estate, unless a contrary intention appear, and can be enforced against the devisees personally only so far as they have received the rents, and the fee and life estates in the realty could not be sold to provide the annuity.<sup>6</sup> And the surplus rents and profits are not to be accumulated to meet future deficiencies in the rents to pay the annuity.<sup>7</sup>

**4. Annuities Granted by Will.—Abatement.**—An annuity may be granted either by deed or by will. An annuity granted by will is a legacy,<sup>8</sup> and upon a deficiency of assets, for the purpose of abate-

1. *Perkins v. Emory*, 55 Md. 27; *Nash v. Taylor*, 83 Ind. 349. "A release of one child from the payment of the part of the annuity chargeable on his lands" does not "operate as a release of the charge upon the other shares."

2. "Where a will constitutes a link in the title through which a grantee or mortgagee claims, he is bound to take notice of the provisions of the instrument." 2 *Redfield on Wills*, p. 209, sec. 7.

3. *Owens v. Claytor*, 56 Md. 129. See same case, note 2, p. 593.

4. *Smith v. Fellows*, 131 Mass. 20. An annuity was given to a widow, "the same to be paid from the income of my property," and the residue after payment of debts and legacies to C. The court held that the annuity (according to the testator's intention) was charged against the whole estate.

5. *Degraw v. Cleason*, 11 Paige (N.Y.), 136. Where an annuity charged on the real and personal estate of the testator was held payable out of the personal estate if sufficient; if not, the land was to be sold. *Nash v. Taylor*, 83 Ind. 347.

6. *Delaney v. Van Aulen*, 84 N.Y. 16. K. by will gave all the residue of her estate in trust, "to receive the rents and profits of the real estate, to invest the personal estate, and to apply the rents

and profits, and the income of the personal estate" to the use of her husband B. for life, except to pay an annuity to C. There was no devise or bequest over of the remainder after the death of C. The rents and profits proved insufficient to pay the annuity. The court held that only the rents and profits, as they accrued from year to year, were chargeable; that the whole question really hung upon the testator's intention. *Wilson v. Hal-liley*, 1 Russ. & Mylne, 590; *Small v. Wing*, 5 Bro. P. C. (Tomlin's Ed.) 66; *Heneage v. Lord Andover*, 3 Young & Jervis, 360; *Baker v. Baker*, 6 H. of L. 616. Each case depending on its own circumstances and language. *Birch v. Sherratt*, L. R. 6 Ch. App. 642 (\*644); *Pierrepont v. Edwards*, 25 N.Y. 128; *Dickinson v. Edwards*, 4 Hare, 273; *Nudd v. Powers*, 136 Mass. 273.

7. *Pierce's Est.*, 56 Wis. 560. Where A directed an annuity to be paid "from the proceeds" of a farm "each and every year," the court held that the surplus proceeds should not be accumulated to meet future deficiencies in the rents, to pay the annuity, as the intent to do so did not appear.

8. *Heatherington v. Lewenberg*, 61 Miss. 372; *Hill on Trustees*, \*362; *Stokes v. Heron*, 12 Cl. & F. 161; *Hedges v.*

ment, is classed with general legacies, except where there is a valuable consideration for the annuity, and where the intention of the testator is clear and conclusive that it shall not abate. An annuity given to a widow in lieu of dower, accepted by her as such, does not abate on a deficiency of assets.<sup>1</sup>

Annuities given by will, although payable out of the personal estate or out of the general funds of the testator, are generally construed and governed by principles which are applicable to a devise of real estate.<sup>2</sup>

5. **Apportionment.**—The rule of common law was that annuities were not apportionable.<sup>3</sup> Exceptions were made in several cases, where the annuity was given for the maintenance of a wife living separate from her husband;<sup>4</sup> for the support of mi-

Harper, 3 DeG. & J. 131; Potter v. Baker, 2 Eng. L. & Eq. 92; Bent v. Culler, L. R. 6 Ch. App. 238; Watson v. Hayes, 5 Ney & Cr. 125, 133; Fox v. Fox, L. R. 19 Eq. Cas. 286; Hellman v. Hellman, 4 Rawle (Pa.), 440; Birdsall v. Hewlett, 1 Paige (N. Y.), 32; Jarman on Wills, (5th Am. Ed.) \*834; Lodger v. Hatfield, 71 N. Y. 92, 99; Fuller v. Winthrop, 3 Allen, 51; Veazey v. Whitehorse, 10 N. H. 409; Perry on Trusts, § 566; Stanley v. Colt, 5 Wall. 119; Wright v. Wilkins, 2 B. & S. 232; Kirk v. Kirk, L. R. 21 Ch. Div. 437; Bugber v. Sargent, 23 Maine, 269; Sands v. Champlin, 1 Story, 376; Perry on Trusts, §§ 121, 568; Fosdick v. Fosdick, 6 Allen (Mass.), 43.

1. Heath v. Dindy, 1 Russ. Ch. Cas. 543; Burrige v. Bradley, 1 P. Wms. 127; Blower v. Morret, 2 Ves. Sen. 420; Davenport v. Fletcher, Ambler, 244; App. of University of Pa., 97 Pa. St. 187.

In *Pennsylvania* it was held that an annuity to a widow did not abate, because by statute a bequest to a wife was in lieu of dower, unless otherwise expressed, the widow being thus a purchaser and not a volunteer. Reed v. Reed, 9 Watts (Pa.), 263.

2. Bradhurst v. Bradhurst, 1 Paige (N. Y.), 331, where the rules applicable to a devise of real estate were applied in order to prevent a testator's attempt to render personal property inalienable for a longer period than the law against perpetuities would allow real estate to be inalienable.

3. The Law of Wills (Redfield), 3d Ed., vol. iii. p. 185, n. 17; Wiggins v. Sweet, 6 Metc. 194; Phelps v. Culver, 6 Vt. 430; Story's Eq. Juris. (13th Ed.) 488; Watson's Comp. of Eq. 21; Hay v. Palmer, 2 P. W. 501; *Ex parte Smyth*, 1 Sw. 349.

So that if the annuitant died before the fixed day of payment, "his representative is not entitled to a proportionate

part of the annuity for the time which has elapsed since the last day of payment." *In re Lackawanna Iron & Coal Co.*, 37 N. J. Eq. 126; *Ex parte Smyth*, 1 Swanst. 349 n.; Price v. Williams, Cro. Eliz. 380; Reg. v. Treas. Comm'rs, 16 Q. B. 357; Leathe v. French, 8 Irish Ch. 401; Ausman v. Montgomery, 8 W. C. C. P. 364; Thacker's Trusts, 28 L. T. (N. S.) 56; Franks v. Noble, 12 Ves. 484; Tracy v. Strong, 2 Conn. 659; Heizer v. Heizer, 71 Ind. 526; Manning v. Randolph, 1 South, 144; Irving v. Rankine, 13 Hun (N. Y.), 147; Stewart v. Swain, 13 Phila. (Pa.) 185.

If the annuitant lives until morning of the day whereon the annuity is payable, his representatives are entitled thereto, although not demanded by him. *In re Lackawanna Iron & Coal Co.*, 37 N. J. Eq. 126, ed. note; Paton v. Sheppard, 10 186; Robinson v. Robinson, 2 Irish Sim. C. L. 370.

4. Story Eq. Juris. (13th Ed.) 489, n. 1; Howell v. Hanforth, 2 W. Bl. 1016; Sweigert v. Frey, 8 S. & R. (Pa.) 299; Fisher v. Fisher, 5 Pa. L. J. Rep. 178; Watson's Comp. of Eq. 21.

A and wife conveyed a farm to B in consideration of B agreeing to pay an annuity of \$250 (secured by B's bond and mortgage on the premises) on the 1st of April, for his life, and if A's wife survived him, to pay her an annuity of \$200 for life. She survived A, and died Sept. 19, 1881. The court held that her annuity, given evidently for her support, was apportionable. *In re Lackawanna Iron & Coal Co.*, 37 N. J. Eq. 126.

A agreed (by bond), in consideration of B quit-claiming to him all her right to the estate of her late husband, "to pay to her annually on the 1st of May, during her natural life, \$185." Her administrator claimed an apportionment of the annuity up to the time of her death, but the court



nors.<sup>1</sup> An annuity in lieu of dower is apportionable.<sup>2</sup>

**6. Validity.** (See CONSIDERATION.)—An annuity granted to one on consideration of not marrying, or during widowhood, has not always been declared invalid; but courts of equity have been indulgent, and have sought by subtle distinctions to evade enforcing the condition. Distinctions have been drawn between conditions and limitations, conditions precedent and conditions subsequent, and between those cases in which there was a gift over and those in which there was not. A condition subsequent, when there is no gift over, is generally held to be void; but if there is a bequest over, the condition is valid.<sup>3</sup>

When words of limitation are used the annuity has been held to cease upon marriage, but the distinction between words of limitation and words of condition is very narrow.<sup>4</sup>

A devise of real estate in trust for the payment of annuities is valid so long as it does not render it inalienable for a longer period than the law allows.<sup>5</sup>

**7. Consideration.—Assignment.** (See VALIDITY.)—An annuity may be purchased like other property, and inequality of price will

held it did not come within the exception; that this transaction was a disposal of her estate in dower, in consideration of an annuity. *Tracy v. Strong*, 2 Conn. 659.

Nor is the annuity apportionable if the wife is living with her husband, for then it is not for maintenance. *In re Lackawanna Iron & Coal Co.*, 37 N. J. Eq. 126, ed. note; *Story Eq. Juris.* (13th Ed.) 489, n. 1; *Anderson v. Dwyer*, 1 Sch. & Lef. 301.

1. *In re Lackawanna Iron & Coal Co.*, 37 N. J. Eq. 126; *Hay v. Palmer*, 2 P. Wms. 501; *Dexter v. Phillips*, 121 Mass. 180; *Weston v. Weston*, 125 Mass. 268; *Ellerbe v. Ellerbe*, Spears Ch. 329.

2. *Blight v. Blight*, 51 Pa. St. 420. In lieu and satisfaction of dower, a testator bequeathed to his wife an annuity to be paid quarterly. The widow died in the midst of a quarter, and it was held that the annuity was apportionable up to the time of her death, for an annuity in lieu of dower lasts as long as dower would, the exceptions being in favor of dower and maintenance. See also *Hill on Trustees*, 385; *Gheen v. Osborne*, 17 S. & R. (Pa.) 171.

3. *Crawford v. Thompson*, 91 Ind. 266. A gave his wife his residuary personally on condition that she pay B an annuity for life on condition that B should not marry. Held, "that when a subsequent condition is annexed to a gift of personality, if general, it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach

the interest of the first donee ceases and the gift over takes effect; but if there is no gift over, then the condition is said to be *in terrorem* only, and is inoperative." In *Indiana*, by statute, "a devise or bequest, with a condition in restraint of marriage shall stand, but the condition shall be void." 2 R. S. 1852 (p. 308, § 2567, R. S. 1881). In the above case the condition was held void, as an absolute restraint upon marriage.

As to conditions subsequent, see *Cook's Est.*, 3 Phila. (Pa.) 60, in which it was also decided that it is not sufficient that there is a devise of the residue, into which the legacy would fall upon marriage, but the particular legacy must be given over. *Parsons v. Winslow*, 6 Mass. 169; *Story's Eq. Juris.* (13th Ed.) 288; *Knight v. Camerow*, 14 Ves. 388; *Clarke v. Parker*, 19 Ves. 13; *Reynish v. Martin*, 3 Atk. 330; *McIlvane v. Gethen*, 3 Wh. (Pa.) 575.

4. *Hotz's Est.*, 2 Wright (Pa.), 422, in which it was held that if proper words of limitation were used, the annuity ceased upon marriage, the words being, "if she shall be living and the wife or widow of my son, for her sole and separate use, all during the time she shall continue the wife or widow of my son." No estate is given to her for life, only during widowhood, so there is no condition subsequent, no estate is defeated, and it is not a condition *in terrorem*. See *Cornell v. Lovett's Exr.*, 11 Casey (Pa.) 100.

5. *Mason v. Mason*, 2 Sandf. (N. Y.) Ch. 432.

not of itself make the contract usurious.<sup>1</sup> All annuities founded on valid consideration are binding.<sup>2</sup> But if there is no consideration save natural love and affection, and for the payment of which the testator was under no legal obligation, then there can be no charge upon his estate, and it makes no difference that he paid it during his lifetime, or that it was paid through an agent by his written order; no obligation legal or equitable was created.<sup>3</sup>

An annuity may be reached by a creditors' bill, and the annuitant forced to assign for their benefit.<sup>4</sup> But an annuity given for a charitable object cannot be assigned away from the purpose for which it was granted.<sup>5</sup>

**8. Payment.**—The general rule as to payment of annuities is that they are payable at the end of the first year after the testator's death, unless there is some stipulation to the contrary.<sup>6</sup>

**1. Lloyd v. Scott, 4 Pet. (U. S.) 205.**

The inadequacy of price must not be so great as to amount to evidence of fraud. Vol. 104, Law. Lib. p. 345; Lloyd v. Scott, 4 Pet. (U. S.) 205, in which there was a grant (in consideration of \$5000) of a certain annuity issuing out of certain realty; further it was covenanted that at any time after five years the \$5000 might be paid back, and the rent or annuity extinguished. The court decided the contract usurious; that although "an annuity may be purchased like a tract of land or other property, the inadequacy of price in itself will not make a contract usurious without other circumstances. But the purchase of an annuity to cover an usurious transaction will be unavailing and cannot be enforced."

**2. A granted to B an annuity issuing out of a bond and mortgage. C undertook to pay the arrearages of the annuity in consideration that B should not sue the personal representatives of B. Held,** that "a promise to pay an annuity in consideration of forbearance to sue the personal representatives of the grantor is binding, and may be enforced against the promisor." Horton v. Cook, 10 Watts (Pa.), 124.

"Money lent and paid at different times for the education and advancement of the defendant is held good consideration for the grant of an annuity; and a covenant by a husband to secure to his wife an annuity during her life in case she should survive him is a sufficient consideration for a grant of an annuity from her father." Wait's Actions and Defences, "Annuity;" Kelf v. Ambrose, 7 Term R. 551; Ex parte Draycott, 2 Glyn & J. 283.

**3. Kearney v. Kearney, 17 N. J. Eq. 59.**

Nor are "past seduction and cohabitation a good consideration." Wait's Actions and Defences, "Annuity;" Beaumont v. Reeve, 8 Q. B. 483; s. c., 15 L. J. (Q. B.) 141; 10 Jur. 284.

**4. Degraw v. Cleason, 11 Paige (N.Y.), 136. Held,** that an annuitant may sell his interest, and that the creditors are entitled to have an assignment of it.

**5. A by will gave his farm to B on condition that he pay an annuity of \$50 to the M. E. Church for the support of preaching. Held,** that the object of the testator must be carried out; that the church could not assign the annuity; that it was intended for preaching in the church, and that the court would appoint trustees to carry out the intent, if the church did not. Merritt v. Buchanan, 77 Me. 253.

**6. Hall v. Hall, 2 McCord (S. Car.), Ch. 281.** The testator directed an annuity to be paid to his wife "annually or in any way she might wish." The chancellor decreed it to be paid quarterly in advance, "thus adhering to the general principle," and yet allowing the wife to have it more frequently.

**Waring v. Purcell, 1 Hill (S. Car.) Ch. 193.** The testator gave to A \$500 annually to be paid out of the income of the estate on the first of March during her life. The testator died in September. **Held,** that as "he died in September and the whole annuity would not be due until September of the following year, but it was to be paid on March first of every year, it accorded best with the intention that she should be paid on the first day of March next after his death; a proportion of the annuity equal to the time that had run after his death." M'Lenore v. Blocker, 1 Harp. (S. Car.) Ch. 272.

**9. Remedies.**—In former times the remedy for non-payment of an annuity was by means of the original writ of annuity, but it is long since obsolete. Now the action of debt is used, or covenant (if there is a covenant for payment in the deed); or a bill in equity may be brought; and the decree of the court ought to cover not only the arrears of the annuity already fallen due, but also liberty ought to be reserved to apply to the court to extend its decree to cover all annuities afterwards falling due.<sup>1</sup>

**10. Determination.** (See VALIDITY.)—If an annuity is for life, it ceases upon the death of the annuitant. The duration of an annuity given by will depends upon the construction given to the intention of the testator. Or it may determine through the limitations of the deed or will granting the annuity (see VALIDITY as to conditions and limitations). Or the annuitant may forfeit the grant through a breach of condition.<sup>2</sup>

**ANNUL.**—To make null and void; to abrogate or abolish; to cause a forfeiture.<sup>3</sup>

An annuity differs from interest or income. Nothing is due on an annuity before the day of payment; if the annuitant die, there is no apportionment, & it income or interest accrues from day to day. *Cray v. Cray*, 3 Barb. (N. Y.) Ch. 76; *Eyre v. Gelding*, 5 Binney (Pa.), 472.

In an annuity the first payment is after one year from the testator's death; in the case of income, two years. The Law of Wills (Redfield), 3d Ed. vol. 3, p. 185. In *Griswold v. Griswold*, 4 Bradf. (N. Y.) 216, the testator directed his executor to pay his wife a certain sum, during life, in equal quarterly payments, on the first Mondays of January, April, July, and October, such payments to commence immediately after his death. He died on August 4th. *Held*, that, "in the absence of any specific direction, the first payment would be at the end of a year, and according to the intention of the testator no payment was to be made on any day except those named, that they were required to be equal," and this excludes apportionment of the first installment, and on the first Monday of October a full quarter is due.

1. *Marshall v. Thompson*, 2 Munf. (Va.) 1811; *Townshend v. Duncan*, 2 Bland (Md.), 45; 3 Kent. Com. (13th Ed.) \*460; *Wood v. Wood*, 3 Wend. (N. Y.) 454; *Webb v. Jiggs*, 4 Maule & Selwin, 113.

2. *Dixon v. Manning*, 1 Demarest (N. Y.), 581; *Cox's Est.*, 15 Phila. (Pa.) 537, and *Hewson's App.* 102 Pa. St. 55, where A by will directed B to take charge of his children, B "to receive annually" from

his estate, "for her services," \$500. The court held that "as the care of the children ceased upon their attaining majority," the annuity ceased also, from a construction of the whole will.

*Blackmer v. Blackmer*, 5 Vt. 355. Suit was brought on a bond of \$1000 conditioned for the payment of \$100 annually during the life of A. The first ten payments were punctually made, and then the payments were refused. The court held that "the ten payments of \$100 each, indorsed as they fell due from year to year, and amounting in the whole to the penalty of the bond was" not "a bar to any suit for after-payment falling due in the lifetime of the grantee."

3. Where an act authorizing the sale of the St. Louis Common gave a power to "annul" a sale of a lot in said Common, the power was substantially pursued by a resolution by the proper authority declaring the lot "forfeited" to the city of St. Louis. "Annul" is not a technical word. The annulling of a lease is nothing more in effect than causing a forfeiture of it. *Woodson v. Skinner*, 22 Mo. 13, 24.

In English law, to annul a judicial proceeding is to deprive it of its operation either retrospectively or only as to future transactions. Thus, annulling an adjudication in bankruptcy puts an end to the proceedings without invalidating anyacts previously done by the trustee or the court, and makes the property of the bankrupt revert to him unless the court otherwise orders. Bankruptcy Act 1869, § 81. See *Rapalge & Lawrence's Law Dict.*, *sub voce*.

ANSWER.

- |   |  |
|---|--|
| 1. <i>Discovery.</i>                            | 11. <i>Answer in Support of Pleas.</i>             |
| 2. <i>Discovery, How Compelled.</i>             | 12. <i>Plea Overruled by Answer.</i>               |
| 3. <i>Pro Confesso.</i>                         | 13. <i>Form of Answer.</i>                         |
| 4. <i>Interrogatories.</i>                      | 14. <i>Oath.</i>                                   |
| 5. <i>Documents.</i>                            | 15. <i>Signature.</i>                              |
| 6. <i>Scandal and Impertinence.</i>             | 16. <i>Parties.</i>                                |
| 7. <i>Exception for Insufficient Discovery.</i> | 17. <i>Answer by Infant, Married Woman, etc.</i>   |
| 8. <i>Verification of Answer.</i>               | 18. <i>Sworn Answer as Evidence for Defendant.</i> |
| 9. <i>Defences.</i>                             | 19. <i>Amendment.</i>                              |
| 10. <i>Answer not Demurrable.</i>               |  |

The answer is the pleading regularly filed by the party defendant in an equitable suit or proceeding, to the bill or petition of the party plaintiff.<sup>1</sup>

Where a bond was given stipulating for the good conduct of an officer holding office for a fixed term and until "another" officer be appointed, on the re-appointment of the same officer the bond was held not in force beyond the fixed term. For said the court: "Since if there be a re-election, it is in fact to another and not the same office. See *Amherst Bank v. Root*, 2 Metc. (Mass.) 522, 536. It does not seem a strained or far-fetched exposition to deduce from the facts of the present case that 'another treasurer' was chosen at each successive annual election, whether the old incumbent was re-chosen or 'another person' was put in his place." *Citizens' Loan Assoc. v. Nugent*, 40 N. J. Law, 215; s. c., 29 Am. Rep. 230.

By "the money or property of another," the embezzlement of which by any agent, clerk, or servant, without the consent of his employer, is made larceny by the Rev. Sts. c. 126, § 29 (Mass.), is meant the money or property of any one else than such agent, clerk, or servant who embezzles it. *Commonwealth v. Stearns*, 2 Metc. (Mass.) 343.

The constitution of New Hampshire provides that "no person of any particular religious sect or denomination shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect, or denomination;" and where a tax had been assessed on a Presbyterian for the salary of a Congregational minister, elected by the First Parish of Amherst as a public teacher of piety, religion, and morality therein, under the constitution and laws of New Hampshire, it was held that Presbyterians and Congregationalists are different sects in religion within the meaning of the constitution. Hence a Presbyterian cannot be taxed for the support of a Congregational minister. *Muzzy v. Wilkins Smith's Dec.* (N. H.) 1.

Under the 32 and 33 Vict. c. 112, which by § 2 defines the term "to dye seeds" as giving to seeds, by any process of coloring, dyeing, sulphur-smoking, or other artificial means, the appearance of seeds of "another" kind, and by § 3 imposes a penalty upon any person who, with intent to defraud, "dyes any seeds or sells any dyed seeds," no offence is committed by subjecting seeds to a process by sulphur-smoking so as to improve them in appearance, and to make old and inferior seed appear to be new seed, so long as such seed is not made to appear of a different species or description from that to which it actually belongs. *Francis v. Maas*, L. R. 3 Q. B. Div. 341.

The phrase "personal goods of another," in sec. 16 of the act of April 30, 1790 (1 U. S. Stat. at Large, 116), embraces the personal goods of the United States. *U. S. v. Maxon*, 5 Blatch. (U. S.) 360.

So where a Missouri statute on the consolidation of railroads authorized "a corporation of this State to lease its road to a corporation of another State," it was held that a corporation chartered by Congress was a corporation of "another State" within the meaning of the act; the act being designed to embrace any corporation outside of Missouri, whether chartered by Congress or another State. *Smith v. Pacific R. Co.*, 61 Mo. 17.

1. The answer is the regular mode of replying to a bill or petition setting up an equitable cause of action. The plea and demurrer were originally unknown in equity pleading, and did not come into general use until comparatively recent times. They were borrowed from the common law. *Langdell Eq. Pl.* § 92.

The answer need not be more specific than the charge. *Buerk v. Imhaeuser*, 20 Blatch. (U. S. C. Ct.) 274.

The word "answer" is frequently used in a general sense, so as to signify any pleading by which an issue, whether of

It ordinarily subserves two entirely distinct purposes: first, to give discovery as to the charges and allegations of the bill; second, to set forth the defences to the bill.<sup>1</sup>

1. **Discovery.**—The answer must always give the plaintiff all the discovery to which he is entitled. It must answer specifically each and every material allegation of the bill, and all interrogatories founded upon such allegations.<sup>2</sup>

law or of fact, is made or tendered on the part of the defendant. *Howell v. Howell*, 15 Wis. 55, 59.

A demurrer is not an answer. *Kelly v. Downing*, 42 N. Y. 71.

And therefore where an attorney, appointed *ad litem* to defend for a defendant constructively summoned, filed a demurrer to the complaint, the demurrer was properly sustained, as it was not an answer, and would not be an appearance for the absent defendant. *Henry v. Blackburn*, 32 Ark. 445. But see, where context clearly shows that answer includes demurrer, *Lyman v. Bechtel*, 55 Iowa, 437; *Howell v. Howell*, 15 Wis. 55; *Broadhead v. Broadhead*, 4 How. (N. Y.) 308.

**Frivolous or Sham Answer.**—The word "answer," as used in section 247 of the New York Code, means an entire answer as a distinct pleading, and not one or more of several defences constituting it, and the remedy given by said section for a frivolous pleading is only available when the pleading as a whole is frivolous. *Strong v. Sproul*, 53 N. Y. 497. See *The People v. McCumber*, 18 N. Y. 315; *Keefer v. Thomas*, 6 Abb. Pr. N. S. (N. Y.) 42; *Cottrill v. Cramer*, 40 Wis. 555.

The name of an attorney placed for special purpose under the name of a respondent in a docket entry of a petition for a partition of land does not constitute either an answer or an appearance. *Larrabee v. Larrabee*, 33 Me. 100.

1. Much confusion has arisen from a failure to recognize this twofold nature of the answer. It seems to have been first pointed out by Wigram (*Discovery*, 2d Ed. §§ 17, 18) and by Hare (*Discovery*, 223). See *Langdell Eq. Pl.* § 68, n. 2. It is now generally recognized. *Story Eq. Pl.* § 850; 1 *Dan. Ch. Pl. & Pr.* (5th Am. Ed.) \*711. *Stone v. Moore*, 26 Ill. 165.

In the pleading in the ecclesiastical courts, from which equity pleading is derived, discovery and the statement of defence were made in distinct instruments. *Story Eq. Pl.* § 850; *Dan. Ch. Pl. & Pr.* (5th Am. Ed.) \*711; *Langdell Eq. Pl.* § 68.

2. 1 *Pom. Eq. Jur.* § 204; *Saunders v. Jones*, L. R. 7 Ch. D. 435, 443; *Reade v. Woodruffe*, 24 Beav. 421; *Methodist Episc. Church v. Jaques*, 1 Johns. (N. Y.) Ch. 65; *Phillips v. Prevost*, 4 Johns. (N. Y.) Ch. 205; *Cuyler v. Bogert*, 3 Paige (N. Y.), 186; *Bank of Utica v. Messereau*, 7 Paige (N. Y.), 517; *Champlin v. Champlin*, 2 Edw. (N. Y.) Ch. 362; *Waring v. Suydam*, 4 Edw. (N. Y.) Ch. 420; *Brooks v. Byam*, 1 Story (U. S. C. Ct.), 296; *Langdon v. Goddard*, 3 Story (U. S. C. Ct.), 13; *Wooten v. Burch*, 2 Md. Ch. 190; *Hagthorp v. Hook*, 1 Gill & J. (Md.) 270; *Salmon v. Clagett*, 3 Bl. (Md.) Ch. 125; *Shotwell v. Struble*, 21 N. J. Eq. 31; *Parkinson v. Trousdale*, 3 Scam. (Ill.) 367.

If the defendant wishes to avoid giving discovery, he must either plead or demur to the bill. In which case the averments of the bill not traversed are constructively admitted, on the theory of common-law pleading. But as the common-law theory of constructive admissions has no part in equity pleading except as thus adopted in the case of pleas and demurrers, if the defendant elect to answer he must give full discovery. *Langdell Eq. Pl.* § 93; *Story Eq. Pl.* § 846; *Hill v. Cravy*, 7 Ark. 536; *Salmon v. Clagett*, 3 Bland (Md.), 125. For the plaintiff must prove all allegations of the bill not admitted by the answer. *DeWolf v. Long*, 2 Gilm. (Ill.) 679.

Defendant must give the discovery sought by the bill, although it is not necessary to enable plaintiff to prove his case. *Davis v. Mapes*, 2 Paige (N. Y.), 105.

The defendant must answer the charges and interrogatories in the bill particularly and precisely: a general denial of the averments of the bill is insufficient. *Walker v. Walker*, 3 Ga. 302; *Jones v. Wing*, Harr. Ch. (Mich.) 301.

The answer should avoid a negative pregnant, that is, it should deny each part of a collective statement. *Davis v. Mapes*, 2 Paige (N. Y.), 105; *King v. Ray*, 11 Paige (N. Y.), 235.

The defendant need not answer all the allegations of the bill, but only such as are relevant to the plaintiff's case as made out by the bill. He need not answer impertinent or irrelevant or scandalous al-

The defendant may, however, refuse to give discovery in cases where he can claim privilege as a witness as to the discovery sought.<sup>1</sup>

Thus he may refuse to answer any allegations, the answering of which would tend to criminate him or subject him to a penalty.<sup>2</sup>

So an attorney need not answer where to do so would involve a disclosure of confidential communications.<sup>3</sup>

Admissions in the answer are conclusive upon the defendant.<sup>4</sup>

**2. Discovery—How Compelled.**—The regular means of compelling discovery is by process of contempt, issued against the defendant in case of his failure fully to answer all material allegations of the bill within the time required.<sup>5</sup>

legations. Story Eq. Pl. § 846; Wigram Discov. (2d Ed.) pp. 190-199; Langdell Eq. Pl. § 69; *Agar v. Regent's Canal Co.*, Cooper, 212; *Davis v. Collier*, 13 Ga. 485; *Batterson v. Ferguson*, 1 Barb. (N. Y.) 490; *Hardeman v. Harris*, 7 How. 726; *West v. Williams*, 1 Md. Ch. 358. Nor need he answer allegations of the bill which are relevant to a defence to the plaintiff's case, but not to the case itself. 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.); pp. \*579, \*580; Story Eq. Pl. § 572 *et seq.*; *Bolton v. Corporation of Liverpool*, 1 M. & K. 88, 91; *Attorney-General v. Corporation of London*, 2 M'N. & G. 247, 256; *Stainton v. Chadwick*, 3 M'N. & G. 575; *Bellwood v. Wetherell*, 1 Y. & C. Ex. 211, 215.

This principle, which is generally recognized, is often somewhat difficult of application. It must be borne in mind that the plaintiff is entitled to discovery to aid him in breaking down the case of his adversary as well as to aid him in supporting his own. *Bray Discov.* 458, 459; *Atty.-General v. Corporation of London*, 2 M. & G. 247; *Glascott v. Copper Miner's Co.*, 11 Sim. 305, 312. Such discovery is not for the purpose of prying into the defendant's case, but for the purpose of establishing an attack upon that case. *Bray Discov.* 459; *Wigram Pl.* 343; *Gumprecht v. Parry*, 32 W. R. 558; *Goodman v. Holroyd*, 15 C. B., n. s. at 844. This distinction, though real, is often difficult to make. *Bray Disc.* 458. See *Storey v. Lennox*, 1 My. & Cr. 525.

1. Langdell Eq. Pl. § 69; *Agar v. Regent's Canal Co.*, Cooper, 212, 215.

Where grounds of privilege appear on the face of the bill, defendant may protect himself from discovery by demurrer. 1 Dan. Ch. Pl. & Pr. 549; *Hare Disc.* 149.

Where the bill itself does not disclose

grounds of privilege, privilege must be claimed by the answer or by plea. Langdell Eq. Pl. § 97.

Defences to discovery may be taken by answer. *Hunt v. Gookin*, 6 Vt. 462.

Even where the bill discloses grounds on which a claim of privilege may be based, the defendant may protect himself from discovery by submission in his answer. 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) 717; *Hare Disc.* 149.

2. 1 Dan. Ch. Pl. & Pr., pp. \*562, \*567; 1 Pom. Eq. Jur. § 202; *Gadsden v. Woodward*, 8 N. E. R. 653 (N. Y., under Code); *Wolf v. Wolf*, 2 Har. & G. (Md.) 382; *United States v. Twenty-eight Packages*, Gilp. (U. S. C. Ct.) 306; *Butler v. Catling*, 1 Root (Conn.), 310; *Leigh v. Everheart*, 4 T. B. Mon. (Ky.) 379; *Dwinal v. Smith*, 25 Me. 379; *Livingston v. Tompkins*, 4 Johns. (N. Y.) Ch. 415; *Northwestern Bank v. Nelson*, 1 Gratt. (Va.) 108.

The defendant must state upon oath his belief that the discovery sought, if given, would tend to expose him to penalties, or to a criminal prosecution; a submission of the question to the court is insufficient. *Scott v. Miller* (No. 2), Johns. 328.

Where a statute provides that the defendant's answer shall not be admissible against him in a criminal prosecution he may be compelled to answer. *Philadelphia v. Keyser*, 10 Phila. (Pa.) 50.

3. 1 Dan. Ch. Pl. & Pr. pp. 573, 574; Story Eq. Pl. § 846; *Wigram Discov.* (2d Ed.) 195; 1 Pom. Eq. Jur. § 203.

4. *Home Ins. Co. v. Myer*, 93 Ill. 271; *Miller v. Payne*, 4 Bradw. (Ill.) 112.

5. Dan. Ch. Pl. & Pr. \*p. 488; Langdell Eq. Pl. § 84; *McKim v. Odom*, 3 Bland. (Md.) 407.

A *distringas* will issue to compel a corporation to answer. *McKim v. Odom*, 3 Bland (Md.), 407.

**3. Pro Confesso.**—Where the process of contempt fails to compel an answer, the practice (generally regulated by statute) is to order the bill to be taken *pro confesso*.<sup>1</sup>

Taking a bill *pro confesso* admits the truth of facts constituting the equity of complainant's bill,<sup>2</sup> but not statements as to amounts of money due upon an accounting.<sup>3</sup>

**4. Interrogatories.**—It is usual to append to the bill interrogatories in support of its principal allegations. Unless such interrogatories are based on averments of the bill they need not be answered.<sup>4</sup>

**5. Documents.**—The answer must admit or deny allegations charging the possession by the defendant of documents relevant to complainants' case as stated in his bill.<sup>5</sup>

1. 1 Dan. Ch. Pl. & Pr. pp. \*517, \*518; Langdell Eq. Pl. § 84.

Where part of the defendants answered traversing the principal averments of the bill, and the plaintiff failed to prove such averments, *held* that no decree could be entered as to such principal averment, against defendants not answering, but otherwise as to allegations not connected with such principal averments. *State v. Cathcart*, 12 S. Car. 370. Accord, see *Salmon v. Smith*, 58 Miss. 399; *McDaniel v. Goodall*, 2 Coldw. (Tenn.) 391.

Where a defendant fails to answer an averment, after repeated exceptions for such failure, the bill may be taken as confessed as to such averment. *Hale v. Continental Life Ins. Co.*, 20 Fed. Rep. 344; *Buckingham v. Peddicord*, 2 Bland (Md.) 447; *Weaver v. Livingston*, Hopk. (N. Y.) 595.

It has been held that the answer may in such case be disregarded and the entire bill taken *pro confesso*. *Lea v. Vanbibber*, 6 Humph. (Tenn.) 18.

2. Langdell Eq. Pl. § 84.

3. Langdell Eq. Pl. § 84; *Dominicetti v. Latti*, Dickens, 588.

4. *Mechanics' Bank v. Levy*, 3 Paige (N. Y.), 606; *Mechanics' Bank v. Lynn*, 1 Pet. 376; *Miller v. Saunders*, 17 Ga. 92; *Grim v. Wheeler*, 3 Edw. (N. Y.) Ch. 334.

But special interrogatories are not necessary (in the absence of a rule of court), and defendant must answer the averments of the bill, although there are no interrogatories. *Pitts v. Hooper*, 16 Ga. 442; *Jordan v. Jordan*, 16 Ga. 446; *Miles v. Miles*, 27 N. H. 440; *McDonald v. McDonald*, 16 Vt. 630.

5. Langdell Eq. Pl. § 76, and §§ 205-208; 1 Pom. Eq. Jur. § 206.

By the former rules of English chancery practice, in order to compel the production of documents, the bill must contain a charge of documents—that is, a charge that the defendant had in his pos-

session documents tending to prove the truth of the allegations in the bill. 2 Dan. Ch. Pl. & Pr. \*1818; Langdell Eq. Pl. § 205. This charge the defendant was bound to answer, and if he failed so to do an exception might be taken. If the answer admitted the possession of relevant documents, the court would, upon motion, order the defendant to leave the documents with his clerk in court (*i.e.*, his attorney) that the plaintiff might inspect and make copies of them. 2 Dan Ch. Pl. & Pr. 1818; *Atkins v. Wright*, 14 Ves. 211, 213; *Lord Eldon in Princess of Wales v. Earl of Liverpool*; 1 Swanst. 114. The clerks in court could also be compelled to attend with the documents at the hearing. Langdell Eq. Pl. § 209.

The plaintiff must in his bill require the defendant to schedule and describe all documents admitted to be relevant, as the court would not order the production of documents unless clearly identified. Langdell Eq. Pl. § 205; *Atkins v. Wright*, 14 Ves. 211.

Discovery of documents may be made by annexing them to the bill. *Reed v. Cumberland, etc., Ins. Co.*, 36 N. J. Eq. 146.

The plaintiff was concluded by the defendant's answer as to the possession of relevant documents. He could not disprove by his own affidavit or those of third persons, the defendant's denial of possession or of relevancy. Langdell Eq. Pl. § 204; *Bray on Discov.* p. 153; *Barnett v. Noble*, 1 Jac. & W. 227; 1 Pom. Eq. Jur. § 206; *Wright v. Pitt L. Pl.* 3 Ch. 809; *Regnell v. Sprye*, 1 De G. M. & G. 656. See *Saull v. Browne*, L. R. 17 Eq. 402.

As to the nature of the documents of which the plaintiff was entitled to discovery, they were those tending to prove his own case. He was not entitled to inspect the documentary evidence in support of his adversary's case. Dan. Ch. Pl. & Pr. \*579, 580; Langdell Eq. Pl.

**6. Scandalous Matter—Impertinence.**—Scandalous or impertinent matter in an answer may be stricken out on motion.<sup>1</sup>

**7. Exception for Insufficient Discovery.**—The answer may be accepted to for insufficiency, in case the complainant deems it not to give all the discovery to which he is entitled.<sup>2</sup>

§ 213; *Shadwell v. Shadwell*, 6 C. B., n. s. 679; *Stroud v. Deacon*, 1 Ves. 37; *Smith v. Beaufort*, 1 Ha. 507.

The modern practice in regard to production of documents is almost everywhere based upon statutes. Thus the English Judicature Act, § 27, provides that "it shall be lawful for the court or a judge at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such documents in his possession or power, relating to any matter in question in such suit or proceeding, as the court or judge shall think right, and the court may deal with such documents, when produced, in such manner as shall appear just." Under this statute the admission of relevant documents in the answer is no longer necessary. Production of documents is ordered on motion by the party desiring it, supported by affidavit stating the possession by his adversary of documents relating to the matters in question in the suit. But it seems that the adverse party may file an affidavit denying possession or relevancy, and that, as in case of an answer to a charge of documents, under the old practice such denial is conclusive upon the party seeking production. *Bray Discov.* pp. 154, 155; *Wright v. Pitt*, L. R. 3 Ch. 809, 810; 1 Pom. Eq. Jur. § 206, n. s.

Production of documents may still be ordered on admissions of possession and relevancy in the answer. But exceptions to the answer on the score of insufficient discovery as to documents is no longer favored. *Piffard v. Beeby*, L. R. 1 Eq. 623; *Kidger v. Worswick*, 5 Jur. N. S. 37; *Baniard v. Hunter*, 1 Jur. N. S. 1065.

Documents "relating to any matter in question in such suit or proceeding, as the court or judge shall think right" (*Judic. Act*, § 27), is broader than documents "by which the truth of the facts alleged in the bill, or of some of them, will appear" (the phraseology of the usual "charge of documents" occurring in bills under the old practice). It includes documents which would not be evidence for the party, but would give him directly or indirectly some information as to the case. *Bray Discov.* 183, citing *Brett, M. R.*, in *Com-*

*pagnie Financière, etc., v. Peruvian Guano Co.*, 11 Q. B. D. 62. It does not, however, include documents which contain only evidence in support of the adverse party's case. The statute gives the party no right to production or inspection of such documents. *Bewicke v. Graham*, L. R. 7 Q. B. D. 400; *Attorney-General v. Emerson*, L. R. 10 Q. B. D. 191.

Privilege as a witness may be asserted to protect the party claiming it from the necessity of producing documents. 1 Pom. Eq. Jur. § 207. The same rule governing discovery by answer to charge in the bill, apply 1 Pom. Eq. Jur. § 207.

For a *résumé* of the statutory provisions in regard to production and discovery of documents, see *BILLS OF DISCOVERY, STATUTES*.

1. *Story Eq. Pl.* § 862; *Cooper Eq. Pl.* 318; *Langdell Eq. Pl.* § 208; *Crammer v. Atlantic City Gas & W. Co.*, 39 N. J. Eq. 76; *Oregonian R. Co. v. Oregon R. & Nav. Co.*, 27 Fed. R. 277; *Heckscher v. Trotter*, 5 Atl. R. 652; *Langdon v. Goddard*, 3 *Story (U. S. C. Ct.)*, 13.

According to the practice in some jurisdictions, an answer may be excepted to for impertinence. *Langdon v. Goddard*, 3 *Story (U. S. C. Ct.)*, 13; *Mason v. Mason*, 4 Hen. & Mun. (Va.) 414; *Burr v. Burton*, 18 Ark. 214; *McIntyre v. Trustees of Union College*, 6 Paige (N. Y.), 239; *Johnson v. Tucker*, 2 Tenn. Ch. 244; *United States v. McLaughlin*, 24 Fed. R. 823. This was formerly the practice in England. *Raphael v. Birdwood*, 1 Swanst. 228; *Beavan v. Waterhouse*, 2 Beav. 58; *Tench v. Cheese*, 1 Beav. 571; *Pellew v. —*, 6 Ves. 456. But it has been changed, and a motion to expunge is now the only remedy. 15 & 16 Vict. c. 86, § 17.

An exception to an answer for impertinence, embracing material matter, will be overruled. *Balcom v. N. Y. Life Ins. & Trust Co.*, 11 Paige (N. Y.), 454; *Curtis v. Mastern*, 11 Paige (N. Y.), 15.

Written exceptions for impertinence are unnecessary when the court itself refers an affidavit upon scandal or impertinence. *Powell v. Kane*, 2 Edw. (N. Y.) 450.

2. 1 *Dan. Ch. Pl. & Pr.* 760; *Story Eq. Pl.* § 864.

The complainant must, in the first in-



The exceptions noted to the answer are, in case the defendant does not submit to answer more fully, referred to a master in

stance, except to every part of the answer which he deems insufficient. *Blaisdell v. Stevens*, 16 Vt. 179; *Travers v. Ross*, 1 McCarter (N. J.), 254; Story Eq. Pl. § 864.

Failure to except waives insufficiency of discovery. *Warfield v. Gambrill*, 1 Gill & J. (Md.) 503. And the insufficiency of the answer cannot be regarded as an admission of the truth of the allegations not answered. *Savage v. Benham*, 17 Ala. 119; *Wooten v. Burch*, 2 Md. Ch. 190; *Blaisdell v. Stevens*, 16 Vt. 179; *Pegg v. Davis*, 2 Blackf. (Ind.) 281. Nor can the unanswered averments be taken *pro confesso* without allowing defendant to file a further answer. *Nash v. Taylor*, 2 Hayw. (N. Car.) 125; *Marsh v. Crawford*, 1 Swan (Tenn.), 116.

The exceptions must be specific. *Mut. Life Ins. Co. v. Cokefair*, 3 Atl. R. (N. J.) 686; *Turnaye v. Fisk*, 22 Ark. 286.

Where by statute the failure to answer a material averment of the bill admits its truth, exceptions for insufficiency are no longer necessary or proper. But an answer may be excepted to on the ground that its denials are not sufficiently specific. *Richardson v. Donehoo*, 16 W. Va., 685. By such a statute, only averments of facts charged to be or clearly within defendant's knowledge are admitted by failure to deny. *Cowen v. Alsop*, 51 Miss. 158.

An unsworn answer cannot be excepted to for insufficiency, because such answer is not evidence. 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) 760, n. 2; *McCormick v. Chamberlain*, 11 Ib. 543; *Sheppard v. Akers*, 1 Tenn. Ch. 326; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 599. *Contra*, see *Reed v. Cumberland Mut. Fire Ins. Co.*, 36 N. J. Eq. 393. For the same reason exceptions for insufficiency cannot be taken to an infant's answer filed by his guardian *ad litem*. 1 Dan. Ch. Pl. & Pr. \*169; *Copeland v. Wheeler*, 4 Bro. C. C. 256; *Lucas v. Lucas*, 13 Ves. 274; *Leggett v. Sellon*, 3 Paige (N. Y.), 84; *Bulkley v. Van Wyck*, 5 Paige (N. Y.) Ch. 536. Nor to the answer of a corporation. *United States v. McLaughlin*, 24 Fed. R. 823. Nor to the answer of the attorney-general. *Davison v. Attorney-General*, 5 Price, 398, *note*.

Exceptions for insufficiency may be filed after exceptions for impertinence. *Patriotic Bank v. Bank of Washington*, 5 Cranch. (U. S. C. Ct.) 602.

Exceptions for insufficiency must be in writing. *De la Torre v. Bernaldes*, 4

Mad. 396. And signed by counsel. *Cross v. Cohen*, 3 Gill (Md.), 257; Story Eq. Pl. § 864. And must specify that the answer complained of was an answer to the bill. *Earl of Lichfield v. Bond*, 5 Beav. 513, 514; Story Eq. Pl. § 864; *Conway v. Turner*, 8 Ark. 356; *Baker v. Kingsland*, 3 Edw. (N. Y.) 138.

The written exceptions must set out *verbatim* the parts of the bill unanswered. *Stafford v. Brown*, 4 Paige (N. Y.), Ch. 88; *Cooper Eq. Pl. 319*; *Brooks v. Byam*, 1 Story (U. S. C. Ct.), 296; *Buloid v. Miller*, 4 Paige (N. Y.), 473; *Baker v. Kingsland*, 3 Edw. (N. Y.) 138. It must also set out *verbatim* the part of the answer excepted to. *Brooks v. Byam*, 1 Story (U. S. C. Ct.), 296.

If an exception includes an averment in the bill, to which the answer is unexceptionable, together with one to which it is exceptionable, the whole exception must fail. *Higginson v. Blockley*, 1 Jur. N. S. 1104; *Buloid v. Miller*, 4 Paige (N. Y.), 473.

The objection of *res adjudicata* to the defences set up by answer cannot be taken by exception. *Thriffs v. Fritz*, 101 Ill. 457.

After amendment of a bill, exceptions to an answer for failure to give proper discovery to the original bill are not allowed. Failure to except to answer before amending the bill waives all insufficiencies of the answer. *Overy v. Leighton*, 2 S. & S. 234; *Wich v. Parker*, 22 Beav. 59; *Irving v. Viana*, McClell. & Y. 563; 2 Dun. Ch. Pl. & Pr. 761, 762; *Chazournes v. Mills*, 2 Barb. (N. Y.) Ch. 466. And where, after exceptions sustained for insufficiency, a further answer is filed, although plaintiff may insist that the further answer does not supply the defects pointed out by the original exceptions, he cannot file new exceptions. *Partidge v. Haycraft*, 11 Ves. 570, 581; *Williams v. Davies*, 1 S. & S. 426; Story Eq. Pl. § 865; *Bennington Iron Co. v. Campbell*, 2 Paige (N. Y.), 169. Where the amendment totally changes the character of the bill, so that the defendant is entitled to file a new answer thereto, if defendant allows his answer to remain on file as answer to the amended bill, it may be excepted to for insufficiency or impertinence as to any part. *Angel v. Penn. R. Co.*, 37 N. J. Eq. 92.

After filing four insufficient answers, the English practice was to commit the defendant to prison for contempt, and compel him to answer written interroga-

chancery, and, if he reports that the discovery is insufficient as to any of the points noted, the court will compel further answer on such points.<sup>1</sup>

**8. Positive Knowledge—Information and Belief.**—The defendant must answer positively as to facts which are within his own knowledge, if of recent occurrence. As to facts not within his own knowledge, he must answer on information and belief, if he have any information and belief in the matter.<sup>2</sup>

**9. Defences.**—Besides discovery, an answer contains a statement of the defence or defences on which the defendant means to rely.<sup>3</sup>

tories prepared by the plaintiff's counsel and settled by the master. *Farquharson v. Balfour*, T. & Russ. 184; *Langdell Eq. Pl.* § 82; 1 *Dan. Ch. Pl. & Pr.* \*771.

Where a defendant demurs or pleads to a part of the discovery and answers as to the rest, exceptions to the answer before the argument of the plea or demurrer admit the validity of the plea or demurrer. *Story Eq. Pl.* § 866; *Cooper Eq. Pl.* 321; 1 *Dan. Ch. Pl. & Pr.* \*760; *Darnell v. Reyny*, 1 *Vern.* 344; *Brownell v. Curtis*, 10 *Paige* (N. Y.), 210.

Exceptions cannot be taken after replication filed. *Coleman v. Lyne*, 4 *Rand.* (Va.) 454.

1. *Story Eq. Pl.* § 865; *Langdell Eq. Pl.* § 82.

Either party may except to the master's report upon the exceptions to the answer. *Story Eq. Pl.* § 865. If defendant submits to exceptions, or to the report of the master allowing them, he cannot, upon reference of a further answer, insist that the original exceptions were not well taken. *Higbie v. Brown*, 1 *Barb.* (N. Y.) Ch. 320.

A court may itself pass upon exceptions without referring them to a master. *Satterwhite v. Davenport*, 10 *Rich.* (S. Car.) Eq. 305.

2. *Story Eq. Pl.* § 854; 1 *Dan. Ch. Pl. & Pr.* (5th Am. Ed.) \*722; *Tradesman's Bank v. Hyatt*, 2 *Edw.* (N. Y.) Ch. 195; *Bailey v. Wilson*, 1 *Dev. & Bat.* (N. Car.) Eq. 182, 187; *Hall v. Wood*, 1 *Paige* (N. Y.), 404; *Utica Ins. Co. v. Lynch*, 3 *Paige* (N. Y.), 210; *Sloan v. Little*, 3 *Ibid.* 103; *Brotherton v. Downey*, 21 *Hun* (N. Y.), 436; *Reed v. Cumberland Mut. Fire Ins. Co.*, 36 *N. J. Eq.* 146; *Rienzie v. Barker*, 4 *Atl. R.* (N. J.) 309; *Smith v. Loomis*, 5 *N. J. Eq.* 60; *Grady v. Robinson*, 28 *Ala.* 289; *Noyes v. Ireland*, etc., Co., 4 *MacArth.* (D. C.) 1.

An answer denying knowledge on the part of the defendant may be excepted to unless it also deny information and belief as well. *Kittredge v. Claremont*

*Bank*, 1 *Woodb. & M.* (U. S. C. Ct.) 244; *Brooks v. Byam*, 1 *Story* (U. S. C. Ct.), 296; *Bradford v. Geiss*, 4 *Wash.* (U. S. C. Ct.) 513; *Kinnaman v. Henry*, 6 *N. J. Eq.* 90; *Robinson v. Woodgate*, 3 *Edw.* (N. Y.) 422; *Brotherton v. Downey*, 21 *Hun* (N. Y.), 436; *Reed v. Cumberland Mut. Fire Ins. Co.*, 36 *N. J. Eq.* 146. *Sanderlin v. Sanderlin*, 24 *Ga.* 583; *Bailey v. Wilson*, 1 *Dev. & B.* (N. Car.) Eq. 182; *Devereaux v. Cooper*, 11 *Vt.* 103.

As to facts within defendant's knowledge, but not of recent occurrence, he may answer to his remembrance. Lord Clarendon's order provided that he must answer positively if the facts were laid to be done within seven years, unless the court should see fit to relax the rule for cause shown. *Story Eq. Pl.* § 855.

Defendant may answer to remembrance when the facts occurred more than six years before. *Cary v. Jones*, 8 *Ga.* 516.

If the court is satisfied that defendant cannot swear positively, an answer as to his belief will be allowed, even as to his own acts. *Hall v. Wood*, 1 *Paige* (N. Y.), 404.

3. It seems that an answer need only state affirmative defences. Defences consisting in the denial of material averments of the bill need not be stated. *Langdell Eq. Pl.* § 79. It is only in so far as the answer contains a statement of defence or defences that it is in any proper sense a pleading.

A defendant need only state the facts constituting his defence; he need not state the conclusion of law he intends to draw from those facts. *Stone v. Moore*, 26 *Ill.* 165. But where the answer states certain facts as evidence of a particular defence, such facts cannot be made use of at the hearing to establish an entirely different defence. 1 *Dan. Ch. Pl. & Pr.* \*712; *Bennett v. Neale*, *Wightw.* 324.

A defendant cannot avail himself of any defence appearing in his evidence not stated in his answer. *Stanley v. Robinson*, 1 *R. & M.* 527, 529; *Harrison*

The answer may set up several defences to the entire bill, provided they be not inconsistent with each other.<sup>1</sup>

**10. Answer not Demurrable.**—The legal sufficiency of defences set up by answer cannot be questioned by demurrer.<sup>2</sup>

**11. Answer in Support of Pleas.**—Anomalous and negative pleas must be supported by answer, giving discovery as to averments of the bill disproving or avoiding the plea.<sup>3</sup>

*v. Borwell*, 10 Sim. 382; *Hodgson v. Thornton*, 1 Eq. Ca. Abr. 228, pl. 5; *Burnham v. Dalling*, 3 C. E. Green (N. J.), 132; *Hart v. Schenck*, 32 N. J. Eq. 148; *Fuller v. Fuller*, 3 Atl. Rep. (N. J.) 409.

In stating his case, the defendant must use such degree of certainty as will inform the plaintiff of the nature of the case to be made against him. 1 Dan. Ch. Pl. & Pr. 714; *Cummings v. Coleman*, 7 Rich. (S. Car.) Eq. 509; *Gates v. Adams*, 24 Vt. 70.

It seems that any sort of defence may be taken by answer. 1 Dan. Ch. Pl. & Pr. \*714. It seems that certain defences to discovery, available by plea or demurrer, such as purchase for value without notice, cannot be taken by answer. *Story Eq. Pl. § 847*; *Portarlington v. Soulby*, 7 Sim. 28. *Contra*, see 30th Rule of Equity, Supr. Ct. of U. S. Any defence to the relief may be taken by answer.

The defence of statute of limitations may be taken by answer. *Pierce v. McClellan*, 93 Ill. 245. The defendant cannot obtain relief by answer. He must file a cross-bill. *Duryea v. Linsheimer*, 27 N. J. Eq. 366; *Wicliffe v. Clay*, 1 Dana (Ky.), 589; *Carnochan v. Christie*, 11 Wheat. 446; *Andrews v. Kibbee*, 12 Mich. 94; *Mason v. McGirr*, 28 Ill. 322; *Weisman v. Smith*, 6 Jones (N. Car.) Eq. 124; *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Norman v. Huddleston*, 64 Ill. 11; *Andrews v. Gilman*, 122 Mass. 471; 2 Dan. Ch. Pl. & Pr. (5th Am. Ed.) 1550.

1. 1 Dan. Ch. Pl. & Pr. \*713; *Langdell Eq. Pl. § 79*; *Hopper v. Hopper*, 11 Paige (N. Y.), 46.

A defendant may not set up inconsistent defences, or those which are the consequence of inconsistent facts. 1 Dan. Ch. Pl. & Pr. § \*713; *Jesus College v. Gibbs*, 1 Y. & C. Ex. 145, 160.

2. *Langdell Eq. Pl. § 83*; *United States v. McLaughlin*, 24 Fed. R. 823; *Williams v. Owens*, 2 Freem. 181.

If the plaintiff deems the defences taken by the answer to be invalid, and that the answer affords sufficient proof of his bill, he may have the cause set down for hearing upon bill and answer. *Langdell Eq. Pl. § 83*. In which case the defences taken in the answer are

assumed to be true and their legal sufficiency alone considered. *Langdell Eq. Pl. § 83*; 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*982; *Fordey v. Shriver*, 5 N. E. R. (Ill.) 87; *Crowe v. Wilson*, 5 Atl. Rep. (N. J.) 427; *Leeds v. Marine Ins. Co.*, 2 Wheat. 380; *Von Schmidt v. Huntington*, 1 Cal. 55; *Baldwin v. Lee*, 7 Ga. 186; *Derby v. Gage*, 38 Ill. 27; *Westfall v. Lee*, 7 Iowa. 12; *Wheeler's Estate*, 1 Md. Ch. 80; *Rogers v. Mitchell*, 41 N. H. 154; *Booraem v. Wells*, 19 N. J. Eq. 87; *Gates v. Adams*, 24 Vt. 70; *Blanton v. Brackett*, 5 Call (Va.), 232; *Gaines v. Agnelly*, 1 Woods (U. S. C. Ct.), 238. The plaintiff must prove his bill by admissions in the answer. *Ibid.*; *Childs v. How*, 1 Clarke (Iowa), 432; *Warren v. Twilley*, 10 Md. 39; *Perkins v. Nicholls*, 11 Allen (Mass.), 542; *Brinckerhoff v. Brown*, 7 John. (N. Y.) Ch. 217; *Crowe v. Wilson*, 5 Atl. Rep. (N. J.) 427; *United States v. Scott*, 3 Woods (U. S. C. Ct.), 334.

3. A negative plea is one traversing a material allegation of the bill or complaint. 1 Dan. Ch. Pl. & Pr. \*604. An anomalous plea is an affirmative plea, containing a traverse of an affirmative reply to the plea set up in the bill in anticipation of the defence. Such a plea is in reality an affirmative plea, and a negative rejoinder to an affirmative replication, both being pleaded in a single pleading. *Langdell Eq. Pl. § 101*.

An answer must be filed in support of a plea in two cases. First, when the bill contains averments inconsistent with and in disproof of the plea, whether the plea be affirmative or negative. 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*616; *Langdell Eq. Pl. § 102*; *Story Eq. Pl. § 668 et seq.* Second, in the case of anomalous pleas. 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*616; *Langdell Eq. Pl. § 101*; *State Bank v. Wilson*, 4 Gilm. (Ill.) 57; *Chapin v. Coleman*, 11 Pick. (Mass.) 331. In the first case the discovery must be as to the averments in disproof of the plea. *Langdell Eq. Pl. § 105*. In the second as to averments in support of the affirmative reply to the plea. *Langdell Eq. Pl. § 101*. The reason why the plaintiff is entitled to the discovery above indicated is because it may aid him in proving his case at the

**12. Plea Overruled by Answer.**—A defendant cannot defend a single cause of action by both plea (or demurrer) and answer.<sup>1</sup>

In such a case the answer overrules the plea—that is, the plea is disregarded.<sup>2</sup>

**13. Form of Answer.**—The answer is headed by the title, specifying of which of the defendants it is the answer, and the names of the plaintiffs in the cause.<sup>3</sup>

Then follows a reservation of all advantages that might have been taken by exception to the bill.<sup>4</sup>

Then comes the substance of the answer, consisting of matters of discovery and defence.<sup>5</sup>

Last of all comes the general traverse of all the unlawful combination charged in the bill, and all other matters therein contained.<sup>6</sup>

**14. Oath.**—The office of the answer being to give discovery, it must be sworn to by the party for whom it is filed.<sup>7</sup>

The plaintiff may, however, by his bill waive an answer under oath.

hearing of the plea. Story Eq. Pl. § 672. The reason why he is not entitled to discovery as to the rest of his bill is because it is constructively admitted by the plea.

1. Langdell Eq. Pl. § 103; *Cottingham v. Fletcher*, 2 Atk. 155; *Bolton v. Gardner*, 3 Paige, 273; *Ferguson v. O'Harra*, Peters (U. S. C. Ct.), 493; *Souzer v. De Meyer*, 2 Paige (N. Y.) Ch. 574; *Brownell v. Curtis*, 10 Paige (N. Y.), 210; *Bruen v. Bruen*, 4 Edw. (N. Y.), 640; *Bank v. Dugan*, 2 Bland (Md.), 254; *Joyce v. Gunnels*, 2 Rich. (S. Car.) Eq. 259; *Bell v. Woodward*, 42 N. H. 181; *L. Episcopal Church v. Leroy*, Riley (S. Car.) Ch. 156.

It has been held that this rule applies in case of a negative or anomalous plea, and an answer filed in support of it. *Thring v. Edgar*, 2 Sim. & Stu. 224; *Bolton v. Gardner*, 3 Paige (N. Y.), 273; *Bangs v. Strong*, 10 Ibid. 11; *Bank v. Dugan*, 2 Bland. (Md.) 254; *Lacraft v. Dempsey*, 4 Paige, 124; *Lewis v. Baird*, 3 McLean (U. S. C. Ct.), 56. But it seems that it should properly apply only to cases where the answer contains statements of defence, and not when, as in case of answers in support of pleas, the office of the answer is to give discovery solely. Langdell Eq. Pl. § 103.

This application of this rule, in connection with the rule requiring the answer in support of a plea to be full, rendered it very difficult to take a defence by way of plea and answer. In England this difficulty has been done away with by court rules providing that an answer in

support of a plea should not overrule it. 1 Dan. Ch. Pl. & Pr. \*617.

2. Langdell Eq. Pl. § 103; *Mitford Eq. Pl.* (4th Ed.) 209, 210, 319, 320.

3. Story Eq. Pl. § 870; 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*731; *Fulton Co. v. Mississippi & Wabash R. Co.*, 21 Ill. 338.

An answer may be rejected when not properly entitled. *Supervisors, etc., v. Mississippi, etc., R. Co.*, 21 Ill. 338.

4. Story Eq. Pl. § 870.

The general reservation is generally omitted in the answer of an infant. Story Eq. Pl. § 871.

5. Story Eq. Pl. § 870.

6. Story Eq. Pl. § 870.

The general traverse and denial of combination are omitted in answers for infants. Story Eq. Pl. § 871.

7. Story Eq. Pl. § 874; 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*734; *Van Altenburg v. Alberry*, 10 Iowa, 264.

An answer sworn to by only part of the defendants joining, cannot be admitted as a joint answer. *Masterson v. Craig*, 5 Litt. (Ky.) 39.

8. Story Eq. Pl., § 874.

It has often been stated that the plaintiff may compel the defendant to answer without oath. But it seems that the right to answer under oath, and thus to compel the plaintiff to prove averments traversed by the answer by more than the testimony of a single witness, is one which the defendant cannot be deprived of by the plaintiff. Story Eq. Pl. (9th Ed.) § 874, n. a; Langdell Eq. Pl. § 78; *Clements v. Moore*, 6 Wall. 299; *Amory v.*

15. **Signature.**—The answer must be signed by the party filing it,<sup>1</sup> and by his counsel.<sup>2</sup>

16. **Parties.**—Two or more parties defendant may join in an answer.<sup>3</sup>

Where several defendants are joined in a bill, each one need only give discovery as to allegations material to the relief sought against him.<sup>4</sup>

17. **Answer by Infant, Married Woman, etc.**—An infant answers by his guardian *ad litem*. A lunatic by his committee or guardian *ad litem*.<sup>5</sup>

Lawrence, 3 Cliff. (U. S. C. Ct.), 523, 537; Brown v. Bulkley, 14 N. J. Eq. 294, 306; Story Eq. Pl. § 875, a. *Contra*, Dorn v. Bayer, 16 Md. 144; Winchester v. Baltimore, etc., R. Co., 4 Ib. 231 (statute); Willenborg v. Murphy, 36 Ill. 344; Wallwork v. Derby, 40 Ill. 527; Hyer v. Little, 20 N. J. Eq. 443.

Where defendant has answered under oath, the evidentiary force of the oath cannot be annulled by an amendment to the bill waiving the oath. Walker v. Campbell, 5 Lea (Tenn.), 354.

An unsworn answer filed by counsel without concurrence of the defendant, and subsequently withdrawn on that account, cannot be read as admissions of defendant. Hurst v. Jones, 10 Lea (Tenn.), 8.

An unsworn answer is a mere pleading. Willis v. Henderson, 4 Scam. (Ill.), 13; Ransom v. Henderson, 4 N. E. R. (Ill.) 141; Willenborg v. Murphy, 36 Ill. 344; Wallwork v. Derby, 40 Ill. 527; Wilson v. Towle, 36 N. H. 129; Morris v. Hoyt, 11 Mich. 9. It is, however, evidence in favor of complainant. Smith v. Potter, 3 Wis. 432; Hyer v. Little, 20 N. J. Eq. 443.

Where the interests of the defendants are separate, an answer on oath may be waived as to one defendant, without waiver as to the others. Bulkley v. Van Wyck, 5 Paige (N. Y.), 536; Morse v. Hovey, 1 Barb. (N. Y.) Ch. 404.

But *quere* where their interests are joint. Stephenson v. Stephenson, 6 Paige (N. Y.), 353.

1. Story Eq. Pl. § 875; 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*733; Wilson v. Grace, 14 Ves. 172; Harding v. Harding, 12 Ves. 159; Van Alenburgh v. Alberry, 10 Iowa, 264.

This requirement is not insisted upon if there is good reason why the answer is not signed by the party. Cooper Eq. Pl. 326, 327; Story Eq. Pl. § 875; 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*734.

It is not necessary, according to the American practice, that the defendant should sign for himself. Counsel may

sign the answer for him. Supervisors, etc., v. Mississippi, etc., R. Co., 21 Ill. 338; Hatch v. Eustaphieve, 1 Clarke (N. Y.), 63.

An answer filed by one purporting to be "agent and attorney in fact" for one of the defendants will not be noticed at the hearing. Palmer v. Yarbrough, 1 Ired. (N. Car.) Eq. 310.

The answer must be signed though oath waived. Kimball v. Ward, Walk. (Mich.), 439.

But name of a municipal corporation need not be signed by an officer of the same. If the name appears, it will, in the absence of evidence to the contrary, be presumed to have been written by one bearing authority. Larrison v. Peoria, etc., R. Co., 77 Ill. 11.

Where members of a firm are not charged with personal knowledge, one partner may answer on behalf of the firm. Reynolds v. Dothard, 11 Ala. 531.

2. Story Eq. Pl. § 876; Cooper Eq. Pl. 327; Davis v. Davidson, 4 McLean (U. S. C. Ct.), 136; 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*732.

By N. J. practice the signature of the solicitor is sufficient. Counsel need not sign. Freehold, etc., Assoc. v. Brown, 28 N. J. Eq. 42.

3. 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*729.

Where defendants have a joint interest only, they will not in general be allowed to sever in their defence. 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*730; Gaunt v. Taylor, 2 Beav. 346; Dudgeon v. Corley, 4 Dr. & War. 158. It is, however, merely a question of costs.

4. Story Eq. Pl. § 853, c.

In a bill in equity where there are several parties defendant, it frequently happens that certain allegations in the bill relate only to the relief sought by particular defendants. Such allegations need not be answered by the other parties defendant. Story Eq. Pl. § 853, c.; Hare Discov. 160; Agar v. Regent's Canal Co., Cooper, 212, 215.

5. Story Eq. Pl. § 871; 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*753, \*754.

A husband and wife must answer jointly where both are parties defendant.<sup>1</sup>

**18. Sworn Answer as Evidence for Defendant.**—Material averments of a bill denied by an answer under oath must be proved by the testimony of two witnesses, or of one witness supported by corroborating circumstances.<sup>2</sup>

The answer of an infant by his guardian cannot be read against the infant. *Stephenson v. Stephenson*, 6 Paige (N. Y.) Ch. 353; *Harris v. Harris*, 6 Gill & J. (Md.) 111; *Kent's Admrs. v. Taneyhill*, 6 Gill & J. (Md.) 1.

Nor do its sworn traverses of material averments of the bill require to be disproved by more evidence than the testimony of a single sworn witness. *Bulkley v. Van Wyck*, 5 Paige (N. Y.) Ch. 536.

In the case of a lunatic with committee, the committee may answer. No order is necessary to entitle the committee to defend, but they must first obtain the permission of the judge or court in the lunacy, before defending. 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*175; *Story Eq. Pl. § 70*; *Harrison v. Rowan*, 4 Wash. (U. S. C. Ct.) 202.

In *Exec. of Brasher v. Van Cortlandt*, 2 John. (N. Y.) Ch. 242, it was held unnecessary to make the lunatic a party to a bill by a creditor for the payment of the lunatic's debts; that the committee, only, need be made defendants. But when the interests of the lunatic and his committee are conflicting, both should be made parties. *Teal v. Woodworth*, 3 Paige (N. Y.) Ch. 470.

A person of weak or unsound mind, but not so found by inquisition, answers by a guardian *ad litem* appointed by order of the court, the same as an infant. 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*176.

1. 1 Dan. Ch. Pl. & Pr. (5th Am. Ed.) \*754; *Story Eq. Pl. § 71*.

In equity, as at law, when a suit is instituted against a married woman her husband must be joined as party defendant. 2 *Story Eq. Jur. § 1368*; *Story Eq. Pl. § 71*.

In general the husband and wife must answer jointly. But where the suit relates to a demand against the wife's separate estate, and the husband is joined solely for conformity, the plaintiff may compel a separate answer from the wife. *Dubois v. Hole*, 2 Vern. 613.

And in certain cases, upon sufficient cause shown, as where the husband and wife are living apart, on application of either husband or wife, leave will be granted to answer separately. 1 Dan.

Ch. Pl. & Pr. (5th Am. Ed.) \*180; *Story Eq. Pl. § 71*. But a wife cannot answer separately from her husband without a special order. *Toole v. DeKay*, 4 Sandf. (N. Y.) Ch. 385; *Robbins v. Abraham*, 5 N. J. Eq. 16; *Leavitt v. Cruger*, 1 Paige (N. Y.), 421.

2. *Story Eq. Pl. § 875, a*; *Langdell, Eq. Pl. § 78*; *Burke's Appeal*, 99 Pa. St. 350; *Nulton's Appeal*, 103 Pa. St. 286; *Rick v. Neitzky*, 1 Marck. (D. C.) 21; *Willdey v. Webster*, 42 Ill. 108; *Blow v. Gage*, 44 Ill. 208; *Slessinger v. Buckingham*, 17 Fed. R. 454; *Hogan v. Smith*, 16 Ala. 600; *Jones v. Perry*, 10 Verg. (Tenn.) 59; *Lee v. Baldwin*, 10 Ga. 208; *Jones v. Slubey*, 5 Har. & J. (Md.) 392; *Hardy v. Summers*, 10 Gill & J. (Md.) 316; *Lyerly v. Wheeler*, 3 Ired. (N. Car.) Eq. 599; *Schwarz v. Wendell*, Walk. (Mich.) 267; *Bank v. Griffith*, 2 Wisc. 443; *Smith v. Clark*, 4 Paige (N. Y.), 368; *Hughes v. Blackwell*, 6 Jones (N. Car.), Eq. 73; *Miles v. Miles*, 32 N. H. 147; *Dunn v. Graham*, 17 Ark. 60; *White v. Walker*, 5 Fla. 478; *State v. Tilghman*, 6 Iowa, 496; *Bird v. Styles*, 18 N. J. Eq. 297; *Gould v. Williamson*, 21 Me. 273; *Union Bank v. Geary*, 5 Pet. 99; *Mason v. Peck*, 7 J. J. Marsh. (Ky.) 300; *Johnson v. Crippen*, 62 Miss. 597.

In *Vigel v. Hopp*, 104 U. S. 441, it was held that the corroborating circumstances must be equivalent to another witness.

In *Jones v. Abraham*, 75 Va. 466, it was held that documentary or circumstantial evidence alone, without any witness, was enough. Accord, see *Jones v. Belt*, 2 Gill (Md.), 106.

Where a sworn answer was filed denying the material allegations of the bill, and the complainant thereupon dismissed and filed a new bill waiving an answer under oath, *held*, that the first answer remained evidence in the second suit, and that its traverses must be disproved by more evidence than the oath of a single witness. *Mey v. Gulliman*, 105 Ill. 272.

The rule does not apply to averments denied upon information and belief. *Berry v. Sawyer*, 19 Fed. Rep. 286; *Allen v. O'Donald*, 28 Fed. Rep. 17; *Pennington v. Gittings*, 2 Gill & J. (Md.) 208. See *Arline v. Miller*, 22 Ga. 330; *Newman v. James*, 12 Ala. 29; *Paulding*

**19. Amendment.**—Amendments of answers are not easily allowed, since they are sworn pleadings.<sup>1</sup>

In general this indulgence is confined to cases of mere mistake or surprise.<sup>2</sup>

**ANTICHRESIS.**—A kind of pledge, known to the Roman law, by which the pledgee took the fruits of the thing pledged in lieu of interest on his loan.<sup>3</sup>

*v. Watson*, 21 Ala. 279; *State v. Hol- loway*, 8 Blackf. (Ind.) 45; *Whittington v. Roberts*, 4 T. B. Mon. (Ky.) 173; *Town v. Needham*, 3 Paige (N. Y.), 546; *Fry- rear v. Lawrence*, 5 Gilm. (Ill.) 325; *Mc- Lard v. Linnville*, 10 Humph. (Tenn.) 263; *Berry v. Sawyer*, 19 Fed. R. 286. Or where the defendant, being called as witness, himself refutes the sworn state- ment in his answer. *Morris v. White*, 36 N. J. Eq. 324. Or in case of an unsworn answer. *Clay, Assignee, v. Towle* (Stat- ute, N. J.), 2 Atl. R. 852. Even though a sworn answer be waived by the bill. *Miller v. Avery*, 2 Barb. (N. Y.) Ch., 582; *Bartlett v. Gale*, 4 Paige (N. Y.), Ch. 503; *Patterson v. Gaines*, 6 How. 550; *Peck v. Hunter*, 7 Ind. 295. Or to alleg- ations in the answer not responsive to the bill. *Randall v. Phillips*, 3 Mass. (U. S. C. Ct.) 378; *Lane v. Marshall*, 65 Vt. 85; *Beckwith v. Butler*, 1 Wash. (Va.) 224; *Gardiner v. Harden*, 12 Gill & J. (Md.) 365; *Planters' Bank v. Stockman*, 1 Freem. (Miss.) 502; *Atwood v. Harri- son*, 5 J. J. Marsh. (Ky.) 329; *Green v. Vardiman*, 2 Blackf. (Ind.) 324; *Walker v. Scott*, 13 Ark. 644; *Cartledge v. Cut- cliff*, 29 Ga. 758; *Leach v. Forbes*, 11 Gray (Mass.), 506; *Fisher v. Porch*, 10 N. J. Eq. 243; *Coleman v. Ross*, 46 Pa. St. 180; *Cloud v. Calhoun*, 10 Rich. (S. Car.) Eq. 358; *Sheldon v. Sheldon*, 3 Wis. 699; *Barton v. Barton*, 75 Ala. 400. Or where the answer does not fully meet the facts as charged. *Gregg v. Renfrews*, 24 Ill. 620.

A denial, not of facts, but of a legal conclusion from them, need not be over- come by evidence. *Gaines v. Russ*, 20 Fla. 157.

Where an answer is discredited upon some points, it is said it will not be sus- tained as to others against the testimony of one witness. *Young v. Hopkins*, 6 T. B. Mon. (Ky.) 18; *Morris v. White*, 36 N. J. Eq. 324; *Forsyth v. Clark*, 3 Wend. (N. Y.) 637.

A corporation cannot swear to its answer. It has therefore been claimed that on this account its answer notsworn to should have the same effect as to the amount of evidence necessary to over- come its denials of material averments

of the bill that is accorded to sworn answers. But this claim has been disal- lowed. *Langdell Eq. Pl. § 78*; *Story Eq. Pl. § 875, a*; *Union Bank v. Geary*, 5 Pet. 99, 110-112; *McLard v. Linnville*, 10 Humph. (Tenn.) 163; *Maryland, etc., Co. v. Wingert*, 8 Gill (Md.), 170.

A sworn answer, in so far as it is re- sponsive, is evidence in favor of a co- defendant, but not against him. *Pleas- anton v. Raughley*, 3 Del. Ch. 124.

1. *Story Eq. Pl. § 896*.

Amendment is usually only allowed in small matters, not in material ones. *Story Eq. Pl. § 896*; *Smith v. Babcock*, 3 Sumner (U. S. C. Ct.), 583.

2. *Story Eq. Pl. § 896*; *Smith v. Bab- cock*, 3 Sumner (U. S. C. Ct.), 583.

3. Generally the pledgee was obliged to account to the pledgor for the prod- ucts of the pledge received by him. *Mackeldy Rom. Law, § 346*; *Pothier Nantissement*, 35; *Story Bailm. § 343*; *Mackenzie Rom. Law* (3d Ed.), 212.

But by special agreement called anti- chresis (*ἀντίχρησις* = an exchange of uses) the creditor was sometimes given the right to retain the fruits of the thing pledged in lieu of interest on his debt, and such a contract was valid, when not made to conceal usury. *Mackeldy Rom. Law, § 346, n. 4*; *Muhlenbruch Doctrina Pandectarum, § 321*; *Story Bailm. § 344*.

In such case the creditor need not ac- count for the fruits.

In modern times the law relating to antichresis has been so modified, that, in all cases, the creditor must account for the fruits or profits received above inter- est and expenses. *Story Bailm. § 344*; *Pothier Nantissement*, n. 20; 1 *Domat*, B. 3, tit. 1, § 1, art. 28; *Civ. Code of Lou- isiana*, arts. 3102, 3143; 4 *Kent Comm.* 138, n. c.

The Welch mortgage was a contract precisely similar to the old Roman anti- chresis. The creditor took the profits of the land in lieu of interest, and was not bound to render any account of them. But in cases of Welch mortgages, courts of equity would, if the value of the rents and profits was excessive, decree an ac- count, any agreement to the contrary notwithstanding. 4 *Kent Comm.* 137.

**ANY.**—A common word in statutes and other writings, having sometimes the sense of "some," but more frequently that of "all" or "every." Like the word "all" (which see), it has often been made the subject of judicial construction, and, like that word, its meaning has been restrained and limited,<sup>1</sup> as in the examples given below.<sup>2</sup>

Antichresis is also analogous to the old *vivum vadium*.

In Louisiana, under the Civil Code, there are two kinds of pledges—the pawn, where the security is movable, and the antichresis, where the security consists in immovables or real estate. Under the latter the creditor acquires the right to take the rents and profits of the land, and to credit the same annually, upon the interest and the surplus upon the principal of the debt, and is bound to keep the estate in repair and to pay the taxes. Upon default the creditor may obtain a decree for selling the thing pledged. 4 Kent Comm. (12th ed.) 137, n. c.; *Story v. Livingston*, 11 Pet. 351; La. Rev. Civ. Code (1870), arts. 3133–3135 and arts. 3176–3181.

It is specially provided that the creditor shall not become the owner of the pledged immovable by reason of the debtor's failure to pay the debt at the stated time, and that any clause to the contrary is void. Rev. Civ. Code, art. 3179; *Livingston v. Story*, 11 Pet. 351.

In *Livingston v. Story*, 11 Peters (U.S.), 351, it was held that an absolute conveyance of land by a debtor to a creditor to secure a debt, accompanied by a counter-letter by the creditor, agreeing to reconvey on payment of the debt, and, in case of default, to sell premises at auction and account to the debtor for the price, the creditor to take immediate possession under the sale, was not a conditional sale (*vente à remède*), because the title of the creditor was not absolute on default by the debtor, but he was bound to sell at auction and account for proceeds; that the transaction was not a mortgage under the Louisiana law, since possession was given to the creditor, and that therefore, by exclusion, it must be construed an antichresis, or pledge of realty.

A letter pledging growing crops is not an antichresis, where the creditor has no right to enter and reap the fruits. *Hagan v. Sompeyrac*, 3 La. 154, 157.

The antichretic pledgee, while bound to make useful and necessary repairs (La. Rev. Civ. Code, 3177), may not make unusual improvements. If he do, he cannot reimburse himself their actual

cost, but only the increased value resulting therefrom. An antichresis and a mortgage may coexist. Prior to foreclosure, the pledgee is entitled to the fruits. Other creditors may cut off an antichresis by a *fi. fa.* *Pickergill v. Brown*, 7 La. Ann. 297. See Rev. Civ. Code, § 3181.

An agreement to hire a slave until the lessor's debt to the lessee be paid from the wages stipulated, amounts to an antichresis, and must be in writing. *Smith v. Tabor*, 7 La. Ann. 582. Compare Rev. Civ. Code, § 3135, which provides that the antichresis shall consist in immovables.

Where a slave is antichretically pledged, the owner cannot sue for his wages until the principal debt has been paid. *Smith v. Taylor*, 14 La. Ann. 663; Rev. Civ. Code, § 3178.

A counter-letter stipulating that the property sold could not be disposed of by the creditor (purchaser) without the consent of the debtor (vendor), and that the property should revert as soon as the debt, the sale was intended to secure, was paid, shows a contract of antichresis. *Calderwood v. Calderwood*, 23 La. Ann. 658.

1. Burrill's Law Dictionary, *sub voce*.

2. Thus in a deed of bargain and sale, where the premises conveyed an estate "to the grantees or any of them, their, or any of their heirs or assigns," and the habendum "to them, their heirs or assigns forever," "any" was construed to mean "each," so as to create a grant of tenancy in common, and not a joint tenancy. *Galbraith v. Galbraith*, 3 S. & R. (Pa.) 392.

The word "any" is synonymous with "either," so an act saying, "any person who shall counterfeit, or utter or attempt to pass, knowing them to be counterfeit, any of the aforesaid gold or silver coins, etc.," means any one of them, that is to say one or more; and an indictment under this act will be sustained by proof of the passing a single dollar, knowing it to be counterfeit. *State v. Antonio*, 3 Wheeler's Crim. Law Cases, 508.

So "any" was construed as "any single one," where an act had declared that "robbery or larceny of obligations or



**APART.**—Separately in regard to space or company; in a state of separation as to place; aside.<sup>1</sup>

**APARTMENT.**—A part of a house; a room; one or more rooms in a house, occupied by one or more persons, distinct from other occupants of the same house.<sup>2</sup>

bonds, etc., shall be punished in the same manner as robbery or larceny of any goods or chattels;" therefore it was held that the act applied to the robbery or larceny of a single obligation, etc. *Com. v. Messenger*, 1 Binney, 273, 276, 280, 286.

The words "any suit," in a statute authorizing a person aggrieved to apply for a jury within one year after the final determination of any suit wherein the legal effect of the doings of the board of aldermen is drawn in question, embrace such suits only in which the applicant is a party. *Shute v. City of Boston*, 99 Mass. 236.

So the words "any creditor" have been limited in a composition-deed to those creditors only who were to receive a composition under the deed. *Wells v. Greenhill*, 5 B. & Ald. 869.

Where an act limited the jurisdiction of a justice to cases where the amount claimed by "any one creditor" did not exceed \$100; and a creditor obtained three several judgments on three separate claims of \$100 each, accompanied by affidavit and bond to each claim respectively, it was held that "any one creditor" meant any one claiming under the same bond and affidavit, and that the justice had jurisdiction. *State v. King*, 5 Ind. 439.

**Any Person or Persons.**—For the limitation of "any" thus used to persons of a particular class, see *U. S. v. Palmer*, 3 Wheaton (U. S.), 610; *Denn v. Goldtrap*, Coxe (N. J.), 272; *Com. v. Loring*, 8 Pick. (Mass.) 370.

So also of things. See *Halsey v. Whitney*, 4 Mason (U. S.), 206, 227; *Pierce v. Richardson*, 9 Metc. (Mass.) 69.

For cases in which "any" has been given by the courts the full force of "all" or "every" in its widest extent, see *Logan v. Small*, 43 Mo. 254; *Overseers of Township of Manchester v. Guardians of St. Pancras*, L. R. 4 Q. B. Div. 409; *McMurray v. Brown*, 1 Otto (U. S.), 257, 265; *The Collector v. Hubbard*, 12 Wallace (U. S.), 1; *Wilmot v. Rose*, 3 El. & Bl. 563; *McComas v. Amos*, 29 Md. 132, 141; *Mayor of Liverpool v. Tomlinson*, 7 Dowl. & Ry. 556; *Heaton v. Wright*, 10 How. Pr. (N. Y.) 79, 83; *Tillon v. Britton*, 3 Halstead (N. J.), 120, 128; *Livermore v. Swasey*, 7 Mass. 212, 227.

1. Web. Dict.

**Living Apart.**—A husband is not "living apart" from his wife within the meaning of a statute dispensing with his joining in a conveyance under certain circumstances, when he is only temporarily absent in pursuit of his ordinary calling, as in the case of a seaman. *Ex parte Gilmore*, 3 C. B. 967.

Nor when the circumstances of his going away are not such as to warrant a belief that he has no intention of coming back. *In re Emma*, 17 C. B. 176.

**Apartment from her Husband.**—In an act providing that the acknowledgment of a married woman should be taken "on a private examination apart from her husband," it was held that the above clause did not exclude the presence of other persons than the husband, as the latter words qualified and explained the former ones, the omission of which from an acknowledgment did not invalidate it. *Den v. Geiger*, 4 Halst. (N. J.) 225.

2. Bur. L. Dict.; Rap. & Lawr. L. Dict.

**Apartment—What is an.**—Where one occupied a part of a house, having a key to the outer door, the landlord not residing in or occupying any portion of the premises; held, that the portion occupied was rightly described as "apartments." *Score v. Huggett*, 7 Man. & G. 95.

Where a house originally entire is divided into distinct partitions to which distinct avenues are allotted so that the several inhabitants have no communication with each other, they are occupiers of "separate apartments," and are ratable to the parish as inhabitants. *Tracy v. Talbot*, 6 Mod. 214.

**Apartment—What is not an.**—A small building on the same lot with a dwelling-house, at the distance of forty-five rods from it, with a lane or open passage-way between them, is not an "apartment" of the dwelling-house, though one person occupies the lot on which both are. *Com. v. Estabrook*, 10 Pick. (Mass.) 293.

**"Apartments" in a Lease.**—By the lease of "apartments" in a house the lessee takes no interest in the land independent of and distinguishable from the apartments rented, and only such as is involved in the enjoyment thereof. *McMillan v. Solomon*, 42 Ala. 356.

**"Apartment" in an Indictment.**—On

**APEX.**—The summit or highest point of anything; the top.<sup>1</sup>

an indictment for burglary in entering the "house, room, apartment, and tenement of A," he being shown to be a lodger, and renting his room from one who was tenant and lessee of the whole house; *held*, that there was no variance between the allegations and proofs. *People v. St. Clair*, 38 Cal. 137.

**"Apartment" of a Prison.**—An inclosed prison-yard containing the only necessary house for the accommodation of prisoners is not an "apartment" of the prison, unless it has been assigned as such. *M'Lellan v. Dalton*, 10 Mass. 190. *Cf. Partridge v. Emerson*, 9 Mass. 122.

**1. Mine.**—For a full discussion of the meaning of this word as used in the U. S. statute (Rev. St. U. S. § 910) in regard to a mining claim, see *Duggan v. Davey*, 26 N. W. Repr. 887. The court said: "The definition of the top or apex of a vein usually given is 'the end or edge of a vein nearest the surface;' and to this definition the defendants insist we must adhere with absolute, literal, and exclusive strictness, so that wherever, under any circumstances, an edge of a vein can be found at any surface, regardless of all other circumstances, that is to be considered as the top or apex of the vein. The extent to which this view was carried by the defendants, and, I must confess, its logical results, were exhibited by Prof. Dickerman, their engineer, who, replying to an inquiry as to what would be the apex of a vein cropping out at an angle of 1 deg. from the vertical, on a perpendicular hillside, and cropping out also at a right angle with that along the level summit of the hill, stated that in his opinion the whole line of that outcrop, from the bottom clear over the hill as far as it extended, would be the apex of the vein. Some other witnesses had a similar opinion. The definition given is no doubt correct under most circumstances, but, like many other definitions, is found to lack fullness and accuracy in special cases; and I do not think important questions of law are to be determined by a slavish adherence to this letter of an arbitrary definition. It is indeed difficult to see how any serious question could have arisen as to the practical meaning of the terms 'top' or 'apex,' but it seems in fact to have become somewhat clouded. I apprehend if any intelligent person were asked to point out the top or apex of a house, a spire, a tree, or hill, he would have no difficulty in doing so, and I do not see why the same com-

mon-sense should not be applied to a vein or lode. Statutory words are to receive their ordinary interpretation, except where shown to have a special meaning; and, as I think the testimony shows that these terms were unknown to miners in their application to veins before the statute, the ordinary rule would seem to apply to them.

"Justice Goddard, a jurist of experience in mining law, in his charge to the jury in the case of *Iron Silver v. Louisville*, defines 'top' or 'apex' as the highest or terminal point of a vein 'where it approaches nearest the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein.' Chief Justice Beatty, of Nevada, who is mentioned in the report of the public lands commission of 1879-80 as 'one of the ablest jurists who has administered the mining law,' in his letter to that commission says, after defining dip and course of strike: 'The top or apex of any part of a vein is found by following the line of its dip up to the highest point at which vein matter exists in the fissure. According to this definition, the top or apex of a vein is the highest part of a vein along its entire course. If the vein is supposed to be divided into sections by vertical planes, at right angles to the strike, the top or apex of each section is the highest part of the vein between the planes that bound that section; but if the dividing planes are not vertical, or not at right angles to a vein which departs at all from a perpendicular in its downward course, then the highest part of the vein between such planes will not be the top or apex of the section which they include.' Report Pub. Lands Com. 399.

"I am aware that in several adjudged cases 'top' or 'apex' and 'outcrop' have been treated as synonymous, but never, so far as I am aware, with reference to a case presenting the same features as the present. The word 'apex' ordinarily designates a point, and so considered the apex of a vein is the summit; the highest point in the vein in the ascent along the line of its dip or downward course, and beyond which the vein extends no further, so that it is the end, or, reversely, the beginning, of the vein. The word 'top,' while including 'apex,' may also include a succession of points,—that is, a line,—so that by the 'top' of a vein would be meant the line connecting a succession of such highest points or apices, thus forming an edge.

**APPARATUS.**—A collection or combination of means for the accomplishment of some purpose; a complete set of utensils or instruments for performing any operation or business.<sup>1</sup>

"I have spoken of the 'dip' or 'downward course' of the vein, treating these words as synonymous, and so I think they must be regarded. 'Dip' and 'depth' are of the same origin,—'dip' is the direction or inclination towards the 'depth,'—and it is 'throughout their depth' that veins may be followed, and that is surely their downward course. Mr. Riotte gives us a different definition. He says: 'Starting any line upon the apex of the vein, and running down upon the vein parallel to the end lines (of the location), the inclination that line has is the downward course of the vein.' And when asked: 'So that the direction of the end lines of a mining location absolutely fixes the direction of the downward course of the vein?' he replies: 'As far as it interests the man who has located that claim.' Elsewhere he says that, in his view of the law, end lines or locations are, as he expresses it, 'swingable,' so that when the locator determines the direction of his ore chutes he may swing his end lines parallel to them, so as to take them in throughout their depth. A very little reflection will show that, if this be the law, a locator, instead of being limited to 1500 feet along the vein, could readily place his end lines at such an angle as practically to control nearly 3000 feet of the vein. With all proper respect for this gentleman's opinion, I cannot accept his views upon this subject at all. I think it clear that the law intended these lines to be laid substantially at right angles to the general course or strike of the vein, since in no other way could the locator be limited to a given length along the ledge.

"This seems to have been the view taken of the law by the three learned judges who sat in the Richmond-Eureka case. It is true that they hold that the provisions of the law of 1872 requiring parallel end lines may be regarded as merely directory, so that a failure to so lay them would not invalidate the location; but I think the whole force of the observations of the court upon this point lies in their assumption that it makes no difference how the miner may choose to locate his end lines, since the law limits his right to that section of the lode or ledge carved out by vertical planes drawn through the extreme points or ends of his line of location at right angles with a line representing the general course or

strike of the lode. In this same case, on appeal to the supreme court of the United States (103 U. S. 844) the fact is noted that the 'zone,' as it is called, dips at right angles to its course or strike, and that the extension downwards of the compromise line, which was coincident with the end lines of the adjacent claims, followed the dip of the zone.

"I have been led into some digression from the strict line of my argument. Bearing in mind the descriptions heretofore given of the two lines of outcrop on Custer hill, if we might suppose that the outcrop along the northerly face were nearly vertical, I do not see how it could be seriously contended that such outcrop, under the circumstances, constituted the top or apex of this stratum of quartzite. Such a conclusion could only be reached, it seems to me, by shutting one's eyes to every feature of the case, except the one fact that there was an edge at or near the surface, which was therefore the top or apex of the vein. This I cannot do without such a violation of the ordinary use of words, and, with all the respect and deference which I feel for the opinions of the learned counsel for the defence, I must say without such a transgression of the dictates of a sound common-sense view of the situation, as, in my judgment, the statute does not contemplate. Nor can I see that there would be any difference whatever in the principle were this outcrop to be found at an angle of 45 deg., or, as it is, at an angle of about 8 deg. from the horizontal. I am compelled, therefore, to hold that this outcrop found in the Sitting Bull location is not the top or apex of this vein, lode, or ledge, and that such top or apex is not within that location. I must regard that outcrop as merely an exposure of the edge of the vein on the line of its dip."

#### 1. Worc. Dict.

**Apparatus of Gaming.**—Game-cocks are not "apparatus or implements of gaming." Implements were defined as "things necessary in any trade or mystery without which the work cannot be performed; also the furniture of a house, as all household goods, implements, etc. And implements of household are tables, presses, bedsteads, and the like." "It does not appear that it has ever been used to denote animals or beings having life. . . . The words 'implements' and

**APPAREL.** See WEARING APPAREL.

**APPARENT.**—What seems to exist or is indicated by appearances<sup>1</sup>; also manifest, evident, proved; what is regularly before the court.<sup>2</sup>

'apparatus' have the same meaning and are so defined. No one, we apprehend, ever did or ever would call a living animal an apparatus." *Coolidge v. Choate*, 11 Metc. (Mass.) 79.

Billiard-tables were held not to be "gaming apparatus" within the meaning of one penal statute, as they were expressly named in another similar statute. *State v. Hope*, 15 Ind. 474.

**Necessary Apparatus.**—In a lease of a paper-mill in which the lessors covenanted to furnish "all necessary apparatus," held, that those words meant, not such articles of necessary apparatus as were at the mill at the date of the lease, but "all apparatus which might become necessary for manufacturing paper according to the ordinary process usually adopted by conductors of such establishments, and that all such apparatus, whether at the mill or not at the date of the contract, was included in the lease." *Patteson v. Garret*, 7 J. J. Marsh. (Ky.) 112.

1. *Johnson v. State*, 5 Tex. App. 433.

2. Burr. Law Dict.

**Apparent Ownership** was defined to be equivalent to "*prima-facie* ownership" in *State Bank v. Hastings*, 15 Wis. 84.

**Apparent Possession.**—The Bill of Sales Act, 17 and 18 Vict., c. 36, s. 1, provides that "personal chattels shall be deemed to be in the apparent possession of the person making or giving the bill of sale so long as they shall remain or be in any house . . . or other premises occupied by him or as they shall be used in and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person." The grantor of a bill of sale being tenant of rooms in which the goods were placed, but residing elsewhere, having made default in paying the sum secured, gave the keys to the grantee, who opened the doors and put his name on some of the goods, though without removing them. Held, that the goods had ceased to be in the "apparent possession" of the grantor, and that the bill of sale was valid as against his execution creditor. *Robinson v. Briggs*, L. R. 6 Ex. 1. See also *Gough v. Everard*, 2 H. & C. 1.

Where goods in the house of a trader, but not belonging to him, were levied upon by the sheriff under a *fi. fa.* against

the trader, held, that this did not disturb the "apparent possession" of the trader, subsequently declared a bankrupt, so that they might be sold by his assignees as against the true owner. *Barrow v. Bell*, 5 El. & Bl. 540.

**Apparent Danger.**—"Apparent danger" of a kind to justify homicide by way of self-defence is such overt, actual demonstration by conduct and acts of a design to take life, or do some great personal injury, as would make the killing apparently necessary to self-preservation. *Evans v. State*, 44 Miss. 773;

**Apparent Intention.**—It was provided by statute that "though a homicide may take place under circumstances showing no deliberation, yet if a person guilty thereof provoked a contest with the apparent intention of killing or doing serious bodily injury to deceased, the offence does not come within the degree of manslaughter." Held, that "apparent danger" meant what was "manifest, beyond doubt, obvious," as distinguished from the popular meaning signifying "that which seems to exist or is indicated by appearances, rather than that which is real or actual." *Johnson v. State*, 5 Tex. App. 423.

**Apparent Easements—Apparent Signs.**—Apparent or continuous easements are those depending upon some artificial structure upon, or natural formation of, the servient tenement, obvious and permanent, which constitutes the easement or is the means of enjoying it; as the bed of a running stream, an overhanging roof, a pipe for conveying water, a drain or a sewer. *Fetters v. Humphreys*, 3 C. E. Green (N. J.), 262.

Where the defendant was not aware of the existence of a drain running under his house at the time it was conveyed to him, and urged that there could be no implied agreement unless the easement were "apparent and continuous," held, that he must have known or ought to have known that some drainage then existed, and if he had inquired he would have known of this drain; and that by "apparent signs" must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. *Pyer v. Carter*, 1 H. & N. 916.

**APPARENT HEIR.** See HEIR APPARENT.

**APPEAL.** (See also WRIT OF ERROR.)

1. *Civil.*

*Generally.*

*When it Lies.*

*By whom Taken.*

*Amount.*

*Time.*

*Notice.*

*Waiver.*

*Effect.*

*Record.*

*What is Open.*

*Practice.*

*Dismissal.*

*Judgment.*

2. *Criminal.*

3. *Legislative.*

[In its modern sense from *appellatio*, Lat.; *appeller*, Fr. (Co. Lit. 278 b.); in criminal proceedings from the Norman-French *apel*, *appeler*, to accuse (Brit. 38 b).]

1. **Civil.**—The removal of a cause from an inferior to a superior court.<sup>1</sup> It was a civil-law proceeding in its origin,<sup>2</sup> and was introduced therefrom into equity, admiralty, and ecclesiastical proceedings, to which it is chiefly confined,<sup>3</sup> and from thence by statute into our common-law proceedings, and to which it was originally unknown.<sup>4</sup> In order, therefore, that an appeal may be sustained the right of the party to appeal must clearly appear,<sup>5</sup> and it is consequently lost by any failure to comply with the statutory regulations.<sup>6</sup> Appeals are distinguished from writs of error in that

**"Apparent Good Order" in Bills of Lading.**—Where in a bill of lading it is admitted that goods were shipped or received in "apparent good order," the word "apparent" does not change the legal effect of the bill of lading. The receipt and giving of the bill are *prima facie* evidence that the goods were in good order, but in any case the admission is limited to the external or apparent condition of the package, so far as the same is open to ordinary observation. Therefore the carrier is not concluded from showing that a loss occurring proceeded from some latent cause or secret defect in the package, though the burden of proof is on him to show that they were not in fact in good order. *The Oriflamme*, 1 Sawy. (U. S.) 176. See also *The California*, 2 Sawy. (U. S.) 12; *Blade v. Chicago*, etc., R. Co., 10 Wis. 4.

**"Apparent Violation" of a Rule of Court.**—In a rule of court declaring that "where more than one count, etc., shall have been used in apparent violation of the preceding rule" which prohibited their use when founded on more than one subject-matter, *held*, that the words "apparent violation" meant that "two things appear to be the same, whether they are so or not. . . . That if the two counts be such that any person conversant with pleading, looking at them, would say that they are founded on the same sub-

ject-matter of complaint, the fifth rule is violated." *Ramsden v. Gray*, 7 C. B. 967. See *Temple v. Keily*, 1 M. & G. 904.

1. 4 Bl. Com. 312; 3 Dall. 321; 7 Cranch, 110.

2. 3 Dall. 321; 7 Cranch, 108; *The San Pedro*, 2 Wheat. (U. S.) 132.

3. *U. S. v. Wonson*, 1 Gall. (U. S. C. Cts.) 5, 12.

4. *Ohio & Mississippi R. Co. v. Lawrence Co.*, 27 Ill. 50; *Mr. Justice Breese in Hammond v. The People*, 32 Ill. 464.

"Appeals are allowed by statute, and can be had in no case unless so allowed. Writs of error are writs of right of, and cannot be refused in any civil case. It may be well said, an appeal will not lie in a given case because there is no statute allowing it." *State v. Meeker*, 19 Neb. 444.

5. *The Schooner Constitution v. Woodworth*, 1 Scam. (Ill.) 511; *Street v. Francis*, 3 Ham. (Ohio) 277; *Wetherbee v. Johnson et al.*, 14 Mass. 420.

Nor will the consent of the parties in interest give any jurisdiction on appeal. *Sampson et al. v. Welsh et al.*, 24 How. 207; *Mills et al. v. Brown et al.*, 16 Peters, 521.

6. *Beardsley, J., in Ladow v. Groom*, 1 Denio, 429.

"Nothing which was done by the commissioner who allowed the appeal or by the justice could make the appeal legal

the former subject both the facts and the law to a re-examination, while the latter is confined to a re-examination or review of questions of law.<sup>1</sup>

*When it Lies.*—An appeal lies only from a final judgment<sup>2</sup> or

without complying substantially with the requirements of the statute." *McNay v. Stratton*, 109 Ill. 30. See also *TIME*.

1. 3 Dall. 321; 7 Cranch, 110; *Dean v. Mason et al.*, 20 How. 198.

2. *Frederick v. Connecticut Savings Bank et al.*, 106 Ill. 147; *Porter v. Deterly*, 1 S. & M. (Miss.) 163; *Lamphear v. Lamprey*, 4 Mass. 107; *International Bank et al. v. Jenkins et al.*, 109 Ill. 219; *McCullum v. Eager*, 2 How. 61; *Walker v. Spencer*, 86 N. Y. 162.

In *Logan v. Harris*, 90 N. Car. 7, Judge Merrimon, in delivering the opinion of the court, said, in speaking of an appeal, "The entry of a judgment on the record is essential to its completeness and efficiency. It is this that gives it life and certainty, and perpetuates it as an established memorial. It is not sufficient that the court had taken its resolution as to what judgment it would enter: this is only in the mind of the judge. To make his purpose a judgment, it must be entered of record, and until this shall be done, there is nothing to appeal from. . . . It is probable that in this case the court intended to enter a judgment, and the parties and their counsel so understood, but what judgment, does not appear; nor is there any minute from which we can ascertain what it was intended to be. It is said in the case upon appeal there was 'judgment,' but none appears in the record proper."

**As to what Constitutes a Final Decree.**

—"As we have had occasion to say at the present term in *Bostwick v. Brinkerhoff*, 106 U. S. 3, and *Grant v. Phoenix Insurance Co.*, 106 U. S. 429, a decree is final for the purposes of an appeal to this court when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." Mr. Ch. J. Waite in *St. Louis, I. M. & P. R. Co. v. Southern Express Co.*, 108 U. S. 24.

A decree which adjudges costs and awards execution. *Mo., K. & T. R. Co. v. Dinsmore*, 108 U. S. 30.

Or which settles all the equities between the parties. *Hastie & Silver v. Aiken et al.*, 67 Ala. 313; *Thompson et al. v. Brooks et al.*, 76 Va. 160.

As for instance, a refusal to grant a decree to restrain the foreclosure by a mortgagee on a fraudulent conveyance of real

estate on petition of assignee in bankruptcy. *Ex parte Norton*, 108 U. S. 237.

Or a decree enjoining the sale of real estate. *Richards & Merrill v. Coon*, 13 Neb. 419.

Or an order of sale in partition. *Flie-nor et al. v. Driskill et al.*, 97 Ind. 27.

Or an order to pay costs. *Cleveland et al. v. Burnham*, 60 Wis. 16.

Or an order dismissing for want of jurisdiction. *Ross v. Evans*, 30 Minn. 206.

Or an order assuming jurisdiction. *Curran v. Excelsior Coal Co.*, 63 Iowa, 94.

Or dismissal of a rule to show cause why a writ of prohibition should not be granted. *Singer Mfg. Co. v. Spratt*, 20 Fla. 122. *Contra*, *People ex rel. v. Westbrook et al.*, 89 N. Y. 152.

Or orders after final judgment. *I. M. B. A. v. Superior Court*, 65 Cal. 506.

Or a decree fixing compensation of trustees. *Williams et al. v. Morgan et al.*, 111 U. S. 684.

Or any judicial act. *In re Application of Cooper*, 22 N. Y. 67.

As an order suspending a jailer in the discharge of his duty. *Lowe v. Commonwealth*, 3 Met. (Ky.) 237.

Or the rejection of a collector's bond. *Ex parte Lowman*, 42 Ark. 37.

When the appointment of a receiver takes from an administrator the management and custody of property. *Perrin v. Lepper*, 56 Mich. 351.

*Cooley*, Ch. J., said, in delivering the opinion in this case, "The order appointing a receiver in this cause took from the complainant the entire custody and management of the property of the estate of Horace J. Perrin, of which he was administrator, and transferred it to the person appointed, who was a stranger to that estate. It was therefore appealable within the decision in *Barry v. Briggs*, 22 Mich. 201.

And many other cases decided by this court. See particularly *Port Huron, etc., R. Co. v. Jones*, 33 Mich. 303; *Taylor v. Sweet*, 40 Mich. 736; *Morey v. Grant*, 48 Mich. 330.

It would be a serious reproach to the law if a litigant could be thus summarily divested of his legal possession and excluded from it pending what might be a long litigation, with no redress whatever except in future restoration, when perhaps it had been demonstrated that the

some decree affecting substantial rights and equivalent thereto.<sup>1</sup> It does not lie from a mere interlocutory or provisional judgment,<sup>2</sup> unless expressly authorized by statute;<sup>3</sup> consequently an appeal

original exclusion was unwarranted. But we have said enough in the cases above cited to show that the law is not subject to this reproach."

Or any order as to a receivership which determines a question of right between the parties to the suit and directs the statement of an account upon the principles of such determination. *Reeder v. Machen & Mason, Receivers*, 57 Md. 56.

A refusal to strike off a judgment entered on Sunday and make proper entry thereof is such a final judgment as will support an appeal. *Ecker v. First National Bank*, 62 Md. 519.

Or the rejection of a final report. *In re Town of Clinton*, 52 Conn. 5.

Or a decree of the court below granting or refusing a review. *Kupfer v. Force*, 86 Ind. 81.

Or an order on the sheriff to pay over money. *Coykendall v. Way*, 29 Minn. 162.

Or any distribution of property. *Savannah v. Jesup*, 106 U. S. 563.

Or an order setting aside an award. *Garitee v. Carter*, 16 Md. 309.

Or an order appointing a guardian. *Pote's Appeal*, 106 Pa. 574.

1. *Peeper v. Peeper et al.*, 57 Wis. 507.

Orders affecting substantial rights are *res adjudicata*. *Spitley v. Frost*, 15 Fed. Rep. 299; *In re Estate of Ten Eyck*, 36 Hun. 575.

2. An appeal will not lie from a motion overruling a motion to quash a writ of error *coram nobis*. *Bridendolph v. Yeller's Exrs.*, 3 Md. 325.

Nor from an interlocutory judgment to a demurrer. *Griffie v. Mann et al.*, 62 Md. 248.

As an order overruling a demurrer. *Kirchner v. Wood et al.*, 48 Mich. 199.

Nor the appointment of a receiver in an action of partition. *Emeric v. Alvarado*, 64 Cal. 529.

Nor of a railroad. *Kansas R. M. Co. v. A., T. & S. F. R. Co.*, 31 Kan. 90.

Nor that property be delivered to a receiver pending litigation. *Forgay et al. v. Conrad*, 6 How. 201; *Donaldsonville v. Ascension Police Jury*, 33 La. Ann. 248.

Nor an order for striking out redundant matter as it does not affect substantial rights. *Carpenter v. Reynolds*, 58 Wis. 666.

Nor an order for judgment. *Macrievin v. Macrievin*, 63 Cal. 186.

Nor a decree in favor of plaintiff for

title and possession of land and improvements and ordering a reference to a master. *Fitzpatrick v. Phillips*, 106 U. S. 429.

Nor an order affirming part of a decree and reversing part of it in the intermediate court. *International et al. v. Jenkins et al.*, 109 Ill. 219.

Nor a judgment of such intermediate court remanding the cause to the lower court. *Bolles v. Stockman*, 42 Ohio St. 445.

Nor the refusal of judge to grant a license. *Martin & Milliken v. Probate Judge*, 32 Kan. 146.

Nor for setting aside a judgment. *Ray et al. v. Northup*, 55 Wis. 396.

Nor for a refusal to modify the terms of a reference. *Attorney-General v. Continental Life Ins. Co.*, 90 N. Y. 45.

Nor a refusal to allow amendments. *Wiggins v. McCoy*, 87 N. Car. 499; *Dennis v. Snell*, 50 N. Y. Sup. Ct. 95; *New York Ice Co. v. Northwestern Ins. Co.* 23 N. Y. 357. *Comstock, Ch. J.*, in delivering the opinion of the court, said, *inter alia*: "I am of opinion that the supreme court had no right to entertain the appeal at all from the order of the special term. That order, in its substance and nature, simply allowed a pleading to be amended in furtherance of the justice of the case. Such orders rest in the discretion of the court which makes them. They involve no substantial right, and they are not reviewable on appeal."

Nor for an order granting a continuance. *Read v. Gooding, Mull & Co.*, 20 Fla. 773; *Wilson v. City of Wheeling*, 19 West. Va. 323.

For "a motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case, and although an appellate court will supervise the action of the court on such a motion, it will not reverse a judgment on that ground, unless such action is plainly erroneous." *Haymond, J.*, in the last-cited case.

Nor in cases of *habeas corpus*. *In re Coston*, 23 Md. 27; *Weddington et al. v. Sam Sloan*, 15 B. Mon. (Ky.) 147.

Except when authorized by statute. *Doyle v. The Commonwealth*, 107 Pa. 20.

Nor would an appeal lie, it would seem, in New York, without the decision of the full bench of the court below. *People ex rel. v. The Marine Ct.*, 2 Abbt. Pr. 126.

3. *Hilliard on New Trials*, chap. xxi. § 37.

cannot be taken from any order or decree within the discretion of the court making it,<sup>1</sup> or where the court below has in view a further disposition of the cause.<sup>2</sup> They are more frequently given to the party aggrieved by the decisions of courts of probate or justices of the peace. In such cases the statute fixes the amount or determines the particular subject-matter in litigation in regard to which an appeal may be taken.<sup>3</sup>

*By Whom Taken.*—An appeal can only be taken by those parties affected by the decree or judgment,<sup>4</sup> or whose substantial rights are prejudiced thereby,<sup>5</sup> but all such parties must be joined in the appeal.<sup>6</sup>

*Amount.*—When the jurisdiction of the appellate tribunal depends on the amount in controversy, it must be tested by the actual sum laid in the pleadings, exclusive of costs,<sup>7</sup> or in other

Statutes have been passed in many of the States designating writs of error, appeals; and the effect of this has been that cases which are in all but name writs of error are put under the title "Appeal" in the United States and the various State digests, thereby causing endless confusion. But it has been held in substance that the remedy of appeal furnished by the codes, so far as relates to common-law actions, is a mere substitute for the old writ of error, the change being merely one of name, and that in respect to suits in equity it is identical with the former appeal. Hilliard on New Trials, chap. Appeal, § 2; Bayliss on New Trials and Appeals, p. 1.

1. *In re* Thirty-fourth Street (N. Y.), 3 Central Repr. 305; Truett v. Rains, 17 S. Car. 451; Dows et al. v. Congdon et al., 28 N. Y. 122; The People v. The N. Y. C. R. Co., 29 N. Y. 418.

As an order of commitment for contempt. Crow v. The State, 24 Tex. 12; Huerstal v. Muir, 62 Cal. 479; State ex rel. v. Giles, 10 Wis. 101; Cars v. Maxwell, 20 Fla. 17; A. & P. Telegraph Co. v. B. & O. Telegraph Co., 87 N. Y. 355.

Without the discretion be abused and one of the parties be injured thereby. Market Nat. Bank of N. Y. v. The Pacific Nat. Bank, 102 N. Y. 464; Logan v. Logan, 90 Ind. 107; Louvais v. Leavitt et al., 53 Mich. 577.

That a commitment for contempt may be reviewed. Romeyn v. Caplis, 17 Mich. 449; Waner v. The State, 13 Lea (Tenn.), 152.

The taxation of costs by the lower court cannot be reviewed except in a flagrant case. Miskey's Appeal (Pa.), 3 Central Repr. 299.

2. Bolles v. Stockman, 42 Ohio St. 445; Tenby v. Martin, 80 Ky. 463.

As during the time a motion for a new

trial is pending. Kenney v. S. & N. Alabama R. Co., 73 Ala. 536.

Or where an appeal is taken after moving for the alteration of a decree and before its determination. Vincent v. Vincent, 3 Mack. (D. C.) 320.

Or any issues are pending below. Robinson v. Hall, 35 Hun (N. Y.), 214.

If, however, substantial rights are determined, an appeal will lie. Mackall v. Richards, 112 U. S. 396.

3. Hilliard on New Trials, § 2, Chap. Appeal.

4. Montgomery v. Leavenworth, 2 Cal. 57.

But a trustee is not such a party. On the distribution of a fund his commissions are not affected. Stewart v. Codd, 58 Md. 86.

5. Comb, etc., v. Jefferson P. D. Co., 3 Met. (Ky.) 72; Rowen v. King, 25 Pa. St. 409.

6. Brewster v. Wakefield, 22 How. 118; Clifton v. Sheldon, 23 How. 481; Day et al. v. Washburn et al., 23 How. 309; Lovejoy v. Inlan, 17 Md. 525.

Without the interests can be separated. Knight et al. v. Weiskoff, 20 Fla. 140.

Or where a decree joint in form is substantially against one. Raub v. Relief Association, 3 Mack. (D. C.) 68.

Or when some of the parties to the suit below have no interest in maintaining or reversing the decree. Basket v. Hassell, 107 U. S. 602.

7. Bradenberger v. Rigler, 68 Iowa, 300.

Reed, J., in delivering the opinion of the court in Curran v. The Excelsior Coal Co., 64 Iowa, 94, said: "We think the costs are not to be included. The questions in controversy between the parties are those put in issue by the pleadings, and the amount in controversy is the sum claimed as damages in the plead-



words, the *bona-fide* claim of the plaintiff,<sup>1</sup> and the rule is the same where the judgment in the court below is for an amount less than that over which the appellate court may take jurisdiction.<sup>2</sup> This right of appeal exists also where the amount of defendant's set-off equals or exceeds that authorizing an appeal.<sup>3</sup> Nor can it be

ings. The question in controversy in this case was whether the plaintiff was entitled to recover damages from the defendant on account of the wrong of which he complained, and, if so, the amount of that controversy. As an incident of the controversy certain costs are taxed under the statute against the losing party as compensation for the officers who have rendered services in the case, or for witnesses who have given testimony in it. But the question as to who shall pay these costs is not the subject of the controversy between the parties. The suit is brought and prosecuted for the enforcement or protection of the right involved, or for redress of the wrong complained of, and not for the recovery of such costs as may accrue in its prosecution. These, as we have said, are taxed to pay the officers and witnesses. The successful party has no interest in them except in cases where he has advanced the costs.'

*Ex rel. Seymour v. Judges, etc.*, 34 La. Ann. 1046; *Gillespie v. Benson*, 18 Cal. 409; *Zoebler v. Riley*, 98 N. Y. 668.

If the matter before the court is divisible, each of these separate claims must be of itself sufficient in amount to give jurisdiction to the appellate court. *Elgin v. Marshall*, 106 U. S. 578; *Tupper et al. v. Wise*, 110 U. S. 398; *St. Louis Bank v. Stout*, 113 U. S. 684.

But *contra*, *Cummins v. Holmes et al.*, 107 Ill. 552, as in case of trustee for the benefit of creditors, where the separate claims would be insufficient for the appellate court to have jurisdiction. *Atkinson v. McCormick*, 76 Va. 791.

1. Interest to the date of judgment may be included in order to give appellate jurisdiction. *The Patapsco*, 12 Wall. 451.

This decision is not inconsistent with *Moore v. Wait*, 1 Ben. (Pa.) 319; *Walsh v. Mayer*, 111 U. S. 31; *Aymar v. Bourgeois*, 36 La. Ann. 392. *Contra*, *Panitt v. Stuart*, 5 Ala. 112. The test is, Was it possible for either party to obtain judgment equal to or more than the amount giving jurisdiction to the appellate court? *Centreville v. Drake*, 58 Iowa, 564.

But a merely colorable claim is insufficient. *Tower v. Lamb*, 6 Mich. 362; and *Cox v. Carr, et al.*, 79 Va. 28. *Rich-*

*ardson, J.*, in delivering the opinion, expressed himself as follows: "The well-established rule of this court is that it has jurisdiction in civil cases with certain exceptions not necessary to be mentioned, where the matter in controversy exclusive of costs exceeds in value or amount five hundred dollars at the date of the judgment or decree complained of. This is ascertained by excluding only the costs. The usual test is, where the plaintiff sues for money, the amount claimed in his declaration or bill. *Gage v. Crockett*, 27 Gratt. 735.

By this it must not be understood that the plaintiff by any reckless, unfounded claim could acquire jurisdiction in this court, especially if, looking to the whole record, the court can see that the amount claimed is with a view of improperly acquiring jurisdiction in this court.

In *Fink v. Dering*, 75 Va. 667, it is said: "If the claim is merely colorable in order to give the court jurisdiction, and that was made to appear, jurisdiction would be declined, for jurisdiction can no more be conferred than it can be taken away by improper devices of parties." See also *Hansborough and Wife v. Stinnett*, 22 Gratt. 593.

2. *Downey v. Ferry*, 2 Watts (Pa.), 304; *Walsh v. Mayer*, 111 U. S. 31. *Contra*, *Tower v. Lamb*, 6 Mich. 362; *Hart v. Funk*, 15 Ala. 675; *Parsley v. Eskew*, 73 Ind. 558.

But in this case the defendant has no right to appeal. *Cox v. Carr et al.*, 79 Va. 28.

3. *Smith v. Memphis & Louisville R. Co.*, 18 Fed. Rep. 304; *Thompson v. Butler*, 95 U. S. 694; *Capen et al. v. De Steiger Glass Co.*, 105 Ill. 185; *Downey v. Ferry*, 2 Watts (Pa.), 304; *Prestly v. Ross*, 11 Pa. 411; *Church v. French*, 54 Vt. 420.

But the amount of the set-off cannot be added to the original claim in order to make an amount sufficient for the appellate court to take jurisdiction. *Fox v. Duncan*, 60 Iowa, 321; *St. Clair v. Day*, 89 N. Y. 357. *Contra*, *Shriver v. Bowen*, 57 Ind. 266; *Bowles et al. v. Brier et al.*, 87 Ind. 391.

In a Missouri case plaintiff sued for over \$2500 (the amount giving a right of appeal), but defendant claimed and was al-

defeated by the plaintiff's remitting to the defendant part of his judgment.<sup>1</sup>

*Time.*—All appeals must be brought within the time allowed by the statute, or the right will be lost;<sup>2</sup> and it is a right which cannot be extended by any agreement of the parties,<sup>3</sup> or by the court,<sup>4</sup> after the time for entering an appeal has elapsed; nor can the presence of the opposite party in court give any jurisdiction;<sup>5</sup>

lowed a set-off, which reduced plaintiff's judgment below that amount; it was then held that the appellate court had no jurisdiction. *Kerr v. Simmons et al.*, 82 Mo. 269.

Where defendant tenders part of the claim the sum not tendered is the amount to determine jurisdiction on appeal. *Marlow v. Marlow*, 56 Iowa, 299; *Young v. McWaid*, 57 Iowa, 101.

1. *Smith v. Memphis & Little Rock R. Co.*, 18 Fed. Rep. 304.

2. *Cherry Township v. Marion Township*, 96 Pa. 528. In this case it was held that if an appeal be taken to an adjourned or special term of the next term, and the statute required the appeal to be taken to the next term, it came too late. And where there was a failure to affix the seal of the court below before the expiration of the time within which an appeal must be taken, it was held the right to appeal was lost. *Mason v. Gibson*, 13 Ill. App. 463.

The bond must be given within the time allowed by statute for taking an appeal. *Pace v. Ficklin's Exrs. et al.*, 76 Va. 292.

And under the statutes of some States the clerk's fees must be paid. *Loomis v. McKenzie*, 57 Iowa, 77.

3. *Flory et al. v. Wilson*, 83 Ind. 391.

The filing of the petition in the court below and giving due notice to the clerks of the court and the opposite solicitor is an entry of the appeal, and the time for filing the transcript may then be extended. *Platt v. Preston*, 19 Blatch. 312.

But the application to extend must be made within the time in which an appeal may be taken. *Cook v. Cook*, 104 Ill. 98; *Patterson v. Stewart*, 104 Ill. 104; *Terhune v. Pinkney, et al.*, 39 N. J. Eq. 494.

Where the last day for filing an appeal is a non-judicial day an appeal taken on the next day is in time. *Estate of Rose*, 63 Cal. 346.

But that a failure to take an appeal within the proper time may be waived by the action of the adverse party. *Sleck v. King*, 3 Bar. (Pa.) 211.

In *Mott v. Ramsay*, 90 N. Car. 372, it was held that the sickness of an attorney

was a sufficient excuse for want of diligence in perfecting an appeal. That the appeal will not be entertained, though the appellant was prevented from perfecting the appeal by virtue of the death of the appellee. *Hopper v. Jones (Md.)*, 3 Central Reporter, 225.

4. *Wait v. Van Allen*, 22 N. Y. 319; *Westmoreland Co. v. Overseers of Cone-maugh*, 34 Pa. 232.

5. *Dowell v. Caruthers*, 26 Kan. 720. *Valentine, J.*: "The only question, then, for us to consider is whether the voluntary appearance of the defendant in error, plaintiff below in the district court, rendered the appeal of the plaintiff in error, defendant below, valid. No rules with respect to appeals which are merely irregular, but not void, can have any application to this case. An irregular appeal might be rendered good by a voluntary appearance, and if the appellee does not move to dismiss the appeal within a reasonable time, where the appeal is merely irregular, he will waive all right to make such a motion afterwards; but that is not this case. In this case the appeal was not merely irregular, but it was absolutely void."

In Michigan it was held in the case of *Moore v. Ellis*, 18 Mich. 77, that "where a party against whom a decree was made in chancery undertook to appeal therefrom, but failed to perfect his appeal within the time limited by law, it was held that no laches of the opposite party in moving to dismiss could preclude his right to have the case dismissed on that ground." The court in that case held that the filing of a bond is a jurisdictional act, and that if no bond is filed no jurisdiction is conferred upon the appellate court. This, we think, is generally true. Of course there are exceptions to this rule. If the plaintiff in this case had gone to trial without making any motion to dismiss the appeal, and had taken the chances of a finding or verdict in his favor, we do not think that he could then have moved to dismiss the appeal, and he might also by other acts have waived his right to make any such motion; but we do not think that he waived his right to make the motion, or

but mere irregularities, however, in perfecting an appeal may be waived or amended.<sup>1</sup> The statutes of most of the States require appeal to be brought to the next term of the appellate court,<sup>2</sup> and if the record is not filed at that time the appeal is said to be abandoned;<sup>3</sup> but if the failure to file the record is due to the delay of the clerk it is not an abandonment.<sup>4</sup>

**Notice.**—The general rule of law requires that the appellee should have notice of an appeal. Where he has actual notice, that is sufficient; but in other cases there must be an appearance,<sup>5</sup> or a notice or citation duly served by an authorized person and in proper form, or the appeal may be dismissed.<sup>6</sup> It is also necessary that the notice be sufficiently explicit as to leave no doubt as to the cause to which it is intended to refer.<sup>7</sup>

**Waiver.**—An appeal is waived on a case stated,<sup>8</sup> but in ordinary

that he estopped himself from the motion by a mere voluntary appearance in the court. By making a voluntary appearance in the court he simply surrendered to the court jurisdiction of his person, so that the court might have made any order or rendered any judgment with reference to him which would be right under all the circumstances for the court to make or render."

1. As where the clerk has mislaid papers and delays the case. *Whitaker v. Tracy*, 41 Ark. 259.

Or an omission to enter the appeal where it has been taken in open court. *Hudgins et al. v. Kemp, Assignee, etc.*, 18 How. 530.

Or where, owing to the inability of the judges to be present on return day, the appeal is not entered until the first day after return day on which they are present. *Chaffee & Sons v. McIntosh*, 36 La. Ann. 824.

Or the judge neglects to sign the order. *Austin v. Scovill et al.*, 34 La. Ann. 484.

Or an agent takes an appeal and neglects to file his written authority owing to its loss. *Booten et al. v. Bank of the Empire State*, 67 Ga. 358.

Or any delay caused by the judge. *McIlhane v. Holland*, 111 Pa. 634.

2. *Suiter v. Brittle et al.*, 90 N. Car. 19.

And in such cases an appeal taken to the next term but one is in time where another statute requires that the reasons of the appeal should be filed a certain number of days before the next term, and the first day of that term comes before the time required by statute for the filing of the reasons has elapsed. *McCaffrey v. Doyle*, 14 R. I. 313; *Owens et al. v. Crossett*, 104 Ill. 468.

3. *Edmonson v. Bloomshire*, 7 Wall. 306.

4. *Laymance v. Laymance*, 15 Lea (Tenn.), 476.

5. The appearance of the opposite party is sufficient proof of the service of the notice of appeal. *Libbey v. McIntosh*, 60 Iowa, 329.

6. *Alviso v. United States*, 5 Wall. (U. S.) 824; *O'Kane v. Daly*, 63 Cal. 317; *Knight et al. v. Wushoff*, 20 Fla. 140; *Reed v. Allinson*, 61 Cal. 461; *Mead v. Platt*, 17 Fed. Rep. 509.

And the notice must show that it was served. *Anderson et al. v. Knott*, 1 Idaho, 626.

But publication in a newspaper may be sufficient under a statute requiring "opportunity." *Morse v. Stockman et al.*, 65 Wis. 36.

The writ must be properly tested. *Joosh v. Elliott*, 20 Fla. 924.

A copy of the notice, however, properly directed and put in the post-office is sufficient. *Brown v. Green*, 65 Cal. 221.

But it would seem the parties must reside in separate places under the California statute to take advantage of the service of the notice by post. *Cunningham v. Warnekey*, 61 Cal. 507.

A party taking an appeal cannot object to the solicitor of the appellee being heard on the ground that his client is dead. *In re Beckville*, 90 N. Y. 667.

But service on a party's attorney is sufficient. *Thorson v. St. Paul Fire & Marine Ins. Co.*, 32 Minn. 434.

7. *Morris v. Brewster et al.*, 60 Wis. 229.

It cannot be waived by a stipulation of the parties. *Deadwood v. Newton et al.*, 2 Dak. 39.

8. *Wellington v. Stratton*, 11 Mass. 494; *Fuller v. Trevor et al.*, 8 S. & R. 529.

Consequently an appeal will not lie from any order made with the consent of

agreements not to appeal the language must be so clear as to leave no doubt that such is the intention.<sup>1</sup> And the acceptance by the plaintiff of the satisfaction of decree is not a release or waiver of errors, and a party is not estopped thereby from appealing.<sup>2</sup>

*Effect.*—Though on an appeal proper the cause is tried *de novo*,<sup>3</sup> yet it is but a continuation of the old cause;<sup>4</sup> and when the appeal is properly taken it becomes a *supersedeas*, or a stay of proceedings to enforce execution.<sup>5</sup> When the appeal is perfected and the bond is properly executed the jurisdiction and control of the court below ceases,<sup>6</sup> and no motion can be entertained during the pendency of the appeal.<sup>7</sup> Where, however, the court below has no jurisdiction, none arises in the appellate court by virtue of the appeal.<sup>8</sup>

*Record.*—It should contain whatever is necessary to be en-

the party appealing. *Pemberton's Case*, 13 Stewart (N. J.), 520; *Atkinson v. Manks*, 1 Cow. (N. Y.) 691.

But when the agreement on the case stated was obtained by fraud an appeal will lie. *Rowell, Adm., v. Turner*, 139 Mass. 97.

1. *Stediker v. Bernard*, 93 N. Y. 589. But an agreement not to appeal does not preclude a writ of error. *Putnam v. Church*, 4 Mass. 516.

2. *Morris, etc., v. Garland's Adm. et al.*, 78 Va. 215; *In re New York Central R. Co.*, 60 N. Y. 112; *Embry v. Palmer*, 107 U. S. 8.

3. *Walden v. Berry*, 12 Wr. (Pa.) 456; *O'Leary v. Fargher*, 11 Or. 225.

But in order to secure a trial *de novo*, not only all the evidence received but all the evidence offered must be certified. *Clinton Lumber Co. v. Mitchell et al.*, 61 Iowa, 132.

4. 3 Dall. 321; *Mitchell v. Laub*, 59 Iowa, 36; *The State v. Forner*, 32 Kan. 281; *Bratt v. Marum*, 24 W. Va. 652.

5. *Washington, Georgetown & Alexandria R. Co. v. Bradley*, 7 Wall. (U. S.) 575; *Mill v. Compant*, 16 Ind. 107; *State v. King*, 94 Ind. 371; *Doane's Admrs. v. Penhallow et al.*, 3 Dall. 54; *McGill v. McGill*, 19 Fla. 341; *Brainerd v. Taylor*, 80 Mo. 436.

But the court below retains the right (concurrently with the supreme court) to preserve the *status in quo* of the parties. *New Brighton & New Castle R. Co. v. Pittsburgh, Youngstown & Chicago R. Co.*, 105 Pa. 13.

And where the appeal is taken by the party in whose favor the decree is rendered it operates as a *supersedeas* without filing a bond. *Bronson v. La Crosse & Milwaukee R. Co.*, 1 Wall. (U. S.) 405.

That the verdict and judgment were vacated by the appeal. *Long v. Hitchcock*, 3 Ohio, 274.

6. *Coutes v. Wilkes*, 94 N. Car. 174; *Keyser v. Farr*, 105 U. S. 265; *State v. Rowland et al.*, 36 La. Ann. 192; *Stone v. Spellman*, 16 Tex. 432; *Levi v. Karick*, 15 Iowa, 444.

But the filing of the cost bond alone does not prevent the court below from awarding execution. *Bailey v. James*, 64 Tex. 546.

Nor when the appeal taken is in the nature of a writ of error. *Cain v. Williams*, 16 Nev. 426.

The courts of some States hold that the court below has control of its judgment until the close of the term at which it was rendered. *Grubb v. Leon & Blum*, 62 Tex. 426.

7. *Skinner v. Bland*, 87 N. Car. 168; *Penrice v. Wallis et al.*, 37 Miss. 172.

Hence a restraining order, in some of the States, dissolved by a dismissal of a bill in equity remains in force pending an appeal from the order dismissing the bill where the proper steps are taken to secure a *supersedeas*. *Lewis v. Leahey*, 14 Mo. Ap. 564.

But that the appellate court will not suspend the operation of a perpetual injunction pending an appeal. See *Swift v. Shepard*, 64 Cal. 423.

8. *Osgood v. Thurston*, 23 Pick. (Mass.) 110; *Moore v. Hillebrant*, 14 Tex. 312; *Mordecai et al. v. Lindsay et al.*, 19 How. 199. Mr. Justice Wayne, in delivering the opinion of the court in the case last cited, said: "It [referring to the supreme court] cannot overlook the fact upon which its jurisdiction depends by any action in the case in the circuit court upon an irregular appeal. The case in that court was *coram non judice*, and is so here."

rolled according to the law or practice of courts. But what it is not necessary to enroll, such as testimony, exceptions, etc., does not form any part of the record unless made so by order of court, by agreement of the parties, by demurrer to evidence, by oyer, by bill of exceptions, or by special verdict.<sup>1</sup> It should be certified as it originally stood, and all improper changes must be ignored by the appellate court.<sup>2</sup> The opinion of the court nor the evidence is not part of the record without it is made so in the proper manner, and putting it upon the transcript does not make it so.<sup>3</sup> No evidence outside of the record will be considered.<sup>4</sup>

*What is Open.*—All the facts and the law in the record or that are made part of the record by exceptions or in any other proper manner are open to a re-examination and rehearing;<sup>5</sup> and though the cause be heard as if the proceedings were original, yet the court above will not consider questions not excepted to or presented during the trial<sup>6</sup> at the proper time,<sup>7</sup> for they are said to be waived.<sup>8</sup> Objections first taken to evidence in the court above come too late;<sup>9</sup> nor can the ground of the complaint or defence be shifted in the court above from that taken below.<sup>10</sup> The appellate court, however, will take notice of an objection raised for the

1. *Lenox v. Pike*, 2 Ark. 14; *Olds v. Deckman*, 98 Ind. 162.

A motion for change of venue is not part of the record without a bill of exceptions. *Heacock v. Hosmer*, 109 Ill. 245. Nor a master's report. *Stanton et al. v. The State*, 82 Ind. 463.

2. *Kennedy v. Kennedy*, 13 Lea (Tenn.), 24; *Carskadden v. Bartlett*, 63 Iowa, 180.

A short-hand report properly certified may be made a part of the record. *Ross v. Loomis*, 64 Iowa, 432. But it is not ordinarily so. *McAllister v. Connecticut Mutual Life Insurance Co.*, 78 Ky. 531.

3. *England v. Gebhardt*, 112 U. S. 502.

4. *Bond v. Citizens' National Bank*, 4 Atl. Repr. 893; *Bevin et al. v. Rowell et al.*, 11 Mo. App. 216; *Carmichael et ux. v. Cox*, 85 Ind. 151.

5. 7 Cranch. 110; *Owen v. Shelhamer*, 3 Bin. 48.

6. *Harrington v. Minor*, 80 Mo. 270. *Ewing, C.*: "No objection was made on the trial by appellant to the introduction of the testimony or the mode of assessing the damages, nor were there any instructions of law asked or given by the court. There is nothing in this case for this court to review. The only way in which errors can be corrected, if the law is wrongfully decided or a mis-application of the law to the facts is made by the lower court, is to ask declarations of law or instructions in order that this court may see upon what theory the court below proceeded." *Boyd v. Platner*, 5 Mont. 226; *Hummell's Appeal*, 5

Atl. Repr. 669; *Heinion v. Stillwell*, 34 Hun, 178.

As, for instance, what has been ignored below. *Clark Bank v. Christie*, 61 Wis. 9. And an error not well assigned to all appellants cannot be available for any. *Jones et al. v. Carter*, 96 Ind. 306; *Padgett v. Sweeting*, 4 Atl. Repr. 887.

An objection for failure to join parties can only be taken first in the court above when such failure would deprive them of rights. *Mfg. Co. v. Wire Fence Co.*, 109 Ill. 71.

7. *Hallowell's Appeal*, 20 Pa. 215; *Wilson v. Church*, 60 Iowa, 112; *Taylor v. Old Dominion Steamship Co.*, 88 N. Car. 15.

8. *Arnold v. Parmelee et al.*, 97 N. Y. 652.

And objections taken at one trial are of no avail on the second. *Arnold v. Parmelee et al.*, 97 N. Y. 652; *Langley v. Wadsworth*, 99 N. Y. 61.

9. *Honore v. Wiltshire*, 109 Ill. 103; *Rowers et al. v. Johnson et al.*, 86 Ind. 208; *Fostier v. New Orleans Bank*, 112 U. S. 439; *Burroughs v. Morse*, 48 Mich. 520.

So if the objection to the admission of evidence be made on one ground in the court below, other reasons for objection cannot be urged in the court above. *Ladd & Bush v. Sears*, 9 Or. 244.

They must be specific. *McAllister v. Reab*, 8 Wend. 189; *Curelon v. Durgan*, 16 S. Car. 619.

20. *Larison v. Polhemus*, 39 N. J. 303;

first time on appeal, which would have destroyed the foundation of the action,<sup>1</sup> as where there has been a want of jurisdiction,<sup>2</sup> or in case of a void judgment;<sup>3</sup> and in such cases the better practice is to reverse<sup>4</sup> and not to affirm, as that would put the costs on the wrong party. It will not re-examine anything that has been decided in a former appeal, as that is *res adjudicata*; but what is decided simply as incidental to the question at issue is not *res adjudicata*.<sup>5</sup>

Bray's Adm. v. Seligman's Adm., 75 Mo. 31.

1. Bechman v. Frost, 18 Johns. 343.

The appellate court determines its own jurisdiction. The San Pedro, 2 Wheat. 132; *In re* Coston, 23 Md. 271; Thompson v. McKim *et al.*, 6 H. & J. (Md.) 302.

2. Kidder v. Fay, 60 Wis. 218.

Or in fact whenever the complaint fails to support the judgment. Forster v. Wilson, 5 Mont. 53.

Or state a cause of action. Tucker v. Baker, 86 N. Car. 1.

3. Grace v. American Cent. Ins. Co., 109 U. S. 278; M. C. & Lake Michigan v. Swan, 111 U. S. 379.

4. The People v. Ferris, 36 N. Y. 218; Kidder v. Fay, 60 Wis. 218.

5. Supervisors v. Kennicott, 94 U. S. 498; The Lady Pike, 96 U. S. 461; The Star Wagon Co. v. Swezy, Libo & Co., 63 Iowa, 520; Schlender v. Corey, 30 Minn. 501; Jones *et al.* v. Castor, 96 Ind. 307.

The chief justice in Wilson *et al.* v. Fridenberg, 21 Fla. 386, in the course of his opinion, said (of the case at issue): "We think this decision states the law on the subject correctly; but correct or incorrect, it is the law this case, and cannot be reviewed by us."

Rowell, J., in Railroad Co. v. Bixby, 57 Vt. 548, delivered the opinion of the court, of which the following is a part: "Thus it seems that, by some inadvertency, the Supreme Court assumed without allegation or proof that the interest of the Montpelier & St. Johnsbury Co. in said property was a one-third interest, and decided accordingly, whereby injustice was done; and the important question now is whether the mandate of that court is obligatory on the Court of Chancery to the extent of depriving it of the power to allow such further proceedings in the case as were necessary to remedy the wrong and do justice between the parties."

Matters in issue in a cause that are decided by the Supreme Court are as a general rule taken from the control of the Court of Chancery by the mandate. Sortwell v. The Montpelier & Wells River

R. Co., 56 Vt. 180; Sherman & Adams v. The Windsor Manufacturing Co., *ante*, 57.

Matters in issue in a cause that are not decided by the Supreme Court are as fully under the control of the Court of Chancery after mandate as before. Barker & Haight v. Belnap's Est., 27 Vt. 700; s. c., 39 Vt. 168; Gale v. Butler, 35 Vt. 44; *In re* Chickering, 56 Vt. 82.

Matters not in issue in a cause that are inadvertently decided by the Supreme Court, whereby injustice is done, ought to be as fully under the control of the Court of Chancery after mandate as before; otherwise, as here the party might be entirely without remedy, for it is impracticable for him to apply to the Supreme Court in the premises, as frequently the first information he obtains of its decision is derived from the mandate, when it is too late to apply; nor can he resort to a bill of review, for under the statute that is sustainable only for causes originating after, or that were unknown to the party before, the rendition of the decree from which the appeal was taken; nor will the petition for a rehearing lie, for that must not state matters that do not appear in the pleadings or the statement of which is not warranted by the pleadings; and if it makes a case different from that on which the decree was founded, by introducing facts and circumstances not before the court at the time the decree was made, it will be dismissed. Wood v. Griffith, 1 Miss. 35; s. c., 19 Ves. 550; 3 Dan. Ch. Pr. & Pl. (2d Am. Ed.) 1679; 1 Hoff. Ch. Pr. 564.

Now while it may well be said, as it is in Canerdy v. Baker, 55 Vt. 582, that "every consideration demands that a decision of the Supreme Court shall be final, and especially that it shall not be changed by a single judge as chancellor," yet it may also be said, as there, that error, inadvertence, mistake, are not decision. And especially should they not be so regarded when the thing decided was not in issue; but in such case the matter should rather stand as though no decision had been made, and the Court of Chancery left to allow further proceedings in its dis-

**Practice.**—The practice on appeal in the appellate court varies very much; but we may lay it down as a general rule that the finding of the court below will not be disturbed or reversed for a mere preponderance of testimony or weight of evidence,<sup>1</sup> as the court above always presumes in favor of the judgment or decree below.<sup>2</sup> This presumption is so strong that a reversal will not take place without good cause shown,<sup>3</sup> or the appearance of error on the record,<sup>4</sup> and that the appellant has been prejudiced thereby.<sup>5</sup> It is not enough that trivial, formal, or technical errors have been committed.<sup>6</sup>

The party or parties in whose favor the judgment or decree has been entered are not entitled to a reversal or any affirmative relief on an appeal unless they, too, have taken an appeal or a cross-bill has been filed.<sup>7</sup>

cretion. This question has not been decided in this State, but to hold thus accords with the rule that judgments are conclusive as between the parties even only as to matters put in issue by the pleadings and decided. Thus in *Sentenick v. Lucas*, 1 Est. 43, Lord Kenyon said that in order to make a record evidence to conclude any matter it should appear that the matter was in issue. *Manny v. Harris*, 2 Johns. 24.

So in *Campbell v. Consalus*, 25 N. Y. 613, it was held in a subsequent suit that matter formerly adjudged between the parties was not thereby concluded because not then in issue by the pleadings. *People v. Johnson*, 38 N. Y. 63; *Standish v. Parker*, 2 Pick. 20 and *n.* 2; *Outram v. Merewood*, 3 East, 346.

1. *Carmichael et al. v. Cox*, 85 Ind. 151; *Knights of Golden Rule v. Rose*, 62 Tex. 321; *Thomas v. New York Life Ins. Co.*, 99 N. Y. 250; *Cole v. Coskery Adm.*, 63 Iowa, 526; *First National Bank v. Baker*, 60 Iowa, 132; *Fullenwider v. Ewing*, 30 Kans. 15; *Miller et al. v. Bank*, 99 Ind. 272; *Arnold et al. v. Wilt*, 86 Ind. 367; *Roddy's Appeal*, 99 Pa. 9; *Reeves v. Roberts*, 62 Texas, 550; *Wilson v. Lightbody*, 29 Kans. 446; *Brown v. Manning*, 29 Kans. 602; *Shackleford v. Post Publishing Co.*, 61 Cal. 494.

2. *Tom v. Finly*, 74 Ala. 343; *Miller et al. v. Shriver*, 86 Ind. 493.

Consequently, if the evidence be not sent up on exceptions, the judgment will be affirmed. *Nichols v. Littlefield*, 60 Cal. 238.

3. As the admission of incompetent evidence. *Gossard v. Woods et al.* 98 Ind. 195.

Or the exclusion of proper testimony. *McLaurin v. Wilson*, 16 S. Car. 5.

Or proof of legal presumptions. *Brackken v. Minneapolis & St. Louis R. Co.*, 32 Minn. 425.

Or instructions in the abstract erroneous, but which work no injury to the party complaining, are not good cause. *Jones v. Angell*, 95 Ind. 376; *Salmon v. Old & King*, 9 Or. 488; *Edwards Bros. & Fair v. Porter & Porter*, 28 Kans. 700; *Phillips v. Taylor*, 4 Eastern Reporter, 154.

Nor will the admission of evidence *prima facie* inadmissible, but which subsequently becomes competent, work a reversal. *Belmont Coal & R. Co. v. Smith*, 74 Ala. 206.

A reversal will sometimes take place for excessive damages. *Pennsylvania R. Co. v. Heister*, 8 Barr, 445; *Baker v. City of Madison*, 62 Wis. 137. *Contra*, *Reilley v. President of the Del. & Hud. C. Co.*, 5 Eastern Reporter, 756.

But not on a writ of error. *Pa. R. Co. v. Spicker*, 105 Pa. 142.

4. *Heymes v. Champlin et al.*, 52 Mich. 25; *Wilson v. Stanton et al.*, 58 Iowa, 404; *Kelliher v. Keokuk*, 60 Iowa, 473; *Schlesinger v. Chapman*, 52 Conn. 271; *Groenendyke et al. v. Coffeen et al.*, 109 Ill. 325; *Blair v. Ray et al.*, 103 Ill. 615; *Caine et al. v. Truman*, 103 Ill. 321; *Weir v. B. & Mo. R. Co.*, 19 Neb. 212.

Hence, where the exception is clearly frivolous, the motion to dismiss will be denied, but the judgment will be affirmed. *New Orleans Ins. Co. v. Abro Co.*, 112 U. S. 506.

A statutory penalty, given when an appeal is taken in bad faith or for delay, will not be assessed, though the appellee's case is clear and supported by testimony overwhelmingly preponderating, if the appellant's counsel appears to have had confidence in his case. *Taylor v. Kitchum*, 57 Wis. 41.

5. *Kelley v. Fitzell*, 65 Cal. 87.

6. *Dye v. Main*, 10 Mich. 291.

7. *Sickel v. Norman et al.*, 63 Iowa,

When the case is tried *de novo* in the court above, it is upon the same issues as were raised below.<sup>1</sup> Amendments are sometimes, however, allowed to support the decree, but never to reverse it;<sup>2</sup> and in that case the test is, would they have been permitted below?<sup>3</sup> But the record of the court below can only be amended through that court on proof taken or orders made;<sup>4</sup> the appellate court does not of itself amend the record.<sup>5</sup>

Courts of appeal usually require that the appeals should be brought before them in good order,<sup>6</sup> and that the papers in two appeals on the same case should be kept separated.<sup>7</sup>

**Dismissal.**—Appeals will be dismissed for want of jurisdiction,<sup>8</sup> omission to prosecute<sup>9</sup> for want of citation,<sup>10</sup> for failure to file the petition for an appeal within the proper time,<sup>11</sup> or to file a transcript or bond in time;<sup>12</sup> but mere irregularities are not sufficient to cause a dismissal.<sup>13</sup> And proper grounds for the dismissal should be stated in the motion.<sup>14</sup>

**Judgments.**—These are under the control of the court which renders them during the term at which they are rendered or entered of record, and may then be set aside, vacated, modified, or annulled by that court.<sup>15</sup> On the rendition of the judgment by

128; *Turner v. Turner et al.*, 44 Ark. 25; *Clowes v. Dickinson et al.*, 8 Cow. (N. Y.) 328; *Wilt v. Trustees, etc.*, 55 Wis. 376.

The party who does not appeal can only be heard in support of the decree. *The Quickstep*, 9 Wall. 665.

This does not conflict with *Mabey v. Cooper*, 14 Wall. 204; *Stephen Morgan*, 94 U. S. 599.

But this rule does not apply where the proof of the prevailing party showed he had no right to his decree. *Wooley v. Drew*, 49 Mich. 290.

1. *Martin's Appeal*, 23 Pa. 433; *Wickwire v. The State*, 19 Conn. 477.

2. *Rowe v. Comley*, 11 Daly, 317; *Irving National Bank v. Adams*, 28 Hun, 108; *Hamilton v. Langley*, 52 Mich. 549; *Hedrick v. Osbourne & Co.*, 99 Ind. 143.

3. *McLane v. Paschall*, 62 Texas, 102; *Gutbrecht v. Pros. Park & C. I. R. Co.*, 28 Hun, 497; *Kelmer v. N. Y. C. & H. R. R. Co.*, 94 N. Y. 495.

Clerical mistakes may be corrected. *Woodward v. Brown*, 13 Peters, 1; *Dreyfuss v. Tompkins*, 67 Cal. 339.

4. *Boyd v. Burrill*, 60 Cal. 280.

5. *Boyd v. Burrill*, 60 Cal. 280.

6. *Comm'rs of Beaufort v. Satchwell et al.*, 88 N. Car. 1.

7. *In re Swezey et al.*, 64 Howard Pr. (N. Y.) 331; *Olengir v. Liddle*, 55 Wis. 621.

8. *D'Arcy v. Ketchum*, 11 How. 163; *Snitjer v. Downing*, 80 Mo. 586.

9. *The Jonquille*, 6 Wheat. 452; *De*

*Leuw v. Carrigan*, 19 Ill. App. 193; *Jacoby v. Mitchell*, 19 Neb. 537.

10. *Buckingham v. McLean*, 13 How. 150.

11. *Terminal Co. v. Lowenberg et al.*, 11 Or. 286.

12. *Terhune v. Pinkney*, 39 N. J. Eq. 494.

But the motion to dismiss comes too late if not made before the first term of the court. *Wheeler & Wilson Mfg. Co. v. Burlingham*, 137 Mass. 581.

13. As a failure of one of several defendants to make affidavit on appeal when the recognizance is to be for all. *Jones v. Backus & Rogers*, 43 Leg. Int. Pa. 457.

14. *Scofield v. Pope*, 103 Ill. 138; *De Leuw v. Corrigan*, 19 Ill. App. 194.

And where a motion was made to dismiss for the incompleteness of the record, it was held that the motion should state the specific particulars in which the motion was defective. *Huey v. Tricon*, 36 La. Ann. 519.

15. *Fraley v. Feather*, 46 N. J. L. 429.

In *Bronson v. Schulten*, 104 U. S. 410, part of the opinion is as follows: "In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the State courts, they are unimportant. It is



the court above, it is the better practice for that court to send the case down for the court below to enforce or carry out the decree or judgment.<sup>1</sup> But when the plaintiff is given the option of having a new trial or remitting part of his judgment, and he chooses the latter, the appellate court enters the judgment itself.<sup>2</sup> And the court below, on the receipt of the *remittitur*, can only follow the directions of the appellate court and take such incidental steps as are necessary thereto.<sup>3</sup> It has no power to engraft upon the decree of the supreme court an order of restitution not contained in it.<sup>4</sup> When the court of appeal affirms the judgment below without an opinion, the inference is that the opinion is adopted,<sup>5</sup> and the judgment of the lower court is merged by judgment above.<sup>6</sup>

**2. In Criminal Practice.**—An accusation by a private subject against another for some heinous crime demanding punishment on account of the particular injury suffered rather than for the offence against the public.<sup>7</sup> Appeals were either capital or not capital: those not capital were *de pace, de plagio, de imprisonmento* (all of which are obsolete and turned to actions of trespass),<sup>8</sup> and mayhem; capital were for treason (abolished 5 Edw. III. c. 9, 25, Edw. III. c. 24, and 1 Hen. IV. c. 14), arson (obsolete),<sup>9</sup> larceny, rape, and murder (abolished by 59 Geo. III. c. 46, in consequence of *Ashford v. Thornton*<sup>10</sup>). An appeal for murder must

a general rule of law that all judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this placed upon the ground that the case has passed beyond the control of the court." *Brooks v. Railroad Co.*, 102 U. S. 107; *Public Schools v. Walker*, 9 Wall. 603; *Brown v. Aspdon*, 14 How. 25; *Cameron v. McRoberts*, 3 Wheat. 591; *Sibbald v. United States*, 12 Pet. 488; *United States v. The Brig*

*Glamorgan*, 2 Curt. C. C. 236; *Bradford v. Patterson*, 1 A. K. Marsh. (Ky.) 464; *Ballard v. Davis*, 3 J. J. Marsh. (Ky.) 656.

1. *Thomas v. New York Life Ins. Co.*, 99 N. Y. 250.

2. *Baker v. Madison*, 62 Wis. 137.

3. *Zorn et al. v. Lamar et al.*, 71 Ga. 80.

When the *remittitur* is properly issued the jurisdiction of the court above ceases. *Ex parte Dunovant*, 16 S. Car. 299.

But the jurisdiction of the court below exists only to enforce the judgment. *Ex parte Knox*, 17 S. Car. 207.

When the supreme court remands with special directions as to the judgment to be entered, the lower court has no power to enter any other or to open the case again. *Chouteau v. Allen*, 74 Mo. 56.

A judgment of the supreme court is as effective before being certified to the court below as after. *Wall v. Dodge et al.*, 3 Utah, 168.

But discrimination may be used when orders are merely directory. *Gilmore v. Tuttle* (N. J.), 2 Centra Repr. 190.

4. *Hughes' Appeal*, 90 Pa. 60.

5. *Higgins v. Crichton*, 98 N. Y. 626.

6. *Weborn v. Pinney*, 76 Ala. 291.

7. 4 Bla. Com. 312.

8. Bac. Abg. 292.

9. Co. Lit. 288 a.

10. 9 B. & Ald. 405, 1818.

have been brought within a year and a day, and the other appeals within a reasonable time.<sup>1</sup> Appeals were vindictive actions begun either by bill or writ on the civil side of the court.<sup>2</sup> They could be released,<sup>3</sup> but the king's pardon was no defence.<sup>4</sup>

**3. In Legislation.**—The act by which a member of a legislative body who questions the correctness of a decision of the presiding officer in "chair" procures a vote of the body upon the decision. The substance of the question is, "Whether the decision of the chair shall stand as the judgment of the house?" In order to make an appeal it must be done immediately after the decision is rendered—that is, before the intervention of any further parliamentary proceedings.

An appeal may be debated as a question before the assembly, but the proceeding out of which it arises is not debatable.<sup>5</sup>

**APPEARANCE.** See **ACTIONS.**

**APPELLATE.**—Pertaining to or having cognizance of appeals and other proceedings for the judicial review of adjudications.<sup>6</sup>

**APPENDAGE.**—Something added as an accessory to, or the subordinate part of, another thing;<sup>7</sup> something added to a principal or greater thing, though not necessary to it.<sup>8</sup>

1. Bac. Abg. 295.

2. 5 Burr. 2643.

3. Co. Lit. 287.

4. 4 Bla. Com. 315.

5. Cushing Law Practice of Legislative Assemblies, §§ 1460–1466.

6. Rap. & Lawr. L. Dict.

**Appellate Court.**—A court of appeals. *Allen v. State*, 1 Tex. App. 514.

A court having jurisdiction of removed causes, without regard to the manner of their removal—by appeal, *certiorari*, or writ of error. *Clark v. Ross*, Breese's Rep. (Ill.) 261.

**Appellate Jurisdiction.**—Jurisdiction to revise or correct the proceedings in a cause already instituted and acted upon by an inferior court, or by a tribunal having the attributes of a court. *Auditor of State v. Atchison*, etc., R. Co., 6 Kan. 505.

When "appellate jurisdiction" in a certain class of cases is given, the inference is that "original" jurisdiction in that class is excluded. *Marbury v. Madison*, 1 Cranch (U. S.), 175.

"Appellate jurisdiction is not only a continuation of the exercise of the same judicial power which has been executed in the court of original jurisdiction, but it necessarily implies that the original and appellate courts are capable of participating in the exercise of the same judicial power." *Piqua Bank v. Knoup*, 6 Ohio St. 391, dissenting opinion of Bartley, Ch. J.

**"Appellate" and "Supervisory" Power.**—Where by act of Congress the "supervision" of public business relating to public lands was conferred upon the secretary of the interior, and the commissioner of the general land office was vested with authority to perform executive duties connected with the public lands, "under the direction of the secretary of the interior," *held*, that the latter's power of revising the acts of his subordinates was "supervisory rather than appellate power, in the sense in which the term 'appellate' is employed in defining the powers of courts of justice," and that in the exercise thereof he might approve, modify, or annul their acts. *Hestres v. Brennan*, 50 Cal. 211.

7. *State Treasurer v. Somerville*, etc., R. Co., 28 N. J. L. 26.

8. *State v. Fertig* (Iowa), 30 N. W. Rep. 633.

**"Necessary Appendages" to a School-house.**—Under an act directing that "the district board shall provide the necessary appendages for the school-house," it was held that a stereoscope and stereoscopic views did not come within this description, and it was said that appendages for the school-house "would seem to refer to things connected with the building or designed to render it suitable for use as a school-house." *School District v. Perkins*, 21 Kan. 536; s. c., 30 Am Rep. 447.

This language was construed broadly

## APPENDAGE—APPENDANT—APPERTAINING.

**APPENDANCE.** See APPENDANT.

**APPENDANT.** (See also APPURTENANCE.)—A thing used with and related to or dependent upon another thing more worthy, to which it has belonged beyond memory, and agreeing with that to which it is related in its nature and quality.<sup>1</sup> But one kind of corporeal real property cannot be appendant to another description of the like real property, as land to land or a house;<sup>2</sup> and it seems that at common law an easement, as distinct from an interest, cannot in strictness be called appendant.<sup>3</sup>

**APPERTAINING.** (See also APPURTENANT.)—Belonging to; also usually occupied, used, or lying with, as land with a messuage.<sup>4</sup>

so as to authorize the district board to construct a well, a fence, or a privy on the school-house grounds, and it was expressly decided that a well was a "necessary appendage." *Hemme v. School District*, 30 Kan. 377.

A fence inclosing a school-house site and separating it from adjacent lands is a "necessary appendage." "The word 'appendage,' as used in our school statutes, does not mean simply the school apparatus to be used inside the building; nor do I think it can be limited to such articles as brooms, pails, cups, etc., but must be construed in a broader sense, as it has in other courts, to include fuel, fences, and necessary outhouses." *Craeger v. School Dist.* (Mich.), 28 N. W. Rep. 794.

**Road with its Appendages.**—This phrase in a railroad charter was held not to include the equipment, rolling-stock, furniture, or other personal property of the company, but to be invariably applied to real estate—to the accessories of the road itself; and, as examples, were enumerated depots, car-houses, water-tanks, shops for repairing engines, etc.; houses for switch and bridge tenders; coal or wood yards for fuel for the use of locomotives; bridges, viaducts, wharves, piers, and other similar erections. "Invariably the term is used to denote an accessory of the road, something connected with it, and either essential to its completion or to its advantageous and convenient operation." *State Treasurer v. Somerville*, etc., R. Co., 28 N. J. L. 26, 27.

**"Appendage" to a Saloon.**—Where whiskey was found in a room back of a saloon, but separated from it by a third room, it was held that the back room could be properly denominated an "appendage" to the saloon, so that there would be a presumption that the whiskey found there was kept for unlawful sale. *State v. Fertig* (Iowa), 30 N. W. Rep. 633.

1. *Leonard v. White*, 7 Mass. 8. See 1 Chit. Gen. Pr. 153-8.

**"Appendant" and "Appurtenant."**—While the former word denotes a thing which, by prescription, has belonged to another principal and more worthy thing, as commons, ways, and other easements of a manor, the latter signifies that which may commence and be created at this day (1 Chit. Gen. Pr. 154) by grant or use. *Jackson v. Striker*, 1 Johns. Cas. (N. Y.) 291.

2. *Leonard v. White*, 7 Mass. 9.

3. *Godley v. Frith*, Yelv. 159.

4. *Hill v. Grange*, Plowd. 170.

**Property Appertaining to said Railroad.**—A mortgage by a railroad company of its real estate, engines, machinery, etc., and "all other personal property whatsoever in any way belonging or appertaining to the said railroad of the said company," was held not to include canal boats used and run in connection with the road, but beyond its terminus. "They were in a general sense accessory to the business of the road; but I very much doubt whether they belonged or appertained to it according to any interpretation which we can place upon those terms." *Parish v. Wheeler*, 22 N. Y. 494.

**Expenses that may Appertain to the Goods themselves.**—Where one was bound by contract to pay over to another one tenth of the net profits of a business relating to the sale and purchase of cargoes, collecting freight moneys, collecting and forwarding information, etc., after deducting "the actual expenses that may appertain to the goods themselves;" held, that the expenses of clerk-hire, advertising, and taxes were properly deducted from the gross amount. *Foster v. Goddard*, 1 Cliff. (U. S.) 158.

**With the Lands Appertaining.**—It was held that by a devise of a house "with the lands appertaining," land employed for producing hay and corn, etc., passed, while, had the devise been "with the ap-

## APPLICABLE—APPLICATION—APPOINTMENT.

**APPLICABLE.**—Adapted to the habits and condition of our society, and in harmony with the genius, spirit, and objects of our institutions.<sup>1</sup>

**APPLICATION.**—A request, usually in writing, to a person above the one making the request.<sup>2</sup>

**APPLICATION OF PAYMENTS.** See PAYMENTS.

**APPLIED.**—In a contract, directed towards.<sup>3</sup>

**APPLY.**—To have to do with.<sup>4</sup>

**APPOINT.**—The selection by some single person or officer of a certain person to do some particular thing.<sup>5</sup>

**APPOINTMENT.**—**Definition.**—The designation of a person by the person or persons having authority therefor to discharge the duties of some office or trust, or to take an estate or interest in property under a power.<sup>6</sup>

**To an Office.**—The appointment to a public office is made by one or more possessing delegated powers as distinguished from "election" where the right is exercised by many. It is completed by the signing and sealing of the certificate or commission, upon which the appointee can at once take possession of the office.<sup>7</sup>

purtenances," only the garden and orchard would have passed. *Blackborn v. Edgley*, 1 P. Wms. 603.

1. *Wagner v. Bissell*, 3 Iowa, 402.

As, for instance, "a general law might be applicable to the general subject but not applicable to the particular case. In other words, that a general law could not always be so moulded as to meet the exigencies of every case." *Evans v. Job*, 8 Nev. 334.

2. **Application for Continuance.**—Where a statute requires an affidavit on a second application for continuance, it was held that an application refused was not an application within the statute. *The State v. Maguire*, 69 Mo. 204.

**Application for Insurance Policy.**—A paper containing a series of questions intended to be addressed to the person whose life was proposed to be insured. *Higbee v. Guardian M. L. Ins. Co.*, 66 Barb. (N. Y.) 462.

**On Application.**—These words used in the statute giving release to insolvent debtors do not mean necessarily a written application. *State v. Stiles*, 7 Halst. (N. J.) 298.

**Refusal of an Application.**—This phrase is wide enough to include the dismissal of a bill on an appeal. *International F. S. v. City of Moscow Gas Co.*, 7 Ch. Div. 246.

**Summary Application.**—A motion for a retaxation of costs is not a special proceeding nor a summary application in the

action after judgment. *Ernst v. The Steamer Brooklyn*, 24 Wis. 616.

3. *Manice v. Hudson River R. Co.*, 3 Duer (N. Y.) 436.

**Applied For.**—To make an affidavit alleging that it is made for the purpose of obtaining a tax deed is "applied for." *Mead et al. v. Nelson*, 52 Wis. 402.

4. "Before we can assume that the State law applies to such a case we must show that it governs." *Wayman v. Southard*, 10 Wheat. 1.

**Apply to the Use.**—A trust to apply money to the use of A. B. does not mean to pay the money over to A. B., but to apply the money to the use of the beneficiary, that is, to see that the beneficiary actually enjoys the fruit of the donor's bounty. *Hawley v. James*, 16 Wend. 156, 266.

5. The words "nominate," "select," "designate," "choose," would either of them be equivalent to appoint, if used in that sense. *People v. Fitzsimmons et al.*, 68 N. Y. 519; *Comm'rs v. Louisville*, 3 Bush (Ky.), 602; *Speed v. Crawford*, 3 Metc. (Ky.) 207. See also *Rex v. Adams et al.*, 2 Ad. & El. 413.

**Annually Appoint.**—The right to annually appoint if duly exercised entitles the appointee to office for one year, and a resolution rescinding such appointment is void. *Buffalo v. Mackay*, 15 Hun (N. Y.) 204.

6. *Bouv. Law Dict.*; *Rap. & Lawr. Dict.*

7. *U. S. v. Le Baron*, 19 How. (U. S.)

although where it has been exercised without objection the appointment will be presumed to have been duly made.<sup>1</sup>

**Of Executors, Trustees, Receivers, etc.**—See under their respective heads.

**Under a Power.** (See also POWER.)—A power of appointment is a right to limit a use, and as only the first use is executed by the statute of uses, the estate or interest must be appointed immediately to the object of the power, if it is desired to vest in him the legal title.<sup>2</sup> The estate created by the instrument executing the power takes effect as if originally created by the instrument raising the power.<sup>3</sup> However, as a general power enables the donee to dispose of the estate as if he were seized in fee thereof, the period of the commencement of limitations in point of perpetuity is the time of executing the power, and not that of raising it; otherwise in the case of a particular power, where, the donee being restricted to designated objects, the validity of the estate depends on whether it would have been valid if limited in the original instrument.<sup>4</sup>

**Manner of Executing.**—How and by what instrument the appointment is to be executed is generally determined by the instrument raising the power, the provisions of which must be strictly complied with.<sup>5</sup> Equity, however, will relieve in some cases of defective execution;<sup>6</sup> and where the power is exercised in excess, *i.e.*, in favor of more than the proper objects, it will, nevertheless, be a valid appointment *quoad* those objects.<sup>7</sup> A prior appointment takes effect before a subsequent one, and if together they are excessive, the loss falls on the latter appointee.<sup>8</sup> A general disposition, not referring to the power of appointment, may be a good execution of it, where the context shows that it is so intended, as where the donee has no other property.<sup>9</sup>

**Assets.**—The exercise of a general power of appointment renders the property appointed equitable assets, and the demands of the creditors thereon are to be satisfied before those of legatees or appointees.<sup>10</sup>

73; *U. S. v. Stewart*, 19 How. (U. S.) 79; *Conger v. Gilmer*, 32 Cal. 75; *State v. Allen*, 21 Ind. 516; *Justices v. Clark*, 1 T. B. Mon. (Ky.) 82.

1. *Callison v. Hedrick*, 15 Gratt. (Va.) 244; *Carter v. Sympson*, 8 B. Mon. (Ky.) 155; *Spaulding v. Vincent*, 24 Vt. 501.

2. *Sugd. on Pow.* 190.

3. *Smith v. Garey*, 2 Dev. & B. (N. C.) Eq. 42.

4. *Sugd. on Pow.* 394-6.

5. *Porter v. Thomas*, 23 Ga. 467; *Haslen v. Kean*, 2 Tayl. (N. C.) 279; *Horwitz v. Norris*, 49 Pa. St. 213; *Jarnaqui v. Conway*, 2 Humph. (Tenn.) 50; *Bentham v. Smith*, 1 Cheves (S. C.), 33; *Moore v. Dimond*, 5 R. I. 121; *Noel v. Harvey*, 29 Miss. 72; *Cummings v. Parish*, 39 Miss. 412; *Stuyvesant v. Neil*, 67 How. Pr. (N. Y.) 16.

6. In favor of a purchaser, mortgagee, lessee, creditor, wife, legitimate child, or marriage consideration, but not of a natural child, grandchild, brother, volunteer, settlor, etc. *Sugd. on Pow.* 533-5.

7. *Sadler v. Pratt*, 5 Sim. 632; *Harvey v. Stracey*, 1 Drew, 73.

8. *Trolope v. Routledge*, 1 De Gex & Sma. 662.

9. *Mory v. Michael*, 18 Md. 227; *Foos v. Scarf*, 55 Md. 301; *Hutton v. Benkard*, 92 N. Y. 295; *White v. Hicks*, 33 N. Y. 383; *Baird v. Boucher*, 60 Miss. 326; *Weir v. Smith*, 62 Tex. 1; *Clafin v. Van Wagoner*, 32 Md. 252; *Bishop v. Remple*, 11 Ohio St. 277; *Bilderback v. Boyce*, 14 S. C. 528; *Munson v. Berdan*, 35 N. J. Eq. 376; *Yates v. Clark*, 56 Miss. 212; *Blake v. Hawkins*, 98 U. S. 315.

10. *Lassels v. Lord Cornwallis*, 2 Vern.

**Exclusive. APPOINTMENT—APPORTIONMENT. Definition.**

**Exclusive and Illusory Appointments.**—A power of appointment to several objects or to any of them exclusively is called a power of exclusive appointment. Where, by the terms of the instrument raising the power, none of the objects can be excluded, and a merely nominal share is appointed to one or more of them, such an appointment is termed illusory, and a court of equity will interfere in order to ascertain what proportion each is entitled to.<sup>1</sup>

**APPORTIONMENT.**<sup>2</sup> (See also ANNUITY; BANKRUPTCY; CONTRACT; CONTRIBUTION; CORPORATIONS; COSTS; DAMAGES; DEBTOR AND CREDITOR; EQUITY; ESTATES; INCUMBRANCES; INSOLVENCY; INTEREST; LANDLORD AND TENANT; RENT; RENT-CHARGE; RENT-SERVICE; TAXES; WAGES.)

*1. Definition.*

*2. Use of the Term.*

**Definition.**—Apportionment is the division or distribution of a subject-matter into proportionate parts.<sup>3</sup>

**Use of the Term.**—There are three kinds of apportionment known to the law.

**A. Apportionment of Rights.**—Rights may be apportioned in two ways: in respect of the fulfilment of the conditions which give rise to the right, as in the case of contracts;<sup>4</sup> and in respect of the specific thing out of which the right issues, as where the owner of a rent acquires a portion of the land out of which the rent issues.<sup>5</sup>

**B. Apportionment of Liabilities, e.g., Damages, Incumbrances, etc.**—In this sense the term is rather loosely used to denote con-

465; *Johnson v. Cushing*, 15 N. H. 298; *Tallmadge v. Sill*, 21 Barb. (N. Y.) 51; 4 Kent. 339. See *Cutting v. Cutting*, 20 Hun (N. Y.), 360.

1. The rule in equity on this subject has been abolished in England by the 1 Wm. IV. c. 46, by which an illusory appointment is made a valid execution of a power, where the instrument creating it does not declare the amount from which no object shall be excluded. The doctrine has also been disapproved of in some of the States. *Fronty v. Fronty*, 1 Bail. Eq. (S. C.) 529; *Cowles v. Brown*, 4 Call. (Va.) 477; *Aleyn v. Belchier*, 1 Lead. Cas. Eq., note; *Graeff v. De Turk*, 8 Wright (Pa.), 527.

2. The various kinds and instances of apportionment are best studied as they occur in connection with the subjects mentioned in the cross-references. All that is attempted here is a general explanation of the use of the term.

3. *Bouvier's Law Dict.* Coke's definition is "This commeth of the word *partio*, *quasi partio*, which signifieth a part of the whole; and apportion signifieth a partition of a rent, common, etc., or a making of it into parts," *Co. Litt.* 147, b.

4. A contract is said to be apportionable when the amount of the consideration to be paid by the one party depends upon the extent of the performance by the other. 2 Pars. Contr. \*520.

If, on the other hand, the contract is entire, complete performance alone gives a right to the consideration, and there can be no apportionment. 1 Story's Equity, §§ 470 *et seq.*; Pars. Contr. \*520-522; 1 Washburn on Real Prop., 133, 549, 555; 2 Washburn on Real Prop. 302.

The apportionment acts of 11 Geo. II. c. 19, § 15; 4 and 5 Will. IV. c. 22, and 33 and 34 Vict. c. 35, have greatly modified the strict common-law rule as to entire contracts, especially with regard to the apportionment of annuities, rents, dividends, interest, salaries, wages, etc., in respect of time. Similar statutes exist to some extent in the United States.

5. A rent-service was always apportionable under such circumstances, but a rent-charge was extinguished, unless the acquisition of the land was by operation of law. *Co. Litt.* 147, b; *Viner's Abr.* "apportionment;" 2 Washburn on Real Prop. 302, n.

tribution by different persons, having different rights, towards the discharge of a common burden or charge.<sup>1</sup>

*C. Apportionment of Representatives and Taxes.<sup>2</sup>*

**APPRAISE—APPRAISERS.** (See also APPRAISAL; APPRAISEMENT.)—To set a price upon; to value; to find the market value of.<sup>3</sup>

**APPRAISEMENT.—Definition.**—The act of appraising, *i.e.*, setting a value upon, estimating the worth of, especially by persons appointed for that purpose.<sup>4</sup>

**Commission of Appraisement.**—On seizure of treasure-trove, wrecks, waifs, and estrays, after an information had been filed in the Exchequer, a proclamation for the owner and a commission of appraisement to value the goods were issued at the same time. On the return of the latter, and after a second proclamation, the goods were condemned to the use of the crown.<sup>5</sup>

**Kinds of Appraisement.**—In modern times appraisements are very common in connection with legal proceedings. The following cases may be enumerated as among the most important:

**Decedents' Estate.**—Executors and administrators are obliged, within a time appointed by law, to have the goods of the decedent appraised and an inventory thereof filed.<sup>6</sup>

1. 1 Washburn on Real Prop. 130, 549; 2 Washburn on Real Prop. 209; 1 Story's Equity, §§ 470, 477, 478. The equitable remedy of contribution was often employed to effect this species of apportionment.

Under this second head come apportionment of calls upon the stock of a corporation, apportionment of the debts of a corporation among persons individually liable, etc.

2. Representatives in the Congress of the United States are apportioned among the several States, according to their respective numbers, excluding Indians not taxed, and not exceeding one representative for every thirty thousand inhabitants, but each State may have at least one representative. The apportionment is based on the decennial census. U. S. Const. art. 1, sec. 2; art. 14, sec. 2; U. S. Rev. Stat. §§ 20, 21.

The various State constitutions provide for the apportionment of representatives in the State legislatures.

3. **Appraised Value.**—In construing the United States Tariff Act of July 30, 1846 (9 U. S. Stat. at Large, 42), the court said: "The appraised value, as used in this act of 1846, and in that of August 30, 1842, and indeed in all the revenue acts, means the value of the goods, to be estimated and ascertained by the appraisers, either according to the 'actual cost,' 'actual value,' or 'market value,' as the case may be, exclusive of charges."

Wilson v. Maxwell, 2 Blatch. (U. S.) 316, 321. See Grinnell v. Lawrence, 1 Blatch. (U. S.) 346.

Where a statute read, "The selectman shall appraise all taxable property at its full and true value in money," the words "full and true value in money" were held to be words of description and superfluous, and that if these words had been omitted the statute would have had the same meaning. An appraisal of property signifies a valuation of it, or an estimation of its value, at its true worth. Cocheco Co. v. Strafford, 51 N. H. 455, 482.

**Appraiser.**—An appraiser must be an impartial and disinterested person. It is not necessary that these words should be used in the agreement for their appointment. An award made where one of the appraisers was the brother and business agent of the party choosing him should be set aside. Poole v. Hennessy, 39 Iowa, 192.

The words "sworn appraisers" in the statute, 2 W. & M. sess. 1, c. 5, s. 2, merely means two indifferent persons who are sworn to appraise the goods distrained according to the best of their understandings. They must be persons who are reasonably competent, but need not be professional appraisers. Roden v. Eyton, 6 M. G. & Scott, 427.

4. Webster's Dict.

5. 3 Black. Com. 262.

6. Williams on Executors (6th Am. Ed.), pp. 1040-1053.

**Executions.**—After the levy of real estate on execution and prior to sale, an appraisal, generally by three persons, is directed to be made by statute in many of the States.<sup>1</sup>

**Eminent Domain.**—Where private property is taken for public uses by the right of eminent domain, an appraisal is made and damages assessed by a jury or by commissioners, according to the regulations of local statutes.<sup>2</sup>

**Arbitration Proceedings.**—In these an appraisal of goods in dispute is frequently necessary. But there is a diversity of opinion as to whether, when there is no dispute, the appraisal by referees appointed for the sole purpose of valuing the goods has or has not the force of an award.<sup>3</sup>

**Taxation.**—In the case of lands or goods subject to taxation, the proportion of the tax is determined by an appraisal of their value made by assessors appointed for that purpose.<sup>4</sup>

**Dutiable Goods.**—An appraisal of all goods subject to import duties is made by the customs officers in accordance with the provisions of the United States statutes.<sup>5</sup>

**Revenue Laws, Prize, etc.**—An appraisal is made where goods are seized for violation of revenue laws,<sup>6</sup> in prize cases, where the vessel captured is not in a condition to be sent into port for adjudication;<sup>7</sup> where property is taken for the use of the United States,<sup>8</sup> and in other similar cases.<sup>9</sup>

**Leases.**—A covenant for the renewal of a lease frequently contains a condition that the amount of the new rent as determined by the value of the premises at the end of the expired term, allowing for improvements, etc., shall be settled by an appraisal made by disinterested parties.<sup>10</sup>

**Admiralty Cases.**—In admiralty suits *in rem* the court may, on the application of the claimant, order the property to be delivered to him after a due appraisal under the direction of the court, on his entering security or paying money into court to abide the result of the suit.<sup>11</sup>

1. Appraisal statutes are strictly construed in New England, and if not complied with the levy is void. *Russell v. Dyer*, 40 N. H. 173; *Ellison v. Wilson*, 36 Vt. 160; *Russ v. Gilman*, 16 Me. 299; *Bradley v. Bassett*, 2 Cush. (Mass.) 417; *Chamberlain v. Doty*, 18 Pick. (Mass.) 495.

In other States they may be waived by the debtor. *Stockwell v. Byrne*, 22 Ind. 6; *Wray v. Miller*, 20 Pa. St. 111; *Lessee v. Parrish*, 3 Ohio, 187; *New Orleans Ins. Co. v. Bagley*, 19 La. Ann. 89. See *Herman on Executions*, §§ 197, 257.

2. *Dillon on Munic. Corp.* (3d Ed.) §§ 618-625.

3. It has been held to have such force in *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 339, and 17 Johns. Ch. 405; *Smith v. R. Co.*, 36 N. H. 458. But see, *contra*, *Garred v. Macey*, 10 Mo. 161; *Curry v. Lackey*, 35 Mo. 389; *Garr v.*

*Gomez*, 9 Wend. (N. Y.) 649; *Leeds v. Burrows*, 12 East, 1; *Jenkins v. Betham*, 24 L. J. C. P. 94; *Scott v. The Liverpool Corp.*, 28 L. J. Ch. 230; *Russell on Arb.* (3d Ed.) p. 43.

4. *Cooley on Taxation*, ch. xii.

5. See *Rev. Stat. U. S. of 1878*, tit. xxxiv., ch. vi.

6. *Rev. Stat.* (1878) §§ 3459, 3460.

7. *Act of June 30, 1864*, c. 174, § 1, p. 306.

8. *Act of June 30, 1864*, c. 174, § 27, p. 314.

9. See *Rev. Stat.* (1878) §§ 993, 3187, 3331, 4626, 4871.

10. See *Wood on Landlord and Tenant*, § 416.

11. 2 *Parsons on Ship. & Adm.* p. 416. And such appraisal is conclusive. *The Cargo ex Venus*, *Law Rep. 1 Adm.* 50.



**APPREHEND.** (See also ARREST; WARRANT.)—To take hold off, whether with the mind, and so to conceive, believe, fear, dread; or actually and bodily, and so to take a person on a criminal process; to seize; to arrest.<sup>1</sup>

**APPRENTICES.**—1. **Definition.**—An apprentice is a person bound by contract to serve another person in some trade, business, or profession, the latter person being also bound by contract to instruct him in the mysteries of such trade, business, or profession.<sup>2</sup>

2. **Common Law.**—Contracts of apprenticeship were known to the common law, and were of especial importance in the city of London, where there were certain customs affecting apprenticeship.<sup>3</sup> In the reign of Queen Elizabeth a statute was passed regulating apprenticeship throughout England, except in the city of London and elsewhere, where local customs existed.<sup>4</sup> At the present time the entire subject is, in most jurisdictions, controlled by statute.

3. **Who may Take an Apprentice.**—Any person exercising some trade, business, or profession,<sup>5</sup> who is *sui juris*, may take an apprentice.<sup>6</sup>

4. **Who may be an Apprentice.**—Any person, whether an infant or of age, may be bound as an apprentice.<sup>7</sup>

5. **Formalities—Requisite of Contract.**—The relation of master and apprentice can only be created by formal instrument. At com-

1. The Alabama statute forbidding the carrying of concealed weapons permits the doing so where any person has "good reason to apprehend an attack." (Code, § 4109, of 1876); *Hardin v. State*, 63 Ala. 38.

The apprehension must, however, be founded on *good reason*; and the court properly refused to charge the jury "that if they believe from the evidence that the defendant had reason to apprehend an attack, they must acquit him." *Baker v. State*, 49 Ala. 350.

Where an act of Congress "for the punishment of certain crimes, etc." (vol. I. p. 103, § 8) provides that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended or into which he may first be brought," it was held that the word "apprehend" does not imply a legal arrest to the exclusion of a military arrest or seizure. *Ex parte Bollman and Swartout*, 4 Cranch S. C. (U. S.), 75.

2. The word "apprentice" need not be used in the contracts. *King v. Rainham*, 1 East, 531.

Housewifery is a "mystery" within the meaning of a statute permitting the apprenticing of children to be taught some

"art, trade, or mystery." *Commonwealth v. Jennings*, 1 Browne (Pa.), 197.

The word "trade," as used in 5 Eliz. ch. 4, § 31, only includes trades known at the time the statute was passed. 6 Bac. Abr. 521.

3. Com. Dig. "London," N. 2; *Bohun Priv. Lond.* 175 *et seq.*

4. 5 Elizabeth, ch. 4.

5. By 5 Eliz. c. 4, §§ 25-30, limitations were placed upon the right of taking apprentices. Thus, it was provided that the master must be a householder, in case of an apprenticeship to learn a trade. *Wood Master and Servant* (2d Ed.), § 40.

6. No one under a disability preventing him from binding himself by contract, can assume the relation of master. *Wood Master and Servant* (2d Ed.), § 40.

A married woman cannot take an apprentice. *Rex v. Guildford*, 2 Chitty, 284. (It is otherwise where by statute she can contract. *Fraser Master and Servant*, 447; *Wood Master and Servant* (2d Ed.), § 40.)

Nor can an infant. *Rex v. Petrox*, 4 T. R. 196; *Wood Master and Servant* (2d Ed.), § 40. But the articles in such case are not void, but only voidable, and hence a settlement may be gained under them. *Rex v. Petrox*, 4 T. R. 196.

7. *King v. Arnesby*, 3 B. & Ald. 584.

mon law a writing under seal seems to have been sufficient.<sup>1</sup> But by the statute of 5 Eliz. c. 4, and by most modern statutes, indentures are required.<sup>2</sup>

**6. Pauper Apprentices.**—Provision is ordinarily made by statute for empowering the overseers of the poor, or other officers, to bind out poor orphan children, or the minor children of paupers. This

1. *Castor v. Aicles*, 1 Salk. 68; *Rex v. Ditchingham*, 4 T. R. 769; *Rex v. Mawnan*, Burr. (Set. Cas.), 290; *Peters v. Lord*, 18 Conn. 337. See *Crombie v. McGrath*, 139 Mass. 550.

2. *Aldridge v. Ewen*, 3 Esp. 188; *Rex v. Stratton*, 1 Bots P. L. C. 526; *Rex v. Whitchurch*, 1 Bots P. L. C. 527; *Phelps v. Pittsburgh*, etc., R. Co., 99 Pa. St. 108. See Ark. Dig. of Stat. §§ 236, 237; Dak. Civil Code, § 140; Del. Laws, ch. 79, § 5; Ga. Code, § 1877; Ill. R. S. ch. 9, § 8; Mass. P. S. ch. 149, § 5; N. Car. Code, § 9; Oreg. Laws, ch. 13, Tit. III. § 39; Pa. Brightley's Pur. Dig. p. 77, §§ 5, 6; S. Car. G. S. § 2072; R. I. R. S. Tit. 44, ch. 169 § 1; Tenn. Code, 1884, § 3431; Utah C. L. Tit. 16, ch. 4, § 1; Vt. R. L., 1880, § 2516; Wis. R. S. 1878, § 2379.

When the articles fail to conform to the formal requirements of the statute, they are voidable by the apprentice at his option. *Page v. Marsh*, 36 N. H. 305; *Brown v. Whittemore*, 44 N. H. 369; *Fowler v. Hollenbeck*, 9 Barb. (N. Y.) 309.

No one else can take advantage of formal defects in the indentures. *Page v. Marsh*, 36 N. H. 305; *Fowler v. Hollenbeck*, 9 Barb. (N. Y.) 309. See *In re M'Dowles*, 8 Johns. (N. Y.) 328; *Wood Master and Servant* (2d Ed.), § 47.

An agreement in writing, not under seal, was made, by which a minor was bound by his father to a master for a certain time, and the master agreed to teach him a certain art. Subsequently the master sold his business, and the father agreed to continue the agreement with the successor. The son afterwards had an opportunity to work for some one else, and his then master released him from his apprenticeship, in consideration of the father giving a promissory note for a certain sum, payable to the master. *Held*, that although the agreement of apprenticeship did not comply with the statutory requirements, it was good at common law, and that the note was given for a sufficient consideration. *Crombie v. McGrath*, 139 Mass. 550.

Under many statutes, however, indentures not conforming to the statutory provisions are expressly made void. See Dak. Civil Code, § 152; Del. Laws, ch. 79, § 80; Ill. R. S. ch. 9, § 3; Kan.

C. L. § 342. *Wood Mast. & Serv.* (2d Ed.) § 60; *Butler v. Hubbard*, 5 Pick. (Mass.) 250, 254; *Taylor's Case*, 1 Brown, Pa. Append. 73; *Guthrie v. Murphy*, 4 Watts (Pa.), 80; *Welborn v. Little*, 1 Nott & Mc. (S. Car.) 263.

A contract by a parent, engaging that his son shall serve under a contract of apprenticeship, void as to the infant, because not within the statute, is not void as against public policy. *Van Dorn v. Young*, 13 Barb. (N. Y.) 286.

In *Day v. Everett*, 7 Mass. 145, indentures not conforming to the statute, were held to constitute a valid common-law assignment by the father of his child's services.

Where the son serves under void indentures, executed by overseers of the poor, the father may sue the master at any time for the services rendered. *Reidell v. Morse*, 19 Pick. (Mass.) 358.

The indentures must require the master to perform all duties designated by the statute, but the fact that they include more duties, does not render them invalid. *Cochran v. Davis*, 5 Litt. (Ky.) 118.

Where the statute requires that the apprentice must be bound to some trade, the indentures will be invalid if they fail to specify the trade. *In re Goodenough*, 19 Wis. 274. But otherwise, when the statute authorizes apprentices to be bound to any lawful business. *Bowes v. Tibbets*, 7 Me. 457; *Fowler v. Hollenbeck*, 9 Barb. (N. Y.) 309.

Failure by a master to record indentures, in compliance with the requirements of the statute, renders the apprenticeship avoidable, at the option of the apprentice, until they are recorded. *Haber v. Heis*, *Wright* (Ohio), 19.

The avoidance by apprentice must be established by an act showing unequivocally an intention to determine. Merely absenting himself a few days from his master's employment, will not prove an avoidance. *Wood, Mast. & Serv.* (2d Ed.) § 48; *Hudson v. Worden*, 39 Vt. 382; *Wray v. West*, 15 L. T. N. S. 180.

Quitting the master's service, and engaging in work elsewhere, is a sufficient avoidance by an apprentice of a voidable contract of apprenticeship. *Page v. Marsh*, 36 N. H. 305; *Brown v. Whittemore*, 44 N. H. 369.

power, being purely statutory, can be exercised only by such officer as the statute specifies, upon such persons as come within the statutory provisions, and in such manner as the statute directs.<sup>1</sup>

**7. Parties.**—At common law the person to be bound as apprentice was a necessary party to the indentures.<sup>2</sup>

**8. Duties of Master to Apprentice.**—The duties of the master to the apprentice are also, to a large extent, dependent upon the covenants of the indentures.<sup>3</sup> But he is bound, in every case, to instruct the apprentice in the trade or business in which the apprentice is articulated to him.<sup>4</sup> And in the absence of a special agreement to the contrary, to furnish him with clothes, food, and lodging, if the apprentice lives with him. Also with necessary medical aid.<sup>5</sup> A master stands *in loco parentis* to a minor apprentice, and must have a care to his moral training and to his health, diet, and safety.<sup>6</sup>

1. *Butler v. Hubbard*, 5 Pick. (Mass.) 250, 254; *Reidell v. Morse*, 19 Pick. (Mass.) 358; *Whitmore v. Whitcomb*, 43 Me. 458; *Howry v. Calloway*, 48 Miss. 587; *Com. v. Roach*, 1 Ashm. (Pa.) 27; *Smith v. Elwood*, 4 Cranch (U. S. C. Ct.), 670; *Brewer v. Harris*, 5 Gratt. (Va.) 285; *Squires v. Whipple*, 1 Vt. 69.

2. A father has, at common law, no authority to bind out his infant child. The child must execute the indentures himself. *King v. Arnesby*, 3 B. & Ald. 584; *King v. Ripon*, 9 East, 295.

It has been said that an infant could not bind himself unless his parent or guardian joined in the indentures. *Harney v. Owen*, 4 Blackf. (Ind.) 337. Compare *In re M'Dowles*, 8 Johns. (N. Y.) 328. It was always customary for the parent or guardian to join.

In many States, by statutory provision, the infant is the person to bind himself out. See Iowa Code, § 2282; Kan. C. L. § 332; La. R. S. § 71; N. J. Rev. "Apprentices," § 1; N. Y. R. S. pt. 2, Tit. 4, art. 1, § 1; Ohio R. S. § 3118; Wis. R. S., 1878, § 2377. *Arkley v. Horkins*, 14 Johns. (N. Y.) 374; *In re M'Dowles*, 8 Johns. (N. Y.) 328; *Guthrie v. Murphy*, 4 Watts (Pa.), 80.

In such States there is almost always a statutory provision that the consent of the parent or guardian shall be expressed in the indentures and evidenced by his signing them. See reference to statutory provisions in preceding paragraph. *Arkley v. Horkins*, 14 Johns. (N. Y.) 374; *In re M'Dowles*, 8 Johns. (N. Y.) 328; *Guthrie v. Murphy*, 4 Watts (Pa.), 80.

In many jurisdictions, however, the parent or guardian is given power to bind out an infant. See p. 637, n. 2.

In such jurisdiction the statutes generally require the consent of the infant, if over a certain age, to be stated in the indentures and evidenced by his signing them. See McClue Dig. (Fla.) ch. 4, § 3; Ill. R. S. ch. 9, § 1; Me. R. S. 1883, ch. 62, § 2; Mass. P. S. ch. 149, §§ 1, 2, and 3; Oregon Laws, chap. 13, Tit. III, § 36; Utah C. L. Tit. 16, ch. 4, § 1; Vt. R. L., 1880, § 2511; W. Va. R. S. ch. 133, § 1. *Wood Mast. & Serv.* (2d Ed.) § 42; *Commonwealth v. Moore*, 1 Ashm. (Pa.) 123; *Hudson v. Worden*, 39 Vt. 382; *Harney v. Owen*, 4 Blackf. (Ind.) 337; *Balch v. Smith*, 12 N. H. 437.

Neither the signature of the infant, without a clause in the indentures expressing his assent (*Wood Mast. and Serv.* (2d Ed.) § 43; *Harper v. Gilbert*, 5 Cush. (Mass.) 417), nor such a clause without the infant's signature to the indentures (*Commonwealth v. Atkinson*, 8 Phil. (Pa.) 375), is sufficient. Both are necessary.

Where statute requires the parent to bind infant as apprentice, and infant to give his assent, indentures by which infant binds himself and his mother assents are void. *Whitmore v. Whitcomb*, 43 Me. 458.

A testamentary guardianship being a personal trust, not to be delegated, it seems that such a guardian cannot bind out his ward as apprentice. *Balch v. Smith*, 12 N. H. 437.

3. *Wood Mast. & Serv.* (2d Ed.) § 49.

4. *Wood Mast. & Serv.* (2d Ed.) § 49.

5. *Rex v. Hales-Owen*, 11 Mod. 278; *Reg. v. Smith*, 8 C. & P. 153; *Easley v. Craddock*, 4 Rand. (Va.) 423.

6. See Iowa Code, § 2286; Utah C. L. Tit. 16, ch. 4, § 3; *Wood Mast. & Serv.* (2d Ed.) p. 60, n. 3; *Coventry v. Wood*

**9. Right of Master to Punish.**—A master has a right to correct and punish a minor apprentice for misconduct. He may even chastise him.<sup>1</sup> But this right is purely personal, and cannot be delegated.<sup>2</sup> It must be exercised with discretion and moderation.<sup>3</sup>

**10. Apprehension of Truant Apprentice.**—Statutes upon apprenticeship commonly provide for the apprehension of truant and refractory apprentices, and their commitment until they shall become tractable.<sup>4</sup>

**11. Term of Apprenticeship.**—Under the statute of 5 Elizabeth, c. 4, and according to the custom of London, the term of service must be at least seven years.<sup>5</sup>

An infant apprentice became emancipated on reaching twenty-one, and could leave his master's service, although the term fixed by the indentures had not expired.<sup>6</sup>

**12. Dissolution of Apprenticeship.**—Statutory provision is usually made for a dissolution of the apprenticeship and a cancellation of the indentures, on application of either party, for misconduct or breach of duty by the other.<sup>7</sup>

But it seems that the misconduct or breach of duty of neither party will justify the other in himself determining the apprenticeship and withdrawing from his relation of master or apprentice, without an order of court.<sup>8</sup>

hall, Hob. 134, a; Hull v. Gardner, 1 Mass. 172.

Indentures of apprenticeship do not give the master any higher rights, or greater control, over a female apprentice than such as the parent could legally exercise, and are, therefore, not void as being in restraint of marriage. Dent v. Cock, 65 Ga. 400.

1. Wood Mast. & Serv. (2d Ed.) p. 68, n. 5; 1 Blk. Comm. p. 428; Blake v. Grove, 4 Keb. 661, pl. 50.

2. People v. Phillips, 1 Whar. Cr. Ca. (N. Y.) 155.

3. People v. Sniffen, 1 Whar. Cr. Ca. (N. Y.) 502.

4. It is stated that a master has this right at common law. Wood Mast. & Serv. (2d Ed.) § 58.

5. Com. Dig. London, N. 2.

6. Cuming v. Hill, 3 B. & Ald. 59; Coghlan v. Callaghan, 7 Ir. C. L. R. 291; Drew v. Peckwell, 1 E. D. Smith (N. Y.), 408; Forsyth v. Hastings, 27 Vt. 646; Walker's Admr. v. Chambers, 5 Harr. (Del.) 311.

Upon the question whether the apprenticeship is determinable by reason of the apprentice having become of age, the master is bound by the statements as to the apprentice's age appearing in the indentures. McCutchin v. Jamieson, 1 Cranch (U. S. C. Ct.), 348.

But the apprentice is not. Drew v. Peckwell, 1 E. D. Smith (N. Y.), 408; Hooks v. Perkins, Busb. L. (N. Car.) 21.

The term begins from the date of the indentures, and not from the actual date of entering service. Wood Mast. & Serv. (2d Ed.) p. 692.

7. A court will discharge the apprentice, on application of his master, for serious misconduct, operating as a breach of the indentures. Wood Mast. & Serv. (2d Ed.) p. 91; Powers v. Ware, 2 Pick. (Mass.) 451; Sheppard v. Murdstone, 10 Mod. 144.

Dishonesty or immorality of the apprentice is a valid ground for a court to order the dissolution of an apprenticeship. Hawkesworth v. Hillary, 1 Saund. 314; Powers v. Ware, 2 Pick. (Mass.) 452.

8. Watkins v. Edwards, Vent. 175.

It seems quite clear that, in general, misconduct on the part of the apprentice will not justify the master in turning him away. His only course is to apply for an order of discharge. Wood Mast. & Serv. (2d Ed.) p. 90; Powers v. Ware, 2 Pick. (Mass.) 451; Wise v. Wilson, 1 C. & K. 662; Mercer v. Whall, 5 Q. B. 447.

Even dishonesty on the part of an apprentice will not justify his master in turning him away. Phillips v. Clift, 4 H. & N. 168.

But his conviction of felony probably would. Phillips v. Clift, 4 H. & N. 168.

By the custom of London a master may turn away his apprentice for gaming. Woodroffe v. Farnham, 2 Vern. 291.

An apprenticeship may be terminated by the joint agreement of all parties to the indentures.<sup>1</sup>

**13. Death of Master or Apprentice.**—The relation of master and apprentice, being a purely personal one on both sides, is of necessity terminated by the death of either the master or the apprentice.<sup>2</sup>

The death of either master or apprentice also determines such covenants as are purely personal—such as the covenant to serve or the covenant to leave.<sup>3</sup>

But not covenants not personal in their nature. Hence the death of the master does not determine his covenant to furnish board and lodging during the term.<sup>4</sup>

**14. Removal.**—The removal of the master out of the jurisdiction justifies the apprentice in withdrawing from his master's service.<sup>5</sup>

So does the sending of apprentices out of the jurisdiction.<sup>6</sup>

An apprentice is justified in leaving his master when the latter has treated him with great cruelty or inhumanity. *McGrath v. Herndon*, 4 T. B. Mon. (Ky.) 480; *Coffin v. Bassett*, 2 Pick. (Mass.) 357.

Or has been guilty of grossly immoral or improper conduct, such as would furnish an evil example to the apprentice. *Wood Mast & Serv.* (2d Ed.) § 49; *Berry v. Wallace*, *Wright* (Ohio), 657; *Warren v. Smith*, 8 Conn. 14; *Commonwealth v. St. German*, 1 Browne (Pa.), 24.

The incurable illness of the apprentice is no sufficient ground for a court to dissolve the apprenticeship. *Rex v. Halesowen*, 1 Stra. 99.

1. *Graham v. Graham*, 1 S. & R. (Pa.) 330.

A court of equity will dissolve an apprenticeship where the execution of the indentures was procured by fraud. *Webb v. England*, 29 Beav. 44. See *Mitchell v. McElvin*, 45 Ga. 558.

2. *Wood Mast. & Serv.* (2d Ed.) § 44; *Rex v. Peck*, 1 Salk. 66; *Cochran v. Davis*, 5 Litt. (Ky.) 118; *Eastman v. Chapman*, 1 Day (Conn.), 30.

The apprenticeship is not determined by the death of the parties if the articles contain express provisions that it shall not be. *Wood Mast. & Serv.* (2d Ed.) § 44.

The decease of the master renders the apprenticeship voidable, not void. If the apprentice continues to serve with the administrator of deceased master, she will be deemed to have served under the indentures, and cannot recover compensation for such services. *Phelps v. Culver*, 6 Vt. 430.

In England and Scotland a custom once existed for the heirs or executors of a deceased master to find a new master, but this is contrary to the general law. *Wood Mast. & Serv.* (2d Ed.) § 44.

3. *Wood Mast. & Serv.* (2d Ed.) § 44; *Rex v. Peck*, 1 Salk. 66; *Cochran v. Davis*, 5 Litt. (Ky.) 118.

4. *Wadsworth v. Gye*, Sid. 216; *Walker v. Hall*, 1 Sid. 117; *Wood Mast. & Serv.* (2d Ed.) § 44.

5. *Coffin v. Bassett*, 2 Pick. (Mass.) 357; *Lobdell v. Allen*, 9 Gray, 337; *Vickersee v. Pierce*, 12 Me. 315; *Walters v. Morrow*, 1 Houst. (Del.) 527.

If the infant consents to the removal, follows his master, and completes his term of service, he cannot recover for services rendered out of the jurisdiction, as they will be deemed rendered under the contract of apprenticeship. *Olney v. Myers* 3 Ill. 311.

6. *Randall v. Rotch*, 12 Pick. (Mass.) 107; *Commonwealth v. Edwards*, 6 Binn. (Pa.) 202; *Commonwealth v. Deacon*, 6 S. & R. (Pa.) 526; *Coventry v. Woodhall*, Hob. 134.

A right to remove the apprentice may be implied from the nature of the business or trade. *Coventry v. Woodhall*, Hob. 134.

The removal of the apprentice from the State abrogates the indentures, even though consented to by the apprentice. *Commonwealth v. Deacon*, 6 S. & R. 526; *Commonwealth v. Edwards*, 6 Binn. (Pa.) 202.

The removal of the apprentice from the State will not determine the indentures when consented to by both apprentice and his parents. This consent may be shown by parol. *Burden v. Skinner*, 3 Day (Conn.), 126.

A father consenting to the removal of his child cannot withdraw that consent and retake his child, without being liable on his covenant that the child should serve. *Lobdell v. Allen*, 9 Gray (Mass.), 377.

A custom that master may send his apprentice out of the jurisdiction is void.

**14. Assignment.**—The relation of the master to his apprentice being one of personal trust and confidence, he cannot substitute another in his place as master.<sup>1</sup>

**15. Premium.**—Upon dissolution of an apprenticeship by order of court, if a premium was paid on executing the indentures, the court may order the return of a proportionate part thereof.<sup>2</sup>

**16. Habeas Corpus.**—A writ of *habeas corpus* lies at the instance of either parent or apprentice to release a person held as apprentice under void or avoided indentures.<sup>3</sup>

**17. Covenants.**—*Infant Apprentice.*—In the absence of express statutory provision, an infant apprentice, executing the indentures, cannot be held liable on his covenants therein.<sup>4</sup>

*Parent or Guardian.*—A parent or guardian executing the indentures as party thereto becomes bound for the faithful performance by the apprentice of his duties as fixed by the covenants.<sup>5</sup>

Randall v. Rotch, 12 Pick. (Mass.) 107; Wood Mast. & Serv. (2d Ed.) § 46.

1. Wood Mast. & Serv. (2d Ed.) § 44; Caister v. Eccles, 1 Ld. Raym. 683; Rex v. Bedford, 6 T. R. 452.

Where a master sells the service of his minor apprentice for a valuable consideration, although the apprentice be not liable to serve, yet if he do serve the master may sue for the consideration. Nickerson v. Howard, 19 Johns. (N. Y.) 113; Martin v. Rice, 2 Browne (Pa.), 191; Guilderland v. Knox, 5 Cow. (N. Y.) 363. Compare Walker v. Johnson, 2 Cranch (U. S. C. Ct.), 203. But not if the minor absconds during the period for which his services were assigned. Davis v. Coburn, 8 Mass. 299. Compare Martin v. Rice, 2 Browne (Pa.), 191.

An assignment with consent of the minor, but without that of the parent, makes the apprenticeship determinable by the latter. Com. v. Leeds, 1 Ashm. (Pa.) 405. See case under REMOVAL.

Even though the apprentice assents to the transfer, such a transfer will render the articles avoidable at any time by him. Rex v. Bridgford, Burr. (S. C.) 133; Williams v. Finch, 2 Barb. (N. Y.) 208.

Where all the parties consent to an assignment of the indentures, such assignment is valid, and does not avoid the indentures. Lobdell v. Allen, 9 Gray (Mass.) 377; Com. v. Leeds, 1 Ashm. (Pa.) 405; Rex v. Stockland, 1 Dougl. 70.

2. Therman v. Abell, 2 Vern. 64; Stewart v. Davis, 11 Ir. L. R. 34; *Ex parte Sundby*, 1 Atk. 149; Wood Mast. & Serv. (2d Ed.) § 45; 4 Bac. Abr., title Master and Servant, 566.

Where an apprentice dies during the term, the master is not liable to refund any part of the premium. Whincup v. Hughes, L. R. 6 C. P. 78; Wood Mast.

& Serv. (2d Ed.) § 62; Fraser Mast. & Serv. 468; Derby v. Humber, L. R. 2 C. P. 247.

3. U. S. v. Anderson, Cooke (Tenn.), 143; Commonwealth v. Robinson, 1 S. & R. (Pa.) 353; Commonwealth v. Harrison, 11 Mass. 63; *In re McDowles*, 8 Johns. (N. Y.) 328; Rex v. Delaval, 3 Burr. 1434.

4. Whitley v. Loftus, 8 Mod. 190; Gylbert v. Fletcher, Cro. Car. 179; Whittingham v. Hill, Cro. Jac. 494; Lylly's Case, 7 Mod. 15; Blunt v. Melcher, 2 Mass. 228. Compare Woodruff v. Logan, 6 Ark. 276.

The English cases cited above were under the statute of 5 Eliz. c. 24.

According to the custom of London, an infant over the age of fourteen years could bind himself out as apprentice, and was liable on his covenants to the indentures. Com. Dig. London, N. 2; 3 Viner Abr. p. 27 (Apprentice L.); Wood Mast. & Serv. (2d Ed.) § 38; Whittingham v. Hill, Cro. Jac. 494; Barber v. Dennis, 6 Mod. 69 (Case 80).

In Meakin v. Morris, 53 L. J. M. C. 72, the indentures contained a covenant that the wages of the minor should be suspended during such time as the master's business should be interrupted or impeded by any turn out, during which time the minor was allowed to hire himself out for his own benefit. It was held that such provision made the indentures voidable at the election of the minor. The court held that any agreement disadvantageous to an infant apprentice rendered the articles void, and that consequently the apprentice would not be compelled to serve under them. *Accord*, see Reg. v. Lord, 12 Q. B. 757 (Servant not Appr.)

5. Wood Mast. & Serv. (2d Ed.) §

But not where, by statute, he is required to sign merely to indicate his consent to the binding out.<sup>1</sup>

**Master.**—The master is liable in damages for a breach of his covenants in the indentures.<sup>2</sup>

**Mutual and Independent.**—The covenants in indentures are mutual and independent, and a breach of covenant by one party does not excuse a breach by the other.<sup>3</sup>

**18. Wages.**—The master is entitled to the earnings of his apprentice during the term.<sup>4</sup>

Third persons employing an apprentice must pay the value of his services to the master.

A payment to the apprentice will not discharge this obligation,

49; *Cuming v. Hill*, 3 B. & Ald. 59; *Branch v. Ewington*, 2 Dougl. 518; *Ackley v. Horkins*, 14 Johns. (N. Y.) 374; *Sacket v. Johnson*, 3 Blackf. (Ind.) 61; *Blunt v. Melcher*, 2 Mass. 228; *Velde v. Levering*, 2 Rawle (Pa.), 269.

1. *Woodruff v. Corey*, 3 N. J. 540; *Velde v. Levering*, 2 Rawle (Pa.), 269; *Holbrook v. Bullard*, 10 Pick. (Mass.) 68; *Blunt v. Melcher*, 2 Mass. 228; *Ackley v. Hoskins*, 14 Johns. (N. Y.) 374; *Sacket v. Johnson*, 3 Blackf. (Ind.) 61.

In such case a parent or guardian is presumed to have signed solely to indicate his assent, unless it plainly appear that he intended to become party to the covenants. *Blunt v. Melcher*, 2 Mass. 228.

**Defences.**—In an action on the covenant that apprentice shall serve, the parent or guardian may show in defence that the apprentice was prevented from serving by the default of the master. *Coffin v. Bassett*, 2 Pick. (Mass.) 357; *McGrath v. Herndon*, 4 T. B. Mon (Ky.) 480; *Berry v. Wallace*, *Wright* (Ohio), 657; *Warner v. Smith*, 8 Conn. 14. Or that the apprenticeship was determined without the default of the apprentice. *Hiatt v. Gilmer*, 6 Ired. (N. Car.) 450; *Hooks v. Perkins*, *Busb.* (N. Car.) L. 21; *Couchman v. Sillar*, 18 W. R. 757; *Baxter v. Burfield*, 2 Str. 1266; *Ellen v. Topp*, 6 Exch. 424; *Rex v. Harberton*, 1 T. R. 139.

In an action for breach of the covenant for faithful service, acts of misconduct on the part of the master, not sufficient to warrant a dissolution of the apprenticeship by a court, may be shown in mitigation of damages. *Berry v. Wallace*, *Wright* (Ohio), 657.

To an action for breach of an apprenticeship deed, the defendant (the father) pleaded that the apprentice "was and is prevented by the act of God, to wit, by permanent illness, happening and arising after the making of the indenture, from remaining with or serving the plaintiff during all the said term." *Held*, on de-

murrer, a good plea in excuse of performance, without any averment that the plaintiff had notice of the illness before the commencement of the action. *Boast v. Firth*, L. R. 4 C. P. 1.

Illness not brought on by apprentice's own act will not release master from liability to pay wages. *Caden v. Farwell*, 98 Mass. 137; *Wood Mast. & Serv.* (2d Ed.) § 58.

A removal from the State by the master is a breach of his covenant to teach. *Walters v. Morrow*, 1 Houst. (Del.) 527; *Coffin v. Bassett*, 2 Pick. (Mass.) 357.

2. *Wood Mast. & Serv.* (2d Ed.) § 51.

The fact that the apprentice obstinately refused to be taught, and by his wilful act prevented his master from teaching him, is a good defence to an action on the covenant to teach. *Raymond v. Minton*, L. R. 1 Ex. 244; *Westwick v. Theodor*, L. R. 10 Q. B. 224. But in order to excuse himself on this score, the master must show that he used all reasonable means to control and instruct the apprentice. *Phillips v. Clift*, 4 H. & N. 168; *Wright v. Brown*, 5 Md. 37. The fact that the apprentice was incapable of being taught the trade relieves the master from his obligation to teach. *Wright v. Brown*, 5 Md. 37; *Barger v. Caldwell*, 2 Dana (Ky.) 129; *Clancy v. Overman*, 1 Dev. & B. (N. Car.) 402.

3. *Whitley v. Loftus*, 8 Mod. 190; *Winstone v. Linn*, 1 B. & C. 460; *Phillip v. Clift*, 4 H. & N. 168.

4. *Wood Mast. & Serv.* (2d Ed.) § 50; *Co. Litt.* 117, a; *Barber v. Dennis*, 6 Mod. 69; *Kelly v. Sprout*, 97 Mass. 169; *Randall v. Rotch*, 12 Pick. (Mass.) 107.

The master's right to the wages earned after a transfer of the apprentice's services rendering the articles avoidable, is determined by an avoidance of the articles by the apprentice, and the master is liable to the apprentice for all wages by him received since the transfer. *Randall v. Rotch*, 12 Pick. (Mass.) 107. See *Kelly v. Sprout*, 97 Mass. 169.

## APPRENTICES—APPROPRIATE—APPROPRIATION.

although such third person did not know of the existence of the apprenticeship at the time of payment to the apprentice,<sup>1</sup> unless the want of knowledge was due to the laches of the master.<sup>2</sup>

As between parent and apprentice, the parent is, in the absence of express provision to the contrary, entitled to all wages earned under the articles.<sup>3</sup>

**19. Rights of Master against Third Persons.**—A master has a right of action against any person wrongfully injuring his apprentice so as to cause a loss of service.<sup>4</sup>

He has a right of action against any one enticing away or harboring his apprentice.<sup>5</sup>

**APPROPRIATE—APPROPRIATION.** (See also **APPLY.**)—To determine the use of, to make a thing the property of a person; to reserve or destine a fund or property for a distinct use, or for the payment of a particular demand.<sup>6</sup>

Appropriation is originally the act of appropriating. In common parlance, the money in the public treasury which has been appropriated to some public use is called the appropriation.<sup>7</sup>

1. *James v. Le Roy*, 6 Johns. (N. Y.) 274; *Conant v. Raymond*, 2 Aik. (Vt.) 243; *Bowes v. Tibbetts*, 7 Me. 457; *Stout v. Woody*, 63 N. Car. 37; *Bardwell v. Purrington*, 107 Mass. 419; *Wood Mast. & Serv.* (2d Ed.) § 50.

2. *Bardwell v. Purrington*, 107 Mass. 419.

3. *Balch v. Smith*, 12 N. H. 437.

4. *Hodsoll v. Stallebrass*, 11 Ad. & El. 301; *Hall v. Hollander*, 4 B. & C. 660; *Ames v. Union R. R. Co.*, 117 Mass. 541.

5. *Bonnel v. Brotzman*, 3 W. & S. (Pa.) 178; *Heinecke v. Rawlings*, 4 Cranch (U. S. C. Ct.), 699; *Hooks v. Perkins*, Busb. L. (N. Car.) 21; *Stuart v. Simpson*, 1 Wend. (N. Y.) 376; *Ferguson v. Tucker*, 2 H. & G. (Md.) 182.

In an action for enticing away an apprentice, plaintiff must prove that defendant knew of the apprenticeship at the time of the enticing. See cases cited in last paragraph above.

No action lies for enticing away apprentice where he did not sign the indenture. *Ivins v. Norcross*, 3 N. J. L. 977.

6. Under the Declaration of Rights of the Massachusetts constitution, which provides, "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor," the court said: "Here again the term 'appropriate' is of the largest import, and embraces every mode by which property may be applied to the use of the public. Whatever exists, which public necessity demands, may be thus appropriated." *Boston & Lowell R. v. Salem & Lowell R.*, 2 Gray

(Mass.), 1, 35. See *Eidemiller v. Wyandotte City*, 2 Dillon (U. S.), 376.

Where a policy of insurance provided that if the premises should at any time be appropriated, applied, or used for anything hazardous or extra hazardous, or specified in the memorandum of special rates, the policy should become void, it was held that a change from the manufacturing of carpets to that of blankets was no such change or different appropriation as was contemplated by that clause. *Smith v. Mech. & Trad. Ins. Co.*, 32 N. Y. 399, 403. See *U. S. Fire & Mar. Ins. Co. of Balt. v. Kimberly*, 34 Md. 224.

Where a testator first charged all his estate, both real and personal, with the payment of his debts, and then declared that the revenues should be used for that purpose together with such other appropriations as he might make, it was held that the word "appropriations" evinced the intention of the testator to designate and set apart the portion referred from his other property for a specific object, viz., to constitute a fund in the hands of his executors to pay his debts. *Whithead v. Gibbons*, 2 Stockton's Ch. (N. J.) 230.

7. Appropriation is thus used in contracts to denote the application of a sum of money paid by a debtor to his creditor to one or more of several debts due from the former to the latter. This may be made by the debtor himself, or, in case of his neglect, by the creditor, or, where neither has made it, by the law. See *Stone v. Seymour*, 15 Wendell (N. Y.), 19, for a full view of the doctrine. And see *Postmaster-General v. Furber*, 4 Mason (U. S.), 333; *United States v.*



Other meanings of *appropriate*, are to distribute ;<sup>1</sup> also, suitable ; proper.<sup>2</sup>

**APPROVE—APPROVER—APPROVEMENT.**—This group of words has several meanings. First, it signifies much the same as improvement ; thus “*approvement of common*” means the enclosing a part of a common by the lord of the manor for the purpose of cultivating the same, leaving sufficient for the commoners.<sup>3</sup> Second, to cultivate land after enclosing it ; to make the best benefit or profit of it, by increasing the rent. The profits of a farm.<sup>4</sup> Third, its most frequent meaning, and the one in use in modern criminal law, is to accuse an accomplice by giving evidence against him, in order to secure the approver’s own pardon.<sup>5</sup> Finally, to be satisfied with ; commend ; accept.<sup>6</sup>

Wardwell, 5 Mason (U. S.), 82; Reed v. Boardman, 20 Pick. (Mass.) 441; Hoyt v. Story, 3 Barb. (N. Y.) 262.

Appropriation, as applicable to the general fund in the treasury, may perhaps be defined to be an authority from the legislature given at the proper time and in legal form to the proper officers to apply sums of money out of that which may be in the treasury in a given year to specified objects or demands against the State. *Ristone, etc., v. The State ex rel.*, etc., 20 Ind. 328. 138.

For other examples of this use of the word see *McConnel v. Wilcox*, 2 Ill. 344; *State v. Bordelou*, 6 La. Ann. 68.

A specific appropriation is an act by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular demand. *Stratton v. Green*, 45 Cal. 140.

The act of Congress of July 4, 1864 (13 Stat. at Large, 381), declares that the jurisdiction of the court of claims shall not extend to or include any claim against the United States growing out of the destruction of, appropriation of, or damage to property by the army or navy, or any part of the army or navy engaged in the suppression of the rebellion from the commencement to the close thereof. It was held that the term “*appropriation*” in this act included all taking and use of property by the army and navy in the course of the war not authorized by contract with the government. *Filor v. United States*, 9 Wallace (U. S.), 45. See *U. S. v. Russell*, 13 Wallace (U. S.), 623; *Pugh v. U. S.*, 13 Wallace (U. S.), 633; *U. S. v. Kimball*, 13 Wallace (U. S.), 636; *Waters v. U. S.*, 4 Ct. of Claims (U. S.), 389.

On appropriation of lands by the State, see *People v. Com. of State Land Office*, 23 Mich. 270; *Railroad Co. v. Fremont County*, 9 Wallace (U. S.), 89.

1. To appropriate also means to

distribute. The property in goods of a deceased person is in the executor or administrator, and it is his duty to appropriate them, that is, to distribute them among the persons entitled according to their rights. See *Blake v. Dexter*, 12 Cush. (Mass.) 559.

2. Where an act provided that the real estate of any private corporation “*above what was required and used for the transaction of its appropriate business*” should be liable to be assessed and taxed to the same extent as if owned by an individual, it was held that land owned by a bridge company and used for wharves was liable to taxation under the statute. *Toll Bridge Co. v. Osborn*, 35 Conn. 7.

The fifteenth amendment to the constitution of the United States empowered Congress to enforce the rights therein given by appropriate legislation. But an act of Congress broad enough to cover wrongful acts without as well as within the constitutional jurisdiction is not such appropriate legislation. *U. S. v. Reese*, 2 Otto (U. S.), 214.

3. There can be no approver in derogation of a right of common of turbary. At common law the lord might approve against common of pasture appendant. *Grant v. Cunner*, 1 Taunton, 434.

4. *Cowell's Interpreter* (Law Dict.), *sub voce*.

Thus the “*king's approvers*” were those that had the letting of the king’s demesnes in small manors, to his best advantage. Stat. 51 Hen. III. st. 5.

So the bailiff of a lord in his franchise. Stat. 9 Hen. VI. c. 10.

5. An approver is one who confesses himself guilty of felony, and accuses others of the same crime to save himself from punishment. *Myers v. People*, 26 Ill. 173. See *Gray v. People*, 26 Ill. 344; *Rex v. Rudd*, 1 Cowper, 331.

6. Where a codicil recited the will with this expression, “*which I fully approve*

**APPURTENANCE.** (See also APPURTENANT; DEEDS; EASEMENTS AND SERVITUDES.)—A thing used with and related to or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant.<sup>1</sup> A thing belonging to another thing as principal, and which passes as incident to the principal thing.<sup>2</sup> By appurte-

of," it was held to have the effect of a republication. *Rich v. Cockell*, 9 Vesey, Jr. 369.

Where a statute prohibited any one to be received as a lecturer, etc., in any church, chapel, etc., unless he be first "approved" and thereunto licensed by the bishop of the diocese, the court refused a *mandamus* to the Bishop of London upon affidavit made by the bishop that he could not consistently with his duty approve of the applicant as a fit person, holding that it was in the discretion of the bishop. *The King v. The Archbishop of Canterbury*, and the Bishop of London, 15 East. 117.

Where goods were sold to be paid "by bill," evidence was rejected to show that "by bill" is meant an "approved" bill. "I cannot receive this evidence," said Lord Ellenborough. "The contract must speak for itself. Even if the phrase 'approved bill' were introduced, I think it could only mean a bill to which no reasonable objection could be made, and which ought to be approved." *Hodgson v. Davies*, 2 Campbell, 530.

So where one agrees to execute to another a note with "good and approved freehold surety," the latter cannot arbitrarily refuse the surety; it is sufficient if the surety be good freehold surety, worthy of approval. For, said the court, "It is further urged that the 'possession of the lease which obligated Personett to procure a 'good and approved freehold surety' to sign the note with him conferred upon Andis the right, as he might see fit, to approve or disapprove any person who may have been offered as surety under that provision; and that hence Andis had the right to reject any note tendered by Personett on which the surety was, for any cause, unacceptable to him. We are unable to agree to such a construction of the lease. The word 'approved' has several shades of meaning. One of the definitions which Webster gives of it is, 'To make or show to be worthy of approbation or acceptance; to commend;' and it is in that sense we construe the word as it was used in connection with the surety which was to be furnished by Personett. The phraseology used in the provision in question was equivalent to saying that Personett

should execute a note with 'good freehold surety, worthy of approval.' In view of the nature of the transaction as evinced by the entire lease, any less liberal construction than this would scarcely seem reasonable, and might have been made to work great injustice to Personett. We consequently see no objection to the substantial sufficiency of the complaint." *Andis v. Personett*, 9 N. E. Rep. 101.

On a sale for "approved" indorsed paper, the construction of law is, paper which ought to be approved. *Guier & Diehl v. Page*, 4 S. & R. (Pa.) 1.

On such a sale the burden of proof is thrown upon the vendee to show that it was such a note as the vendor ought to have received and approved. *Mills v. Hunt*, 20 Wend. (N. Y.) 431.

Where the charter of the Bank of the United States required the cashier to give a bond with two or more approved securities, in a suit upon the bond, it was held that the fact of such approval might be proved by presumptive evidence, there being no record of such approval. *Bank of U. S. v. Dandridge*, 12 Wheaton (U. S.), 64.

1. The word "appurtenances" has a technical signification, and when strictly considered is employed in cases for the purpose of including any easements or servitudes used or enjoyed with the demised premises. When the term is thus used, in order to constitute an "appurtenance," there must exist a propriety of relation between the principal or dominant subject and the accessory or adjunct, which is to be ascertained by considering whether they so agree in nature and quality as to be capable of union without incongruity. *Riddle v. Littlefield*, 53 N. H. 503, 508.

2. The term as used in conveyances passes nothing but the land and such things as belong thereto, and are part of the realty. *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57. See *Meek v. Breckenridge*, 29 Ohio, 642, 648.

Therefore, where a conveyance is of a piece of land by defined boundaries "with appurtenances," other land not included in the boundaries will not pass as appurtenant to the grant. All that can be claimed, as embraced in the word "appurtenances," are easements and servi-

nance is meant not what is on, but what is off, the land.<sup>1</sup> The word "appurtenance" has received frequent construction by the

tudes necessary to the enjoyment of the land conveyed. *Woodhull v. Rosenthal*, 61 N. Y. 382.

So where the granting clause in a lease was as follows: "That the said Richard Bell has this day leased and rented to the said R. P. Hall . . . the Bell house . . . with all the appurtenances thereunto belonging"; it was held that a kettle situated upon a lot not included in the lease of hotel property, and not indispensable to its enjoyment, although a convenience to such property, and used by the grantor in connection therewith, is not an appurtenance thereto, and the grantee may at any time be deprived of its use by the grantor; for the term "appurtenances" carries with it no rights or interest in property of the grantor on other lands not included in the deed under which the grantee claims. *Barrett v. Bell*, 82 Mo. 110. See *Bolton v. Bolton*, L. R. 11 Ch. Div. 968; *Leonard v. White*, 7 Mass. 6.

It cannot be made to include anything not situate on the land described, though it belong to the grantor, and be used by him in his business. *Frey v. Drahos*, 6 Neb. 1; s. c., 29 Am. Rep. 353. See *Grant v. Chase*, 17 Mass. 443; *Spaulding v. Abbott*, 55 N. H. 423; *Barber v. Clark*, 4 N. H. 380; *Coolidge v. Hagar*, 43 Vt. 9; *Swazey v. Brooks*, 34 Vt. 451; *Seavey v. Jones*, 43 N. H. 441; *Bettisworth's Case*, 2 Coke, 516; *Jackson v. Striker*, 1 Johns. Cases (N. Y.), 284; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; *Buszard v. Capel*, 8 B. & C. 141; s. c., in Ex. Ch. 6 Bingham, 150; *Ogden v. Jennings*, 62 N. Y. 526.

1. Therefore buildings are in no sense appurtenances; but if annexed to the freehold, they are a parcel of the land, and pass as such by the deed. *U. S. v. Harris*, 1 Sumn. (U. S.) 21, 38.

Land cannot be an appurtenance to land. Appurtenances, in a will or deed, comprehend only things in their nature incident to the tract conveyed. *Helme v. Guy*, 2 Murph. (N. Car.) 341. See *New York Central R. Co. v. Buffalo R. Co.*, 49 Barb. (N. Y.) 501; *Harris v. Elliott*, 10 Pet. (U. S.) 25.

In wills, however, lands may pass under the term "appurtenances" to give effect to the intent. *Otis v. Smith*, 9 Pick. (Mass.) 293.

And by appurtenances, in a deed of 5000 acres of Pennsylvania lands, dated 1704, it was held that the usual city lots and liberty lands passed. *Hill v. West*, 4 Yeates (Pa.), 142.

But the fee of an adjoining road or

street does not pass by a deed, as an appurtenance of the land professedly granted. *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; *Harris v. Elliott*, 10 Pet. (U. S.) 25.

An appurtenance which is conveyed by general terms in a grant must be something which necessarily attaches to the lands conveyed as a matter of right. Thus defendant sold and conveyed to plaintiff a dwelling-house and lot in the city of T., described by metes and bounds, "with the appurtenances," the deed containing covenants of warranty and of quiet enjoyment. There were at the time a bath-room and water-closet in the dwelling, the discharge-pipes from which emptied into a sewer leading from the premises to and across adjoining premises owned by G. Defendant had no right to the use of the sewer across the lands of G., and G., subsequent to the conveyance, brought an action against plaintiff perpetually restraining her from using said sewer. In an action to recover damages for alleged breach of the covenants, *held*, that the right to use the sewer was not a legal appurtenance within the meaning of the deed, and that, therefore, the action was not maintainable. *Green v. Collins*, 86 N. Y. 246.

The words "with the appurtenances" cannot affect the rights of the parties or enlarge the scope of the deed, as the appurtenances would pass without such words, for it is a general rule that whatever is in use for the land as an incident or appurtenance is conveyed by the deed. *Hattemeier v. Albro*, 18 N. Y. 48.

In *Plant v. James*, 5 B. & A. 791, Lord Denman said: "Nothing is more clear than that under the word 'appurtenances,' according to its legal sense, an easement which has become extinct, or which does not exist in point of law by reason of unity of ownership, does not pass. If the grantor wishes to revive or create such a right, he must do it by express words, or introduce the terms 'therewith used and enjoyed,' in which case easements existing in point of fact though not existing in point of law would be transferred to the grantee." See *Simmons v. Cloonan*, 81 N. Y. 557; *Curtis v. Ayrault*, 47 N. Y. 73; *Lampman v. Milks*, 21 N. Y. 505; *French v. Carhart*, 1 N. Y. 96; *Bank of British N. A. v. Miller*, 7 Sawyer (U. S.), 163.

The mere use of the word "appurtenances" will not create an easement. *Kenyon v. Nichols*, 1 R. I. 411.

The incidents which pass as "appur-

courts, and the principles on which their interpretation was based have been clearly explained.<sup>1</sup>

tenances" must be open and visible, and when so, knowledge will be inferred, and the appurtenances which pass in such case are not limited to those absolutely necessary to the enjoyment of the property conveyed. It is sufficient if full enjoyment of the property cannot be had without. Thus H., being the owner of premises upon which was a mill known as "The Old Mill," and a dam and reservoir, the water from which was conducted to the mill by a flume, conveyed "The Old Mill" to B., the deed granting the right to use the water of the reservoir for the benefit of the mill, with the condition, however, that in case the mill should not be kept in use the water-privileges and right of flowage should cease and revert to H. H. subsequently contracted to sell and convey to B. a portion of the lands lying between "The Old Mill" and the reservoir, upon which B. erected a new mill, taking the water from the reservoir for its use. B. subsequently assigned his contract back to H., and released the title acquired under it. H. thereupon, without reference to the contract, conveyed to S. the premises embraced therein, with appurtenances, as to which nothing was said in the contract. "The Old Mill" was afterwards destroyed by fire, and was not rebuilt. H. conveyed the lands upon which was the reservoir to defendant C., who proceeded to fill up the reservoir and remove the flume. In an action to restrain the doing of this, *held*, that as by the assignment of the contract to H. he became re-invested with the entire title, freed from the equities of the contract, the date of the deed to S. became the date of the sale, and the water-power then in use for the mill, and visibly incident and appurtenant thereto, passed by the deed, and that, therefore, the action was maintainable. The assignment from B. to H. in terms authorized the latter to convey to S., and the conveyance was in pursuance of an arrangement between B. and S.; the consideration of the deed was about the contract price, with interest, unaffected by the improvements put on the land by B. *Held*, that all the facts justified a finding that the intent of the parties was not simply to carry out the old contract, but that the sale should bear the date of the deed and that the water-power should pass as appurtenant. B. fitted the mill so erected by him with steam-power, to be used when the water-supply was insufficient. *Held*, that this did not prevent the passing, under the

deed to S., as appurtenant, of the right to use the water, as the water-power was necessary to the full enjoyment of the property. *Simmons v. Cloonan*, 81 N. Y. 557. See *Voorhees v. Burchard*, 55 N. Y. 98.

A devise of a grist-mill "with the appurtenances" will pass everything necessary for the full and free enjoyment of the grist-mill, and requisite for the support of the establishment, such as dam, water, the race leading to the mill, a proper portion of ground before the mill for the unloading and loading of horses, wagons, etc., as used by the testator. *Blaine v. Chambers*, 1 S. & R. (Pa.) 169.

But the soil of a way immemorably used for the purpose of access to the mill does not pass, though it may be treated as a grant of the easement for the accommodation of the mill. *Leonard v. White*, 7 Mass. 6.

What is necessary for the enjoyment of a mill-stream passes as an appurtenance; therefore a water-power appurtenant to a mill passes. *Pickering v. Stabler*, 5 S. & R. (Pa.) 109.

But one who hires a tanyard and bark-mill cannot throw the contents into the stream, nor put his waste bark on the lessor's adjoining land, for that is a convenience, not a necessity. *Howell v. McCoy*, 3 Rawle (Pa.), 256.

1. The "appurtenance" and the thing to which it is appurtenant must agree in nature and quality. Thus a seat in a church may be appurtenant to a house, but not to land. Where a mill was sold with the appurtenances, a kiln occupied with the mill for many years did not pass, it not appearing but that the kiln was a lime-kiln, having no relation to the mill, though had it been shown to be a malt-kiln it might pass. 3 Salk. 40, "Appertaining."

So it was decided that by a devise of a silver tea-kettle and lamp with its appurtenances nothing passes but the kettle, lamp and frame, and not, as the devisee claimed, the silver canister, tea-pot and lamp, milk-pot, spoons, strainer, and tongs. *Hunt v. Berkley*, Mosely Ch. Rep. 47.

The right to take ore out of certain mine-hills is an easement, and is such a right as can be annexed to other land by express grant, and will pass as appurtenant to it. *Grubb v. Grubb*, 74 Pa. St. 25.

One entire railroad will not pass by the word "appurtenance" to another railroad, any more than one tract of land would pass as appurtenant to another. *Phila.*

**APPURTENANT.** (See also APPENDANT; APPURTENANCES; EASEMENTS; FRANCHISES; INCORPOREAL HEREDITAMENTS; RIGHTS OF WAY.)—Annexed to or belonging to. An annexation, where the connection has arisen either by grant or by prescription from long adverse enjoyment. It is of convenience merely, and not of necessity, and may have had its origin at any time, in both of which respects it is distinguished from appendant.

*v. Phila. & Reading R. Co.*, 58 Pa. St. 253.

But flats may pass as appurtenant to a wharf, notwithstanding the maxim that land cannot pass as appurtenant to land, for a wharf is not land within the construction of that maxim, and the flats are necessary for the use of the wharf, and usually occupied with it. *Doane v. Broad Street Assoc.*, 6 Mass. 332. See *Barker v. Bessey*, 73 Me. 472; s. c., 40 Am. Rep. 377, and cases cited; *Hoskins v. Brawn*, 76 Me. 68.

So appurtenances of a riparian lot include an addition formed by an extension of the port-warden's line outward. *Williams v. Baker*, 41 Md. 523.

This maxim that land cannot be appurtenant to land has some exceptions. Thus in wills lands may pass under the term "appurtenances," to give effect to the intent. *Otis v. Smith*, 9 Pick. (Mass.) 293.

And a grant of a messuage with the lands appertaining will pass the lands usually occupied therewith. *Blackborn v. Edgley*, 1 P. Wms. 600. See *Hill v. Grange*, 1 Plowden, 164; *Ammidown v. Ball*, 8 Allen (Mass.), 293.

And appurtenances may include a yard and sidewalk of a building. *McDermott v. Palmer*, 8 N. Y. 383, 387.

The rule is that land will pass under this word whenever it is essential to the beneficial use and enjoyment of the property granted. Therefore a written agreement for the sale and conveyance of a "bridge with the privileges and appurtenances" will pass the land upon which it stands. *Sparks v. Hess*, 15 Cal. 186.

But not other land held by the bridge company. *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410.

So by the devise of a mill "and its appurtenances," not the buildings merely, but all the land under the mill and necessary for the use of it, and commonly used with it, passes to the devisees. *Whitney v. Olney*, 3 Mason (U. S.), 280. See *Gilson v. Brockway*, 8 N. H. 465; *Wise v. Wheeler*, 6 Ired. (N. Car.), 196; *Allen v. Scott*, 21 Pick. (Mass.) 25; *Blake v. Clark*, 6 Greenl.

(Me.) 436; *Forbush v. Lombard*, 13 Metc. (Mass.) 109; *Swartz v. Swartz*, 4 Barr. (Pa.) 353; *U. S. v. Appleton*, 1 Sumn. (U. S.) 492.

Also the right to convey and discharge water from and across land not within the boundaries given by the deed. *Jackson v. Trullinger*, 9 Oregon, 393.

Whatever is on board a ship for the objects of a voyage and adventure on which she is engaged, belonging to the ship and not being cargo, constitutes a part of the ship and her "appurtenances." *Gale v. Laurie*, 5 B. & C. 150. See *The Witch Queen*, 3 Sawyer (U. S.), 201; *Briggs v. Strange*, 17 Mass. 405.

A clause in a mortgage upon a vessel read "with her boats, guns, ammunition, small-arms, and appurtenances." It was held that a piano was not one of the appurtenances. *St. John v. Bullivant*, 45 U. C. Q. B. Rep. 614.

The word "appurtenance" will not pass an easement which the grantor could not effectually convey; therefore a deed conveying land subsequent to the statutory closing of a highway adjoining does not convey an easement in the highway which entitles the grantee to the damages subsequently awarded. *King v. The Mayor of New York et al.*, 102 N. Y. 171.

The use of the word "appurtenances" has been especially construed, as to deeds, in *Smith v. Modus Water-power Company*, 35 Conn. 392; *Blakeman v. Blakeman*, 39 Conn. 320; *Gazetty v. Bethune*, 14 Mass. 49; s. c., 7 Am. Dec. 188, where it was held that its use would not create a new easement; *Grant v. Chase*, 17 Mass. 443; s. c., 9 Am. Dec. 161; *Pickering v. Stapler*, 5 S. & R. (Pa.) 107; s. c., 9 Am. Dec. 336; *James v. Plant*, 4 Ad. & El. 749; *Strickler v. Todd*, 10 S. & R. (Pa.) 63; s. c., 13 Am. Dec. 49; *Parsons v. Johnson*, 68 N. Y. 62; *Worthington v. Grinton*, 2 Ell. & Ell. 618.

For its use in wills, see *Blaine's Lessee v. Chambers*, 1 S. & R. (Pa.) 169; *Smith v. Ridgeway*, L. R. 1 Ex. 46; *Doe dem. Renow v. Ashley*, 10 Ad. & El. N. S. 663; *Doe dem. Hubbard v. Hubbard*, 15 Ad. & El. N. S. 227; *Pheysey v. Vicary*, 16 M. & W. 484.

## APPURTENANT—APT TIME—ARBITRARILY.

Appurtenant is that which belongs to another thing, but which has not belonged to it immemorially.<sup>1</sup>

**APT TIME.**—Sometimes depends upon *lapse* of time, as when a thing is required to be done at the first term, or within a given time, it cannot be done afterwards. But it more usually refers to the order of proceeding, as *fit* or *suitable* time.<sup>2</sup>

**ARBITRARILY.**—As employed in a lease with reference to the withholding of the lessor's consent to an assignment by the lessee, seems to mean "without fair, solid, and substantial cause, and without reason given," and not to be applicable where the assent is refused "upon any fair and reasonable ground," and upon advice, even without reasons given therefor.<sup>3</sup>

1. Coke on Littleton, 121, b; Farmer v. Ukiah Water Co., 56 Cal. 11.

Where a grantor conveyed by deed a tract of land described by metes and bounds, with a mill upon the same, and at the time of the conveyance there was a raceway to conduct the water from the mill, running along the side of the natural stream, beyond the bounds of the land granted into other land of the grantor, and there discharging the water into the natural stream, and which raceway had been used with the mill several years, and was necessary to the convenient use of the mill, it was held that a right to have the water flow off uninterruptedly through the whole extent of the raceway passed as appurtenant to the mill. New Ipswich W. L. Factory v. Batchelder, 3 N. H. 190.

In Nicholas v. Chamberlain, Cro. Jac. 121, Croke says: "It was held by all the court, upon demurrer, that if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and the pipes pass with the house, because they are necessary and appurtenant thereto." See Philbrick v. Ewing, 97 Mass. 133; Seymour v. Lewis, 2 Beas. Eq. (N. J.) 439; Elliot v. Sallee, 14 Ohio State, 10; Hazard v. Robinson, 3 Mason (U. S.), 272; U. S. v. Appleton, 1 Sumn. (U. S.) 492; Saffield v. Brown, 33 L. J. Ch. (N. S.) 249.

An inclosed yard, the sole use of which is in connection with a house of correction, is "adjoining or appurtenant thereto" within the meaning of the Gen. Stat. c. 178, § 6, and a prisoner in the house of correction, escaping from such a yard, is liable to punishment under § 46 of the same statute. Com. v. Curley, 101 Mass. 24.

"Nor are appurtenants necessarily of an incorporeal nature, but things corporeal may be appurtenant." Dissenting

opinion by Lewis, J., in Jackson v. Striker, 1 Johns. Cas. (N. Y.) 284, 287. See, *contra*, Lister v. Pickford, 34 Beavan, 576.

But though lands cannot be "appurtenant" to lands, or a messuage to a messuage, strictly speaking, yet "appurtenant" may be taken in the sense of "usually let" or "occupied" with the land, and may thus include what is not strictly "appurtenant." Hall v. Benner, 1 P. & W. (Pa.) 402; s. c., 21 Am. Dec. 394.

A policy insuring all articles making up the stock of a pork-house, and within and appurtenant to the building, covers everything in the building properly belonging to a pork-house, without regard to the particular ownership of each and every article contained in or appurtenant to the building. Aetna Ins. Co. v. Jackson, 16 B. Mon. (Ky.) 242. See Crosby v. Franklin F. Ins. Co., 5 Gray (Mass.), 504; Haley v. Dorchester, etc., Co., 12 Gray (Mass.), 545; Bryant v. Poughkeepsie Ins. Co., 17 N. Y. 200; s. c., 21 Barb. (N. Y.) 154; Pindar v. Kings Co. Ins. Co., 36 N. Y. 648; Begler v. New York Central Ins. Co., 20 Barb. (N. Y.) 635.

2. Pugh v. York, 74 N. C. 383. In this case the defendant filed a petition for a *recordari* to remove a case from a justice's to the superior court, and before putting it on the trial docket obtained his discharge in bankruptcy, which he pleaded, two years later, when he moved to have the case put upon the trial docket. The motion having been refused as the plea was not offered in "apt time," *held*, error, as no time was prescribed within which a discharge in bankruptcy was to be pleaded and if it were done in the proper order it made no difference whether the time was long or short.

3. Treloar v. Bigge, L. R. 9 Ex. 155. The point directly decided in this case was that the words "such consent not being arbitrarily withheld," contained in the lessee's covenant not to assign without consent, did not amount to an absolute covenant on the part of the lessor

## ARBITRATION.

### ARBITRATION AND AWARD.

1. DEFINITION, 647.
2. AWARD, 647.
3. AT COMMON LAW; UNDER STATUTES, 647.
4. WHO CAN BE PARTIES TO ARBITRATION, 648.
  - Control*, 648.
  - Infants*, 648.
  - Bankrupts*, 648.
  - Husband and Wife*, 649.
  - Corporations*, 649.
  - Partners*, 650.
  - Agents*, 652.
  - Executors and Administrators*, 653.
  - Guardians*, 654.
  - Overseers of the Poor*, 654.
5. SUBMISSIONS, 654.
  - Under Statutes*, 654.
  - Intent of Parties*, 655.
  - At Common Law*, 655.
  - Form of*, 656.
  - Simultaneous*, 657.
  - When Submission may be Made*, 658.
  - What may be Submitted*, 658.
  - Must be a Matter of Doubt at Least*, 658.
  - Matters Regarding Real Estate*, 659.
  - General Submission*, 660.
  - What Matter Excluded*, 661.
  - Conditional Submission*, 661.
  - Of Cases Pendente Lite*, 661.
  - Cases Suspended*, 662.
  - What is Submitted*, 663.
  - Release of Errors*, 663.
6. REVOCATION OF, 664.
  - Form of*, 665.
  - Implied*, 665.
  - Effect on Parties*, 666.
  - Revocation Binding on both Parties*, 666.
7. SPECIFIC PERFORMANCE OF SUBMISSION, 667.
  - Condition Precedent*, 668.
8. ARBITRATORS, 670.
  - Who may be Chosen*, 670.
  - Must have no Interest in the Matter*, 672.
  - Adverse Opinion*, 673.
  - When Objection must be Raised*, 673.
  - Agents of both Parties*, 673.
  - Oath of Arbitrator*, 674.
9. POWER OF, 675.
  - Judges of Law and Facts*, 675.
  - Restricted Power*, 675.
  - Waiver*, 675.
  - Questions of Pure Law*, 676.
  - Matters of Fact*, 676.
  - Excess of Authority*, 676.
  - Presumption*, 677.
  - May not be Delegated*, 677.
  - Ministerial Acts*, 678.
  - The Oath of Witnesses*, 678.
  - To Compel Attendance of Witnesses*, 679.
10. RULING AS TO EVIDENCE, 679.
  - As Officer of Court*, 680.
  - May Leave the Question to the Court*, 680.
  - Witnesses*, 680.
  - Should Hear all the Evidence Offered*, 680.
  - Reopening the Case*, 681.
  - Evidence de bene esse*, 682.
11. HE CONTROLS THE PROCEEDINGS, 682.
  - Adjournments*, 682.
  - Counsel*, 683.
12. ARBITRATORS MUST ACT TOGETHER, 683.
  - Private and Public Matters*, 684.
  - Need not Agree upon every Question*, 685.
13. ARBITRATORS MUST HEAR THE PARTIES IN PRESENCE OF EACH OTHER, 685.
  - Notice of Hearing*, 685.
  - Of what Meetings Notice must be Given*, 686.
  - Waiver of Notice*, 686.
14. COMPENSATION, 686.
  - When Entitled to*, 686.
  - Costs*, 687.
  - Fees*, 688.
15. DURATION OF ARBITRATOR'S AUTHORITY, 688.
  - Power Expires with the Making of the Award*, 689.
16. UMPIRE AND THIRD ARBITRATOR, 680.
  - Power of*, 690.
  - Appointment of*, 690.
  - Must Act on his own Judgment*, 691.
  - Must Sign the Award*, 691.

not to withhold his consent arbitrarily, but only prevented the lessee's covenant operating in any case of arbitrary refusal on the part of the lessor.

17. ARBITRATORS AS WITNESSES, 691.
18. THE AWARD, 692.
  - Form of*, 692.
  - Under Statutes*, 692.
  - Form of Words*, 693.
  - Subject-matter*, 693.
  - The Omission must be Proved*, 694.
  - Must be Actually Submitted*, 694.
  - Part of Submission Withdrawn*, 695.
19. MUST BE FINAL AND CERTAIN, 695.
  - Intendments and Presumptions*, 696.
  - Award need not Specify all Matters Submitted*, 697.
  - Title to Real Estate*, 698.
  - Award in the Alternative*, 698.
  - Certain as to Subject-matter*, 698.
  - Certainty about Boundary-lines*, 699.
  - Certainty as to Persons*, 699.
  - As to Time*, 699.
  - Amount*, 700.
  - Arbitrators can Reserve no Authority*, 701.
  - Ministerial Acts*, 701.
20. AWARDS MUST BE MUTUAL, 701.
  - Mutuality Must not Rest on Outside Circumstances*, 702.
21. MUST BE ENTIRE, 703.
  - Award may Refer to Extrinsic Documents*, 703.
  - Awards under Statute*, 704.
22. MUST BE POSSIBLE, 704.
23. PUBLICATION OF, 704.
  - Delivery of*, 705.
24. IMPEACHMENT OF, 706.
  - Fraud, Partiality, Corruption*, 707.
  - Fraud by Parties*, 708.
  - Irregularity in Proceedings*, 708.
  - Oath of Arbitrator*, 709.
  - Adjournments*, 709.
  - Evidence*, 709.
  - Irregularity in Form*, 709.
  - Mistakes of Fact*, 709.
  - Must be Apparent*, 710.
  - Award part Good, part Bad*, 710.
  - Power of Court over Objectionable Award*, 711.
25. EFFECT OF AWARD, 711.
  - Merger*, 712.
  - On Matter not Submitted*, 712.
  - On Real Estate Matters*, 713.
  - Of Inadequate Award*, 714.
  - On Strangers*, 714.
  - Ratification of Award*, 714.
  - Effect on Executors, etc.*, 715.
26. ENFORCEMENT OF AWARD, 715.
  - Must have Performed his Part*, 716.

1. **Definition.**—Arbitration is the investigation and determination of a matter or matters of difference between contending parties by one or more unofficial persons, chosen by the parties and called arbitrators or referees.<sup>1</sup>

2. **Award.**—The judgment of the arbitrators and also the paper on which it is written are called an "award."<sup>2</sup>

3. **At Common Law.**—At common law the matter of arbitration is entirely voluntary with the parties to the matter in dispute; but most States have enacted statutes prescribing a certain form for submission to arbitration, and enforcing awards made thereon by special proceedings in court; in some States, as in Pennsylvania, arbitration has been made compulsory on one party if the other elects to settle the matter by arbitration. Generally, however, in States where statutes exist regulating the matter it is left optional with the parties to submit to arbitration according to common-law or statutory rules.<sup>3</sup>

1. Bouvier Law Dict.; Worcester's Dict.; 3 Black. Com. 16; Burchell v. Marsh, 17 How. (U. S.) 344.

2. Bouvier's Inst. § 2496.

3. Wells v. Lain, 15 Wend. (N. Y.) 99;

Howard v. Sexton, 4 Comst. (N. Y.) 157; Burnside v. Whitney, 21 N. Y. 148; Diedrick v. Richley, 2 Hill (N. Y.), 271; Cope v. Gilbert, 4 Den. (N. Y.) 347; Wood v. Tunnicliff, 74 N. Y. 38; Farrington v.



**4. Who Can be Parties to Arbitration.**—Any person of legal capacity to contract may be a party to an arbitration.

*Control.*—But he must have such a control<sup>1</sup> over the subject-matter of the arbitration that he can carry out any orders embodied in a legal award, and be free from duress.<sup>2</sup>

*Infants.*—The submission to arbitration by an infant is treated as contracts of infants in general. It has been held to be void, but usually to be voidable; and this refers to courts of law and of equity.<sup>3</sup>

*Bankrupts.*—Bankrupts cannot submit to arbitration without the consent or ratification of their assignees; and assignees in submitting the matters of the bankrupt will be held personally liable

Hamblin, 12 Wend. (N. Y.) 212; Cutter v. Cutter, 48 N. Y. Super. Ct. 470; Logsdon v. Roberts, 3 T. B. Mon. (Ky.) 255; Overly v. Overly, 1 Metc. (Ky.) 117; Evans v. McKinsey, 6 Litt. (Ky.) 262; Thomasson v. Risk, 11 Bush (Ky.), 619; Lusk v. Clayton, 70 N. Car. 184; Pierce v. Kirby, 21 Wis. 124; Winne v. Elderkin, 1 Chandl. (Wis.) 219; Allen v. Chase, 3 Wis. 249; Lamar v. Nicholson, 7 Post (Ala.), 158; Byrd v. Odem, 9 Ala. 755; Foust v. Hastings, 66 Iowa, 522; Love v. Burns, 35 Iowa, 150; Conger v. Dean, 3 Iowa, 463; s. c., 66 Am. Dec. 93; Fink v. Fink, 8 Iowa, 313; Titus v. Scantling, 4 Blackf. (Ind.) 89; Carson v. Earlywine, 14 Ind. 256; Miller v. Goodwine, 29 Ind. 46; Smith v. Kirkpatrick, 58 Ind. 254; Brown v. Kincaid, Wright (Ohio), 37; Wilkes v. Cotter, 28 Ark. 519; Eisenmeyer v. Sauter, 77 Ill. 515; Torrance v. Amsden, 3 McL. (U. S. C. Ct.) 509; Richardson v. Cassily, 3 Watts (Pa.), 320; Erie v. Tracy, 2 Grant (Pa.), Cas. 20; Petit v. Wingate, 25 Pa. St. 74; Schneider v. Gas & Coal Co., 98 Pa. St. 470; Dantziger v. Williams, 91 Pa. St. 234; Watson v. Wetter, 91 Pa. St. 385. But compare Bulson v. Lohnes, 29 N. Y. 291.

It has even been held that where the parties submitted to arbitration under the statute rule, the party in whose favor the award was given could enforce it, either under the statute rule or under the common-law rule. Dickerson v. Tyner, 4 Blackf. (Ind.) 253; Titus v. Scantling, 4 Blackf. (Ind.) 89. But compare Deerfield v. Arms, 20 Pick. (Mass.) 480; s. c., 32 Am. Dec. 228; Pierce v. Kirby, 21 Wis. 124; Williams v. Walton, 9 Cal. 142.

And an arbitration which does not conform to statutory requirements may, nevertheless, be good at common law; and a common-law action will lie to enforce it if it fairly disposes of the matter in dispute and leaves nothing open to controversy. Galloway v. Gibson, 51 Mich. 135; Willingham v. Harrell, 36 Ala.

583; Estep v. Larsh, 16 Ind. 82; Tyler v. Dyer, 13 Me. 41; Tynan v. Tate, 3 Neb. 388; Low v. Nolte, 16 Ill. 475.

So will a submission to one arbitrator be upheld in Texas, where the statute requires two arbitrators, although it would not be a statutory arbitration. Myers v. Easterwood, 60 Tex. 107.

1. Morse on Arb. and Award, 3.

2. Bean v. Farnam, 6 Pick. (Mass.) 269; Brady v. Mayor of Brooklyn, 1 Barb. (N. Y.) 584; Wyatt v. Benson, 23 Barb. (N. Y.) 327.

So may parties who are competent to transfer real estate or exercise acts of ownership over it refer their disputes concerning it to arbitration. Cox v. Jagger, 2 Cow. (N. Y.) 638; s. c., 14 Am. Dec. 522.

A sold real estate to B without disclosing the fact that he and his neighbor had submitted a dispute about the boundary line to arbitration. Held, that B was not a party to the submission, and not bound by a subsequent award. Emery v. Fowler, 38 Me. 99.

A man under arrest for the same matter which forms the subject of the arbitration is thereby not disqualified from being a party to the arbitration. Shephard v. Watrous, 3 Cai. (N. Y.) 166.

3. Rudston v. Yates, March, 111, 141; Godfrey v. Wade, 6 Moore, 488; Evans v. Cogan, 2 P. Wms. 450; Britton v. Williams, 6 Munf. (Va.) 453; Handy v. Cobb, 44 Miss. 699.

The decision will depend much upon the merits of the case, however. So where an infant submitted a claim for damages for assault and battery to arbitration and received an award of fifty dollars, and brought suit afterward, the jury were instructed by the court to give only nominal damages if they should find that the infant had received adequate compensation for the injury; but to give a verdict for such additional sum as with the fifty dollars already received would

on the award unless they are protected by statutes or specially exempted by the terms of the submission.

*Husband and Wife.*—Whether a feme covert has a right to bind herself by a submission independent of her husband, or whether a husband has a right to submit matters concerning his wife's estate independent of the wife, are matters largely regulated by statutes. It ought to be safe to lay down the rule substantially as follows: The wife may bind herself by her own sole submission in respect of any property in regard to which she has the absolute power of disposal and conveyance by her own independent and individual action; but she may not bind herself otherwise than in respect of such property. The husband may bind the wife to any undertaking, provided that he has the power to carry out the possible terms of the award without her joinder or acquiescence; or provided that the law would enforce such joinder or acquiescence, if it were legally indispensable to the due performance of the award.<sup>2</sup>

*Corporations.*—A corporation, like an individual, may submit matters in dispute to arbitration.<sup>3</sup>

*Municipal Corporations.*—As a general proposition, municipal corporations have the same power to liquidate claims and indebtedness that natural persons have, and from this proceeds power to adjust all disputed claims, and, when the amount is ascertained, to pay the same as other indebtedness. A municipal corporation, therefore, unless disabled by positive law, can submit to arbitration all unsettled claims, with the same liability to perform the award as would rest upon a natural person, but such power must be exercised by ordinance or resolution of the corporate authorities.<sup>4</sup>

form a reasonable satisfaction if they found that the original award was inadequate. *Baker v. Lovett*, 6 Mass. 78; s. c., 4 Am. Dec. 88.

1. Morse on Arb. 30; 3 Pars. on Contr. 471; *In re Ford*, 18 Nat. Bankr. Reg. 427.

2. Morse on Arb. 26.

3. Morse on Arb. 5; *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83; *Wood v. Auburn, etc., R. Co.*, 4 Seld. (N. Y.) 160; *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Fryeburg Canal v. Frye*, 5 Greenl. (Me.) 38.

Two corporations organized under the laws of Great Britain entered into an agreement, which provided, in case of difference, for arbitrators to be appointed and to act in this State, having the powers given to arbitrators under the English common-law procedure, their award to be made a rule of the Queen's Bench. In an action brought by one of said corporations against the other, and arbitrators appointed under the agreement, to restrain the prosecution of the arbitration, the special term denied plaintiff's

motion for a preliminary injunction, on the ground, as stated in the order, "that the court has no jurisdiction in this action." *Held*, error; as the plaintiff, although a foreign corporation, could invoke the jurisdiction of the courts, and the individual defendants were residents of the State. *Direct United States Cable Co. v. Dominion Telegraph Co.*, 84 N. Y. 153.

4. *City of Shawneetown v. Baker*, 85 Ill. 563; *Brady v. Mayor of Brooklyn*, 1 Barb. (N. Y.) 584; *Kane v. Fond du Lac*, 40 Wis. 495; *In re Arbitration between Township of Eldon and Ferguson*, 6 U. C. L. J. 207. See rule as stated in *Dillon on Mun. Corps.* (3d Ed.) § 478. "Corporations, sole and aggregate, may, if not disabled, submit disputes relating to the corporate property to arbitration, and their successors will be bound thereby; but in the case of corporations aggregate, it must be the act of the whole corporate body, as by the dean and chapter, the mayor and commonalty, the master and his fellows." *Billings, Law of Award* (L. L.), 42.

*Partners.*—One partner has no right to submit the partnership's

One of the earliest decided cases concerning the right of a municipality to submit the settlement of disputed questions to arbitration is the case of the Magistrates of Edinburgh. After the occurrence of a great fire in Edinburgh it was regarded as an important object of public policy that all the new tenements to be erected on the site of the conflagration "should be of stone-work," and should be otherwise constructed with a due regard to the safety of the city against fire, as well as to its improved appearance. With this view, an amicable arrangement seems to have been made, in the form of a "submission by the whole neighbors of Edinburgh" to the magistrates and council, to which the privy council interposed an act of ratification, and under which powers were given to the arbiters to regulate as to the building of the new tenements. An attempt being made by one of the citizens to evade his obligations under the contract of submission, on the allegation of "enormous lesion or injustice," it was repelled by a decision the report of which has handed down some notice of the transaction. The Magistrates of Edinburgh, 1 Suppt. 732, Feb. 12, 1675, reported in Gosford's Reports.

A resolution or ordinance adopted at a meeting of the common council submitting a question to arbitration need not be under the corporate seal. *Brady v. Brooklyn*, 1 Barb. (N. Y.) 584.

The common council may intrust the selection of arbitrators to the city attorney. *Kane v. Fond du Lac*, 40 Wis. 495.

The selectmen of a town have power to submit to arbitration any such claims against the town as they are by statute authorized to audit and adjust, and the town will be bound by an award made in pursuance of such commission. *Dix v. Town of Dummerston*, 19 Vt. 263.

But they are not empowered, *virtute officii*, to submit to arbitration a question regarding the settlement of a pauper which involves the right or liability of the town. *Town of Griswold v. Town of North Stonington*, 5 Conn. 367.

In Maine it has been held that the overseers of the poor of a town have not the power, *ex officio*, to submit a claim on behalf of a pauper to arbitration. The plaintiff, a woman of feeble understanding, who had lived in the family of the defendant as a servant, afterwards became chargeable to the town as a pauper. The overseers of the poor made a de-

mand against the defendant for the balance claimed as her wages to be applied in her support. This demand the defendant and overseers jointly submitted to the determination of certain referees, who awarded a balance due from the defendant which he refused to pay. Upon an action brought in the name of the pauper upon this award, it was held that the overseers of the poor had no authority, by virtue of their office, to bind the pauper by their submission, and that the award was therefore void for want of mutuality in reference. *Furbish v. Hall*, 8 Greenl. (Me.) 315.

Where, however, one has submitted his claim against a town to arbitration, and has appeared before, and been fully heard by, the arbitrators, he cannot, after an adverse decision, dispute the authority of the selectmen of the town to enter into the submission on its behalf. *Campbell v. Upton*, 113 Mass. 67.

The authority to prosecute or defend a suit implies a power to refer it by rule of court, that being a legal mode of prosecuting or defending. And when a municipal corporation appointed agents to prosecute an action, and the agents thus appointed employed an attorney, by whose assent the submission was made, *held*, that it was binding upon the municipality. *Buckland v. Conway*, 16 Mass. 395.

An agreement by which a city undertakes with the owners of land taken for a street to submit the assessment of damages and betterments to arbitration is *ultra vires* and void; and the city cannot maintain an action to enforce an award made under such submission. *City of Somerville v. Dickerman*, 127 Mass. 272.

A claim against a municipal corporation for damages arising from a change in the grade of a street cannot form the subject of arbitration under the statute. *Osborn v. City of Fall River*, 13 Am. & Eng. Corp. Cas. 534.

The abutters on a street in Boston entered into an agreement with a committee of the selectmen of said town for the widening of the street. They mutually promised each other to submit to the award of certain arbitrators concerning what each should pay or receive on account of the premises, according to the damage or benefit they should respectively receive. An action was sustained by the inhabitants of Boston, on the agreement, against one of the abutters for the sum he was awarded to pay,

affairs to arbitration without the express consent of the other partners. All the partners must be parties to the arbitration.<sup>1</sup>

although the said widening had not been recorded; and the money was awarded to be paid to the other abutters and not to the inhabitants; and a part of it was to be paid to an abutter who was not a party to the agreement. *Boston v. Brazier*, 11 Mass. 447.

Where the law imposes a personal duty upon an officer in relation to a matter of public interest he cannot delegate it to others, and therefore such officer cannot submit such matters to arbitration. So, where commissioners of highways are unable to agree with the owner of land over which a highway is sought to be laid out, as to the damages to be paid him, they have no authority to submit the question of such damages to arbitration and thus bind their town. *Mann v. Richardson*, 66 Ill. 481.

But in Vermont, where a town at an annual meeting appointed an agent to compromise a disputed claim for damages on account of a road laid across plaintiff's land by the selectmen, and such agent referred the question of the amount to be paid to arbitrators, it was held that the town was bound by the award. *Schoof v. Town of Bloomfield*, 8 Vt. 472.

The county commissioners in Nebraska can only locate public roads and erect bridges thereon in the manner provided by law. The commissioners of Otoe County made a contract with one McCann to purchase a private bridge over the Nemoha River, and arbitrators were selected by the parties to appraise the same and damages for right of way across McCann's land. *Held*, that the award was a nullity. *McCann v. Commissioners of Otoe Co.*, 9 Neb. 324.

In Kentucky it is held that the county court may submit matters in controversy between it and a contractor for building a bridge for the county; and the contractor may maintain his action against the county court to recover the amount of the award of the arbitrators in his favor. *Remington, etc., v. Harrison County Court*, 12 Bush (Ky.), 148.

A State may drop its sovereignty and its exemption from suits, and by a legislative act submit claims against it in dispute to arbitration. And where it does consent to arbitration, the agreement is necessarily implied that the award to be made is to be legal, and, if it is not, that either party shall have the right to show its illegality by legal proceedings. *State v. Ward*, 9 Heisk. (Tenn.) 100.

A matter cannot be submitted to arbitration on behalf of the United States without a special act of Congress authorizing such submission. The United States had machinery in operation, carried by water, on land which had been sold to them and over which jurisdiction had been ceded to them by the State of Massachusetts. A. owned mills above and below them on the same stream, and the dams of each party flowed back so as to obstruct the other. A submission of the matters in dispute was entered into by A., on the one part, and by the district attorney authorized by the Solicitor of the Treasury or War Department, on the other part, but without any authority from Congress; and an award was made thereon, prescribing the height of the dam. The United States afterwards brought an action of trespass against A. for flowing their land. He pleaded a special bar of the award, alleging that he had complied with its terms. On general demurrer, it was held that the special plea could not be sustained. *Held*, also, that no officer of the United States has authority to enter into a submission in their behalf which shall be binding on them, unless the power is given by the special act of Congress. *United States v. Ames*, 1 W. & M. (C. C.) 76. See also *Smith v. Raleigh*, 3 Am. & Eng. Corp. Cas. 615.

Where differences arise between a public corporation and one of its officers, it is lawful to submit them to arbitration for settlement. *Distr. Tp. of Walnut v. Rankin*, 29 N. Western Repr. (Iowa) 806.

1. *Backus v. Coyne*, 35 Mich. 5; *Karthaus v. Ferrer*, 1 Pet. (U. S.) 222; *Jones v. Bailey*, 5 Cal. 345; *Wood v. Shepherd*, 2 Patt. & H. (Va.) 442; *Davis v. Berger*, 54 Mich. 652; *Buchoz v. Grandjean*, 1 Mich. 367; *Martin v. Thrasher*, 40 Vt. 460; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137; s. c., 10 Am. Dec. 200; *Harrington v. Higham*, 13 Barb. (N. Y.) 660; *Hutchins v. Johnson*, 12 Conn. 376; s. c., 30 Am. Dec. 622; *Eastman v. Burleigh*, 2 N. H. 484.

In Pennsylvania, Kentucky, Ohio, and Illinois, however, one partner can bind his copartner by a submission to arbitration not under seal in partnership matters. *Taylor v. Coryell*, 12 S. & R. (Pa.) 243; *Gay v. Waltman*, 89 Pa. St. 453; *Southard v. Steele*, 3 T. B. Monr. (Ky.) 453; *Hallack v. March*, 25 Ill. 48; *Wilcox v. Singletary*, Wright, Ohio, 420.

The consent of the other partner need, however, not be given in a formal way:

**Agents.**—Without express authority an agent cannot submit the matters of his principal to arbitration; not even where he has instructions to settle out of court if possible.<sup>1</sup>

it may be implied from circumstances. *Russell on Arb.* 20; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *McBride v. Hagan*, 1 Wend. (N. Y.) 326; *Davis v. Berger*, 54 Mich. 652. But compare *Martin v. Thrasher*, 40 Vt. 460, where it was held that the mere presence of the partner at the signing of the award did not imply consent.

Consent must be given before the award is rendered. *Eastman v. Burleigh*, 2 N. H. 484; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285.

A joinder of partners in suing out a writ of error to review the judgment on an award against the firm has the effect of affirming the authority delegated to one partner to submit to arbitration. *Davis v. Berger*, 54 Mich. 652.

The partner who submits a partnership matter without consent of the other partners is bound by the award. *Brink v. Amsterdam, etc., Ins. Co.*, 5 Robt. (N. Y.) 104; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137; s. c., 10 Am. Dec. 200; *Dater v. Wellington*, 1 Hill (N. Y.), 319; *McBride v. Hagan*, 1 Wend. (N. Y.) 326; *Jones v. Bailey*, 5 Cal. 345; *Wood v. Shepherd*, 2 Patt. & H. (Va.) 442; *Karthauss v. Ferrer*, 1 Pet. (U. S.) 222; *Armstrong v. Robinson*, 5 Gill & J. (Md.) 412.

The same principle holds good of an award rendered against two parties, not partners, one of whom did not submit. *Mathews v. Mathews*, 1 Heisk. (Tenn.) 669; *Woodward v. Woodward*, 14 Ill. 466.

And if the not-submitting partner refuses to comply with the requirements of the award, the submitting partner will individually be liable for the whole. *Russell on Arb.* 20.

Where, however, a settlement between one partner and a debtor of the firm has been arrived at by arbitration and the amount awarded had been paid by the debtor, and the acting partner had indorsed a receipt and acknowledgment of satisfaction on the award, it was held to bind the other partner and to act as an accord and satisfaction. *Buchanan v. Curry*, 19 Johns. (N. Y.) 137; s. c., 10 Am. Dec. 200.

Parties who have a joint interest in the same matter as joint heirs cannot individually submit their interests to arbitration and bind the others. Only those who submit are bound by the award. *Eastman v. Burleigh*, 2 N. H. 485; *Smith v. Smith*, 4 Rand. (Va.) 95; *Boyd v. Magruder*, 2 Robins. (Va.) 761.

1. *Scarborough v. Reynolds*, 12 Ala. 252; *Huber v. Zimmerman*, 21 Ala. 488; s. c., 56 Am. Dec. 255; *Cox v. Fay*, 54 Vt. 446; *Mich. Centr. R. Co. v. Gongar*, 55 Ill. 503; *Trout v. Emmons*, 29 Ill. 433; *McPherson v. Cox*, 86 N. Y. 472; *Lowenstein v. McIntosh*, 37 Barb. (N. Y.) 251; *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83.

An officer of the United States cannot submit matters of the United States to arbitration so as to bind them by the award, unless such power be given to him by special act of Congress. *United States v. Ames*, 1 Woodb. & M. (U. S.) 76.

Neither can matters of public interest and trust be submitted to arbitration by the officer to whom they are intrusted. He cannot delegate his power. *Mann v. Richardson*, 66 Ill. 481.

A factor cannot bind his principal by submitting to arbitration a claim for damages arising out of an alleged breach of an implied warranty of the quality of the thing sold. *Carnochan v. Gould*, 1 Bailey's L. (S. Car.) 179; s. c., 19 Am. Dec. 668.

Nor can a broker submit his principal's matters to arbitration. *Ingraham v. Whitmore*, 75 Ill. 24.

Attorneys are excepted from this rule. *Holkner v. Parker*, 7 Cranch. (U. S.) 436; *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 377; *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83; *Bates v. Visser*, 2 Cal. 355; *Smith v. Bossard*, 2 McChord's Ch. (S. Car.) 406; *Buckland v. Conway*, 16 Mass. 396; *White v. Davidson*, 8 Md. 169; s. c., 17 Am. Dec. 699; *Jenkins v. Gillespie*, 10 S. & M. (Miss.) 31; s. c., 48 Am. Dec. 732; *Brooks v. New Durham*, 55 N. H. 559; *Pike v. Emerson*, 5 N. H. 393; s. c., 22 Am. Dec. 468; *Wade v. Powell*, 31 Ga. 1; *Morris v. Grier*, 76 N. Car. 410; *Stokeley v. Robinson*, 34 Pa. St. 315; *Evars v. Kamphaus*, 59 Pa. St. 379; *Somers v. Balabrega*, 1 Dall. (Pa.) 164; *Williams v. Danziger*, 91 Pa. St. 232; *Cahill v. Benn*, 6 Binn. (Pa.) 99; *Coleman v. Grubb*, 23 Pa. St. 393; *Wilson v. Young*, 9 Barr. (Pa.) 101; *Bingham v. Guthrie*, 19 Pa. St. 418; *Beverly v. Stephens*, 17 Ala. 701. But compare *Tilton v. U. S. Life Ins. Co.*, 8 Daly (N. Y.), 84.

The general doctrine that an attorney has power to submit a matter in dispute to arbitration is limited to the case where there is a cause pending which he has been employed to manage. *Jenkins v. Gillespie*, 18 Miss. 31; *Scarborough v.*

*Executors and Administrators.*—Executors and administrators have by power of their office the right to submit to arbitration

Reynolds, 12 Ala. 252; Markley v. Amos, 8 Rich. L. (S. Car.) 468.

In Pennsylvania an attorney cannot submit matters of his client to arbitration when it would endanger the client's title to real estate; as where by the award land is taken instead of money. Huston v. Mitchell, 14 S. & R. (Pa.) 307; Pearson v. Morrison, 2 S. & R. (Pa.) 20; Naglee v. Ingersoll, 7 Pa. St. 185.

An attorney-at-law may bind his client by an agreement, signed by him without an express warrant of attorney, to submit the matters in dispute in a pending action of ejectment (where the principal contention was one of boundary and not title) to arbitrators, whose decision shall be final, without right to writ of error. In such case where, in pursuance of the submission, judgment was entered on the award, a writ of error taken to such judgment by the unsuccessful party will not lie. Sargeant v. Clark, 108 Pa. St. 588.

An agent who has received express authority to submit the matters of his principal to arbitration must keep strictly to his authority. Authority to refer to A does not include the right to refer to B if A refuses to serve. Cox v. Fay, 54 Vt. 446.

General usage or a rule of court may impliedly or directly confer upon an agent power to submit for his principal. 2 Pars. on Contr. 689; Buckland v. Conway, 16 Mass. 396.

So may an agent appointed by a town, to compromise a claim against the town for damages, submit the claim on behalf of the town. Schoff v. Bloomfield, 8 Vt. 472.

A board of supervisors has the right. People v. Supervisors, 24 Hun (N. Y.), 413.

Selectmen and common councils have, as a rule, power to submit to arbitration matters relating to the town which they represent. It depends, however, largely on the powers conferred upon them by statute or town resolutions. Dix v. Dummerston, 19 Vt. 262; Boston v. Brazer, 11 Mass. 447; Brady v. Mayor of Brooklyn, 1 Barb. (N. Y.) 584; Hollister v. Pawlet, 43 Vt. 425. Compare Griswold v. N. Stonington, 5 Conn. 367.

But a submission cannot be made by a selectman from each of three towns respectively. Authority to arbitrate can proceed only from the board of selectmen. Haddam v. East Lyme, 5 Atl. Rep. (Conn.) 368.

A person who underwrites and settles losses for another has implied authority from him to refer to arbitration a dispute about a loss. Goodson v. Brooke, 4 Camp. 163; Hine v. Stephens, 33 Conn. 497.

The captain of a ship when unable to communicate with the owners may submit a claim for salvage; but he must act in entire good faith, and the arbitrators be worthy of trust. Houseman v. Schooner North Carolina, 15 Pet. (U. S.) 40.

When a member of a partnership firm gave his son a power of attorney to act on his behalf in dissolving the partnership, with authority to appoint any other person as he may see fit, it was held that this gave the son power to submit the accounts to arbitration. Henley v. Soper, 8 B. & C. 16.

An agent appointed to prosecute and defend a suit has, like an attorney, a power to submit the matter to arbitration by rule of court. Buckland v. Conway, 16 Mass. 396.

A sold real estate to B without disclosing the fact that he and his neighbor had submitted a dispute about the boundary-line to arbitration. Held, that B was not bound by a subsequent award. Emery v. Fowler, 38 Me. 99.

Where an agent not authorized to submit his principal's matters to arbitration still did so, and an award is rendered, the principal may ratify the act of his agent, and such ratification may be implied from circumstances. Detroit v. Jackson, 1 Dougl. (Mich.) 106; Diedrick v. Richley, 2 Hill (N. Y.), 271; Fryeburg Canal v. Frye, 5 Greenl. (Me.) 38; Furber v. Chamberlain, 9 Fost. (N. H.) 405; Perry v. Mulligan, 58 Ga. 479; Isaac v. Beth Hamedash Society, 1 Hilt. (N. Y.) 469.

Where a city attorney, after praying for an appeal from a judgment against the city, agreed with counsel for the plaintiff to submit the question of the liability of the city to the arbitrament and decision of an arbitrator, if the city council, after the lapse of several months, made no objection to the agreement to arbitrate, and afterward availed of the decision of the referee by bringing suit to have his decision carried into effect, it was held that the other party could not avoid the effect of the award on the ground of want of authority on the part of the city attorney to bind the city by

matters regarding the estate under their administration as a result of their power to bring and defend suits.<sup>1</sup>

**Guardians.**—A guardian has the power to submit matters concerning his ward. An award duly performed will bind the ward when coming of age.<sup>2</sup>

**Overseers of the Poor** have no authority as such to control the property of paupers, and to submit their claims to arbitration.<sup>3</sup>

**5. Submissions.**—*Under Statutes.*—Submissions to arbitration under statutory regulations must in form comply with the requirements of the statute.<sup>4</sup>

his agreement. *Connett v. Chicago*, 114 Ill. 233.

So where after submission by the agent the principal attends by agent and attorney and does not object to the proceedings, this will be a ratification of the agent's act. *Memphis & Charleston R. Co. v. Scruggs*, 50 Miss. 284.

And where the principal, after the award had been rendered without his authority, took an assignment of the award to himself and then assigned it to a stranger, it was held that these were emphatic acts of ratification. *Lowenstein v. McIntosh*, 37 Barb. (N. Y.) 251.

An agent submitted to arbitration matters concerning some real estate which he supposed to belong to his principal. He afterward learned that the property belonged to his principal's wife, and informed the other parties, proposing to alter the submission accordingly. The other party, however, refused, saying, "It is good enough as it is." The proceedings then continued with full knowledge of the wife, who did not object. Held to be a ratification. *Smith v. Sweeney*, 35 N. Y. 291.

An agent authorized to submit matters of his principal to arbitration, and who wishes to bind only his principal by the award, must distinctly state so in his submission. If he merely enters into the submission in his own name, or if he merely describes himself as "agent," he will be personally bound by the award. *Winsor v. Griggs*, 5 Cush. (Mass.) 210; *Smith v. Van Nostrand*, 5 Hill (N. Y.), 419.

1. *Wood v. Tunnicliff*, 74 N. Y. 38; *Russell v. Lane*, 1 Barb. (N. Y.) 519; *Yarborough v. Leggett*, 14 Tex. 677; *Alling v. Munson*, 2 Conn. 691; *Chadbourn v. Chadbourn*, 9 Allen (Mass.), 173; *Coffin v. Cottle*, 4 Pick. (Mass.) 454; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Jones v. Deyer*, 16 Ala. 221; *Merchants' Bank v. Rawls*, 21 Ga. 334; *Overly v. Overly*, 1 Metc. (Ky.) 117; *Logsdon v. Roberts' Exrs.*, 3 T. B. Monr. (Ky.) 256; *Kendall v. Bates*, 35 Me. 357; *Eaton v. Cole*, 1

*Fairf. (Me.)* 137; *Weston v. Stewart*, 2 *Fairf. (Me.)* 326; *Wheatley v. Martin*, 6 *Leigh (Va.)*, 62; *Strodes v. Patton*, 1 *Brock (U. S.)*, 228. But compare *Lattier v. Rachal*, 12 La. Ann. 695; *Clark v. Hogle*, 52 Ill. 427; *Reitzell v. Miller*, 25 Ill. 67.

This power extends, however, only to matters over which they have control. When an administrator has no control over the real estate of the deceased he cannot submit matters concerning such realty. *Bridgham v. Prince*, 33 Me. 174.

2. *Strong v. Beroujon*, 18 Ala. 168; *Weston v. Stuart*, 11 Me. 326; *Goleman v. Turner*, 14 S. & M. (Miss.) 118; *McComb v. Turner*, 14 S. & M. (Miss.) 119; *Weed v. Ellis*, 3 Cai. (N. Y.) 253; *Beebe v. Trafford*, Kirby (Conn.), 215; *Bean v. Farnam*, 6 Pick. (Mass.) 269.

This does, however, not apply to guardians *ad litem*. *Fort v. Battle*, 13 S. & M. (Miss.) 133; *Hannum v. Wallace*, 9 *Humph. (Tenn.)* 169.

3. *Furbish v. Hall*, 8 Me. 315.

4. *Price v. Byne*, 57 Ga. 176; *Jones v. Payne*, 41 Ga. 23; *McGunn v. Hanlen*, 29 Mich. 476; *Healy v. Isaacs*, 73 Ind. 226; *Boots v. Canine*, 58 Ind. 450; *Francis v. Ames*, 14 Ind. 251; *Moody v. Nelson*, 60 Ill. 229; *Foust v. Hastings*, 66 Iowa, 522; *Sargent v. Hampden*, 29 Me. 70; *Smith v. Pollock*, 2 Cal. 92; *Painter v. Kistler*, 59 Pa. St. 331; *Cotton v. Babcock*, 64 Pa. St. 462; *Wright v. Rad-din*, 100 Mass. 319.

Where a statute requires a submission to be under seal, a seal must be attached by one who has authority to attach it. *Hamilton v. Hamilton*, 27 Ill. 158; *Burnett v. Gould*, 27 Hun (N. Y.), 366; *Madison Ins. Co. v. Griffin*, 3 Ind. 277.

Or when required to be in writing, a verbal submission will be void. *McClen-don v. Kemp*, 18 La. Ann. 162; *Raguet v. Carmouche*, 5 La. Ann. 133; *Boots v. Canine*, 58 Ind. 450.

Where the statute requires the instrument to be acknowledged. *Fink v. Fink*, 8 Iowa, 313; *Abbott v. Dexter*, Cush.

*Intent of Parties.*—In many of the States, however, the strictness of the statutory rules has been much relaxed. The courts, as a rule, will uphold a submission according to the obvious intent of the parties, and seem to be inclined to a presumption favorable to the validity of the instrument.<sup>1</sup>

*At Common Law.*—A submission at common law may be either oral, in writing, or under seal. It depends on the subject-matter of the arbitration. So if writing is necessary to pass the title to the thing in controversy, a valid award, disposing of such title, must be under a written submission; and if the award is to decide upon the validity of a sealed instrument the submission must be under seal.<sup>2</sup>

(Mass.) 108; Gibson v. Burrows, 41 Mich. 713; Davis v. Berger, 54 Mich. 652; Barney v. Flower, 27 Minn. 403. Or where it is required that a specification of demand be attached under the hand of the party making it, the statute must be followed. Bullard v. Coolidge, 3 Mass. 324; Pierce v. Pierce, 30 Me. 113; Smith v. Kimball, 1 N. H. 72; Mansfield v. Doughty, 3 Mass. 398.

Where the statute requires three arbitrators, submission to one is void. Bowes v. French, 2 Fairf. (Me.) 182; Monosiet v. Post, 4 Mass. 532. See Reading, etc., Co. v. Graeff, 64 Pa. St. 395.

1. McAdams v. Stillwell, 13 Pa. St. 90; Large v. Passmore, 5 S. & R. (Pa.) 51; Harris v. Hayes, 6 Binn. (Pa.) 422; Wynn v. Bellas, 34 Pa. St. 160; Kimmel v. Shank, 1 S. & R. (Pa.) 24; O'Kison v. Flickinger, 1 Watts & S. (Pa.) 257; Massey v. Thomas, 6 Binn. (Pa.) 333; Bemus v. Quiggle, 7 Watts (Pa.), 363; Hill v. Taylor, 15 Wis. 190; Clement v. Comstock, 2 Mich. 359; Wright v. Raddin, 100 Mass. 319; Howard v. Sexton, 1 Den. (N. Y.) 440; Houghton v. Houghton, 37 Me. 72; Tuscaloosa Bridge Co. v. Jemison, 33 Ala. 476; Barnett v. Peck, 6 Vt. 456; White v. Fox, 29 Conn. 570; Halliburton v. Flowers, 12 Heisk. (Tenn.) 25. And see Skilling v. Coolidge, 14 Mass. 43, as to acknowledgment; Humphrey v. Strong, 14 Mass. 262; Harmon v. Jennings, 22 Me. 240; Inman v. Wheeler, 1 Pick. (Mass.) 504; Wood v. Holden, 45 Me. 374; Kendall v. Bates, 35 Me. 357; Barnett v. Peck, 6 Vt. 456, as to specification of demand attached; also Withers v. Haines, 2 Barr. (Pa.) 435, as to the number of arbitrators.

In Price v. Kirby, 1 Ala. 184, it was held that an oral agreement to refer will not necessarily totally avoid the submission, although the statute requires it to be in writing. See Wells v. Lain, 15

Wend. (N. Y.) 99; Bulsom v. Lampman, 1 Kans. 324.

Where, however, the submission professes to be in accordance with the statutes, but is clearly inconsistent with it in a material point, it will be considered that it has not been the intention of the parties to be ruled by the statute. South Carolina R. Co. v. Moore, 28 Ga. 398; s. c., 73 Am. Dec. 778.

2. Phelps v. Dolan, 75 Ill. 90; Smith v. Douglass, 16 Ill. 34; Dilks v. Hammond, 86 Ind. 563; Titus v. Scantling, 4 Blackf. (Ind.) 89; Carson v. Earlywine, 14 Ind. 256; Byrd v. Odem, 9 Ala. 755; Martin v. Chapman, 1 Ala. 278; Winne v. Elderkin, 1 Chand. (Wis.) 219; Valentine v. Valentine, 2 Barb. Ch. (N. Y.) 430; French v. New, 20 Barb. (N. Y.) 481; Philbrick v. Preble, 18 Me. 255; s. c., 36 Am. Dec. 718; McMullen v. Mayo, 8 Sm. & M. (Miss.) 208; Logsdon v. Roberts, 3 T. B. Monr. (Ky.) 255; Evans v. McKinsey, 6 Litt. (Ky.) 262; Stark v. Cannady, 3 Litt. (Ky.) 399; s. c., 14 Am. Dec. 76.

A parol submission must be clearly established to make the award following it effective. Koon v. Hollingsworth, 97 Ill. 52.

So upon general principles an award upon a parol submission is unavailing to vest a title to lands. The right to title to freehold estate can only be transferred by deed. Miller v. Graham, 1 Brev. (S. Car.) 448.

But only where the "title" to real estate is affected is the submission required to be under seal. All other questions relating to real estate may be submitted without a seal. Jackson v. Gager, 5 Cow. (N. Y.) 383; Mitchell v. Bush, 7 Cow. (N. Y.) 185; Palmer v. Davis, 28 N. Y. 242; French v. Richardson, 5 Cush. (Mass.) 450; Snodgrass v. Smith, 13 Ind. 393; Fryeburg Canal Co. v. Frye, 5 Greenl. (Me.) 38; Stark v. Cannady, 3



**Form of Submission.**—A submission at common law may be in any form of words. It is sufficient if an intention is expressed to submit to and abide by the award of the arbitrators.<sup>1</sup>

Litt. (Ky.) 399; s. c., 14 Am. Dec. 76. *Compare* Copeland v. Wading River, etc., Co., 105 Mass. 397.

Matters relating to the price of land may be submitted by parol. *Davy v. Faw*, 7 Cranch (U. S.), 172; *Weston v. Stuart*, 2 Fairf. (Me.) 326.

A submission concerning damages growing out of a contract touching real estate need not be by deed. *Carson v. Earlywine*, 14 Ind. 256.

Nor a submission to settle a question about a boundary-line where nothing passes. *Stewart v. Cass*, 16 Vt. 663; s. c., 42 Am. Dec. 534; *Bowen v. Cooper*, 7 Watts (Pa.), 311.

An oral submission in a dispute about rent due for past occupancy under an oral agreement to pay rent will be valid. It does not concern an interest in real estate. *Peabody v. Rice*, 113 Mass. 31.

Where the question was whether a note under seal had been paid or not, which therefore could wholly be proved by parol evidence, a verbal submission was held to be good. *Shockey v. Glasford*, 6 Dana (Ky.), 9.

An award regarding a claim for dower, rendered under a verbal submission, has been upheld. *Green v. Ford*, 17 Ark. 586.

Where an award has been rendered upon a submission which was in form not in accordance with the requirements of the subject-matter, an actual execution and fulfilment of the award, or acquiescence in the result, will make the award valid and binding. *Sawyer v. Fellows*, 6 N. H. 107; s. c., 25 Am. Dec. 452; *Gray v. Berry*, 9 N. H. 473; *Orr v. Hadley*, 36 N. H. 575; *Eaton v. Rice*, 8 N. H. 378; *Furber v. Chamberlain*, 29 N. H. 405; *Gove v. Richardson*, 4 Greenl. (Me.) 327; *Byam v. Robbins*, 6 Allen (Mass.) 63.

And even if the award for the same reason should be void as between the parties it may yet be received as evidence at a trial of the same question before a jury. *Byam v. Robbins*, 6 Allen (Mass.), 63; *Whitney v. Holmes*, 15 Mass. 152; *Tolman v. Sparhawk*, 5 Metc. (Mass.) 476.

1. *Brady v. Mayor of Brooklyn*, 1 Barb. (N. Y.) 584; *Wilson v. Getty*, 57 Pa. St. 266; *McManus v. McCulloch*, 6 Watts (Pa.), 357; *Kimball v. Walker*, 30 Ill. 482; *Copeland v. Hall*, 29 Me. 93; *Houghton v. Houghton*, 37 Me. 72.

But it has also been held that even the intention to abide by the award need not be expressed in words. The law will imply such intention from the submission. *Valentine v. Valentine*, 2 Barb. (N. Y.) Ch. 430; *Evans v. McKinsey*, 6 Litt. (Ky.) 262; *Stewart v. Cass*, 16 Vt. 663; s. c., 42 Am. Dec. 534; *Wilson v. Getty*, 57 Pa. St. 266; *Whitcher v. Whitcher*, 49 N. H. 176.

An entry is made in two cases, one a common-law suit and the other a chancery cause, in these words: "This day by consent and agreement of parties the two above causes are referred to Reed, one of the commissioners of this court, who is hereby directed to make, audit, settle and state, and return to this court at the next term an account between the plaintiff and C. of all the matters contained in said suits, and said commissioner is to hear the parties and any proper evidence offered, and to take the evidence in writing, and to return the same with his report, and the said commissioner is directed to give the parties interested ten days' notice of the time and place of executing this order, and such report shall be entered up as the judgment of this court." *Held*, this is a submission to arbitration, not a simple order of reference; and on the report of said commissioner being returned to the court, it should be treated as though it was an award, not as an ordinary report of a commissioner in chancery subject to such exceptions as would lie to such a report ordinarily. *Duff v. Core*, 27 W. Va. 232.

A submission by bond is a very ordinary mode of effecting a reference, each party executing a bond to the other in a certain penalty subject to the condition of his abiding by and performing the award of the person named as arbitrator. The penalty in the bond does not limit the amount the arbitrator may award, although if he exceeds that limit no larger sum than the penalty can be recovered on the bond. *Russell on Arb.* 52; *Marshall v. Reed*, 48 N. H. 36; *Washburne v. Lufkin*, 4 Minn. 466.

But a bond to secure the performance of an award referring to but not containing an agreement to submit will not take the place of the required written submission. *Boots v. Canine*, 94 Ind. 408.

A submission may also be made by indenture containing mutual covenants to

**Simultaneous Submissions.**—Where a verbal submission has been made, or a submission to two arbitrators, a subsequent or even a

stand to the award; and it seems to be no objection to the validity of the submission that one party is bound by deed and the other by agreement under seal as on a submission by a private individual and a corporation which the former signs, but to which the seal of the latter is affixed. *Russell on Arb.* 53; *Tomlin v. Mayor of Fordwich*, 6 N. & M. (S. Car.) 594.

A submission to arbitration must be definite in its terms and be mutual. It should be made by all the parties in the controversy; so an act of Congress referring a claim against the U. S. to the secretary of war does not make the secretary an arbitrator nor his decision an award. *Gordon v. U. S.*, 7 Wall. (U. S.) 188; *De Groot v. U. S.*, 5 Wall. (U. S.) 419; *Weichardt v. Hook*, 83 Pa. St. 434; *Chorpenning v. U. S.*, 11 Ct. of Cl. 625; *Leonard v. Cox*, 64 Mo. 32; *Ingraham v. Whitmore*, 75 Ill. 24; *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Jersey City, etc., R. Co. v. Jersey City, etc., R. Co.*, 20 N. J. Eq. 61.

It should be certain as to the subject-matter, and where the submission is uncertain and the uncertainty is not cured by a certain award, the award will be set aside. *Woodward v. Atwater*, 3 Iowa, 61.

But a submission of "all our accounts and claims in relation to Mill Rock mills," and one of "our business pertaining to a trade in land," have been held to be sufficiently definite as to the subject. *Zook v. Spray*, 38 Iowa, 273; *McKinnis v. Freeman*, 38 Iowa, 364.

And so was a submission of "all demands between the said parties which either of them has against the other arising from a controversy between them upon the claim of said H. for a balance due for building a certain dwelling-house for said A. in the years 1877-78, and all claims and demands against them of any nature growing out of said building," held to be sufficient. *Heglund v. Allen*, 30 Minn. 38.

In case of uncertainty in a submission the courts will always try to supply the deficiency if this can easily and surely be done. *Rixford v. Nye*, 20 Vt. 132; *Price v. White*, 27 Miss. 275; *King v. Jemison*, 33 Ala. 499.

In general the courts are inclined to give as liberal and comprehensive a construction to a submission as circumstances will permit in order to make it conform to the intention of the parties. *Harmon v. Jennings*, 22 Me. 240; *Munro*

*v. Alaire*, 2 Cai. (N. Y.) 320; *Owen v. Boerum*, 23 Barb. (N. Y.) 187; *Orcutt v. Butler*, 42 Me. 83; *Ross v. Watt*, 16 Ill. 99; *Gerrish v. Ayres*, 3 Scam. (Ill.) 245; *Graham v. Graham*, 9 Pa. St. 254; s. c., 49 Am. Dec. 557; *Noble v. Peebles*, 13 S. & R. (Pa.) 319; *Hopson v. Doolittle*, 13 Conn. 236; *Shockey v. Glasford*, 6 Dana (Ky.), 9; *Estep v. Larsen*, 21 Ind. 190; *Berkshire Woollen Co. v. Day*, 12 Cush. (Mass.) 128.

Parties entered into an agreement for an arbitration to be "conducted and decided upon the principle of fair and honorable dealing between man and man." On the hearing the parties presented written statements and were heard. One of them proposed to produce witnesses, but the majority of the arbitrators declined to allow it on the ground that it was prohibited by the submission. *Held*, error. *Halstead v. Seaman*, 82 N. Y. 27; s. c., 37 Am. Rep. 536.

Where a submission is in writing evidence varying its terms is, however, inadmissible. *Efner v. Shaw*, 2 Wend. (N. Y.) 567; *McNear v. Bailey*, 18 Me. 251.

As where a written submission is general, and embraces "every demand and cause in action in law and equity" parol evidence is not admissible to limit the extent of the submission, and to show that it was confined to matters actually in dispute. *Long v. Stanton*, 9 Johns. (N. Y.) 38.

Where the settlement of partnership affairs is submitted to arbitration, the submission will also give the arbitrators the right to decide what are the partnership effects. *Masters v. Gardner*, 5 Jones L. (N. Car.) 298.

And where a claim is submitted it will involve both the amount and the legality of the claim. *Colcord v. Fletcher*, 50 Me. 398.

Where pending an injunction suit for the abatement of a livery-stable the parties agreed to a submission containing the following clause: "That the award of the arbitrators made in pursuance of the agreement shall terminate and forever decide all matters of controversy at law or in equity in relation to said livery-stable," it was held that an action upon the bond in the injunction suit could not be maintained, although the bond was not mentioned in the submission. *Jesse v. Cater*, 28 Ala. 475.

The court will, however, not go to the extent of including matters which, al-

simultaneous submission in writing and to three arbitrators will supersede the parol submission.<sup>1</sup>

*When a Submission may be made.*—It is not necessary that a suit should be pending to authorize parties to make a submission.<sup>2</sup>

*What may be Submitted.*—All matters of a civil character which are in dispute, difference, or doubt between the parties, may be submitted by them to arbitration; but matters of an illegal nature, or criminal proceedings instituted against one party at the instigation of the other cannot be submitted.<sup>3</sup>

*Must be a Matter of Doubt at Least.*—It must be a matter of doubt at least which can be submitted. An uncertainty which can be removed by measurement, calculation, or investigation is not such a matter of doubt; and therefore when parties employ engineers,

though cognate to the matter in dispute, are obviously omitted; as where partnership disputes were submitted payments by one of the partners on the partnership's account subsequent to the submission were excluded. *Graham v. Graham*, 9 Pa. St. 254; s. c., 49 Am. Dec. 557; *Scott v. Barnes*, 7 Pa. St. 134; *Solomon v. Maguire*, 29 Cal. 227; *Adams v. Adams*, 8 N. H. 82; *Hopson v. Doolittle*, 13 Conn. 236; *Furber v. Chamberlain*, 29 N. H. 405; *Irvine v. Marshall*, 7 Minn. 286; *Bixby v. Whitney*, 5 Greenl. (Me.) 192.

All documents and papers submitted to the arbitration must be taken in consideration in construing the submission. *Com. v. Pejepsut Props.*, 7 Mass. 399.

Where an uncertain or ambiguous submission is acted upon, and an award has been rendered, the parties to the arbitration taking part in the proceedings and not objecting, they will be bound by the view the arbitrators have taken of the submission, and the award rendered accordingly. *Cheshire Bank v. Robinson*, 2 N. H. 126; *Hays v. Hays*, 23 Wend. (N. Y.) 363.

1. *Symonds v. Mayo*, 10 Cush. (Mass.) 39; *Freeman v. Beadle*, 2 Root (Conn.), 492; *Loring v. Alden*, 3 Metc. (Mass.) 576.

Where an agreement for an amicable action was embodied in the same paper with a submission to reference and a request to the prothonotary to grant an order accordingly, the several agreements will be taken in their appropriate order. The case will be entered and then the reference made. *Massey v. Thomas*, 6 Binn. (Pa.) 333.

2. *Titus v. Scantling*, 4 Blackf. (Ind.) 89.

Not even that there should have been a controversy between the parties. A difference of opinion or a simple matter of doubt may be submitted. *Brown v.*

*Wheeler*, 17 Conn. 345; s. c., 44 Am. Dec. 550; *Ranney v. Edwards*, 17 Conn. 309; *Mayo v. Gardner*, 4 Jones L. (N. Car.) 359; *Findlay v. Ray*, 5 Jones L. (N. Car.) 125; *O'Keson v. Barclay*, 2 P. & W. (Pa.) 531.

3. *Morse on Arb.* 36, 53; *Harrington v. Brown*, 9 Allen (Mass.), 579; *Partridge v. Hood*, 120 Mass. 403; s. c., 21 Am. Rep. 524; *People v. Bishop*, 5 Wend. (N. Y.) 111; *Shaw v. Spooner*, 9 N. H. 197; s. c., 32 Am. Dec. 348; *Hinds v. Chamberlain*, 6 N. H. 225; *Noble v. Peebles*, 13 S. & R. (Pa.) 319; *Maurer v. Mitchell*, 9 W. & S. (Pa.) 69; *Stanwood v. Mitchell*, 59 Me. 121; *Shaw v. Reed*, 30 Me. 105; *Bowen v. Buck*, 28 Vt. 308; *Cameron v. M'Farland*, 2 Carolina L. Rep. 415; *Corley v. Williams*, 1 Bailey (S. Car.), 588; *Vincent v. Groom*, 1 Yerg. (Tenn.) 430; *Hall v. Kimmer*, 28 N. W. Repr. (Mich.) 96; *Finley v. Funk*, 35 Kans. 668; *Davenport v. Fulkerson*, 70 Mo. 417.

An award on an illegal contract is void. So held where a claim of a pension agent who had charged more than the statute allowed, was submitted. *Hall v. Kimmer*, 28 N. Western Repr. (Mich.) 96.

The courts will, however, not open matters which have been closed by a general award, apparently good, on the ground of an illegal item in the account. *Morse on Arb.* 53; *Wohlenberg v. Lageman*, 6 Taunt. 250.

In criminal matters, where a party has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation he is entitled to, to arbitration, although a criminal prosecution may have been commenced. *Noble v. Peebles*, 13 S. & R. (Pa.) 319.

And it is in the discretion of the court to decide whether a personal satisfaction thus obtained will authorize a stay of the

accountants, or other experts to remove the uncertainty the result of their investigation is not generally regarded as an award.<sup>1</sup>

*Matters regarding Real Estate.*—All matters regarding real estate may be the subject of arbitration, although formerly a different view was held; and a general submission of "all matters in dispute" will include questions relating to real estate as well as those relating to personality.<sup>2</sup>

criminal proceedings. *Partridge v. Hood*, 120 Mass. 403; s. c., 21 Am. Rep. 524; *Com. v. Dowdican*, 115 Mass. 133; *State v. Hunter*, 14 La. Ann. 71.

1. *Kelly v. Crawford*, 5 Wall. (U. S.) 785; *Hale v. Handy*, 26 N. H. 206; *Condon v. Southside R. Co.*, 14 Gratt. (Va.) 362; *Norton v. Gale*, 95 Ill. 533; s. c., 35 Am. Rep. 173; *McAuley v. Carter*, 22 Ill. 53; *Packard v. Van Schoick*, 58 Ill. 79; *Korf v. Lull*, 70 Ill. 420; *Thayer v. Bacon*, 3 Allen (Mass.), 163; s. c., 80 Am. Dec. 59; *McKinney v. Page*, 32 Me. 513; *Davis v. Townsend*, 10 Barb. (N. Y.) 333; *Vosburgh v. Teator*, 32 N. Y. 561; *Terry v. Chandler*, 16 N. Y. 354; s. c., 69 Am. Dec. 707.

Some authorities, however, hold that such persons are to be considered as arbitrators, and that their decision is final to the extent of their employment. *McAvoy v. Long*, 13 Ill. 147; *Canal Trustees v. Lynch*, 5 Gilm. (Ill.) 521; *Mason v. Bridge*, 14 Me. 468; s. c., 31 Am. Dec. 66; *Robbins v. Clark*, 129 Mass. 145.

An award is not binding upon a party not accepting it where there is no evidence of a previous dispute between the parties concerning the matters submitted. *Cothran v. Knox*, 13 S. Car. 496.

The same variance of legal opinion has been expressed in regard to appraisals. Some authorities regard appraisers as arbitrators; others hold a contrary view. *Curry v. Lackey*, 35 Mo. 389; *Garred v. Macey*, 10 Mo. 161; *Mason v. Bridge*, 14 Me. 468; s. c., 31 Am. Dec. 66; *Oakes v. Moore*, 24 Me. 214; s. c., 41 Am. Dec. 379; *Garr v. Gomez*, 9 Wend. (N. Y.) 649; *Rochester v. Whitehouse*, 15 N. H. 468. *Compare Smith v. Boston, etc., R. Co.*, 36 N. H. 458; *Efner v. Shaw*, 2 Wend. (N. Y.) 567; *Underhill v. Van Cortland*, 17 Johns. (N. Y.) 405; 2 Johns. Ch. (N. Y.) 339; *Leonard v. House*, 15 Ga. 473; *Lauman v. Young*, 31 Pa. St. 306.

The appeal to the recollection of a third party about past occurrences, although the decision may be made binding on the appealing parties, is not an arbitration. *Williams v. Wood*, 1 Dev. (N. Car.) 82; *Delesline v. Greenland*, 1 Bay (S. Car.), 458.

But where a matter is actually in dispute or in doubt it may be submitted. So may a claim of dower, a claim to owelty of partition, a single item of a long account, questions of pure law, form the subject-matter of arbitration. *Morse on Arb.* 54; *Cox v. Jagger*, 2 Cow. (N. Y.) 638; s. c., 14 Am. Dec. 522; *McBride v. Hogan*, 1 Wend. (N. Y.) 326; *Green v. Ford*, 17 Ark. 586; *Strawbridge v. Funstone*, 1 W. & S. (Pa.) 517.

The question whether or not a certain place was kept as a nuisance, and whether or not it should be abated as such, may properly be submitted to arbitration. *Richards v. Holt*, 61 Iowa, 529.

Debts which are termed certain, such as debts on bonds, arrears of rent under a lease, have long been held not to be subject to arbitration, though they may be joined with other matters which are uncertain. This principle has, however, since long been considered of no value. *Russell on Arb.* 4; *Godfrey v. Godfrey*, 2 Mod. 303.

In general, things which by themselves cannot be submitted may be submitted in connection with other matters. *Coxal v. Sharp*, 1 Keb. 937; *Morris v. Creech*, 1 Lev. 292.

It is doubted whether actions upon penal statutes by common informers may be determined by arbitration. *Morse on Arb.* 54.

Debts depending on a specialty, as an administration bond, a *scire facias* on a judgment upon an award, or a debt on a recognizance of bail in error, are held not to be the subject-matter of arbitration. *Stout v. Com.*, 2 Rawle (Pa.), 341; *Hill v. Crawford*, 8 S. & R. (Pa.) 477; *Stevenson v. Docherty*, 3 Watts (Pa.), 176.

But in an action for the penalty of a contract under seal, the amount equitably due may be determined by a referee. *Phoenix Mut. Life Ins. Co. v. Clark*, 59 N. H. 561.

2. *Penniman v. Rodman*, 13 Metc. (Mass.) 382; *Jones v. Boston Mill Corp.* 4 Pick. (Mass.) 507; s. c., 16 Am. Dec. 358; *Clark v. Burt*, 4 Cush. (Mass.) 396; *McMullen v. Mayo*, 8 Sm. & M. (Miss.) 298; *People v. McGinnis*, 1 Park Cr. Cas. (N. Y.) 387; *Munroe v. Alaïre*, 2

**General Submissions.**—A submission is general when it submits to arbitration all actions and causes of actions, all quarrels, controversies, trespasses, damages and demands whatsoever. It is immaterial what terms are used to make the submission general, as, "divers others matters," "all controversies," "all matters, claims, and demands at law or equity," "all other actions or causes of actions," as long as the intention of the parties is evident to submit all matters of dispute or controversy. Under such a general submission the arbitrators have a right to decide upon all questions concerning the civil rights of the parties between them, whether legal or equitable, relating to personal or real property; and the courts will construe the submission as liberally as possible, so as to terminate all controversies, and to dispose of all rights of action.<sup>1</sup>

Cai. (N. Y.) 320; Cox v. Jagger, 2 Cow. (N. Y.) 638; s. c., 14 Am. Dec. 522; Byers v. Van Deusen, 5 Wend. (N. Y.) 268; Sellick v. Addams, 15 Johns. (N. Y.) 197; Blair v. Wallace, 21 Cal. 317; Akely v. Akely, 16 Vt. 450; McNear v. Bailey, 18 Me. 251; McCracken v. Clarke, 31 Pa. St. 498; Davis v. Havard, 15 S. & R. (Pa.) 162; s. c., 14 Am. Dec. 536; Austin v. Snow, 2 Dall. (Pa.) 157; Chicago, etc., Co. v. Stewart, 19 Fed. Rep. 5; Shackelford v. Purket, 2 A. K. Marsh. (Ky.) 435; s. c., 12 Am. Dec. 422; Finley v. Funk, 12 Pac. Rep. (Kans.) 15.

So may questions about a boundary-line be submitted. Stout v. Woodward, 71 N. Y. 590; Ryder v. Dodge, 14 Week. Dig. (N. Y.) 84; Sellick v. Addams, 15 Johns. (N. Y.) 197; Robertson v. McNeill, 12 Wend. (N. Y.) 578; Davis v. Havard, 15 S. & R. (Pa.) 162; s. c., 16 Am. Dec. 537.

Or the question of damages for a right of flowage. Fitch v. Constantine Hydraulic Co., 44 Mich. 74.

Even in New York, where the statute makes an award regarding all matters of real estate absolutely void, the courts are very liberal in its construction, and hold that it refers only to cases where a claim to a legal title is involved, but does not operate where an equitable title is claimed. Wiles v. Peck, 26 N. Y. 42; Olcott v. Wood, 14 N. Y. 32. See Quinn v. Besse, 64 Me. 366.

Future rights of parties in regard to property which cannot yet be reached by the courts may be decided by arbitration. Thus an arbitrator has been called upon to set out what road one of the contending parties should have over certain lands; to determine with respect to such things as a pump, a yard, a doorway, a hedge, a ditch, a flue, a watercourse or a water-spout; how they shall in future be

enjoyed and used; and even to say generally what shall be done by the parties respecting the matters in dispute. Parties may even refer to arbitration any future differences between them, though none at present exist. Russell on Arb. 5; Morse on Arb. 54.

1. Sellick v. Addams, 15 Johns. (N. Y.) 197; Munroe v. Alaire, 2 Cai. (N. Y.) 320; De Long v. Stanton, 9 Johns. (N. Y.) 38; Byers v. Van Deusen, 5 Wend. (N. Y.) 268; Jones v. Welwood, 71 N. Y. 208; Adams v. Macfarlane, 65 Me. 143; Brown v. Leavitt, 26 Me. 251; Orcutt v. Buttler, 42 Me. 83; Connor v. Simpson, 104 Pa. St. 440; Merritt v. Merritt, 11 Ill. 565; Indiana Centr. R. Co. v. Bradley, 7 Ill. 49; Overby v. Thrasher, 47 Ga. 10; Barker v. Belknap, 39 Vt. 168; Woods v. Page, 37 Vt. 252; Guerrant v. Smith, 48 Miss. 90; Richards v. Holt, 61 Iowa, 529; Jackson v. Hoffman, 31 La. Ann. 97.

Under a general submission, — by which was understood a submission containing no express reservation or limitation upon the authority conferred, — both law and fact are submitted to the judgment of the arbitrators for consideration and decision. Johnson v. Noble, 13 N. H. 286; s. c., 38 Am. Dec. 485.

A submission stipulating to abide by any award made by their mutual friends M. and C. in the arbitration of an unsettled account between them was held to cover all matters of dispute between the parties growing out of the account. Henniken v. Brown, 4 Baxt. (Tenn.) 397.

And where two partners submitted to arbitration all the differences between them in respect to their partnership affairs in general terms, the arbitrators were authorized to adjust every question of dispute arising out of the partnership transactions. They were not limited to

*What Matters Excluded.*—Only such matters, however, are rightly included as concern the parties directly and which are in dispute at the time of the submission. Matters formerly disposed of, or matters not in dispute, are excluded.<sup>1</sup>

*Conditional Submissions.*—Submissions with a condition attached are valid, and do not take effect before the condition is fulfilled.<sup>2</sup>

*Submission of Cases pendente lite.*—A case pending in court may be submitted to arbitration, either by rule of court under statutory regulations, or by voluntary agreement of the parties. If done under rule of court it is of course only a continuance of the regular court proceedings under another form; but if done by voluntary agreement and without regard to the statutory provisions, the submission will act as a discontinuance of the case in court, according to the great majority of authorities.<sup>3</sup>

the books of the partnership's accounts. *Tucker v. Page*, 69 Ill. 179.

A submission of "all causes of action" has been held to include a charge of fraud in a sale of property. *De Long v. Stanton*, 9 Johns. (N. Y.) 38.

And of "all business, whatever kind, in dispute between the parties," a prosecution for assault and battery. *Noble v. Peebles*, 13 S. & R. (Pa.) 319.

And a submission of "all demands," prospective damages on an indemnity bond then outstanding. *Cheshire Bank v. Robinson*, 2 N. H. 126.

Where a dispute in reference to the ownership of a tent was submitted to arbitration under authority to "adjudicate and settle all matters existing between the parties," it was held that authority to assign one person's personal claim to another was included. *Ford v. Burleigh*, 60 N. H. 278.

Where in an action on contract to recover a judgment for a sum of money agreed to be paid to the plaintiff annually, and for a support during his life, the defendant pleads an award of arbitrators, and the submission provides that all matters of difference were submitted between them, it cannot be objected that an award made by them that the defendant should pay to the plaintiff the sum of \$200 in five years, in equal payments, without interest, is not in accord with the submission, and that the time of payment fixed by the arbitrators is not within the terms of the power conferred on them. *Donican v. Mulry*, 29 N. Western Repr. (Iowa) 612; *Woodward v. Atwater*, 3 Iowa, 61; *Zook v. Spray*, 38 Iowa, 273; *McKinnis v. Freeman*, 38 Iowa, 365.

1. *Adams v. Adams*, 8 N. H. 82; *Graham v. Graham*, 9 Pa. St. 254; s. c., 49 Am. Dec. 557; *Thrasher v. Haynes*, 2 N. H. 429; *Samson v. Young*, 50 N. H. 62;

*Calvert v. Carter*, 18 Md. 73; 4 Md. Ch. 199; *Robinson v. Morse*, 29 Vt. 404.

A submission of "all unsettled accounts" does not include a division of personal property owned in common by the parties. *Shearer v. Handy*, 22 Pick. (Mass.) 417.

So under a general submission of partnership matters, an individual debt from the one partner to the other was held not to be included in the submission. *Osborne v. Colvert*, 86 N. Car. 170.

Nor could the question be submitted whether the partnership was void on account of false representations. *Richards v. Todd*, 127 Mass. 167.

But if two parties on one side and one on another submit to arbitration all their claims and differences, not only the joint matters of the two, but also their individual matters, are submitted, and an award on an individual matter will form a bar to any further action. *Fidler v. Cooper*, 19 Wend. (N. Y.) 285; *Cutter v. Whittemore*, 10 Mass. 442.

Claims barred by the statute of limitations are excluded from a general submission. They require a special submission. *Adams v. Adams*, 8 N. H. 82.

Submission of a claim barred by the statute of limitations was formerly held to remove the statute bar, but in later cases a different view has been held. *Colkings v. Thackston*, Cam. & N. (N. Car.) 93; *Barney v. Smith*, 4 H. & J. (Md.) 485; s. c., 7 Am. Dec. 679. But see *Shaw v. Newell*, 1 R. I. 488; *Russell v. Gas, Mart. & Y.* (Tenn.) 353; *Cowart v. Perrine*, 21 N. J. Eq. 101.

In case of doubt the presumption is of an intent that all matters should be decided. *Jones v. Welwood*, 71 N. Y. 208.

2. *Boston v. Brazer*, 11 Mass. 447; *People v. McGinnis*, 1 Park. Cr. Cas. (N. Y.) 387; *Merritt v. Thompson*, 27 N. Y. 225.

3. *Saffie v. Cox*, 9 Humph. (Tenn.) 142;

*Cases Suspended.*—In cases where the submission does not work as a discontinuance of the suit the power of the court over the case is entirely suspended from the time the arbitrators are chosen until the rendering of the award, or until the expiration of the time fixed for rendering the award.<sup>1</sup>

McMinnville, etc., R. Co. v. Huggins, 59 Tenn. 177; Susong v. Jack, 1 Heisk. (Tenn.) 415; Jewell v. Blankenship, 10 Yerg. (Tenn.) 439; Larkin v. Robbins, 2 Wend. (N. Y.) 505; Wells v. Lain, 15 Wend. (N. Y.) 99; Smith v. Barse, 2 Hill (N. Y.), 387; West v. Stanley, 1 Hill (N. Y.), 69; Towns v. Wilcox, 12 Wend. (N. Y.) 503; Jordan v. Hyatt, 3 Barb. (N. Y.) 275; Buel v. Dewey, 22 How. Pr. (N. Y.) 342; Green v. Patchen, 13 Wend. (N. Y.) 293; *Ex p.* Wright, 6 Cow. (N. Y.) 399; Camp v. Root, 18 Johns. (N. Y.) 22; Miller v. Van Auker, 1 Wend. (N. Y.) 516; Wilson v. Williams, 66 Barb. (N. Y.) 209; Jacoby v. Johnston, 3 Thomp. & C. (N. Y.) 747; Mooers v. Allen, 35 Me. 276; s. c., 58 Am. Dec. 700; Crooker v. Buck, 41 Me. 355; Gunter v. Sanchez, 1 Cal. 45; Bigelow v. Goss, 5 Wis. 421; Muckey v. Pierce, 3 Wis. 307; Vanderhoof v. Dean, 1 Mich. 463; Bowen v. Lazalere, 44 Mo. 383; Cunningham v. Craig, 53 Ill. 252; Reeve v. Mitchell, 15 Ill. 297.

There are, however, decisions which hold that a common-law submission has no effect upon the proceedings in court, and that either party has a right to push his suit, leaving the other party to have recourse only to an action for breach of the agreement. Haskell v. Whitney, 12 Mass. 47; Eaton v. Arnold, 9 Mass. 519; McGunn v. Hanlen, 29 Mich. 476; Paulison v. Halsey, 38 N. J. L. 488; Corbin v. Adams, 76 Va. 58; Leonard v. House, 15 Ga. 473; Parnell v. King, Rice (S. Car.), 376; Nettleton v. Gridley, 21 Conn. 531; s. c., 56 Am. Dec. 378; Fielding v. Westermeyer, 20 La. Ann. 51; U. S. v. Ames, 1 Woodb. & M. (U. S.) 76; Haggart v. Morgan, 5 N. Y. 422; s. c., 55 Am. Dec. 350; Lary v. Goodnow, 48 N. H. 170; Dinsmore v. Hanson, 48 N. H. 413. Compare Summy v. Hiestant, 65 Pa. St. 300.

And the discontinuance may be waived, as where both parties appear and continue the proceedings in court. People v. Onondaga, 1 Wend. (N. Y.) 314; Buel v. Dewey, 22 How. (N. Y.) Pr. 342; Jewell v. Blankenship, 10 Yerg. (Tenn.) 439.

Although a submission to arbitration may form a bar to further action in court, this refers only to matters which of necessity are included in the submission. Where a party has the choice to enforce his claim either against the other party to

the arbitration or against one not a party to it, the submission does not operate to bar him from his remedy against the latter. Robinson v. Hawkins, 38 Vt. 603.

1. Ensign v. St. Louis, etc., R. Co., 62 How. Pr. (N. Y.) 123; Hazen v. Ad-dis, 2 Green (N. J.), 333; Maxfield v. Scott, 17 Vt. 634; Grubb v. McCullough, 1 Yeates (Pa.), 193; Thompson v. White, 4 S. & R. (Pa.) 135; Wilcox v. Payne, 88 Pa. St. 154; Hoffman v. Locke, 19 Pa. St. 57; Schuylkill Bank v. Macalester, 6 W. & S. (Pa.) 147; Camp v. Bank of Owego, 10 Watts (Pa.), 130; Douglas v. Kenton, 1 Miles (Pa.), 21; De Lisle v. Priestman, 1 Browne (Pa.), 115; McCall v. Crousillat, 6 S. & R. (Pa.) 167; Brown v. Shaeffer, 6 Binn. (Pa.) 177; Crawford v. Gable, 2 Barr. (Pa.) 444; Withers v. Haines, 2 Barr. (Pa.) 435; Grubb v. Grubb's Ex'r's, 2 Dall. (Pa.) 191; Pollock v. Hall, 4 Dall. (Pa.) 222; Horn v. Roberts, 1 Ashm. (Pa.) 45; Jacoby v. Johnston, 3 Th. & C. (N. Y.) 747.

Where to a submission under the common-law rule a condition is attached stipulating that judgment shall be entered upon the award, the case is not discontinued, but only suspended. Such judgment may be entered, and stands as a judgment by consent. The parties are concluded by their agreement, and cannot be heard to allege that the reference and judgment were not warranted by law. *Ex p.* Wright, 6 Cow. (N. Y.) 399; Green v. Patchen, 13 Wend. (N. Y.) 293; Yates v. Russell, 17 Johns. (N. Y.) 461; Wilson v. Williams, 66 Barb. (N. Y.) 209; Callinan v. Port Huron, etc., R. Co., 27 N. Western Repr. (Mich.) 718; Tison v. Sellars, 40 Ga. 710; McMinnville, etc., R. Co. v. Huggins, 59 Tenn. 177; Roger v. Nall, 6 Humph. (Tenn.) 29; Hearne v. Brown, 67 Me. 156; Carroll v. Locke, 58 N. H. 163; Lary v. Goodnow, 48 N. H. 170; Dinsmore v. Hanson, 48 N. H. 413; Wear v. Ragan, 30 Miss. 83; Bank of Monroe v. Widner, 11 Paige (N. Y.), 529; s. c., 43 Am. Dec. 768.

A case submitted to arbitration *pendente lite* will in no case be considered to be discontinued where the terms of the submission show the intention of the parties not to discontinue. Jacoby v. Johnston, 1 Hun (N. Y.), 242; Hearne v. Brown, 67 Me. 156; Ensign v. St. Louis, etc., R. Co., 62 How. Pr. (N. Y.) 123.

*What is Submitted.*—When a case pending in court is submitted to arbitration the submission includes all the questions of law and fact connected with it; all amendments which have been made or could be allowed are included so as to make the question before the arbitrators as near as possible like the subject-matter of the suit without regard to form.<sup>1</sup>

*Release of Errors.*—A submission of a pending cause operates as a release of all errors, or an estoppel against any assignment of

When, after submission, arbitration becomes impossible, either by the refusal of the arbitrators to act, or to give up the award unless the payment be made, which payment was not made, the suit in court is not discontinued, but suspended, according to some authorities. *Chapman v. Seccomb*, 36 Me. 102; *Elliot v. Quimby*, 13 N. H. 181.

Others hold that under such circumstances the suit was discontinued, and that the plaintiff had to return to his original cause of action and to commence anew. *Buel v. Dewey*, 22 How. Pr. (N. Y.) 342.

So was the mere submission of a cause to arbitration, the arbitrators never taking nor consenting to take upon themselves the burden of the submission, held to operate as a discontinuance of the suit. *McNulty v. Solley*, 95 N. Y. 242; 66 How. Pr. (N. Y.) 147; *Reeve v. Mitchell*, 15 Ill. 297.

A case decided in court was by appeal taken into a higher court, and during the appeal submitted to arbitration, the submission stipulating for the "discontinuance of the appeal." After the disagreement of the arbitrators it was held that although the appeal was discontinued the judgment of the lower court remained in force. *Miller v. Van Auken*, 1 Wend. (N. Y.) 516.

But where under like circumstances the submission contains the clause "all further proceedings in said suit at law are to be hereby stayed and ended," it was held that according to the intention of the parties the suit at law was blotted out and ended, from its commencement to its termination. *Van Slyke v. Lettice*, 6 Hill (N. Y.), 610; *Grosvenor v. Hunt*, 11 How. Pr. (N. Y.) 355. And see *Baldwin v. Barrett*, 6 Thomp. & C. (N. Y.) 362.

A submission of an action to arbitrators after an appeal does not necessarily deprive the plaintiff of his right to enter his complaint for affirmance, unless there is an award made before the sitting of the appellate court, or by the terms of submission time beyond such sitting is allowed for making the award. *Hayes v. Blanchard*, 4 Vt. 210.

According to the same principles, an action brought while an arbitration is pending covering the same subject-matter will be suspended until award has been rendered, the time for the rendering of an award has expired, or the arbitrators disagree or refuse to act. *Small v. Thurlow*, 37 Me. 504; *Brown v. Welcker*, 1 Coldw. (Tenn.) 197; *St. Martin v. Mestayé*, 18 La. Ann. 320. But compare *Knaus v. Jenkins*, 40 N. J. L. 288; *Smith v. Compton*, 20 Barb. (N. Y.) 262.

A mere agreement to submit without an actual submission is, however, no bar to the action. *Tobey v. County of Bristol*, 3 Story (U. S.), 800.

1. *Cushing v. Babcock*, 38 Me. 452; *Waterman v. Connecticut*, etc., R. Co., 30 Vt. 610; s. c., 73 Am. Dec. 326; *Briggs v. Oaks*, 26 Vt. 138; *Davis v. Campbell*, 23 Vt. 236; *Eddy v. Sprague*, 10 Vt. 216; *Maxfield v. Scott*, 17 Vt. 634; *Price v. Brown*, 98 N. Y. 388; *Lee v. Tillotson*, 24 Wend. (N. Y.) 337; s. c., 35 Am. Dec. 624; *Renouil v. Harris*, 2 Sandf. (N. Y.) 641; *Newton v. West*, 3 Metc. (Ky.) 241; *Coffin v. Cottle*, 4 Pick. (Mass.) 454; *Page v. Monks*, 5 Gray (Mass.), 492; *Amet v. Boyer*, 36 La. Ann. 266.

No new matter foreign to the case under submission may be added except when expressly included in the submission; but extra provisions may so be included if they are not in violation of the law. So where the rule of court requires an award of the majority of the arbitrators the submission may require a unanimous award. *Merrill v. Gold*, 1 Cush. (Mass.) 457; *Berkshire Woollen Co. v. Day*, 12 Cush. (Mass.) 128; *Anderson v. Farnham*, 34 Me. 161; *Harman v. Jennings*, 22 Me. 240; *Henderson v. Walker*, 2 Grant (Pa.), 36; *Bemus v. Quiggle*, 7 Watts (Pa.), 363; *Smith v. Kincaid*, 7 Humph. (Tenn.) 28; *Fitzgerald v. Fitzgerald*, Harden (Ky.), 227; *Harrison v. Wortham*, 8 Leigh. (Va.) 296.

A general submission made *pendente lite* includes all matters in dispute at the time of the submission, not at the time of the initiation of the suit. *Woods v. Page*, 37 Vt. 252.



errors, in the proceedings anterior to the submission, and as a waiver of all exceptions to the forms of the process.

**6. Revocation of Submission.—In General.**—Independent of some statutory restriction, an agreement to submit to arbitration is in general revocable by either party, at any time before an award has been made. No stipulation in the agreement will be sustained either at law or in equity as defeating this right, so as to prevent the parties from having recourse to the courts.<sup>2</sup>

1. *Ames v. Stephens*, 120 Mass. 218; *Forseth v. Shaw*, 10 Mass. 253; *Coffin v. Cottle*, 4 Pick. (Mass.) 454; *Vanderhoof v. Dean*, 1 Mich. 463; *Hix v. Sumner*, 50 Me. 290; *Swift v. Harriman*, 30 Vt. 607; *Maxfield v. Scott*, 17 Vt. 634; *Spaulding v. Warren*, 25 Vt. 316; *Ligon v. Ford*, 5 Munf. (Va.) 10; *Taylor v. Sayre*, 24 N. J. L. 647; *Applegate v. Schureman*, 3 N. J. L. 868; *McCahan v. Reamey*, 33 Pa. St. 535.

2. *Davis v. Maxwell*, 27 Ga. 368; *Leonard v. House*, 15 Ga. 473; *Tobey v. County of Bristol*, 3 Story (U. S.), 800; *Snodgrass v. Gavit*, 28 Pa. St. 221; *Johnson v. Andress*, 5 Phil. (Pa.) 8; *Paist v. Caldwell*, 75 Pa. St. 161; *Marseilles v. Kenton*, 17 Pa. St. 238; *Erie v. Tracy*, 2 Grant's Cas. (Pa.) 20; *Power v. Power*, 7 Watts (Pa.), 205; *Wood v. Finn*, 1 Pal. L. J. R. 396; *Marsh v. Packer*, 20 Vt. 198; *Aspinwall v. Tousey*, 2 Tyler (Vt.), 328; *Rawley v. Young*, 3 Day (Conn.), 118; *Bray v. English*, 1 Conn. 498; *Allen v. Watson*, 16 Johns. (N. Y.) 205; *Bank of Monroe v. Widner*, 11 Paige (N. Y.), 529; s. c., 43 Am. Dec. 768; *Tyson v. Robinson*, 3 Ired. (N. Car.) 333; *Peters v. Craig*, 6 Dana (Ky.), 307. Compare *Williams v. Danziger*, 91 Pa. St. 232; *Lewis's Appeal*, 91 Pa. St. 359.

Where a submission contained the stipulation that the award should be rendered on a certain day, and the arbitrator made an award before that day, it was held that the revocation of one of the parties after the award was made, but before it was published to both parties, came too late. *Hunt v. Wilson*, 6 N. H. 36.

A submission entered into by the attorneys of the parties can be revoked by either one of the parties. *Coleman v. Grubb*, 23 Pa. St. 393.

Although it has been doubted, the general rule is held to be, that where the submission is by one on one side and two on the other, one of the two cannot revoke without the concurrence of the other. The authority being jointly given must be jointly taken away. *Kyd on Awards*, 30; *Robertson v. M'Niel*, 12 Wend. (N. Y.) 578; *Greason v. Keteltas*,

17 N. Y. 491; *Brown v. Leavitt*, 26 Me. 251.

Even when the submission contains the stipulation that in case one of the parties fails to appear the proceedings may go on *ex parte*, the submission is not irrevocable. *Boston, etc., R. Co. v. Nashua, etc., R. Co.*, 139 Mass. 463.

A submission to arbitration is revocable before award, even if entered into upon a consideration. *Jones v. Harris*, 50 Miss. 214.

But the contrary view has been held where, by agreement of parties, proceedings in chancery for an account were discontinued, and in consideration thereof a submission to a final reference was made. *McGhee v. Duffield*, 5 Pa. St. 497; *Bank of Monroe v. Widner*, 11 Paige (N. Y.) 529; s. c., 43 Am. Dec. 768; *Paist v. Caldwell*, 75 Pa. St. 161.

Where the parties to an action have entered into a rule of court in the common form, submitting the action and all demands to arbitrators to be mutually chosen, neither party can rescind the rule. *Haskell v. Whitney*, 12 Mass. 47; *Cumberland v. North Yarmouth*, 4 Me. 459; *Ferris v. Munn*, 22 N. J. L. 71; *Freeborn v. Denman*, 3 Halst. (N. J.) 116; *Horn v. Roberts*, 1 Ashm. (Pa.) 45; *Ruston v. Dunwoody*, 1 Binn. (Pa.) 42; *Pollock v. Hall*, 4 Dall. (U. S.) 222; *Suttons v. Tyrrell*, 10 Vt. 94; *Dexter v. Young*, 40 N. H. 130; *Frets v. Frets*, 1 Cow. (N. Y.) 335; *Bray v. English*, 1 Conn. 498; *Tyson v. Robinson*, 3 Ired. L. (N. Car.) 333; *Phillips v. Shipley*, 1 Bland (Md.), 516; *Masterson v. Kidwell*, 2 Cranch (C. Ct.), 669; *Brickhouse v. Hunter*, 4 H. & M. (Va.) 263; s. c., 4 Am. Dec. 528.

Where the parties to a suit in equity, after issue joined, and pending a reference to an examiner, file an agreement to submit the controversy to the final decision of arbitrators, and in consequence of such agreement the court, at the request of the parties, vacates the appointment of the examiner, the agreement of reference is virtually made a rule of court, and becomes irrevocable. *White's Appeal*, 108 Pa. St. 473.

But a submission "to be made a rule

**Form of Revocation.**—No special form for a revocation of a submission is necessary to make it valid, as long as the intention of the parties can be ascertained. The courts will give a liberal construction to the whole instrument to discover what the intention is, often supplying, transposing, or rejecting words.<sup>1</sup>

**Implied Revocation.**—Although there is no direct revocation of the submission by the parties interested, there may be a revocation by implication either through circumstances or through an act of one of the parties.<sup>2</sup>

of court" is revocable until it has been made a rule of court, or until award has been rendered. *Huston v. Clark*, 12 Phila. (Pa.) 383.

Submissions made under statutory provisions must of course follow the statutory rules, and whether they are revocable or not, and at what state of the proceedings, depends on the statutes. *Montgomery Co. v. Carey*, 1 Ohio St. 463; *Bloomer v. Sherman*, 5 Paige (N. Y.), 575; *Heath v. Pres. of Gold Exchange*, 38 How. Pr. (N. Y.) 168; *Shroyer v. Bash*, 57 Ind. 349.

1. So where a sealed revocation read as follows: "We, the subscribers, revoke. Take notice that the arbitration bonds," etc., the court transposed the words "Take notice that," so as to make it read, "Take notice that we, the subscribers, revoke the arbitration bonds," and upheld the revocation. *Frets v. Frets*, 1 Cow. (N. Y.) 335.

A revocation must conform to the submission. A written submission requires a written revocation; a submission under seal can only be revoked under seal. *Shroyer v. Bash*, 57 Ind. 349; *Keyes v. Fulton*, 42 Vt. 159; *Sutton v. Tyrrell*, 10 Vt. 91; *Brown v. Leavitt*, 26 Me. 251; *Evans v. Cheek*, 3 Hayw. (Tenn.) 42; *Wallis v. Carpenter*, 13 Allen (Mass.), 19; *McFarlane v. Cushman*, 21 Wis. 401; *Mullins v. Arnold*, 4 Sneed (Tenn.), 262; *Relyea v. Ramsay*, 2 Wend. (N. Y.) 602; *Howard v. Cooper*, 1 Hill (N. Y.), 44; *Van Antwerp v. Stewart*, 8 Johns. (N. Y.) 125.

It must be express and positive, and coupled with no conditions. *Goodwine v. Miller*, 32 Ind. 419.

A revocation must be absolute. A promise by one of the contesting parties to a submission to arbitration to pay certain claims embraced in the submission; the promise being upon such conditions, however, as to leave unsettled the very question of liability in respect to such claims, which question was covered by the submission, will not be regarded as a withdrawal of them from the consideration of the arbitrators. *Steere v. Brownell*, 113 Ill. 415.

A revocation can be made through an agent, but he must be especially authorized for it. So where the president and secretary of an insurance company are authorized to carry on the business of the company without the presence of the board of directors, this does not authorize them to revoke a submission entered into by the board of directors. *Madison Ins. Co. v. Griffin*, 3 Ind. 277.

Notice must be given to the arbitrators of a revocation of a submission, for unless notice had been given to the arbitrators the instrument would not have amounted to a revocation. *Allen v. Watson*, 16 Johns. (N. Y.) 205; *Brown v. Leavitt*, 26 Me. 251.

A revocation of a submission is considered to be waived when the revoking party appears before the arbitrators and enters into the trial. *Seely v. Pelton*, 63 Ill. 101.

A stranger to a submission under the rule of court may petition the court to revoke the submission on the ground of collusion and fraud between the parties, and the probabilities that the interests of other parties will suffer by the fraud. It will be the duty of the court under such circumstances, fraud or collusion being proved, to grant the petition and to revoke the submission. *Lathrop v. Hitchcock*, 38 Vt. 496.

2. So may a revocation be presumed from the fact that suit was brought after the submission, and before any binding award was rendered. *Peters v. Craig*, 6 Dana (Ky.), 307; *Kimball v. Gilman*, 60 N. H. 54.

But where a suit was entered with the only purpose of keeping the action in existence, should the other party revoke or refuse to attend, this was held not to be a revocation. *Sutton v. Tyrrell*, 10 Vt. 91.

A sold real estate to B without disclosing the fact that he and his neighbor had submitted a dispute about the boundary-line to arbitration. *Held*, that B was not bound by a subsequent award. *Emery v. Fowler*, 38 Me. 99.

The marriage of a *feme sole*, party to a

*Effect of Revocation on the Parties.*—Where one party revokes his submission to arbitration without the consent of the other, he will be liable in damages to the not-consenting party, on the arbitration bond if there is one, or on an action for damages for breach of contract.<sup>1</sup>

*Revocation Binding on both Parties.*—If a submission for any reason ceases to be binding upon one of the parties thereto, it also ceases to be binding upon all the rest.<sup>2</sup>

submission, will operate as a revocation. where the marriage would disable her from disposing of the property in dispute in her own name and by her own individual action. *Sutton v. Tyrrell*, 10 Vt. 91; *Marseilles v. Kenton*, 17 Pa. St. 238; *Abbott v. Keith*, 11 Vt. 525.

Death of one of the parties to a submission generally revokes it unless saved by an express stipulation that it shall survive. *Marseilles v. Kenton*, 17 Pa. St. 238; *Power v. Power*, 7 Watts (Pa.), 205; *Bailey v. Stewart*, 3 Watts & S. (Pa.) 560; s. c., 39 Am. Dec. 50; *Dexter v. Young*, 40 N. H. 130; *Whitfield v. Whitfield*, 8 Ired. L. (N. Car.) 163; s. c., 47 Am. Dec. 350; *Tyson v. Robinson*, 3 Ired. (N. Car.) 333; *McIntire v. Morris*, 14 Wend. (N. Y.) 90.

But if the submission be by rule of court in a pending case, the result will be different. *Freeborn v. Denman*, 3 Halst. (N. J.) 116; *Bacon v. Crandon*, 15 Pick. (Mass.) 79; *Moore v. Webb*, 6 Heisk. (Tenn.) 301.

The death of a member of a partnership, parties to a submission, does not necessarily work as a revocation. The remaining partners may go on with the proceedings if they choose. *Emerson v. Udall*, 8 Vt. 357; *Power v. Power*, 7 Watts (Pa.), 205.

Where a case is submitted to arbitrators by consent, and before the award is confirmed the defendant dies, whereby an abatement of the suit was brought about, it works as a revocation and prevents the confirmation of the award. *Farmer v. Frey*, 4 McCord (S. Car.), 160.

The administrator of the deceased party may, however, go on with the action. *Wheatley v. Martin*, 6 Leigh. (Va.) 62; *Bacon v. Crandon*, 15 Pick. (Mass.) 79.

The death of one of the arbitrators will revoke the submission, even if by the terms of the arbitration they had authority to act either jointly or severally. *Potter v. Sterrett*, 24 Pa. St. 411; *Sutton v. Tyrrell*, 10 Vt. 91.

Where one of the parties has, according to the submission, to fulfil certain conditions before the arbitrators can pro-

ceed, a failure to fulfil the condition will operate as a revocation. *Allen v. Galpin*, 9 Barb. (N. Y.) 246.

But simply neglecting to attend a meeting by one party, will not act as a revocation. *Brown v. Leavitt*, 26 Me. 251; *Bray v. English*, 1 Conn. 498.

The refusal of one of the arbitrators to act will work as a revocation unless the statute provides for substitution or the submission itself makes expressly or impliedly a contrary agreement. *Wilson v. Cross*, 7 Watts (Pa.), 495; *Binsse v. Wood*, 47 Barb. (N. Y.) 624; *Crofoot v. Allen*, 2 Wend. (N. Y.) 494; *Woodbury v. Proctor*, 9 Gray (Mass.), 18; *Ross v. Pleasants*, Wythe (Va.), 147; *Kimball v. Gilman*, 60 N. H. 54.

1. *Brown v. Leavitt*, 26 Me. 251; *Call v. Hagar*, 69 Me. 521; *Dexter v. Young*, 40 N. H. 130; *Frets v. Frets*, 1 Cow. (N. Y.) 335; *Craftsbury v. Hill*, 28 Vt. 763; *Aspinwall v. Tousey*, 2 Tyler (Vt.), 328; *Hawley v. Hodge*, 7 Vt. 240.

But the fact must be shown that the party in some way revoked. *Marshall v. Reed*, 48 N. H. 36.

The measure of damages where there is a bond is, however, not the penalty named in the bond, but actual damages as proved. *Blaisdell v. Blaisdell*, 14 N. H. 78.

Damages may include the costs of the discontinued suit and the expenses incurred by reason of the submission; but not the damages sought to be recovered by the original suit, unless the proceedings have been such that it has become impossible to recover in a fresh suit. *Blaisdell v. Blaisdell*, 14 N. H. 78; *Hawley v. Hodge*, 7 Vt. 237; *Rowley v. Young*, 3 Day (Conn.), 118; *Call v. Hagar*, 69 Me. 521; *Pond v. Harris*, 113 Mass. 114.

2. *Power v. Power*, 7 Watts (Pa.), 205.

After a party has revoked a submission in a manner invalid in itself, and neither the other party nor the arbitrator objected to it at the time, the revoking party will afterward be estopped from denying the validity of his revocation in a suit to recover damages for the breach of his contract. *Hawley v. Hodge*, 7 Vt. 237.

**7. Specific Performance of Agreements to Submit.—Not Allowed.**—Agreements to submit to arbitration are not specifically enforceable. Whether they are the result of a voluntary act of the parties or were embodied in a contract makes no difference. The fact that either party has a right to revoke the submission; the insufficient power of the arbitrators to compel the attendance of witnesses or the production of documents and papers and books of account, or to insist upon a discovery of facts from the parties under oath; the fact that arbitrators are not ordinarily well enough acquainted with the principles of law and equity to administer either effectually in complicated cases, have been held to be sufficient reasons why agreements to submit to arbitration should not be specifically enforced by the courts.<sup>1</sup>

1. *Tobey v. County of Bristol*, 3 Story (U. S.), 800; *Sinclair v. Tallmadge*, 35 Barb. (N. Y.) 602; *Hurst v. Litchfield*, 39 N. Y. 377; *Greason v. Keteltas*, 17 N. Y. 491; *Hug v. Van Burkleo*, 58 Mo. 202; *Biddle v. Ramsey*, 52 Mo. 153; *St. Louis v. Gaslight Co.*, 70 Mo. 69; *Hopkins v. Gilman*, 22 Wis. 476; *Randel v. Chesapeake, etc., Canal Co.*, 1 Harr. (Del.) 275; *Contee v. Dawson*, 2 Bland. (Md.) 264; *Allegre v. Maryland Ins. Co.*, 6 Harr. & J. (Md.) 408; s. c., 14 Am. Dec. 289; *Rowe v. Williams*, 97 Mass. 163; *Cavanagh v. Dooley*, 6 Allen (Mass.), 66; *Nute v. Hamilton Ins. Co.*, 6 Gray (Mass.), 174; *Gray v. Wilson*, 4 Watts (Pa.), 39; *Corbin v. Adams*, 76 Va. 58; *Stone v. Dennis*, 3 Port. (Ala.) 231; *Hill v. More*, 40 Me. 515; *March v. Eastern R. Co.*, 40 N. H. 548; s. c., 77 Am. Dec. 732; *Smith v. Boston, etc., R. Co.*, 36 N. H. 458; *Connor v. Drake*, 1 Ohio St. 167; *Copper v. Wells*, 1 N. J. Eq. 10. Parties cannot oust the courts out of their jurisdiction by embodying in a contract the stipulation that all disputes and controversies which may arise on the contract shall be submitted to arbitration, and that the award of the arbitrators shall be final. Such a condition will not be enforced. *Pearl v. Harris*, 121 Mass. 390; *Wood v. Humphrey*, 114 Mass. 185; *Rowe v. Williams*, 97 Mass. 163; *Cavanagh v. Dooley*, 6 Allen (Mass.), 66; *Kistler v. Indianapolis, etc., Co.*, 88 Ind. 460; *Bauer v. Samson Lodge K. of P.*, 102 Ind. 262; *Supreme Council of O. of C. F. v. Garrigus*, 1 Western Repr. (Ind.) 861; *Randel v. Chesapeake, etc., Canal Co.*, 1 Harr. (Del.) 233; *Robinson v. Georges Ins. Co.*, 17 Me. 131; s. c., 35 Am. Dec. 239; *Hill v. More*, 40 Me. 515; *Holmes v. Richet*, 56 Cal. 307; s. c., 38 Am. Dec. 54; *Allegre v. Maryland Ins. Co.*, 6 H. & J. (Md.) 408; s. c., 14 Am. Dec. 289; *March v. Eastern R. Co.*, 40 N. H. 548;

s. c., 77 Am. Dec. 732; *Smith v. Boston, etc., R. Co.*, 36 N. H. 458; *Stone v. Dennis*, 3 Port. (Ala.) 231; *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. St. 478; s. c., 21 Am. Rep. 80; *Gray v. Wilson*, 4 Watts (Pa.), 39; *Smith v. Compton*, 20 Barb. (N. Y.) 267; *Heath v. N. Y. Gold Exchange*, 38 How. Pr. (N. Y.) 170; *Hurst v. Litchfield*, 39 N. Y. 377; *Stromar v. Neppenfeldt*, 3 Mo. App. 429; *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445; *Liverpool, etc., Ins. Co. v. Creighton*, 51 Ga. 95; *Scott v. Avery*, 5 H. L. Cas. 811; *Callinan v. R. Co.*, 27 N. Western Repr. (Mich.) 718; *McGunn v. Hanlin*, 29 Mich. 480.

So it was held that a by-law of the Union Merchants' Exchange of St. Louis, which compels members to submit their business controversies to arbitration under penalty of being suspended or expelled is unreasonable in a legal sense and cannot be sustained. *State v. Merchant's Exch.*, 2 Mo. App. 96; *Savannah Cotton Exch., v. State*, 54 Ga. 668. Compare *White v. Brownell*, 4 Abb. Pr. N. S. (N. Y.) 162.

An indictment had been preferred against the defendant for obstructing a public road or right of way across certain lots; and after the trial thereof had proceeded some time, was unavoidably adjourned till another court, before the sitting of which an agreement to refer the indictment and all matters in dispute to arbitration was entered into. In pursuance of such agreement evidence was taken before the arbitrators, who made an award that the defendant should pay twenty-five cents damages to the municipality, and that each of the parties should pay his own costs of the criminal proceedings and one half the costs of the arbitration, and if the whole of the latter costs were paid by one of them such party should be entitled to be repaid one

**Condition Precedent.**—Where a contract provides for the appointment of arbitrators as a condition precedent to the right of

half. The plaintiffs having paid the whole of these costs sued the defendant for a moiety thereof. *Held*, that the submission having been entered into with the intention of abandoning and for the express purpose of putting an end to the prosecution of the indictment, it was illegal and void and could not be made the foundation of a binding award, and the action was dismissed. *Hungerford v. Lattimar*, 13 Ontario App. 315.

An agreement between a corporation and a person entering its employ provided that the employee should deposit a certain sum of money with the corporation, as security for the proper discharge of his duties; that the president of the corporation should be the sole judge between the corporation and the employee whether the corporation was entitled to retain the whole or any part of the deposit, and that his certificate in writing that the whole or any part of said sum was to be so retained and forfeited to the corporation should be conclusive evidence between the parties, in all courts of justice, that the amount thereby forfeited was so forfeited, and should bar the employee of all right, under any circumstances, to recover the money so certified to be forfeited. *Held*, in an action by the employee against the corporation to recover the sum so deposited, that the latter clauses were an agreement to submit to arbitration and an attempt to oust the courts of jurisdiction, and were void. *White v. Middlesex R. Co.*, 15 Am. & Eng. R. R. Cas. 131; s. c., 135 Mass. 216.

A contracted with B for the sale of certain shares in a corporation, guaranteeing that the corporation would employ him at a certain salary, and stipulating that if the company failed to give him employment A should buy the shares of B at a fair price to be determined by arbitrators if the parties could not agree upon it themselves, the decision of the arbitrators to be final. *Held*, that specific performance could not be compelled. *Noyes v. Marsh*, 123 Mass. 286.

A mortgage was given to secure a bond which contained the stipulation that "should either party be dissatisfied with the fulfilling of the above bond it shall be submitted to certain named persons and their decision shall be final." It was held that the mortgagee may commence proceedings to foreclose without waiting for this decision. *Hill v. More*, 40 Me. 515.

A testator provided in his will that all disputes concerning the will should be settled by certain arbitrators, and that any party who should refuse to submit should lose his rights under the will. *Held*, that no such forfeiture could be incurred by contesting any disputable matter concerning the will in court. *Contee v. Dawson*, 2 Bland. (Md.) 264.

Provisions in insurance policies that all disputes arising under the policy shall be submitted to arbitrators are not enforceable. An action may be commenced without any offer to refer. *Allegre v. Maryland Ins. Co.*, 6 H. & J. (Md.) 408; s. c., 14 Am. Dec. 289; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55; *Robinson v. Georges Ins. Co.*, 17 Me. 131; *Amesbury v. Bowditch Ins. Co.*, 6 Gray (Mass.), 596; *Hall v. People's M. F. Ins. Co.*, 6 Gray (Mass.), 185; *Cobb v. New England M. M. Ins. Co.*, 6 Gray (Mass.), 193; *Trott v. City Ins. Co.*, 1 Cliff. (U. S.) 439.

Where in leases the stipulation has been made that at the expiration a renewal can be had at a rent to be determined by arbitrators or appraisers, the courts, although willing to enforce renewals of leases so contracted for, have refused to compel the naming of arbitrators. *Johnson v. Conger*, 14 Abb. Pr. (N. Y.) 195; *Kelso v. Kelly*, 1 Daly (N. Y.), 419; *Greason v. Keteltas*, 17 N. Y. 491; *Biddle v. Ramsey*, 52 Mo. 153; *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429; *Hopkins v. Gilman*, 22 Wis. 476. But compare *Tscheider v. Biddle*, 4 Dill. (U. S.) 55.

Under a lease of a lot for a term the lease provided that the lessee might erect a building, and that at the end of the term the lessor might elect to renew the lease, or to buy the building or sell the lot, at a price to be ascertained by arbitrators. The lessee built, but the lessor failed to elect. The lessee then elected to purchase the lot, but the lessor refused to join in an arbitration to fix the price. *Held*, that the lessee was entitled to equitable relief. *Coles v. Peck*, 96 Ind. 333; s. c., 49 Am. Rep. 161.

In New York the court will fix the rent or direct a renewal at the former rent. *Johnson v. Conger*, 14 Abb. Pr. (N. Y.) 195.

A party who refuses to abide by the agreement is, however, liable to a suit for damages on breach of the contract. *Haggart v. Morgan*, 5 N. Y. 422; s. c.,

action, such condition must be fulfilled before an action can be brought; as where the price of materials to be purchased, or the value of work to be done, is to be settled by arbitration, no fixed price being stated in the contract. Parties to a contract may fix on any mode they think fit to liquidate damages, in their own nature unliquidated; and in such case no recovery can be had until the prescribed method has been pursued, or some valid excuse exists for not pursuing it.<sup>1</sup>

55 Am. Dec. 350; *Miller v. Junction Canal Co.*, 53 Barb. (N. Y.) 590; *Corbin v. Adams*, 76 Va. 58.

Where the agreement to submit is only a subsidiary part of a general agreement to compromise, on which compromise judgment was given, as where a boundary line was fixed and in consequence a small strip of land had to be conveyed, the price of which was to be determined by arbitration, the court will substitute itself in place of the arbitrators in case one of the parties refuses to name one. *Black v. Rogers*, 75 Mo. 441.

1. *Old Saucelito Land & Dry-dock Co. v. Commercial Union Ass. Co.*, 5 Pac. Rep. (Cal.) 232; *Perkins v. U. S. Electric Light Co.*, 16 Fed. Rep. 513; *Smith v. Boston, etc., R. Co.*, 36 N. H. 458; *Holmes v. Richet*, 56 Cal. 307; s. c., 38 Am. Dec. 54; *Haley v. Bellamy*, 137 Mass. 357; *Palmer v. Clark*, 106 Mass. 373; *Hood v. Hartshorn*, 100 Mass. 117; *Rowe v. Williams*, 97 Mass. 163; *Davenport v. Long Island Ins. Co.*, 10 Daly (N. Y.), 535; *Delaware, etc., Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Lafond v. Deems*, 31 N. Y. 507; *Hudson v. McCartney*, 33 Wis. 331; *Herrick v. Belknap*, 27 Vt. 673; *United States v. Robeson*, 9 Pet. (U. S.) 319; *Trott v. City Ins. Co.*, 1 Cliff. (U. S.) 439.

Such provision must, however, be complete in itself and state the number of arbitrators and the mode of their appointment. *Mark v. Nat. Fire Ins. Co.*, 24 Hun (N. Y.), 565.

But when the controversy arises out of the non-payment of a sum of money stipulated in the contract, such provision will not be binding. *Sutro Tunnel Co. v. Segregated, etc., Min. Co.*, 8 Am. & Engl. Corp. Cas. 209.

A provision in an insurance policy requiring preliminary proofs before a loss is paid, and a reference to arbitration in case of difference to determine the loss, will be upheld. *Gauche v. London, etc., Ins. Co.*, 10 Fed. Rep. 347; *Avery v. Scott*, 8 Welsb. H. & G. 497; *Davenport v. Long Island Ins. Co.*, 10 Daly (N. Y.), 535; *Mentz v. Armenia Ins. Co.*, 79 Pa. St. 478; s. c., 21 Am. Rep. 80. See also

*Liverpool, etc., Ins. Co. v. Creighton*, 51 Ga. 95. But compare *Crossley v. Connecticut Fire Ins. Co.*, 27 Fed. Rep. 30.

But in such a case the company must show that they admitted the validity of the policy and their liability under it, and that the only question was as to the extent of the loss. *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. St. 478; s. c., 21 Am. Rep. 80; *Robinson v. Georges Ins. Co.*, 17 Me. 131; s. c., 35 Am. Dec. 239; *Milandon v. Atlantic Ins. Co.*, 8 La. Ann. 568; *Lasher v. Northwestern Nat. Ins. Co.*, 57 How. Pr. (N. Y.) 224.

So a clause in a life-insurance policy, which provided that the company would pay the amount insured if in the opinion of their surgeon-in-chief the party did not die of intemperance or by any disease produced or aggravated by intemperance, is a condition precedent to the right to sue. *Campbell v. American, etc., Ins. Co.*, 1 McArth. (D. C.) 250; s. c., 29 Am. Rep. 591.

But where the submission to arbitration, according to the terms of the policy, was to be made "at the request of either one of the parties," it was considered not to be a condition precedent, and the insured was allowed to sue before the arbitration took place. *Gere v. Council Bluffs Ins. Co.*, 23 N. Western Repr. (Iowa) 137; *Wallace v. German Ins. Co.*, 4 McCrary (C. C.), 123; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283; *Nurney v. Fireman's, etc., Ins. Co.*, 6 Western Repr. (Mich.) 639; *Mentz v. Armenia F. Ins. Co.*, 79 Pa. 478; *Reed v. Washington Ins. Co.*, 138 Mass. 572; *Leach v. Republic, etc., Ins. Co.*, 58 N. H. 245; *Mark v. Nat. Fire Ins. Co.*, 91 N. Y. 663; *Stevenson v. Piscataqua Ins. Co.*, 54 Me. 56.

And where, through the failure and refusal of the company, the arbitration did not take place or was ineffectual, and suit was brought, and in the mean time, partly under orders of the city, the debris was removed, and the company then requested plaintiff to submit to a second arbitration, which he refused, it was held that, having once consented to arbitrate, the arbitration clause could no longer stand in the

**8. Arbitrators.—Who may be chosen Arbitrators.**—An arbitrator is a person selected by the mutual consent of the parties to deter-

way of the action. *Uhrig v. Williamsburg, etc., Ins. Co.*, 101 N. Y. 362.

Where receipt in full is given and there is agreement to arbitrate, and arbitration fails through fault of payee, *held*, he cannot sue on original contract. *Hemingway v. Stansell*, 2 Am. & Eng. Corp. Cas. 335; s. c., 106 U. S. 399.

A condition inserted in a contract for work, that in case of difference or dispute about the work performed a reference to an engineer or other expert shall be made before suit can be brought, will be upheld as a "condition precedent" to recovery by suit. *Monongahela Nav. Co. v. Fenlon*, 4 Watts. & S. (Pa.) 205; *Howard v. Alleghany Valley R. Co.*, 69 Pa. St. 489; *Hartupee v. Pittsburgh*, 97 Pa. St. 107; *Railr. Co. v. McGrann*, 33 Pa. St. 530; *Faunce v. Burke*, 16 Pa. St. 469; s. c., 55 Am. Dec. 519; *Condon v. Southside R. Co.*, 14 Gratt. (Va.) 302; *Butler v. Tucker*, 24 Wend. (N. Y.) 447; *Smith v. Brady*, 17 N. Y. 173; s. c., 72 Am. Dec. 442; *Smith v. Briggs*, 3 Den. (N. Y.) 73; *Herrick v. Belknap*, 27 Vt. 673; *Low v. Fisher*, 27 Fed. Rep. 542.

But where it was agreed in a contract for the construction of a railroad that the company's engineer should certify to the performance of the work, and should determine all questions in dispute between the parties, *held*, that this did not preclude the builders from maintaining an action in court to recover of the company the balance due them under the facts certified by the engineer. *Flynn v. Des Moines, etc., R. Co.*, 63 Iowa, 492.

But where a building contract stipulated for an arbitration in case of dispute as to the true value of extra work or of work omitted, it was held that disputes as to whether certain work was extra work, and as to whether extra work done at agreed prices was properly done, were not within the stipulation. Such a stipulation would oust a court of law or equity of all jurisdiction over the matter falling within the stipulation. *Weeks v. Little*, 47 N. Y., Super. Ct. 1; *Hart v. Lauman*, 29 Barb. (N. Y.) 410; *Sinclair v. Tallmadge*, 35 Barb. (N. Y.) 607; *Doyle v. Halpin*, 1 Jones & S. (N. Y.) 369.

And a contractor can sue for damages for breach of contract by the owner if the owner under a contract containing this stipulation refuses to allow the contractor to do the work contracted for. *Boyd v. Meighan*, 3 Central Rep. 689.

And where an agreement for work to be done provided for the submission to

the architect of all disputes in relation to the agreement or annexed plans and specifications, it was held that matters outside not brought before the architect could be set up in subsequent independent proceedings. *Busse v. Agnew*, 10 Ill. App. 527.

A written agreement that in case the cattle of either party should trespass and do injury on the lands of either of the other parties the damages payable should be ascertained by arbitration and not by action, is valid and binding, and precludes either party so injured from suing the owner of the trespassing cattle unless the latter has refused arbitration. *Berry v. Carter*, 19 Kan. 135.

Where two parties enter into an agreement by which one is to erect improvements on the lands of the other, the value thereof to be estimated by two disinterested persons, one party cannot defeat the right to an appraisement by refusing to appoint an arbitrator, and a refusal or failure to appoint gives the other party an undisputed right to have the valuation made. *Orne v. Sullivan*, 3 How. (Miss.) 161; s. c., 34 Am. Dec. 74.

One of the stipulations in a contract between the plaintiff and defendant companies was, that if any dispute arose between them it should be referred to arbitration, each of the parties to name an arbitrator, and the two within ten days after the appointment of the one last named should appoint an umpire; but if either party should neglect or refuse to appoint an arbitrator for the space of ten days after being requested so to do, or should appoint an arbitrator who should refuse or neglect to act as such, then the arbitrator of the party making such request should appoint an arbitrator on behalf of the other party. A notice by the defendant company requiring the plaintiff company to appoint an arbitrator was duly served on the 10th of June, on the agent of the plaintiff company in New York, and on the 19th the plaintiff company, by cablegram from London, named one C. M. D., of New York, as their arbitrator. On the 28th of the same month S., the arbitrator of the defendant company, wrote to C. M. D., requiring him to join in the naming of an umpire; but he answered that he was about to leave the city and would return on the 30th, and that having been only advised by cable of his appointment, and that his commission would be mailed to him,

mine the matters in controversy between them, whether they be matters of law or fact. Neither natural nor legal disabilities hinder a person from being an arbitrator. It has, indeed, been laid down in works to which great respect is due, that idiots, lunatics, infants, married women, persons attainted and excommunicated, are disqualified for the office; but the better opinion is that they may be arbitrators, for every person is at liberty to choose whom he likes best for his judge, and he cannot afterward object to the manifest deficiencies of those whom he himself has selected.<sup>1</sup>

he could not until its arrival intelligently take any action. On the 30th C. M. D. returned to his office, and then wrote to S. expressing his readiness to act, and at the same time confirmed the nomination made by his partners, during his absence, of an umpire. *Held* [affirming the decree of the court below], (1) that the facts did not establish any refusal or neglect on the part of C. M. D. to act as arbitrator, such as would justify S. in naming an arbitrator in his stead; (2) that the naming by the arbitrators of an umpire was not such an act as required C. M. D. to take part in within ten days from his appointment, or in default that his appointment should be vacated and S. have the right to name a substitute. *The Direct U. S. Cable Co. v. The Dominion Telegraph Co. of Canada*, 8 Ontario App. 416.

In Pennsylvania the courts have been more liberal in enforcing similar conditions in contracts than in other States; and they have generally held the parties strictly to them. *O'Reilly v. Kerns*, 52 Pa. St. 214; *Reynolds v. Caldwell*, 51 Pa. St. 298; *Snodgrass v. Gavit*, 28 Pa. St. 221; *Faunce v. Burke*, 16 Pa. St. 469; s. c. 55 Am. Dec. 519; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. (Pa.) 205; *Fox v. The Railroad*, 3 Wall., Jr. (U. S.) 243.

Although a court of equity will not decree specific performance of a contract to arbitrate, it will not be error for the court, by consent of the parties, to permit the amount to be ascertained by arbitrators, and to decree the amount thus found. *Conner v. Drake*, 1 Ohio St. 166.

An insurance policy provided that no action should be sustained thereon unless commenced within six months after the loss should occur, and also that no suit could be maintained until arbitrators had fixed the amount of the loss. *Held*, that the action could be commenced within six months after the arbitrators had fixed the amount of the loss, although more than six months after the loss occurred. *Barber v. Fire & M. Ins. Co.*

of Wheeling, 16 W. Va. 658; s. c., 37 Am. Rep. 800; *Mayor v. Hamilton Fire Ins. Co.*, 39 N. Y. 45; *Longhurst v. Star Ins. Co.*, 19 Iowa, 364; *Stout v. City Fire Ins. Co. of New Haven*, 12 Iowa, 371. *Compare Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; s. c., 33 Am. Rep. 47; *Trott v. City Ins. Co.*, 1 Cliff (U. S.), 439.

Where a fire-insurance policy provides for the submission of certain matters to arbitration and expressly refuses to submit others, the report of such a submission should fully identify it. *Haslinger v. Long Island Ins. Co.*, 28 N. Western Repr. (Mich.) 762.

The insurance company may waive the agreement to arbitration by repairing or rebuilding the insured and damaged property. *Cobb v. New England M. Ins. Co.*, 6 Gray (Mass.), 193.

A party to a building contract may waive a stipulation therein that the final payment to be made by him shall not be required unless the architect shall certify that the contract has been fully performed to his satisfaction; an acceptance of the building as under a completed contract is such a waiver, and entitles the contractor to recover the sum due, although no certificate has been given, and although the architect is not satisfied. *Smith v. Alker*, 102 N. Y. 87.

1. Russell on Arb. 115; Morse on Arb. 99; Bacon's Abr., title Arb. D; *Evans v. Ives*, 15 Phila. (Pa.) 635; *Dickinson v. Railroad*, 7 W. Va. 390.

Where the contract between the parties provides that all questions of difference shall be referred to the chief engineer of a particular corporation, the person who filled the office of and is acting chief engineer when the adjudication was called for, is the proper person to decide disputes between them. *Connor v. Simpson*, 7 Atl. Repr. (Pa.) 161.

Where the agreement was to refer the matter in dispute "to two disinterested men, together with A as surveyor, with privilege to call in a third party," etc., *held*, that the reference is to two arbitrators only, with liberty to call in another, and the surveyor is designated to aid and



*Must have no Interest in the Matter.*—An arbitrator should have no interest in the matter to be decided, and where facts exist which could influence him in favor of either of the contesting parties, such as relationship, joint interest, or a preconceived opinion, he is incompetent. This refers, however, only to secret interests. If such facts are known to the contesting parties, and they do not object, they will be considered to have waived their objections.<sup>1</sup>

The interest must be of such a character that it is probable that it will affect the action of the arbitrator. If far remote or trifling, the courts will refuse to interfere.<sup>2</sup>

not to act as one of them. *Crawford v. Orr*, 84 N. Car. 246.

Executive officers authorized by law to examine certain claims and to report to Congress are not arbitrators. *Ludington v. U. S.*, 15 Ct. of Cl. 453.

1. *Strong v. Strong*, 9 Cush. (Mass.) 560; *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Conrad v. Massasoit Ins. Co.*, 4 Allen (Mass.), 20; *Hicks v. McDonnell*, 99 Mass. 459; *Combs v. Wyckoff*, 1 Cal. (N. Y.) 147; *Perry v. Moore*, 2 E. D. Smith (N. Y.), 32; *Hopkins v. Sodonskie*, 1 Bibb. (Ky.) 148; *Fisher v. Tonner*, 14 Conn. 26; *Brown v. Leavitt*, 26 Me. 251; *Pool v. Hennessey*, 39 Iowa, 192; s. c., 14 Am. Rep. 44; *Etna Ins. Co. v. Stevens*, 48 Ill. 31; *Davis v. Forshee*, 34 Ala. 107; *Dougherty v. McWorter*, 7 Verg. (Tenn.) 239; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. (Pa.) 205; *Bash v. Christian*, 77 Ind. 290.

And the knowledge of the attorney of a party has been held to be the knowledge of the party himself. *Perry v. Moore*, 2 E. D. Smith (N. Y.), 32.

Where an arbiter mutually agreed upon by the parties to a contract is a partner of one of the parties, and conceals that fact from the other, his award is invalid. If, however, the other party knew of the partnership, and, with such knowledge, agreed upon him as arbiter, he cannot afterwards complain. *Connor v. Simpson* 7 Atl. Repr. (Pa.) 161.

2. *Leominster v. Fitchburg, etc.*, R. Co., 7 Allen (Mass.), 38.

So will the award of an arbitrator not be set aside because he had formerly acted as counsel in another action for the party in whose favor he makes the award; although this fact was not known to the unsuccessful party or his counsel, no intentional concealment of the fact being proved. *Goodrich v. Hulbert*, 123 Mass. 190; s. c., 25 Am. Rep. 60. And see *Cheney v. Martin*, 127 Mass. 304.

Mere indebtedness of a party to the arbitrator does not disqualify the latter; but it would be different if the amount of in-

debtedness was considerable, and if an award favorable to the indebted party would affect the creditor's chances of obtaining payment. *Wallis v. Carpenter*, 13 Allen (Mass.), 19; *Fisher v. Townner*, 14 Conn. 26.

But where a railroad company and a land-owner through whose land the railroad was to be built submitted matters concerning such land to arbitrators, the award was set aside because one of them was related to the mortgagee of the land, and the company was ignorant of the mortgage. *Stephenson v. Oatman*, 3 Lea (Tenn.), 462.

Neither is mere indebtedness of the arbitrator to one of the parties a ground for disqualification. *Morgan v. Morgan*, 1 Dowl. 611; *Chicago, etc., R. Co. v. Hughes*, 28 Mich. 186.

But an extraordinary large award to one who was insolvent and indebted to the arbitrators or their relatives, which award was immediately after being made assigned to them, together with other evidence showing that the arbitrator might not have been impartial, was set aside. *Rand v. Redington*, 13 N. H. 72. See *Spearman v. Wilson*, 44 Ga. 473.

In an action begun by trustee process in which W. and his partner appeared as claimants, it appeared that defendant and trustee agreed to submit a matter wherein defendant made claim against trustee to arbitration. The arbitrators met, with the parties, and while they were deliberating, but before they had agreed, W., one of the arbitrators, drew an assignment from defendant to himself and his partner of whatever might be awarded, whereby they were to pay certain costs for defendant with a part thereof and apply the remainder to payment of a debt that they claimed the defendant then owed them. The arbitrators were unable to agree, and R., one of them, went home after proposing a certain sum and promising to sign an award therefor, if notified that night. The trustee also went home. W. and the other arbitrator, after

**Adverse Opinion.**—Where an arbitrator after his appointment, and before hearing the parties, expressed an adverse opinion to the claim submitted, which fact was then unknown to the parties, he was held to be disqualified, and his award set aside.<sup>1</sup>

**When Objection must be Raised.**—If a party to an arbitration objects to one of the arbitrators on account of an incompetency, he must make his objection known as soon as he receives knowledge of facts making the arbitrator incompetent. If he goes on with the proceedings he will be considered to have waived his objection.<sup>2</sup>

**Agents of both Parties.**—Arbitrators are agents of both parties; hence their acts are considered as the acts of the parties them-

consulting defendant and finding that he would be satisfied with the sum named, agreed upon that sum and signed the award; and defendant then signed the assignment. W. thereupon went to R.'s and told him that on consulting defendant they had "come to his terms." R. replied that as they had consulted defendant he would consult trustee. W. and R. accordingly went to trustee's and told him what had been agreed on, and, as he was satisfied with the sum awarded, R. signed the award. W. then notified the trustee of the assignment. Afterwards process was served herein. Neither trustee nor claimants questioned the validity of the award. *Held*, that the award was rendered invalid by the taking of the assignment, even although the trustee assented thereto; that the assignment fell with the award; and that there was no agreement between trustee and defendant upon the sum to be paid and received in settlement of the controversy. *Woodworth v. McGovern*, 52 Vt. 318.

The case will also be different if the debt be discredibly contracted, and in relation to the subject of the reference. *Beddow v. Beddow*, L. R. 9 Ch. D. 89.

Family relationship between the arbitrator and one of the parties, unknown to the other party at the time of the appointment, which arbitrator is objected to afterward, will be a cause of disqualification. *Brown v. Leavitt*, 26 Me. 251; *Pool v. Hennessey*, 39 Iowa, 192; s. c., 18 Am. Rep. 44.

1. *Bowen v. Steere*, 6 R. I. 251; *Taber v. Jenny*, 1 Sprague (U. S.), 315; *Beatty v. Hilliard*, 55 N. H. 428.

An opinion formed by one of the arbitrators before hearing, but without evidence that his mind was so biased that it was not open to conviction, and where there is no imputation of unfairness, will not be sufficient to have his award set

aside. *Graves v. Fisher*, 5 Me. 69; s. c., 17 Am. Dec. 203.

Mere intercourse of arbitrators with the parties or others on the subject of the arbitration is not ground for setting aside an award. *Flatter v. McDermitt*, 25 Ind. 326; *Shear v. Mosher*, 8 Ill. App. 119.

On a notice to confirm the award of three arbitrators in favor of A against a corporation, it appeared as facts that A and one of the arbitrators were familiar acquaintances; that before the submission A had honestly stated to that arbitrator the principal facts in the case, and that thereupon the arbitrator had expressed the opinion that "no commercial house could stand upon the transaction," and advised A to submit the matter to arbitration. *Held*, that no error of law appeared, and the award should be affirmed. *Morville v. Am. Tract. Soc.*, 123 Mass. 129; s. c., 25 Am. Rep. 40.

Partisanship in an arbitrator in favor of the party selecting him will be sufficient ground for disqualification, unless both parties selected partisans. *Wheeling Gas. Co. v. Wheeling*, 5 W. Va. 448.

It is very improper in an arbitrator to accept hospitality from one of the parties; and if the invitation be given with the intent, or have the effect of inducing the arbitrator to act unfairly, the court will set aside the award. *Russell on Arb.* 181; *In re Hopper*, 8 B. & S. 100; *Moseley v. Simpson*, L. R. 16 Eq. 226; *Noyes v. Gould*, 57 N. H. 20.

2. *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Brown v. Leavitt*, 26 Me. 251; *Noyes v. Gould*, 57 N. H. 20; *Perry v. Moore*, 2 E. D. Smith (N. Y.), 32; *Robb v. Brachman*, 38 Ohio St. 423.

And this applies to cases where an objectionable arbitrator has been chosen by the attorney of one of the parties. The objecting party must make his objections known, at once. *Combs v. Wyckoff*, 1 Cal. (N. Y.) 147.

selves, and a balance found by the arbitrators is considered as a balance struck by the parties on an account stated by themselves.<sup>1</sup>

*Arbitrator's Oath.*—At common law it is not necessary that arbitrators should be sworn unless specially required by the submission.<sup>2</sup> The statutes of the various States, however, almost universally require that the arbitrators should be sworn before commencing proceedings. In some States the oath is compulsory;<sup>3</sup> in others it may be waived by the parties either directly or impliedly, but is compulsory if not waived;<sup>4</sup> while others do not require arbitrators to be sworn.<sup>5</sup>

1. *Hays v. Hays*, 23 Wend. (N. Y.) 363; *Browning v. Wheeler*, 24 Wend. (N. Y.) 258; s. c., 35 Am. Dec. 617; *Brown v. Harper*, 54 Iowa, 546.

But although nominated one by each party, they are not to consider themselves as representing separate parties and advocates of opposite sides, but as called on to execute a joint trust and to look impartially at the true merits of the matter submitted to their judgment. *Strong v. Strong*, 9 Cush. (Mass.) 560.

In England it has been held that even a party to the arbitration can act as arbitrator by consent of the other party. *Matthew v. Ollerton*, 4 Mod. 226.

The judge in a case *pendente lite* is not disqualified from acting as arbitrator in the same case, and if so acting no writ of error will lie to his decision and award. *Hughes v. Peaslee*, 50 Pa. St. 257; *Dinsmore v. Smith*, 17 Wis. 20; *Walworth Co. Bank v. Farmers' Loan and Trust Co.*, 22 Wis. 231; *Davis v. Forshee*, 34 Ala. 107; *Galloway v. Webb*, Hardin (Ky.), 318. *Compare Crane v. Hand*, 2 N. J. L. 414; *Rogers v. Woodmansec*, 3 N. J. L. 954.

But parties cannot enter into a rule of reference before a justice, by which the justice is himself named as a referee. *Drew v. Canady*, 1 Mass. 158; *Drew v. Mullikin*, 5 N. H. 153.

Public officers, in their official capacity, may sometimes act as arbitrators, and when so acting their award will be binding. *Stewart v. Waldron*, 41 Me. 486; *Boston, etc., R. Co. v. Western R. Co.*, 14 Gray (Mass.), 253.

2. *Bradstreet v. Erskine*, 50 Me. 407; *Daggy v. Cronnelly*, 20 Ind. 474; *Howard v. Sexton*, 4 N. Y. 157.

3. *Ford v. Potts*, 6 N. J. L. 388; *Combs v. Little*, 4 N. J. Eq. 310; s. c., 40 Am. Dec. 205; *Ruckman v. Ransom*, 35 N. J. L. 565; *Inslie v. Flagg*, 2 Dutch. (N. J.) 368, s. c., 69 Am. Dec. 580; *Bowen v. Lanning*, 1 Pen. (N. J.) 139; *Reeves v. Gaff*, 1 Pen. (N. J.) 143;

*Parker v. Crammer*, 1 Pen. (N. J.) 271; *Little v. Silverthorne*, 2 Pen. (N. J.) 680; *Crammer v. Mathis*, 2 Pen. (N. J.) 550; *French v. Moseley*, 1 Litt. (Ky.) 248; *Lile v. Barnett*, 2 Bibb. (Ky.) 166; *Jackson v. Steel*, Sneed (Ky.), 21; *Snyder v. Rouse*, 1 Metc. (Ky.) 625; *Shryock v. Morton*, 2 A. K. Marsh. (Ky.) 563; *Overton v. Alpha*, 13 La. Ann. 558; *Bethea v. Hood*, 9 La. Ann. 88; *Frissell v. Fickes*, 27 Mo. 557; *Toler v. Hayden*, 18 Mo. 399; *Fassett v. Fassett*, 41 Mo. 516; *Bridgman v. Bridgman*, 23 Mo. 272; *Vaughn v. Graham*, 11 Mo. 575; *Walt v. Huse*, 38 Mo. 210; *Deputy v. Betts*, 4 Harr. (Del.) 352; *Tomlinson v. Hammond*, 8 Iowa, 40; *Ogden v. Forney*, 33 Iowa, 205.

4. *Woodrow v. O'Connor*, 28 Vt. 776; *Tucker v. Allen*, 47 Mo. 488; *Hill v. Taylor*, 15 Wis. 190; *Pierce v. Kirby*, 21 Wis. 124; *Otis v. Northrop*, 2 Miles (Pa.), 330; *Re Vilmar*, 10 Daly (N. Y.), 15; *Browning v. Wheeler*, 24 Wend. (N. Y.) 258; s. c., 35 Am. Dec. 617; *Winship v. Jewett*, 1 Barb. Ch. (N. Y.) 173; *Sonneborn v. Laverello*, 4 Th. & C. (N. Y.) 536; *Howard v. Sexton*, 1 Den. (N. Y.) 440; *Day v. Hammond*, 57 N. Y. 479, s. c., 15 Am. Rep. 522; *People v. McGinnis*, 1 Park. Cr. Cas. (N. Y.) 387; *Whalen v. Albany*, 6 How. Pr. (N. Y.) 278; *Kelsey v. Darrow*, 22 Hun (N. Y.), 125; *Newcomb v. Wood*, 97 U. S. 581.

5. *Sloan v. Smith*, 3 Cal. 410; *Dickerson v. Hays*, 4 Blackf. (Ind.) 44; *Daggy v. Cronnelly*, 20 Ind. 474; *Bradstreet v. Erskine*, 50 Me. 407; *Underwood v. McDuffee*, 15 Mich. 361; *Kankakee, etc., R. Co. v. Alfred*, 3 Ill. App. 511.

A waiver of the oath will be implied from the fact that the parties go to trial without requiring that the oath should be administered. *Newcomb v. Wood*, 7 Otto (U. S.), 581; *People v. McGinnis*, 1 Park. Cr. Cas. (N. Y.) 387; *Winship v. Jewett*, 1 Barb. Ch. (N. Y.) 173; *Milwaukee Co. Supervisors v. Ehlers*, 45 Wis. 281.

**9. Power of the Arbitrators.**—The power of the arbitrators, when not modified or defined by statutes, is derived entirely from the submission, but every part of the submission, including papers or documents to which it refers, should be taken in consideration to determine their power.<sup>1</sup>

**Judges of Law and Facts.**—In a general submission, in which matters of law are not excepted, the arbitrators are the sole judges of law and facts, and the courts will not set aside an award resting upon a mistake of law.<sup>2</sup>

**Restricted Power.**—The parties may, in their submission, so restrict the power of the arbitrator, that, although their award will be final as to matters of fact, it will be open to an investigation by the court if it appears by the award that they have mistaken the law.<sup>3</sup>

**Waiver.**—An arbitrator may either directly or impliedly waive his right to decide matters of law, and give the courts the au-

<sup>1</sup> 1. *Boston Water-power Co. v. Gray*, 6 Metc. (Mass.) 131; *Walsh v. Gilmor*, 3 Har. & J. (Md.) 383.

And within the scope of the submission the arbitrators have power to decide matters of law and fact. *Boston Water-power Co. v. Gray*, 6 Metc. (Mass.) 131; *Rundell v. La Fleur*, 6 Allen (Mass.), 480; *Smith v. Boston & Maine R. Co.*, 16 Gray (Mass.), 521; *Bigelow v. Newell*, 10 Pick. (Mass.) 348; *White Mountains R. Co. v. Beane*, 39 N. H. 107; *Johnson v. Noble*, 13 N. H. 286; s. c., 38 Am. Dec. 485; *Kleine v. Catara*, 2 Gall. (U. S.) 61; *Myers v. York*, etc., R. Co., 2 Curtis (U. S.), 28; *Brown v. Clay*, 31 Me. 518; *Tyler v. Dyer*, 13 Me. 41; *Whitmore v. Le Ballistier*, 35 Me. 488; *Sweetser v. Kenney*, 32 Me. 464; *Walker v. Sanborn*, 8 Greenl. (Me.) 288; *Indiana Centr. R. Co. v. Bradley*, 7 Ind. 49; *De Long v. Stanton*, 9 Johns. (N. Y.) 38; *Bumpass v. Webb*, 4 Port. (Ala.) 65; s. c., 29 Am. Dec. 274; *Leach v. Harris*, 69 N. Car. 532.

<sup>2</sup> 2. *Spear v. Stacy*, 26 Vt. 61; *Price v. Brown*, 98 N. Y. 388; *Halstead v. Seaman*, 52 How. Pr. (N. Y.) 415; *Mitchell v. Bush*, 7 Cow. (N. Y.) 185; *Jackson v. Ambler*, 14 Johns. (N. Y.) 105; *Campbell v. Western*, 3 Paige (N. Y.), 124; *Cranston v. Kenny*, 9 Johns. (N. Y.) 212; *King v. Falls of Neuse Mfg. Co.*, 79 N. Car. 360; *Boston Water-power Co. v. Gray*, 6 Metc. (Mass.) 131; *Smith v. Thorndike*, 8 Greenl. (Me.) 119; *Sabin v. Angell*, 44 Vt. 523; *Cutting v. Stone*, 23 Vt. 571; *Kirten v. Spears*, 44 Ark. 166; *Ruckman v. Ransom*, 23 N. J. Eq. 118; *Burchell v. Marsh*, 17 How. (U. S.) 344; *Adams v. Ringo*, 79 Ky. 211; *Ewing v. Beauchamp*, 3 Bibb. (Ky.) 41; *Baker v.*

*Crockett*, Hardin (Ky.), 388; *Memphis, etc., R. Co. v. Scruggs*, 50 Miss. 284; *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 148; *Mathews v. Miller*, 25 W. Va. 817; *White Mountains R. Co. v. Beane*, 39 N. H. 107; *Johnson v. Noble*, 13 N. H. 286; s. c., 38 Am. Dec. 485; *Shepardson v. Perkins*, 60 N. H. 76. Compare *Cushman v. Wooster*, 45 N. H. 410; *Beane v. Wendell*, 22 N. H. 582; *Greenough v. Rolfe*, 4 N. H. 357; *Myers v. York & C. R. Co.*, 2 Curtis (U. S.), 28.

In these cases it was held that although the arbitrators are the judges of matters of law, this refers only to matters wherein they have used their judgment in regard to the law. Where they have assumed a point of law without discussion and have erred, the courts will inquire into the matter. Compare also *United States v. Farragut*, 22 Wall. (U. S.) 406; *Smith v. Boston*, etc., R. Co., 82 Mass. 521.

<sup>3</sup> 3. *Johnson v. Noble*, 13 N. H. 286; s. c., 38 Am. Dec. 485; *Bigelow v. Newell*, 10 Pick. (Mass.) 348; *Greenough v. Rolfe*, 4 N. H. 357; *Mickles v. Thayer*, 14 Allen (Mass.), 114; *Com. v. Roxbury*, 9 Gray (Mass.), 451; *Estes v. Mansfield*, 6 Allen (Mass.), 69; *White Mountain R. Co. v. Beane*, 39 N. H. 107; *Kleine v. Catara*, 2 Gall. (U. S.) 61; *Walker v. Sanborn*, 8 Greenl. (Me.) 288; *Brown v. Clay*, 31 Me. 518; *Boston Water-power Co. v. Gray*, 6 Metc. (Mass.) 131, 166.

And a submission under a statute which requires the court to "approve" the award, gives the court power to inquire into the decision of the arbitrator as regards matters of law. *Allen v. Miles*, 4 Harr. (Del.) 234.

thority to inquire into the correctness of his award. He does so impliedly by giving reasons for his award, from which it can be inferred that he intended to decide according to law. If in such a case he has mistaken the law, the award will be set aside.<sup>1</sup>

*Questions of Pure Law.*—Where questions of pure law are submitted the arbitrator's power is unquestioned and his decision final.<sup>2</sup>

*Matters of Fact* are peculiarly within the scope of the authority of the arbitrators under the submission, and their award is a final decision.<sup>3</sup>

*Excess of Authority.*—An arbitrator cannot legally exceed the power conferred upon him by the submission. Any award given in excess of the authority so conferred upon him will be void.<sup>4</sup>

1. *Boston Water-power Co. v. Gray*, 6 Metc. (Mass.) 131; *Ward v. American Bank*, 7 Metc. (Mass.) 486; *Fairchild v. Adams*, 11 Cush. (Mass.) 547; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; *Johnson v. Noble*, 13 N. H. 286; s. c., 38 Am. Dec. 485; *Cushman v. Wooster*, 45 N. H. 410; *Kleine v. Catara*, 2 Gall. (U. S.) 61; *United States v. Ames*, 1 Woodb. & M. (U. S.) 76; *Leach v. Harris*, 69 N. Car. 532; *Bell v. Price*, 22 N. J. L. 578. *Compare Smith v. Boston, etc., R. Co.*, 16 Gray (Mass.), 521; *Connor v. Simpson*, 104 Pa. St. 440; *Sutton v. Horn*, 7 S. & R. (Pa.) 228; *Smith v. Thorndike*, 8 Greenl. (Me.) 119; *Learned v. Bellows*, 8 Vt. 79; *Cutting v. Stone*, 23 Vt. 571.

Where arbitrators so waive their right the waiver must be embodied in the award, or at least be contained in an instrument so closely connected with it that it properly forms a part of it. *Brown v. Clay*, 31 Me. 518; *Smith v. Boston, etc., R. Co.*, 16 Gray (Mass.), 521; *Ruckman v. Ransom*, 23 N. J. Eq. 118; *Cushman v. Wooster*, 45 N. H. 410; *Ward v. Am. Bank*, 7 Metc. (Mass.) 486; *Fudickar v. Guardian Mut. Life Ins. Co.*, 45 How. Pr. (N. Y.) 462.

Where, according to the submission for arbitrators, are chosen men "learned in the law," they are presumed to decide according to law, and if they mistake the law the award may be impeached for mistake of law. *State v. Ward*, 9 Heisk. (Tenn.) 100.

2. *Greenough v. Rolfe*, 4 N. H. 357; *Smith v. Smith*, 4 Rand. (Va.) 95; *Kleine v. Catara*, 2 Gall. (U. S.) 61; *Jackson v. Ambler*, 14 Johns. (N. Y.) 96; *Cranston v. Kenny*, 9 Johns. (N. Y.) 212; *Campbell v. Western*, 3 Paige (N. Y.), 124; *Forbes v. Turner*, 54 Ga. 252.

3. *Fairchild v. Adams*, 11 Cush. (Mass.) 547; *Boston Water-power Co. v. Gray*, 6 Metc. (Mass.) 131; *Weston v.*

*Stuart*, 2 Fairf. (Me.) 326; *Goldsmith v. Tilly*, 1 Harris & J. (Md.) 361; *De Long v. Stanton*, 9 Johns. (N. Y.) 38; *Wellborn v. Simonton*, 88 N. Car. 266; *Bryant v. Fisher*, 85 N. Car. 69.

By an agreement for purchase of locomotives, the price was to be paid on the certificate of the purchaser's engineer, and "all disputes" were to be referred to arbitration. The engineer refused his certificate. On a reference to arbitration the umpire made an award in favor of the vendors. *Held*, that the award was *intra vires* the arbitrator, and whether right or wrong could not be reviewed by the court. *Re An Arbitration*, 54 L. T. R. 596.

4. *Richardson v. Huggins*, 23 N. H. 106; *Adams v. Adams*, 8 N. H. 82; *Cook v. Carpenter*, 34 Vt. 121; s. c., 80 Am. Dec. 670; *Howard v. Edgell*, 17 Vt. 9; *Butler v. Mayor of N. Y.*, 7 Hill (N. Y.), 320; *Solomons v. M'Kinstry*, 13 Johns. (N. Y.) 27; *Schuyler v. Vanderveer*, 2 Cal. (N. Y.) 235; *Brown v. Hankerson*, 13 Cow. (N. Y.) 70; *Wright v. Wright*, 5 Cow. (N. Y.) 197; *Collins v. Freas*, 77 Pa. St. 493; *Banton v. Gale*, 6 B. Monr. (Ky.) 260; *Smith v. Kincaid*, 7 Humph. (Tenn.) 28; *Reynolds v. Reynolds*, 15 Ala. 398; *Lee v. Onstott*, 1 Ark. 206; *Squires v. Anderson*, 54 Mo. 193; *Stevens v. Gray*, 2 Harr. (Del.) 347; *Fountain v. Harrington*, 3 Harr. (Del.) 22; *Gibson v. Powell*, 13 Miss. 712; *Sessions v. Barfield*, 2 Bay. (S. C.) 94; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Com. v. Pejepsut Proprs.*, 7 Mass. 399; *Huff v. Parker*, 4 Dall. (U. S.) 285; *Lyle v. Rodgers*, 5 Wheat. (U. S.) 394; *White v. Arthur*, 59 Cal. 33; *Austin v. Clark*, 8 W. Va. 236; *Swann v. Deem*, 4 W. Va. 368; *Dunlap v. Campbell*, 5 W. Va. 195.

Where two persons agreed to submit the question which of the two was primarily liable on an account to a third

*Presumption.*—To avoid an award it must, however, be clearly shown that the arbitrator has exceeded his authority. The presumption of the court will always be that the arbitrator did not exceed it, and the contrary must be proved.<sup>1</sup>

**10. May not Delegate their Power.**—Arbitrators have no authority to delegate their power, nor to appoint a substitute for any one of their number who may be unable or unwilling to serve. Even where the submission provides that in such a case "another or others are to be chosen in their place," it was held that the right to choose did not rest in the other arbitrators, but in the parties.<sup>2</sup>

party. it was held that they were not bound by the award as to the items of the account. *Blakely v. Frazier*, 11 S. Car. 122. See *Re Wallace*, 31 La. Ann. 335.

1. *Myers v. York, etc., R. Co.*, 2 Curtis (U. S.), 28; *Hayes v. Forskoll*, 31 Me. 112; *Burns v. Hendrix*, 54 Ala. 78; *Reynolds v. Reynolds*, 15 Ala. 398; *Richardson v. Huggins*, 23 N. H. 106; *Parsons v. Aldrich*, 6 N. H. 264; *Blair v. Wallace*, 21 Cal. 317; *Sperry v. Ricker*, 4 Allen (Mass.), 17; *Hodges v. Hodges*, 9 Mass. 320; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Hubbard v. Firman*, 29 Ill. 90; *Bush v. Davis*, 34 Mich. 190; *Clement v. Comstock*, 2 Mich. 359; *Caton v. McTavish*, 10 Gill. & J. (Md.) 192; *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268; *Ebert v. Ebert*, 5 Md. 353.

Under a submission of all matters between A and B, the arbitrators rendered an award "We find for A \$4000, including the judgment of C and the judgment of B against D." The court held that it was to be presumed that both parties were in some way interested in the judgments so mentioned, and that therefore they were included in the submission and award. *Hays v. Miller*, 12 Ind. 187.

Even where the submission could not be produced the court held that it must be presumed "that all matters passed upon were matters of difference, and that all matters of difference were passed upon." *Lamphire v. Cowan*, 39 Vt. 420.

Under a general submission the arbitrators are bound to decide only those matters brought to their consideration by the parties. The presumption is that the matters decided by the arbitrators were so brought to their consideration. *Sheffield v. Clark*, 73 Ga. 92.

Only the precise matter submitted may be considered by him. He may neither modify the question nor add other controversies to it, no matter how cognate to the subject under submission. *Wymann v. Hammond*, 55 Me. 534; *Hayes*

*v. Forskall*, 31 Me. 112; *Sawyer v. Freeman*, 35 Me. 542; *Culver v. Ashley*, 17 Pick. (Mass.) 98; *Shearer v. Handy*, 22 Pick. (Mass.) 417; *Brown v. Evans*, 6 Allen (Mass.), 333; *Gilmore v. Hubbard*, 12 Cush. (Mass.) 220; *Worthen v. Stevens*, 4 Mass. 448; *Cook v. Carpenter*, 34 Vt. 121; s. c., 80 Am. Dec. 670; *Butler v. Mayor of N. Y.*, 7 Hill (N. Y.), 329; *Robinson v. Moore*, 17 N. H. 479.

But where an award gives time for the payment of the principal sum found due, it did not avoid it that the arbitrators also allowed interest from date of award. *Noyes v. McLaffin*, 62 Ill. 474.

Even where by mistake the wrong steer was exhibited to the arbitrators, and the award disposed of the steer in dispute, under the mistaken impression that the exhibited steer was the one in question, the award was void. *Cox v. Fay*, 54 Vt. 446.

Where it is agreed that a confessed judgment shall be released on payment of such sum as the arbitrator shall find due, his authority is only to determine the amount in money. He has no authority to award that the judgment shall be released on the payment of a certain amount of property at a certain appraisal. *State v. Jones*, 2 Gill (Md.), 49.

An award may be valid as to the matters, submitted, and void as to matters decided upon by the arbitrators, but not embraced in the submission. *Bogan v. Daughdrill*, 51 Ala. 312.

2. *Potter v. Sterrett*, 24 Pa. St. 411; *Russell v. Gray*, 6 S. & R. (Pa.) 145; *Hicks v. McDonnell*, 99 Mass. 459; *Brown v. Bellows*, 4 Pick. (Mass.) 179; *Haff v. Blossom*, 5 Bosw. (N. Y.) 559.

They may not delegate their authority to each other. Two merchants, arbitrators, may not delegate to a third, though he be a lawyer, the decision of a point of law arising out of the case. In a case of this kind where the lawyer so decided a point of law and signed the award, which was afterward signed by another of the arbitrators (an award by only two being

*Except Ministerial Acts.*—Acts of a purely ministerial character only may as a rule be delegated. Measurement of land by a surveyor, and making up accounts by an expert accountant, are of this character.<sup>1</sup>

*The Oath of Witnesses.*—At common law arbitrators have no power to administer an oath to witnesses; but in most of the States statutes have been passed giving them this power.<sup>2</sup>

good), the court set it aside on the ground that there was no principle of law authorizing the two merchants to delegate their power of judging, and that it was impossible to say but that if the lawyer had expressed his opinion on the point of law to the others before the award was made the result may have been different. *Little v. Newton*, 9 Dowl. 437.

Neither may they delegate their powers to the court which appointed them, or provide for the settlement of a future dispute by another tribunal. *Kingston v. Kincaid*, 1 Wash. (U. S.) 448; *Levezey v. Gorgas*, 4 Dall. (U. S.) 71; *Sutton v. Horn*, 7 S. & R. (Pa.) 228.

But where by an agreement for the sale and purchase of property it was provided that the price should be fixed by two appraisers, who in case of disagreement were to select a third, and the two being unable to agree did select the third and agreed with him that he should fix the value and that they would concur in it, but afterward abandoned this agreement, and the three met together and examined the property, and two of them agreed on a valuation, it was held that the award was valid, as they had abandoned the improper agreement. *Haff v. Blossom*, 5 Bosw. (N. Y.) 559.

If the arbitrators agree together beforehand without authority from the parties to be bound by the opinion of a third person, and make their award on his opinion without exercising any judgment of their own, the award may be set aside on motion. *Whitmore v. Smith*, 31 L. J. Ex. 107.

They may call in the assistance of accountants, appraisers, or other experts, but not leave the decision to such experts. They may use their opinion as evidence and adopt it as their own when they are satisfied of its accuracy. *Russell on Arb.* 214; *Moore v. Barnett*, 17 Ind. 349; *Galloway v. Webb*, Hardin (Ky.) 318; *Hopcraft v. Hickman*, 2 Sim. & St. 130; *Emery v. Wase*, 5 Ves., Jr. 846; *Caledonian R. Co. v. Lockhart*, 3 Macq. 808; *Sharp v. Nowell*, 6 C. B. 253; *Lingood v. Eade*, 2 Atk. 501.

On a reference to surveyors to settle the terms of a lease of a mine, it was held

no objection to the award that one of the surveyors did not go down into the mine, but founded his valuation on the report of a person whom he had sent down into it and upon his own knowledge of the neighborhood. *Eads v. Williams*, 24 L. J. Ch. 531.

But where one of the appraisers did not think the mine worth as much as it was valued at by said person, but concurred in the award because he thought it was no use differing, the award was held bad, because he had not used a judicial discretion upon the case, as he had not adopted the opinion of the expert, but merely subscribed to what he thought wrong because another person thought it right. *Eads v. Williams*, 24 L. J. Ch. 531.

Where in the submission a special provision is made giving the arbitrator power to call in professional assistance, his power in that respect ceased to be a general one arising from the necessity of the case, and he must be governed by such provision. *Anderson v. Wallace*, 3 C. & F. 26.

An arbitrator may employ legal counsel to assist him in framing the award, even the counsel of one of the parties. *Moore v. Ewing*, Coxe (N. J.) 144; s. c., 1 Am. Dec. 195; *Dobson v. Groves*, 6 Q. B. 637; *Featherstone v. Cooper*, 9 Ves., Jr. 67.

He may take the advice of counsel or other professional adviser on points of law affecting not only the form but the substance of the award. *In re Hare*, 6 Bing. N. Cas. 158; *Goodman v. Sayers*, 2 J. & W. 249.

1. *Thorp v. Cole*, 2 C. M. & R. 367; *Harvey v. Shelton*, 7 Beav. 455.

But where a cause was referred to a mining agent, objection having been made by the defendant to a legal arbitrator, and the mining agent called in an attorney to sit with him, and the defendant protested in vain against it and retired, the award made *ex parte* was set aside, the court considering the course pursued by the arbitrator objectionable. *Proctor v. Williamson*, 29 L. J. C. P. 157.

2. *Tobey v. County of Bristol*, 3 Story (U. S.), 800; *Large v. Passmore*, 5 S. &

Where the submission requires that the witnesses shall be sworn, and the arbitrator has no authority to administer the oath, he must call in the assistance of an officer who has this power, unless the parties consent to the omission of the oath.<sup>1</sup>

*Power to Compel the Attendance of Witnesses.*—Where the power to compel witnesses to attend or to produce books and documents has not been given by statute the arbitrator has not such power.<sup>2</sup>

**11. Ruling as to Evidence.**—Incident to the power of an arbitrator to decide all questions of fact, he has also the power to decide all questions as to the admission and rejection of evidence, as well as the credit due to evidence and the inferences of fact to be drawn from it.<sup>3</sup>

R. (Pa.) 51; *People v. Townsend*, 5 How. Pr. (N. Y.) 315; *In re Wells*, 1 N. Y. Leg. Os. 189.

Where an arbitrator at common law, not authorized by statute, administers an oath, the oath will be a mere nullity, and a witness under it cannot legally perjure himself. *Bonner v. McPhail*, 31 Barb. (N. Y.) 106; *Frazer v. Phelps*, 3 Sandf. (N. Y.) 741; *Large v. Passmore*, 5 S. & R. (Pa.) 51; *R. v. Hallett*, 20 L. J. M. C. 197.

1. *Russell on Arb.* 189 *et seq.*; *Ridout v. Pye*, 1 B. & P. 91; *Biggs v. Hansell*, 16 C. B. 562; *Allen v. Francis*, 4 D. & L. 607; *Smith v. Sparrow*, 16 L. J. Q. B. 139; *R. v. Hanks*, 3 C. & P. 419; *R. v. Newman*, 1 Wils. 7.

Where the statutes require witnesses to be sworn he is bound to hear them only under oath; an award upon the testimony of an unsworn witness is not binding. *Wolfe v. Hyatt*, 76 Mo. 156.

The parties may, however, directly or impliedly, waive the obligation of swearing the witnesses. Such waiver will be implied from proceeding without making objections where unsworn witnesses are heard. *Russell on Arb.* 189; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Bergh v. Pfeiffer*, Hill & Den. (N. Y.) 110; *Large v. Passmore*, 5 S. & R. (Pa.) 51; *Newcomb v. Wood*, 7 Otto (U. S.), 581; *Price v. Perkins*, 2 Dev. Eq. (N. Car.) 250. Compare *In re Wells*, 1 N. Y. Leg. Obs. 189.

Where the submission provides that the arbitrator shall be at liberty if he thinks fit to examine the parties and their respective witnesses on oath, it is left optional with the arbitrator whether he will examine them on oath or not, although one of the parties require the witnesses to be sworn. *Smith v. Goff*, 3 D. & L. 47.

2. *Tobey v. County of Bristol*, 3 Story

(U. S.), 800, *Webb v. Taylor*, 1 Dowl. & L. 676.

The power of compelling the attendance of witnesses gives the proceedings of an arbitrator, even though no action be pending, a judicial character, and protects the parties, the counsel, and the witnesses appearing before him from arrest. *Russell on Arb.* 189; *Morse on Arb.* 134; *Sanford v. Chase*, 3 Cow. (N. Y.) 381; *Clark v. Grant*, 2 Wend. (N. Y.) 257; *People v. Detroit Super. Ct. Judge*, 41 Mich. 726.

3. *Boston Water-power Co. v. Gray*, 6 Metc. (Mass.) 131.

Whatever the rule may be in England, in the United States he "is not bound by the strict rules of law as to the admission of evidence." "He may even receive the testimony of a legally incompetent witness if in his judgment the justice of the case requires it." *Russell on Arb.* 207; *Hooper v. Taylor*, 39 Me. 224; *Maynard v. Frederick*, 7 Cush. (Mass.) 246; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; *Eyres v. Fennimore*, 2 Penn. (N. J.) 932; *Fennimore v. Childs*, 1 Halst. (N. J.) 386; *Campbell v. Western*, 3 Paige (N. Y.), 124; *Shaifer v. Baker*, 38 Ga. 135; *Pike v. Gage*, 9 Fost. (N. H.) 461; *Chesley v. Chesley*, 10 N. H. 327; *McCrae v. Robeson*, 2 Murph. (N. Car.) 127; *Bassett v. Cunningham*, 9 Gratt. (Va.) 684.

He may, however, not receive evidence regarding matters which according to law he cannot consider, or which could not be enforced as a demand barred by the statute of limitations. *De La Riva v. Berreyesa*, 2 Cal. 195; *Pearce v. Roller*, 5 Lea (Tenn.), 485.

The improper reception or rejection of evidence by an arbitrator, without any corrupt intent, does not amount to legal misconduct upon which an award will be set aside. The evidence received consisted in statements made by the plaintiff



*As Officer of Court.*—But where an arbitrator is to be regarded as an officer of the court, and the arbitration is to be conducted upon legal principles, he will generally not be allowed to admit incompetent evidence.<sup>1</sup>

*May Leave the Question to the Court.*—The arbitrator has a right to leave the question of the admissibility of the evidence to the court. He may decide conditionally upon the decision of the court as regards evidence. So where an interested person was allowed to testify against the objection of one of the parties, the arbitrators rendered a verdict for the plaintiff, "on condition that the interested party shall be adjudged by the judges of the supreme court to have been legally admitted to testify. If not, they found for the defendant." The court decided for defendant.<sup>2</sup>

*Witnesses.*—The same liberty which an arbitrator has in regard to the admission of evidence is extended as to witnesses. Parties who in a court of law could not be admitted to testify are admissible before arbitrators, as a witness interested in the result of the arbitration.<sup>3</sup>

*Should Hear all the Evidence Offered.*—The arbitrator should hear all the evidence material to the question which the parties choose to lay before him. It has been said that he may exercise some discretion as to the quantity of evidence he will hear, but declining to receive evidence on any matter is, under ordinary circumstances, a delicate step to take, for the refusal to receive proof where proof is necessary is fatal to the award.<sup>4</sup>

*ante litem motam* in substance confirmatory of his evidence before the arbitrator; and the rejection consisted in the arbitrator's refusal to receive parts of the plaintiff's examination without the whole being received. It did not appear that the arbitrator was influenced by the evidence objected to, and he made no request to be allowed to reconsider his award. *Held*, that while the evidence objected to was not strictly admissible, the award could not be interfered with on such ground, when it did not appear to have occasioned any miscarriage on the merits. *Webster v. Haggart*, 9 Ontario Repr. 27.

1. *Allen v. Way*, 7 Barb. (N. Y.) 585; *Burroughs v. Thorne*, 5 N. J. L. 777.

If it is evident, however, that his mind could not possibly have been influenced by such evidence, the admission will not be considered sufficient reason to set aside the award. *Learned v. Bellows*, 8 Vt. 79; *Spear v. Myers*, 6 Barb. (N. Y.) 445.

Even when acting under a rule of court, if the arbitrator is to decide according to justice rather than according to law, his award will not be set aside

for the admission of evidence which could not have been received in a court of law. *Chesley v. Chesley*, 10 N. H. 327; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135.

2. *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; *Hooper v. Taylor*, 39 Me. 224; *Barnard v. Spofford*, 31 Me. 39.

3. *Fuller v. Wheelock*, 10 Pick. (Mass.) 137; *Hollingsworth v. Leiper*, 1 Dall. (U. S.) 161; *McCrae v. Robeson*, 2 Murph. (N. Car.) 127; *Askew v. Kennedy*, 1 Bailey (S. Car.), 46; *Maynard v. Frederick*, 7 Cush. (Mass.) 247. *Compare Eyres v. Fennimore*, 2 Penn. (N. J.) 932; *Fennimore v. Childs*, 1 Halst. (N. J.) 386; *McAlister v. McAlister*, 1 Wash. (Va.) 193.

Unless the arbitrators are, by the submission or by their own acknowledgment, bound to decide only upon legal and competent evidence. *Fowler v. Thayer*, 4 Cush. (Mass.) 111; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135.

4. *Russell on Arb.* 192; *Nickalls v. Warren*, 6 Q. B. 615; *Johnstone v. Cheape*, 5 Dow. 247; *Com. v. La Fitte*, 2 S. & R. (Pa.) 106; *Halstead v. Seaman*, 82 N. Y. 27; *Van Cortlandt v. Underhill*,

*Reopening the Case.*—The arbitrator has the power to open a case which had been closed to receive new evidence, even after he has drawn up his award, as long as it is not delivered. The use of this power is entirely discretionary with the arbitrator, and the courts will not interfere if he refuses to reopen a case even for apparently good reasons.<sup>1</sup>

17 Johns. (N. Y.) 405; *Fudickar v. Guardian Mut. L. Ins. Co.*, 62 N. Y. 392; *Knowlton v. Mickles*, 29 Barb. (N. Y.) 470; *Morewood v. Jewett*, 2 Robt. (N. Y.) 498; *Milner v. Noel*, 43 Ind. 324.

So if an arbitrator, to whom an action for not repairing a house has been referred, make his award on a view of the premises, without calling the parties before him, the court will set aside the award; for though the premises may almost tell their own tale, yet there may be other facts which ought to be inquired into, such as payments by the party or excuses for not repairing. *Anon.*, 2 Chitt. Rep. 44; *Braddick v. Thompson*, 8 East. 344; *Moran v. Bogart*, 16 Abb. Pr. N. S. (N. Y.) 303. See *West Jersey R. Co. v. Thomas*, 23 N. J. Eq. 431; *Dreyfous v. Hart*, 36 La. Ann. 929.

Still less can an award stand where the arbitrator hears one side only. An arbitration case arose out of a dispute as to whether a phaeton had been built according to contract. A coach-builder was nominated sole arbitrator. He viewed the phaeton and took evidence of the defendant's witnesses, and was so confident in his hasty consideration of the circumstances that he refused to hear what the plaintiff and his witnesses had got to say, and made an award forthwith for the defendant. It was afterwards decided that his award was in vain, upon the ground that he ought to have taken the evidence for the plaintiff, however little he thought that it would make him alter his opinion. *Phipps v. Ingram*, 3 Dowl. 669; *Oswald v. Lord Grey*, 24 L. J. Q. B. 69; *Broddick v. Thompson*, 8 East. 344.

The lessee of a mill site had during the term of the lease erected buildings, a mill-dam, a race-way, etc., which, according to the terms of the lease, were to be turned over to the owners of the site at the end of the term, at a value to be ascertained by arbitration. The arbitrators refused to receive evidence about the cost of building the improvements twenty-one years ago. *Held*, that the evidence was improperly excluded. *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405.

The arbitrator has, under some circumstances, power to limit the number of witnesses introduced. So where the

question was as to the genuineness of the indorsement of a check, and the arbitrator restricted the number of witnesses on each side to twenty, his action was upheld. *Sizer v. Burt*, 4 Denio (N. Y.), 426.

The arbitrator should give the parties full opportunity to bring in all the evidence they wish to present. He should be careful not to mislead the parties into a supposition that the case is still open, and then unexpectedly make the award without calling them or giving notice that he shall not examine them; or if, after declaring that he can take no further proceedings in the matter till some books of account have been examined, and he make his award without giving notice to the parties that he has found the inspection of the books unnecessary, the award will be set aside. *Earle v. Stocker*, 2 Vern. 251; *Pepper v. Gorham*, 4 Moore, 148.

Even where a party causes some needless delay, the arbitrator has no right to close the case without giving him due notice. *Doddington v. Hudson*, 1 Bing. 384; *Gladwin v. Chilcote*, 9 Dowl. 550; *Bedington v. Southall*, 4 Price, 232; *Haigh v. Haigh*, 31 L. J. Ch. 420; *Fryer v. Shaw*, 27 L. J. Ex. 320.

But where the submission recited that the arbitrator had been appointed on account of his skill and knowledge of the subject, it was held that he properly could refuse to hear evidence and depend only on his own knowledge and skill. *Wiberly v. Matthews*, 91 N. Y. 648; *Johnstone v. Cheape*, 5 Dow. 247; *Eads v. Williams*, 24 L. J. Ch. 531; *Caledonian R. Co. v. Lockhart*, 3 Mack. 808; *Bottomley v. Amber*, 38 L. T. N. S. 545.

On a reference of a claim for builder's work done to a house, it is within the discretion of the arbitrator to determine whether he will comply with the request of one of the parties that he should view the premises. *Munday v. Black*, 9 C. B. N. S. 557.

1. *Russell on Arb.* 196; *Williams v. Hayes*, 20 N. Y. 58; *Cooper v. Stinson*, 5 Minn. 201; *Dugnia v. Ogilvie*, 32 E. D. Smith (N. Y.), 527; *Cleveland v. Hunter*, 1 Wend. (N. Y.) 104; *Spear v. Myers*, 6 Barb. (N. Y.) 445; *Delafield v. De Grauw*, 9 Bosw. (N. Y.) 1; *Pearson v.*

*Evidence de bene esse.*—Against the objection of a party evidence cannot be received conditionally, the arbitrator reserving the right to disregard it in making up his award; neither can he receive it absolutely and afterwards throw it out. The objecting party must, however, make his objections known before the closing of the case.<sup>1</sup>

**11. He Controls the Proceedings.**—The mode in which the reference is to be conducted depends entirely upon the arbitrator. The courts will not review his discretion provided he acts within his authority according to the principles of justice and behaves fairly toward each party.<sup>2</sup>

*Adjournments.*—The arbitrators also have the power to adjourn the proceedings from time to time as they see fit. They may adjourn for a reasonable time at the request of either one of the parties, or on their own motion without the consent of the parties or either one of them. But the courts may inquire into the matter for the purpose of seeing that the power is not used oppressively, and that no unreasonable delay takes place.<sup>3</sup>

Fiske, 2 Hilt. (N. Y.) 146; Tennant v. Divine, 24 W. Va. 387; Sweeney v. Vaudry, 2 Mo. App. 352.

1. Peck v. York, 47 Barb. (N. Y.) 131; Patten v. Hunnewell, 8 Greenl. (Me.) 19; Brooks v. Christopher, 5 Duer (N. Y.), 216; Allen v. Way, 7 Barb. (N. Y.) 585; Clussman v. Merkel, 3 Bosw. (N. Y.) 402.

2. Russell on Arb. 176; Morse on Arb. 115.

An award has been sustained notwithstanding the arbitrators had omitted to keep a record of their proceedings in the manner directed by the submission. Sweeney v. Vaudry, 2 Mo. App. 352.

He has the right to name the time and place of the hearing if nothing in the submission indicates a contrary intention of the parties. Bray v. English, 1 Conn. 498; Fetherstone v. Cooper, 9 Ves., Jr. 67.

And he may revoke the appointment he has given if he shall think fit. Where for any reason one of the parties should request him to do so, it will be in the arbitrator's discretion either to refuse the request or to rescind his appointment and to name another day. Russell on Arb. 177; Eastham v. Tyler, 2 Bail. Ct. Rep. 136.

In case of continued absence of one of the parties he may for good cause proceed to hear the case *ex parte*. Russell on Arb. 205; Morse on Arb. 121; Kyd on Aw. 100; Bray v. English, 1 Conn. 498; Brown v. Leavitt, 26 Me. 251; Wood v. Leake, 12 Ves. 412.

If he has sufficient reason to believe that a party absents himself with the view to defeat the object of the refer-

ence and prevent justice, it is his duty to give the absenting party peremptory notice of his intention to proceed at a specified time and place, and to proceed at that time *ex parte* if the party fails to appear or does not give a satisfactory excuse. Russell on Arb. 205; Morse on Arb. 122; Waller v. King, 9 Mod. 63; Wood v. Leake, 12 Ves. 412; Hall v. Anderton, 8 Dowl. 326; Gladwin v. Chilcote, 9 Dowl. 550; Scott v. Van Sandan. 6 Q. B. 237; Doddington v. Hudson, 1 Bing. 384.

An arbitrator may properly and conveniently take the examination of a sick or infirm person at that person's own residence. Tillam v. Copp, 3 C. B. 211.

3. *Ex p.* Rutte, 3 Hill (N. Y.), 464; Sonneborn v. Laverello, 4 Th. & C. (N. Y.) 536; Brown v. Leavitt, 26 Me. 251; Bray v. English, 1 Conn. 498; Bixby v. Whitney, 11 Me. 62; Richardson v. Hartsfield, 27 Ga. 528; Langley v. Hickman, 1 Sandf. (N. Y.) 681.

So where the question of alimony in a divorce suit was referred, and the arbitrator adjourned the proceedings against the objection of the wife from the latter part of June to the middle of October to enable defendant's counsel to make a trip to Europe, the delay to the plaintiff was held unreasonable. The court decided that unless the order of adjournment was vacated the arbitrator would be removed. Forrest v. Forrest, 3 Bosw. (N. Y.) 650.

Upon a reasonable request by one of the parties for an adjournment the arbitrator may be bound to grant the request. But the parties must show good cause for the adjournment, as where they are sur-

*Counsel.*—It seems that all arbitrators have discretionary power to hear or to decline hearing counsel of the parties; but in many cases they would be wrong if they refused the party the privilege of appearing by counsel.<sup>1</sup>

**12. Arbitrators must Act together.**—Unless the submission provides differently, each one of the arbitrators must act personally in the performance of the duties of his office as if he were sole arbitrator; for as the office is joint, if one refuse or omit to act the others can make no valid award.<sup>2</sup>

prised by unexpected evidence and want time to procure witnesses or evidence in defence. *Passmore v. Pettit*, 4 Dall. (U. S.) 271; *Forbes v. Frary*, 2 Johns. Cas. (N. Y.) 224; *Coryell v. Coryell*, 1 N. J. L. 385; *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Latimer v. Ridge*, 1 Binn. (Pa.) 458; *Rickards v. Patterson*, 5 Harr. (Del.) 235; *Deputy v. Betts*, 4 Harr. (Del.) 352; *Packer v. French, Hill & Den.* (N. Y.) 103; *Woodworth v. Van Buskirk*, 1 Johns. Ch. (N. Y.) 432.

In one case the court upon motion ordered an adjournment of the proceedings before a referee to enable an important witness, who was absent from the State, to return. *Sudam v. Swart*, 20 Johns. (N. Y.) 477.

And where the arbitrator adjourned against the protest of one of the parties to hear further argument for the other party, although it was agreed that the case should be deemed closed on a previous day, it was held to be such an excess of their power that it avoided the award. *Cole v. Blunt*, 2 Bosw. (N. Y.) 116.

Unless all are present, arbitrators cannot adjourn to a future day; but where all do not attend, they may appoint another session within a reasonable time, unless their authority is expressly revoked or they are prohibited by the terms of the submission. *Jackson v. Ives*, 22 Wend. (N. Y.) 637; *Harris v. Norton*, 7 Wend. (N. Y.) 534; *Harrington v. Rich*, 6 Vt. 666.

1. Russell on Arb. 178. See *Blodgett v. Prince*, 109 Mass. 44.

So where an arbitrator had excluded from some of the meetings the son of one of the parties who was conversant with the accounts of the partnership, which were in dispute, and also a short-hand writer, the attendance of both of whom the party wished to have, his award was set aside. *Haigh v. Haigh*, 31 L. J. Ch. 420.

But an arbitrator in a farming case who refused to allow a stranger skilled in agriculture to remain in the room to assist the defendant's attorney in his conduct of

the case, was held not to have exceeded the discretion vested in him by law. *Tillain v. Copp*, 3 C. B. 211.

2. Russell on Arb. 222.

English and American authorities are alike agreed upon this. All must be present throughout each and every meeting, equally whether the meeting be for hearing the evidence or arguments of the parties or for consultation or determination upon the award. The disputants are entitled to the exercise of the judgment and discretion, and to the benefits of the views, arguments, and influence, of each one of the persons whom they have chosen to judge between them; and they are entitled to these, not only in the award, but at every stage of the arbitration, even where a majority are empowered to decide. *Morse on Arb.* 151; *Smith v. Smith*, 28 Ill. 56; *Bannister v. Read*, 6 Ill. 92; *Thompson v. Mitchell*, 35 Me. 281; *Cumberland v. North Yarmouth*, 4 Greenl. (Me.) 459; *Baker v. Farmbrough*, 43 Ind. 240; *Brower v. Kingsley*, 1 Johns. Cas. (N. Y.) 334; *McInroy v. Benedict*, 11 Johns. (N. Y.) 402; *Ackley v. Finch*, 7 Cow. (N. Y.) 290; *Harris v. Norton*, 7 Wend. (N. Y.) 534; *Green v. Miller*, 6 Johns. (N. Y.) 39; s. c., 5 Am. Dec. 184; *Cope v. Gilbert*, 4 Den. (N. Y.) 347; *People v. Walker*, 23 Barb. (N. Y.) 304; *Ex p. Rogers*, 7 Cow. (N. Y.) 526; *Batley v. Button*, 13 Johns. (N. Y.) 187; *Bulson v. Lohnes*, 29 N. Y. 291; *Howard v. Conro*, 2 Vt. 492; *Blin v. Hay*, 2 Tyler (Vt.) 304; s. c., 4 Am. Dec. 738; *Hoff v. Taylor*, 2 South. (N. J.) 829; *Hills v. Home Ins. Co.*, 129 Mass. 345; *Franklin Mining Co. v. Pratt*, 101 Mass. 359; *Carpenter v. Wood*, 1 Metc. (Mass.) 409; *Short v. Pratt*, 6 Mass. 496; *Walker v. Melcher*, 14 Mass. 148; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Henderson v. Buckley*, 14 B. Mon. (Ky.) 236; *Tuscaloosa Bridge Co. v. Jemison*, 33 Ala. 476; *McCrary v. Harrison*, 36 Ala. 577; *Norfleet v. Southall*, 3 Murph. (N. Car.) 189; *Harryman v. Harryman*, 43 Md. 140; *Hobson v. McArthur*, 41 U. S. 182; *Kingston v. Kincaid*, 1 Wash. (U. S.) 448. Compare

*Private and Public Matters.*—Where private matters are submitted to a common-law arbitration, all the arbitrators must unite in the award, unless the submission authorizes a majority award. The rule is different in regard to public matters.<sup>1</sup>

Glass-Pendery, etc., Mining Co. v. Meyer Mining Co., 7 Colo. 51.

This principle was applied in a case where the arbitrators jointly decided upon an award and had it drawn up by a counsellor, after which it was carried to them separately and executed at their own places of evidence. *Moore v. Ewing, Cox v. (N. J.), 144; s. c., 1 Am. Dec. 195. Compare Maynard v. Frederick, 7 Cush. (Mass.) 247; Blodgett v. Prince, 109 Mass. 44; Sperry v. Ricker, 4 Allen (Mass.), 17.*

An award by three arbitrators, signed by two of them in the presence of each other, but in the absence of the third, and by the third in the presence of one of the others at a different time and place, was set aside. *French v. Butler, 39 Mich. 79.*

Admissions by a party to one of the arbitrators in the absence of the other arbitrators, and communicated by him to the others, cannot be taken in consideration. *Banton v. Gale, 6 B. Mon. (Ky.) 260.*

But objections to the absence of one of the arbitrators at one of the meetings must be made at the time. *Akridge v. Patillo, 44 Ga. 585.*

1. *Green v. Miller, 6 Johns. (N. Y.) 39; s. c., 5 Am. Dec. 184; Jackson v. Gager, 5 Cow. (N. Y.) 383; Schultz v. Halsey, 3 Sandf. (N. Y.) 405; Patterson v. Leavitt, 4 Conn. 50; s. c., 10 Am. Dec. 98; Towne v. Jaquith, 6 Mass. 46; s. c., 4 Am. Dec. 84; Richards v. Holt, 61 Iowa, 529; Hoffman v. Hoffman, 26 N. J. L. 175; French v. Butler, 39 Mich. 79; Eames v. Eames, 41 N. H. 177; Russell v. Gray, 6 S. & R. (Pa.) 145; Smith v. Walden, 26 Ga. 249; Jeffersonville R. Co. v. Mounts, 7 Ind. 669; Memphis, etc., R. Co. v. Pillow, 9 Heisk. (Tenn.) 248. Compare Phippen v. Stickney, 3 Metc. (Mass.) 384; Gas Co. v. Wheeling, 8 W. Va. 321; Kile v. Chapin, 9 Ind. 150; Spencer v. Curtis, 57 Ind. 221.*

Although in public matters a majority may make the award, still the rule holds good that all must act together and take part in the proceedings and consult. *People v. Coghill, 47 Cal. 361; Downing v. Ruger, 21 Wend. (N. Y.) 178; Lee v. Parry, 4 Denio (N. Y.), 125; Keeler v. Frost, 22 Barb. (N. Y.) 200; Horton v. Garrison, 23 Barb. (N. Y.) 176; Stewart v. Wallis, 30 Barb. (N. Y.) 344; Crocker v. Crane, 21 Wend. (N. Y.) 211; Ex p. Rogers, 7 Cow. (N. Y.) 526; Sinclair v.*

*Jackson, 8 Cow. (N. Y.) 543; People v. Walker, 23 Barb. (N. Y.) 304; Eames v. Eames, 41 N. H. 177; Young v. Buckingham, 5 Ohio, 485.*

Where under a statute the arbitrators must all unite in the award, a majority award will not be valid. *Bowen v. Lazalere, 44 Mo. 383; Shores v. Bowen, 44 Mo. 396; Lorenzo v. Deery, 26 Hun (N. Y.), 447. Compare Buxton v. Howard, 38 Ind. 109.*

Where a processioner and five freeholders were proceeding to establish disputed lines, when the parties agreed that the freeholders be constituted arbitrators to settle the dispute in all things, their award to be final, and entered as the judgment of the court, and three of the freeholders signed and filed a paper dividing the disputed lands and the costs between the parties, it was held that it could not be enforced as an award, only three of the arbitrators having concurred in it. Where a reference is made to several persons, the agreement of all is necessary to an award, unless it is expressly agreed that a majority may make it. *Oakley v. Anderson, 93 N. Car. 108.*

Three arbitrators on the close of the evidence agreed on their finding, and a minute thereof was made in writing by one of them but not signed, and it was understood that nothing further was to be done but have a formal award drawn up and executed. Next day the award was drawn up and executed by two of the arbitrators in the presence of each other, but in the absence of the third arbitrator, who a couple of days afterwards executed it in the presence of one of the other arbitrators. In an action of such award, held, that the award should have been executed by the three arbitrators together, and that it was invalid. *Nott v. Nott, 5 Ontario C. P. 283.*

Where, under a submission to three with power to two to make an award, one of the arbitrators is duly notified of the meetings of the others, and refuses to attend or to take part in the proceedings, the others may proceed, and their award will be valid. *Kyd on Aw. 106, 107; Crofoot v. Allen, 2 Wend. (N. Y.) 494; Green v. Miller, 6 Johns. (N. Y.) 39; s. c., 5 Am. Dec. 184; Schultz v. Halsey, 3 Sandf. (N. Y.) 405; Bulson v. Lohones, 29 N. Y. 291; Kingston v. Kincaid, 1 Wash. (U. S.) 448; Kunckle v. Kunckle,*

*Need not Agree upon every Question.*—It is not necessary, however, that the arbitrators should agree upon every question brought before them. If they agree upon the final award it will be sufficient.<sup>1</sup>

**13. Arbitrators must Hear the Parties in Presence of Each Other.**—It is imperative that the arbitrators should hear the parties in each other's presence. Any *ex-parte* testimony received by them will invalidate the award. Hearing one party even before accepting the office and expressing a conclusive opinion is sufficient.<sup>2</sup>

*Notice of Hearing.*—As either party has the right to be present at the examination of the other party and his witnesses, it follows that the arbitrator is bound to give both the parties due and timely notice of the time and place of the hearings. Any hearing of one party without such notice to the other will be illegal, and an award based on it void.<sup>3</sup>

1 Dall. (U. S.) 364; Cumberland v. North Yarmouth, 4 Greenl. (Me.) 459; Carpenter v. Wood, 1 Metc. (Mass.) 409; Short v. Pratt, 6 Mass. 496; Walker v. Melcher, 14 Mass. 148; Dodge v. Brennan, 59 N. H. 138. See King v. Grey, 31 Tex. 22.

If one of the arbitrators dissents from the decision of the others, he must, in order to defeat the award, express this dissent before the award is made. If he unites with the others in making it, he cannot afterward be heard to prove that he did not assent to the decision. Jackson v. Gager, 5 Cow. (N. Y.) 383; Campbell v. Western, 3 Paige (N. Y.), 124.

A party who objects to the award because it is not signed by all the arbitrators must do so at the time when the report is confirmed and judgment entered. It will be too late to raise the question afterward. The objection will then be considered to have been waived. Newcomb v. Wood, 7 Otto (U. S.), 581; Sweeney v. Vaudry, 2 Mo. App. 352.

1. Campbell v. Western, 3 Paige (N. Y.), 124; Jackson v. Gager, 5 Cow. (N. Y.) 383; Bean v. Wendell, 22 N. H. 582.

Although arbitrators must use their own judgment in making the award, it is immaterial what means they use to come to an agreement. So where the arbitrators awarded a sum the exact mean between the sums named by several witnesses, the court assumed that the arbitrators had used their own judgment and were convinced that their award was right. Brown v. Bellows, 4 Pick. (Mass.) 179; Bean v. Wendell, 22 N. H. 582; Campbell v. Western, 3 Paige (N. Y.), 124.

2. Conrad v. Massasoit Ins. Co., 4 Allen (Mass.), 20; Sisk v. Garey, 27 Md. 401; Sullivan v. Frink, 3 Iowa, 66; Her- rick v. Blair, 1 Johns. Ch. (N. Y.) 101;

Clelland v. Hedley, 5 R. I. 163; Hollingsworth v. Leiper, 1 Dall. (U. S.) 161; Hagner v. Musgrove, 1 Dall. (U. S.) 83; Chaplin v. Kirwan, 1 Dall. (U. S.) 187.

Receiving evidence, as affidavits, accounts, or other documents, of one party without the knowledge of the other, will avoid the award. Cameron v. Castleberry, 29 Ga. 495; Passmore v. Pettit, 4 Dall. (U. S.) 271; Bassett v. Harkness, 9 N. H. 164; Jenkins v. Liston, 13 Gratt. (Va.) 535; Clelland v. Hedley, 5 R. I. 163; Emery v. Owings, 7 Gill. (Md.) 488; s. c., 48 Am. Dec. 580; Republic Bank v. Darragh, 30 Hun (N. Y.), 29.

But where one of the arbitrators received from one of the parties a letter as to the merit of the case after they had come to a decision but before the award was drawn up and signed, held not to invalidate the award. Johnson v. Holyoke, etc., Co., 107 Mass. 472.

In order to decide whether they will accept the office or not, they have, before accepting, the right to inquire into the nature of the subject-matter which they are to consider. Campbell v. Western, 3 Paige (N. Y.), 124.

3. Lutz v. Linthicum, 8 Pet. (U. S.) 178; Linde v. Republic F. Ins. Co., 50 N. Y. Super. Ct. 362; Elmendorf v. Harris, 23 Wend. (N. Y.) 628; s. c., 35 Am. Dec. 587; Peters v. Newkirk, 6 Cow. (N. Y.) 103; Morewood v. Jewett, 2 Robt. (N. Y.) 496; Jordan v. Hyatt, 3 Barb. (N. Y.) 275; Collins v. Vanderbilt, 8 Bosw. (N. Y.) 313; Knowlton v. Mickles, 29 Barb. (N. Y.) 465; Young v. Reynolds, 4 Md. 375; Bullitt v. Musgrave, 3 Gill (Md.), 31; Rigden v. Martin, 6 Harr. & J. (Md.) 403; Wilson v. Boor, 40 Md. 483; Bushey v. Culler, 26 Md. 534; McKinney v. Page, 32 Me. 513; Brown v. Leavitt, 26 Me. 251; Webber v. Ives, 1

*Of what Meetings Notice must be Given.*—Notice need be given only of those meetings at which evidence is to be received. Where a meeting was held solely to view the premises, but where the arbitrators made various inquiries of persons present and only one party attended, it was held that due notice of such a meeting ought to have been given.<sup>1</sup>

*Waiver of Notice.*—The want of notice of the time and place of meeting of the arbitrators is no objection to their award if the party appeared and was heard before them.<sup>2</sup>

**14. Compensation.**—*When Entitled to.*—Arbitrators are, however, not entitled to compensation before they are organized unless they are prevented from organizing by the parties or one of them.<sup>3</sup>

Tyler (Vt.), 441; Hills v. Home Ins. Co., 129 Mass. 345; Conrad v. Massasoit Ins. Co., 4 Allen (Mass.), 20; Crowell v. Davis, 12 Metc. (Mass.) 293; Lincoln v. Taunton Copper Mfg. Co., 8 Cush. (Mass.) 415; Ranney v. Edwards, 17 Conn. 309; Upshaw v. Hargrove, 14 Miss. 286; Dormoy v. Klower, 55 Iowa, 722; McCormick v. Blackford, 4 Gratt. (Va.) 133; Shinnie v. Coil, 1 McCord Ch. (S. Car.) 478; Armstrong v. United States, 1 Ct. of Cl. 22; Dreyfous v. Hart, 36 La. Ann. 929; Curtis v. Sacramento, 64 Cal. 102.

Where articles of submission contained a stipulation that "the arbitrator shall collect all the evidence he can and show it to the parties before he decides, and then either party may add what he can, and he shall then decide the whole matter in controversy," and the arbitrator did not show the collected evidence and gave the parties no opportunity to be heard, the award was held to be void. Goodall v. Cooley, 29 N. H. 48.

What is a reasonable notice must be left to the discretion of the arbitrators. Elmendorf v. Harris, 23 Wend. (N. Y.) 628; s. c., 35 Am. Dec. 587.

1. Knowlton v. Mickles, 29 Barb. (N. Y.) 465; Wood v. Helme, 14 R. I. 325.

But of meetings appointed for the purpose of consultation by the arbitrators about the award, or of drafting and signing the award, and where no evidence is received, no notice need be given. Roloson v. Carson, 8 Md. 208; Miller v. Kennedy, 3 Rand. (Va.) 2; Ormsby v. Bakewell, 7 Ohio, Part I. 98; Zell v. Johnston, 76 N. Car. 302.

An award will not be set aside because the arbitrator went, after the hearing, alone to take another view of the premises. Adams v. Bushey, 60 N. H. 200. And see Straw v. Truesdale, 59 N. H. 109.

The obligation to give notice of meetings has only reference to the parties directly. No such notice need to be given

to sureties under a submission. Farmer v. Stewart, 2 N. H. 97; Binsse v. Wood, 47 Barb. (N. Y.) 624.

A notice to the party's attorney is notice to the party. Morse on Arb. 119; Shibe v. Rex, 1 Browne (Pa.), 174. Compare Rivers v. Walker, 1 Dall. (U. S.) 81.

2. Pike v. Stallings, 71 Ga. 860; Dickerson v. Hays, 4 Blackf. (Ind.) 44; Shockey v. Glassford, 6 Dana (Ky.), 9; Newton v. West, 3 Metc. (Ky.) 24; Madison Ins. Co. v. Griffin, 3 Ind. 277; Van Kirk v. M'Kee, 9 Pa. St. 100; Duckworth v. Diggles, 139 Mass. 51.

And where a party to the arbitration being present at a hearing did not then object to a want of notice to another party interested in the matter, he could not after award rendered be heard to impeach the award on that ground. Plumer v. Wausau Boom Co., 49 Wis. 449; Hubbard v. Hubbard, 61 Ill. 228. And see White v. Robinson, 60 Ill. 499.

A party to an arbitration upon receiving notice of time and place of the meeting of the arbitrators for a hearing answered that it was not convenient for him to attend at that time, and offered to state his side of the question. He then stated his case, concluding with the words, "You are to decide." Held to be a waiver of the right to a further hearing. Page v. Ranstead, 10 Allen (Mass.) 295. See also Billings v. Billings, 110 Mass. 225.

3. Baker v. Hunter, 1 Miles (Pa.), 357.

They are entitled to pay for every day they were necessarily employed in the case, including the time of deliberation. Hassinger v. Diver, 2 Miles (Pa.), 411; Re Clark, 36 Hun (N. Y.), 301.

An arbitrator who has rendered some services contemplated by the submission will not necessarily be defeated of all right to compensation by reason of a failure to render all services expected from him; but he will be entitled to a reasonable compensation for all services

*Costs.*—It was formerly held that arbitrators under a common-law submission have no power to award the costs of the arbitration unless given by the terms of the submission, because they are something that had arisen since the time of the submission,<sup>1</sup> and in some States this view is yet held,<sup>2</sup> although it may be different in these States under a statutory submission.<sup>3</sup> In other States it is now held that the power of awarding the cost of the arbitration is necessarily incident to the authority contained in the general submission of the matters in dispute.<sup>4</sup>

actually rendered. *Goodall v. Cooley*, 29 N. H. 48.

Where arbitrators tried two cases identical as to the subject-matter, and where it required no more time to investigate both cases together than it would have required to investigate one, they were held to be entitled to fees as for only one of the cases. *Butcher v. Scott*, 1 Pa. L. J. Rep. 311.

1. *Kyd on Awards*, 100.

2. *Vose v. How*, 13 Metc. (Mass.) 243; *Warner v. Collins*, 135 Mass. 26; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Shirley v. Shattuck*, 4 Cush. (Mass.) 470; *Peters v. Pierce*, 8 Mass. 398; *Harrington v. Brown*, 9 Allen (Mass.), 579; *Day v. Hooper*, 51 Mass. 178; *Bond v. Fay*, 1 Allen (Mass.), 212; *Gordon v. Tucker*, 6 Greenl. (Me.) 247; *Walker v. Merrill*, 13 Me. 173; *Hanson v. Webber*, 40 Me. 194; *Porter v. Buckfield, etc.*, R. Co., 32 Me. 539; *Dundon v. Starin*, 19 Wis. 261; *Alling v. Munson*, 2 Conn. 696.

3. *Harden v. Harden*, 11 Gray (Mass.), 435; *Jones v. Carter*, 8 Allen (Mass.), 431; *Nelson v. Andrews*, 2 Mass. 164; *Bacon v. Crandon*, 15 Pick. (Mass.) 79; *Buckland v. Conway*, 16 Mass. 396; *Alling v. Munson*, 2 Conn. 694; *Holcomb v. Tiffany*, 38 Conn. 271.

4. *Strang v. Ferguson*, 14 Johns. (N. Y.) 161; *Nichols v. Rensselaer Co. Mut. Ins. Co.*, 22 Wend. (N. Y.) 125; *Cox v. Jagger*, 2 Cow. (N. Y.) 638; s. c., 14 Am. Dec. 522; *Chase v. Strain*, 15 N. H. 535; *Joy v. Simpson*, 2 N. H. 179; *Spofford v. Spofford*, 10 N. H. 254; *Chapin v. Boody*, 25 N. H. 285; *Brown v. Mathes*, 5 N. H. 229; *Andrews v. Foster*, 42 N. H. 376; *Hawley v. Hodges*, 7 Vt. 237; *Bowman v. Downer*, 28 Vt. 532; *Burnell v. Everson*, 50 Vt. 449; *Dudley v. Thomas*, 23 Cal. 365; *Dickerson v. Tyner*, 4 Blackf. (Ind.) 253; *McClure v. Shroyer*, 13 Mo. 104; *Young v. Shook*, 4 Rawle (Pa.), 302; *Hewitt v. Furman*, 16 S. & R. (Pa.) 135; *Wade v. Powell*, 31 Ga. 1; *Hoover v. Neighbors*, 64 N. Car. 429.

Arbitrators have an implied authority

to determine the question of the costs of cause submitted to them. *Oakley v. Anderson*, 93 N. Car. 108. Compare *Morrison v. Buchanan*, 32 Vt. 288, where Redfield (J.) held that the power to award costs, and especially the cost of the arbitrator, is quite too important a power to be implied as a mere incident of the submission; and *Matter of Vanderveer*, 4 Den. (N. Y.) 249, where it was held that a submission to arbitration under the statute of New York does not impliedly give the arbitrator authority to award the costs and expenses of the arbitration, although they may award their own fees and expenses. Where arbitrators in excess of their authority have awarded costs the award is not necessarily vitiated. The portion relative to the costs may be stricken out and the rest of the award sustained. *Porter v. Buckfield, etc.*, R. Co., 32 Me. 539; *Hanson v. Webber*, 40 Me. 194; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Clement v. Comstock*, 2 Mich. 359; *Matter of Vanderveer*, 4 Den. (N. Y.) 249.

In some States the courts have decided that where arbitrators have the power to award costs it is also their duty to do it. An omission will, however, not necessarily invalidate the award. *Chapin v. Boody*, 25 N. H. 285; *Brown v. Mathes*, 5 N. H. 229; *Rixford v. Nye*, 20 Vt. 132. *Harvey v. Snow*, 1 Yeates (Pa.), 156.

If the award of arbitrators to whom a case is referred is silent as to cost, the prevailing party is entitled to recover them. *Woolson v. Boston, etc.*, R. Co., 103 Mass. 580.

In case arbitrators award costs in the award it is not necessary that every item should be given; awarding a gross sum is sufficient. The amount must, however, be certain, although in case of uncertainty the courts will try to ascertain the intention of the arbitrators from the award, and decide accordingly. *Tallman v. Tallman*, 5 Cush. (Mass.) 325; *Thoreau v. Pallies*, 5 Allen (Mass.), 354; *Hewitt v. Furman*, 16 S. & R. (Pa.) 135; *Whitney v. Cook*, 5 Mass. 139.

Where a *lis pendens* is submitted to ar-



**Fees.**—Even where the submission does not provide for it, the arbitrator is entitled to reasonable compensation for his services, and it is not error for him to award the fees himself.<sup>1</sup>

**15. Duration of Arbitrators' Authority.**—As the power of the arbitrators is limited by the stipulations of the submission, so is the duration of their authority defined by the same submission. Where the submission stipulates a time within which the award is to be made, their power ceases at the expiration of this time.<sup>2</sup>

bitation the submission implies power to the arbitrators to award the costs of the suit, even if he should decide that the party in whose favor the award is made has to bear them. *Vose v. How*, 13 Metc. (Mass.) 243; *Nelson v. Andrews*, 2 Mass. 164; *Bacon v. Crandon*, 15 Pick. (Mass.) 79; *Jones v. Carter*, 8 Allen (Mass.), 431; *Brown v. Mathes*, 5 N. H. 229; *Joy v. Simpson*, 2 N. H. 79; *School Distr. v. Aldrich*, 13 N. H. 140; *Chapin v. Boody*, 25 N. H. 285; *Austin v. Snow*, 2 Dall. (U. S.) 157. Compare *Chase v. Strain*, 15 N. H. 535.

1. *Hinman v. Hapgood*, 1 Den. (N. Y.) 188; s. c., 43 Am. Dec. 663; *Ott v. Schroepel*, 3 Barb. (N. Y.) 63; *Devlin v. Mayor*, 54 How. Pr. (N. Y.) 68; *Wade v. Powell*, 31 Ga. 1; *Burnell v. Everson*, 50 Vt. 449.

He has a lien on the award for the amount of his fees, and may retain it in his hands until they are paid. *Clement v. Comstock*, 2 Mich. 359.

Each party is liable to him for the full amount of his fees. *Young v. Starkey*, 1 Cal. 426.

Each arbitrator may sue alone for his compensation, and it seems that he must do so. *Hinman v. Hapgood*, 1 Den. (N. Y.) 188; s. c., 43 Am. Dec. 663.

2. *White v. Puryear*, 10 Yerg. (Tenn.) 441; *Brower v. Kingsley*, 1 Johns. Cas. (N. Y.) 334; *Hall v. Hall*, 3 Conn. 308; *White v. Kemble*, 3 N. J. L. 349; *Buntain v. Curtis*, 27 Ill. 374; *Smith v. Spencer*, 1 McCord Ch. (S. Car.) 92; *Rixford v. Nye*, 20 Vt. 132; *Robinson v. O'Connor*, 12 Neb. 405; *Thiesselin v. Rossett*, 3 Abb. Pr. N. S. (N. Y.) 54; *McClure v. Shroyer*, 13 Mo. 104. Compare *Shaw v. Pearce*, 4 Binn. (Pa.) 485.

The parties to the submission may either expressly or by implication extend the time for making the award. Consent to such extension is implied when the parties after the time has elapsed proceed with the arbitration without objecting. *Hall v. Hall*, 3 Conn. 308; *Buntain v. Curtis*, 27 Ill. 374; *Bloomer v. Sherman*, 5 Paige (N. Y.), 575; *White v. Kemble*, 3 N. J. L. 461; *White v. Puryear*, 10 Yerg. (Tenn.) 441; *Smith v. Spencer*, 1 McCord

Ch. (S. Car.) 92; *Mathews v. Miller*, 25 W. Va. 817.

Where the submission is silent as to the time in which an award is to be made, the arbitrator's authority will continue for life unless it be revoked. The parties may request them to proceed within a reasonable time, and if after such request the arbitrator neglect and refuse, such neglect on his part will be a good ground for revoking his authority. *Russell on Arb.* 140; *Small v. Thurlow*, 37 Me. 504; *Harrington v. Rich*, 6 Vt. 666; *Rogers v. Tatum*, 1 Dutch. (N. J.) 281; *White v. Puryear*, 10 Yerg. (Tenn.) 441; *Harding v. Wallace*, 8 B. Monr. (Ky.) 536; *Tyson v. Robinson*, 3 Ired. (N. Car.) 333.

But an award made twelve years after the submission was held to be invalid in the absence of sufficient reason for the delay. *Hook v. Philbrick*, 23 N. H. 288.

Where no time is specified within which an award must be made it may be made at any time; and being delivered to a party with the signature of only one arbitrator it may afterward be signed by the other and thereupon be good. *Saunders v. Heaton*, 12 Ind. 20; *Nichols v. Rensselaer Co. Ins. Co.*, 22 Wend. (N. Y.) 125.

Even where the penalty bond stipulated that the penalty should be paid three months after date, the submission itself being silent as to the time of making the award, it was held that the bond did not limit the power of the arbitrator to that time. *Armstrong v. Robinson*, 5 Gill & J. (Md.) 412.

Where in the submission a day is fixed for making the award, and the time is not extended by consent of the parties, the award to be valid must be made before or on the day fixed. So where by an agreement for the valuation of crops between an outgoing and an incoming tenant it was provided that the valuation should be made immediately, but should be revised and examined by the valuers on the 1st of August then next, and the valuers made a valuation forthwith, and on the second day of August re-examined the crop and reduced the price previously settled, it was held that the time

*Power Expires with the Making of the Award.*—As soon as the award is made, the authority of the arbitrator, having once been completely exercised according to the terms of the reference, is at an end. He is not at liberty, after executing the award, to exercise a fresh judgment on the case and alter the award in any particular. If he does so in fact the alteration will be merely nugatory, and the award, as originally written, will stand good. He is so entirely *functus officio* that he cannot even correct a manifest error in the calculation of figures; or where the defendant is by the award directed to pay costs, substitute instead the name of the plaintiff, though such amendment be merely to make the expression of his will correspond with his original intention; or make a new award identical with the old one, except that it contains words giving the plaintiff the costs of the reference, such words having been in the arbitrator's original draft, but omitted by accident from the fair copy which he signed as his first award.<sup>1</sup>

**16. Umpire and Third Arbitrator.**—The submission may require the arbitrators, when they cannot agree, to appoint an umpire or a third arbitrator. The duty of the umpire, when called in, is to decide alone matters upon which the arbitrators could not agree.<sup>2</sup>

was of the essence of the contract, and that as the revision was not made on the first day of August it was inoperative. *Marshall v. Powell*, 9 Q. B. 779.

When the submission is dated September 1st, and provides that the award shall be rendered within thirty days, an award rendered on the 1st October is within its terms. *Chapman v. Ewing*, 78 Ala. 403.

1. *Russell on Arb.* 144; *Bayne v. Morris*, 1 Wall. (U. S.) 97; *Talbott v. Hartley*, 1 Cranch (C. C.), 31; *Woodbury v. Northy*, 3 Greenl. (Me.) 85; s. c., 14 Am. Dec. 214; *Thompson v. Mitchell*, 35 Me. 281; *Rogers v. Corrothers*, 26 W. Va. 238, 246; *Clement v. Rohrabrack*, 15 Pa. St. 116; *Aldrich v. Jessiman*, 8 N. H. 516; *Indiana Cent. R. Co. v. Bradley*, 7 Ind. 49; *Lansdale v. Kendall*, 4 Dana (Ky.), 613; *Cleveland v. Dixon*, 4 J. J. Marsh (Ky.), 226; *Fitzgerald v. Fitzgerald*, *Hardin* (Ky.), 227; *French v. Moseley*, 1 Litt. (Ky.) 248; *Clark v. Burt*, 4 Cush. (Mass.) 396; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Ward v. Gould*, 5 Pick. (Mass.) 291; *Fallon v. Kelehar*, 16 Hun (N. Y.), 266; *Doke v. James*, 4 Comst. (N. Y.) 567; *Mayor of N. Y. v. Butler*, 1 Barb. (N. Y.) 325; *Smith v. Smith*, 28 Ill. 56; *Butler v. Boyles*, 10 Humph. (Tenn.) 155; s. c., 51 Am. Dec. 697; *Dudley v. Thomas*, 23 Cal. 365; *Patton v. Baird*, 7 Ired. (N. Car.) Eq. 255. Compare *Hazeltine v. Smith*, 3 Vt. 535.

And a decision of arbitrators which is

expressly made subject to future alterations upon the suggestion of errors by the parties does not constitute a valid award. *McCrary v. Harrison*, 36 Ala. 577.

But he has the power to correct a mere clerical error of omission which does not affect the merits. *Goodell v. Raymond*, 27 Vt. 241; *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57; 13 Johns. 27.

Where arbitrators after signing, sealing, and publishing the award, but before delivery, reconsidered it upon the objection of one of the parties interested, and reduced the amount and again signed, sealed, and delivered it, it was, however, held that the latter award was the true one. *Byars v. Thompson*, 12 Leigh (Va.), 550.

The power of an arbitrator is not terminated by the delivery to the parties of an informal statement of their conclusions. *Bodge v. Hull*, 59 Me. 225.

2. *Haven v. Winnisimmet Co.*, 11 Allen (Mass.), 377; *Shields v. Renno*, 1 Overt. (Tenn.) 313; *Mullins v. Arnold*, 4 Sneed (Tenn.), 262; *Bassett v. Cunningham*, 9 Gratt. (Va.) 684; *Rison v. Berry*, 4 Rand. (Va.) 275; *King v. Cook*, T. U. P. Chart. (Ga.) 286; s. c., 4 Am. Dec. 715; *Boyer v. Amand*, 2 Watts (Pa.), 74; *Butler v. Mayor of N. Y.*, 1 Hill (N. Y.), 489; *Lyon v. Blossom*, 4 Duer (N. Y.), 318; *Scudder v. Johnson*, 5 Mo. 551; *Rigden v. Martin*, 6 Har. & J. (Md.) 403; *Smith v. Morse*, 9 Wall. (U. S.) 76.

A third arbitrator is required to act with the others to decide by a majority award.<sup>1</sup>

*Power of Umpire derived from Submission.*—Like the arbitrators, an umpire or third arbitrator derives his power only from the submission. If the arbitrators should call one in without being authorized by the submission, his award or the majority award would be a nullity.<sup>2</sup>

*When Appointed.*—Where the submission authorizes the arbitrators, in case they cannot agree, to leave the decision to an umpire or to call in the assistance of a third arbitrator, they may make their choice before they have heard the evidence.<sup>3</sup>

*Mode of Appointment.*—The acknowledged general rule as to the mode of appointing the umpire is that the appointment must be the act of the will and concurring judgment of both the arbitrators, unless the parties consent to some other mode of appointment.<sup>4</sup>

1. *Mullins v. Arnold*, 4 Sneed. (Tenn.) 262; *Haven v. Winnisimmet Co.*, 11 Allen (Mass.), 377; *Willis v. Higginbotham*, 61 Miss. 164; *Quay v. Westcott*, 60 Pa. St. 163; *Gaffy v. Hartford Bridge Co.*, 42 Conn. 143.

Where a submission provided that the arbitrators should have power in case of disagreement to choose an umpire, and during the trial the parties erased the stipulation regarding the umpire, and provided in the submission for a third arbitrator who was chosen, an award rendered on such submission was upheld. *State v. Rawson*, 25 W. Va. 23.

2. *Daniel v. Daniel*, 6 Dana (Ky.), 98; *Sharp v. Lipsey*, 2 Bailey (S. Car.), 113; *McMahan v. Spinning*, 51 Ind. 187; *Royse v. McCall*, 5 Bush (Ky.), 695.

So where upon a reference to four, with power to call in an umpire, an award by the majority being legal, three of the four agreed, the calling in of an umpire afterward was held to be illegal. *Lockart v. Kidd*, 2 Treadw. (S. Car.) Const. 217; *Black v. Pearson*, 1 McCord (S. Car.), 137.

3. *Kyd on Aw.* 87; *Butler v. Mayor of N. Y.*, 1 Hill (N. Y.), 489; *Van Cortland v. Underhill*, 17 Johns. (N. Y.) 405; *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57; *Rigden v. Martin*, 6 Har. & J. (Md.) 403; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Peck v. Wakely*, 2 McCord (S. Car.), 279; *Stevens v. Brown*, 82 N. Car. 400; *Dudley v. Thomas*, 23 Cal. 365; *Newton v. West*, 3 Metc. (Ky.) 24; *Woodrow v. O'Connor*, 28 Vt. 776; *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83; *Lutz v. Linthicum*, 8 Pet. (U. S.) 165; *Rogers v. Corrothers*, 26 W. Va. 238. Compare *Traverse v. Beal*, 2 Cranch (C. C.), 113.

It follows that, if the submission calls for an award on a certain day, and if they cannot agree for an award by an umpire at a future day, the arbitrators can appoint the umpire as soon as they are convinced that they cannot agree. *Richards v. Brockenbrough*, 1 Rand. (Va.) 449.

And the appointment at such an earlier date does not invalidate their award if they should come to an agreement before the time expired at which their award was called for and before the umpire made his award. *Daniel v. Daniel*, 6 Dana (Ky.), 93.

Under the same stipulations in the submission the arbitrators may appoint the umpire, even if they have not acted at all, and his award will be valid. *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57; 13 Johns. (N. Y.) 27.

Where a submission "authorizes and directs the arbitrators to select an umpire," it means, if there should be disagreement, the umpire shall settle it. But if under such submission there is no disagreement, and no umpire is chosen, the award will not be bad because the arbitrators did not choose an umpire. *Rogers v. Corrothers*, 26 W. Va. 238.

4. *Russell on Arb.* 237; *In re Cassell*, 9 B. & C. 624; *Graham v. Graham*, 12 Pa. St. 128; *Crisp v. Love*, 65 N. Car. 126.

But where two parties had been proposed, to which neither of the arbitrators did object, a choice by lot has been upheld. *Neale v. Ledger*, 16 East, 51; *European & Am. Steam Shipping Co. v. Crooke*, 29 L. J. C. P. 155; *Morgan v. Bolt*, 1 N. R. 271; *In re Hopper*, 8 B. & S. 100.

*Form of Appointment.*—The appointment of an umpire must be in writing under a written submission, and may be by parol under a parol submission, but where required in writing it is sufficient that the appointment be embodied in the award, and the arbitrators join in signing it. Not so, however, where the submission calls for an appointment before the hearing.<sup>1</sup>

*Umpire must Act on his own Judgment.*—The umpire must use his own judgment in making the award. He may not consider the opinions of the disagreeing arbitrators and select the one which he considered correct, but he must consider the evidence of the whole case and decide by this only.<sup>2</sup>

*Umpire must Sign the Award.*—Where upon disagreement of the arbitrators the umpire is called in and makes the award, he must sign the award and not the arbitrators, although the additional signatures of the arbitrators will not invalidate the award. Such signatures will be rejected as surplusage, or as a verification of the recitals in it.<sup>3</sup>

**17. Arbitrators as Witnesses.**—In proceedings upon the award arbitrators may be called as witnesses to testify concerning what matters have been submitted to them.<sup>4</sup>

1. *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628; s. c., 35 Am. Dec. 587; *Sharp v. Lipsey*, 2 Bailey (S. Car.), 113. *Compare* *Rison v. Berry*, 4 Rand. (Va.) 275.

But any irregularity in the appointment may be cured by the consent of the parties. *Knowlton v. Homer*, 30 Me. 552.

Even where he was appointed without any authority at all. *Sharp v. Lipsey*, 2 Bailey (S. Car.), 113.

When authorized by the submission the arbitrators may proceed to call in an umpire without consulting the parties about their choice. *Sharp v. Lipsey*, 2 Bailey (S. Car.), 113.

And if their first appointee refuses to act, they may make successive appointments until they have found the party willing to serve. *Cloud v. Sledge*, 1 Bailey (S. Car.), 105.

2. *Haven v. Winnisimmet Co.*, 11 Allen (Mass.), 377; *Crabtree v. Green*, 8 Ga. 8; *Wheaton v. Crane*, 27 N. J. Eq. 368; *Tollitt v. Saunders*, 9 Price, 612. *Cf.* *Finney v. Miller*, 1 Bailey (S. Car.), 81.

So after the umpire or third arbitrator has been appointed, a rehearing of the case becomes necessary and the parties are entitled to notice of time and place for such a rehearing. *Day v. Hammond*, 57 N. Y. 479; s. c., 15 Am. Rep. 522; *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628; s. c., 35 Am. Dec. 587; *Selby v. Gibson*, 1 Harr. & J. (Md.) 362; *Haven v. Winnisimmet Co.*, 11 Allen (Mass.), 377; *Walker v. Walker*, 28 Ga. 140; *Ingraham v. Whitmore*, 75 Ill. 24; *Alexander v.*

*Cunningham*, 111 Ill. 511; *Small v. Courtney*, 1 Brew. (S. Car.) 205; *Frissell v. Fickes*, 27 Mo. 557; *Daniel v. Daniel*, 6 Dana (Ky.), 93; *Falconer v. Montgomery*, 4 Dall. (U. S.) 233; *Thomas v. West Jersey R. Co.*, 24 N. J. Eq. 567; *Passmore v. Pettit*, 4 Dall. (U. S.) 271; *Lutz v. Linthicum*, 8 Pet. (U. S.) 165; *Thornton v. Chapman*, 2 Cranch. (C. C.) 244; *Taber v. Jenney*, *Sprague* (U. S.), 315. *Compare* *Ranney v. Edwards*, 17 Conn. 309; *Blood v. Shine*, 2 Fla. 127.

But the parties may either expressly or impliedly waive their right to a rehearing; such waiver should be distinct and unequivocal. In case of waiver the umpire may use the evidence as received by the arbitrators. *Day v. Hammond*, 57 N. Y. 479; *Graham v. Graham*, 12 Pa. St. 128; *West Jersey R. Co. v. Thomas*, 6 C. E. Green (N. J.), 205; *Crabtree v. Green*, 8 Ga. 8.

3. *Kile v. Chapin*, 9 Ind. 150; *King v. Cook*, T. U. P. Chart. (Ga.) 286; s. c., 4 Am. Dec. 715; *Tyler v. Webb*, 10 B. Mon. (Ky.) 123; *Rigden v. Martin*, 6 Har. & J. (Md.) 403; *Frissell v. Ficks*, 27 Mo. 557; *Boyer v. Aurand*, 2 Watts (Pa.), 74; *Rison v. Berry*, 4 Rand. (Va.) 275; *Shields v. Renno*, 1 Overt. (Tenn.) 313; *Powell v. Ford*, 4 Lea (Tenn.), 278; *McDonald v. Arnout*, 14 Ill. 58; *Jenkins v. Meagher*, 46 Miss. 84.

An award signed by the umpire alone, or by the umpire and one of the arbitrators, is good. *Sheffield v. Clark*, 73 Ga. 92.

4. *Hawksworth v. Brammal*, 5 M. &

**18. The Award.—Form of the Award.**—Where the submission requires an award to be in writing or under seal, the stipulations of the award must be complied with. Where the submission is silent on the subject a verbal award will be valid, unless disposing of property which can only be passed by a written instrument, or an instrument under seal.<sup>1</sup>

**Under Statutes.**—Awards given under a statutory submission must comply in form with the statutory regulations, although, if the conditions are not complied with, the award may stand as an award at common law, if this was the intention of the parties.<sup>2</sup>

Cr. 281; *Republic Bank v. Darragh*, 30 Hun (N. Y.), 29; *Hale v. Huse*, 10 Gray (Mass.), 99; *Hall v. Vanier*, 6 Neb. 85; *Thrasher v. Overby*, 51 Ga. 91.

But not for the purpose of explaining uncertainties in the award. *Kingston v. Kincaid*, 1 Wash. (U. S.) 448; *Aldrich v. Jessiman*, 8 N. H. 516; *Ward v. Gould*, 5 Pick. (Mass.) 291; *Alexander v. McNear*, 28 Fed. Rep. 403; *Mulligan v. Perry*, 64 Ga. 567; *Cobb v. Dortch*, 52 Ga. 548. *Compare* *Huntsman v. Nichols*, 116 Mass. 521.

An award made in substantial conformity to statutory requirements, and determining with proper certainty all the matters submitted, is final and conclusive between the parties, unless impeached for fraud, partiality, or corruption on the part of the arbitrators; and the oral testimony of the arbitrators themselves cannot be received on motion to enter up the award as the judgment of the court, to show errors or mistakes in their decision. *Chapman v. Ewing*, 78 Ala. 403; *Tucker v. Page*, 69 Ill. 179.

1. *Thompson v. Mitchell*, 35 Me. 281; *Philbrick v. Preble*, 18 Me. 255; s. c., 36 Am. Dec. 718; *Valentine v. Valentine*, 2 Barb. Ch. (N. Y.) 430; *Owen v. Boerum*, 23 Barb. (N. Y.) 187; *M'Manus v. M'Culloch*, 6 Watts (Pa.), 357; *Jones v. Dewey*, 17 N. H. 596; *Marsh v. Packer*, 20 Vt. 198; *Smith v. Bullock*, 16 Vt. 592; *Akely v. Akely*, 16 Vt. 450; *Oates v. Bromil*, 1 Salk. 75; *Cocks v. Macclesfield*, Dyer, 218 b. *Compare* *Mathews v. Miller*, 25 W. Va. 817.

There may be a valid parol award under a parol submission. *Gay v. Waltman*, 89 Pa. St. 453.

An award fixing a boundary-line, like a submission regarding a boundary-line question, may be by parol. *Jones v. Dewey*, 17 N. H. 596; *Sawyer v. Fellows*, 6 N. H. 107; s. c., 25 Am. Dec. 452; *Orr v. Hadley*, 36 N. H. 575; *Eaton v. Rice*, 8 N. H. 378; *Jackson v. Dysling*, 2 Cai. (N. Y.) 198; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Shelton v. Alcox*, 11 Conn.

240. *Compare* *Gove v. Richardson*, 4 Greenl. (Me.) 327.

The award need not be in writing nor under seal simply because the submission is in writing or under seal. *Marsh v. Packer*, 20 Vt. 198; *Goodell v. Raymond*, 27 Vt. 241; *White v. Fox*, 29 Conn. 570; *Crabtree v. Green*, 8 Ga. 8.

Neither is it necessary that the award should be attested by witnesses unless so required by the submission. *Valle v. North Missouri R. Co.*, 37 Mo. 445; *Hedrick v. Judy*, 23 Ind. 548.

The submission need not state in plain words that the award should be in writing to make a written award necessary. Any expression intimating that a written award is required will suffice. *Morse on Arb.* 257.

But an instruction in the submission in regard to the form of the award must be strictly followed. *Pratt v. Hackett*, 6 Johns. (N. Y.) 14; *Allen v. Galpin*, 9 Barb. (N. Y.) 246; *Stanton v. Henry*, 11 Johns. (N. Y.) 133; *Buck v. Wadsworth*, 1 Hill (N. Y.), 321; *Bloomer v. Sherman*, 5 Paige (N. Y.), 575; *Tudor v. Scovell*, 20 N. H. 174; *Caldwell v. Dickinson*, 13 Gray (Mass.), 365; *Montague v. Smith*, 13 Mass. 396; *Newman v. Labeaume*, 9 Mo. 30.

Unless waived by the parties. *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Perkins v. Wing*, 10 Johns. (N. Y.) 143; *Buck v. Wadsworth*, 1 Hill (N. Y.), 321; *French v. New*, 2 Abb. App. Dec. (N. Y.) 209; *Shultz v. Halsey*, 3 Sandf. (N. Y.) 405; *Tudor v. Scovell*, 20 N. H. 174.

2. *Darling v. Darling*, 16 Wis. 644; *Steel v. Steel*, 1 Nev. 27; *Higgins v. Kinneady*, 20 Iowa, 474; *Strum v. Cunningham*, 3 Ohio, 286; *Collins v. Karatopsky*, 36 Ark. 316.

But where the statute requires the attestation of the award, an award signed by three arbitrators, the signatures of two of whom only were attested, was upheld; the submission providing that the award of two would be binding. *Ott v. Schroepel*, 5 N. Y. 482. See also *Tucker v. Allen*, 47 Mo. 488.

*Form of Words.*—No special form of words is required to make a valid award, whether it be verbal or in writing, but it must express an actual decision. The words "to meet the circumstances in a liberal manner, I propose that B should pay A, etc.," do not express a decision, and form no valid award.<sup>1</sup>

*Subject-matter.*—The award must be coextensive with the submission. All matters submitted must be considered and decided upon by the arbitrators; and an award which disposes of only part of the subject-matter of the submission will be void.<sup>2</sup>

In order that a court may enter judgment on an award the statutory regulations must be complied with. *Forman Lumber Co. v. Ragsdale*, 12 Ill. App. 441; *Martine v. Harvey*, 12 Ill. App. 587; *Rogers v. Corrothers*, 26 W. Va. 238. Compare *Gibson v. Burrows*, 41 Mich. 713.

1. *Ott v. Schroepel*, 5 N. Y. 483; *Gulley v. Macy*, 89 N. Car. 343; *Lock v. Vulliamy*, 5 B. & Ad. 600.

Where a dispute about the ownership of certain tract of land and alleged trespass on such land was submitted, the arbitrators "awarded and determined that the 'north line' so called between A and B shall be the line established." Held to be a complete and final award in the matter. *Caldwell v. Dickinson*, 13 Gray (Mass.), 365.

A general award of a specific sum without specifying the items of which it is composed is good in point of form. *Myers v. York, etc.*, R. Co., 2 Curt. (U. S.) 28.

2. *Carnochan v. Christie*, 11 Wheat. (U. S.) 446; *James v. Thurston*, 1 Cliff. (U. S.) 367; *Tudor v. Scovell*, 20 N. H. 171; *Varney v. Brewster*, 14 N. H. 49; *Buntain v. Curtis*, 27 Ill. 374; *Smith v. Potter*, 27 Vt. 304; s. c., 65 Am. Dec. 198; *Akely v. Akely*, 16 Vt. 450; *Morse v. Hale*, 27 Vt. 660; *Dogge v. Northwestern Nat. Ins. Co.*, 49 Wis. 501; *Harker v. Hough*, 7 N. J. L. 428; *Richards v. Drinker*, 1 Halst. (N. J.) 307; *Waller v. Shannon*, 44 Conn. 480; *Muldron v. Norris*, 12 Cal. 331; *Porter v. Scott*, 7 Cal. 312; *Boston, etc.*, R. Co. v. *Nashua, etc.*, R. Co., 139 Mass. 463; *Parker v. Chase*, 104 Mass. 431; *Edwards v. Stevens*, 3 Allen (Mass.), 315; *Houston v. Pollard*, 9 Metc. (Mass.) 164; *Coupland v. Anderson*, 2 Call. (Va.) 106; *Johnston v. Brackbill*, 1 Pa. 364; *Scott v. Barnes*, 7 Pa. St. 134; *McGregor, etc.*, R. Co. v. *Sioux City, etc.*, R. Co., 49 Iowa, 604; *Blackledge v. Simpson*, 2 Hayw. (N. Car.) 30; s. c., 2 Am. Dec. 614; *Gooch v. McKnight*, 10 Humph. (Tenn.) 229; *Jones v. Welwood*, 71 N. Y. 208; *Jackson v. Ambler*, 14 Johns. (N. Y.) 96; *Ott v. Schroepel*, 5 N. Y. 482;

*Wright v. Wright*, 5 Cow. (N. Y.) 197; *McNear v. Bailey*, 18 Me. 251; *Archer v. Williamson*, 2 Har. & G. (Md.) 62; *Stone v. Phillips*, 4 Bing. N. Cas. 37; *In re Rider*, 3 Bing. N. Cas. 874. Compare *Pearce v. McIntyre*, 29 Mo. 423.

But though the award does not in terms decide all the matters submitted to the arbitrators, yet if the thing awarded necessarily includes the other things and matters mentioned in the submission it is sufficient. *Smith v. Demarest*, 8 N. J. L. 195; *Crabtree v. Green*, 8 Ga. 8; *McCullough v. McCullough*, 12 Ind. 487; *Harden v. Harden*, 11 Gray (Mass.), 435; *Mickles v. Thayer*, 14 Allen (Mass.), 114; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Sohier v. Eastabrook*, 5 Allen (Mass.), 311; *Blackledge v. Simpson*, 2 Hayw. (N. Car.) 30; s. c., 2 Am. Dec. 614; *Bowman v. Downer*, 28 Vt. 532; *Dolbier v. Wing*, 3 Greenl. (Me.) 421.

Where two separate suits between the same parties were submitted to the same arbitrator, with order "to take and settle all accounts between the plaintiff and defendant, and finally to determine their claims in full against each other," an award deciding only on matters involved in one suit was held to be void. *Bean v. Bean*, 25 W. Va. 604.

The omission of trifling matters in the award will not avoid it. So where the arbitrators were to divide and dispose of firm assets as they should think proper, and they omitted to dispose of a few small articles of little value, the award was held to be valid. *Moore v. Gherkin*, Busb. L. (N. Car.) 73.

But where a suit for the dissolution of a partnership and the settling of partnership accounts was submitted, and the arbitrators merely awarded that a certain sum should be paid by one partner to the others, without ordering a dissolution or stating an account between each partner and the firm, the award was considered not to be final, and consequently void. *Paine v. Paine*, 15 Gray (Mass.), 299.

Where a submission was under seal, and the award rendered was in conform-

*The Omission must be Proved* by the party assailing the award, or it must appear upon the face of the award. In the absence of proof it will be presumed that all matters submitted were considered and passed upon.<sup>1</sup>

*Must be Actually Submitted.*—The matters included in the submission must be actually submitted to the arbitrators to avoid the award in case of omission.<sup>2</sup>

ance to the submission, held that it was of no importance that the arbitrators were only verbally informed of the contents of the submission, and that the paper was not in their hands during the proceedings. *Boor v. Wilson*, 48 Md. 305.

1. *Porter v. Scott*, 7 Cal. 312; *McCullough v. McCullough*, 12 Ind. 487; *Thoreau v. Pallies*, 5 Allen (Mass.), 354; *Holyoke Mach. Co. v. Franklin Paper Co.*, 97 Mass. 150; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Tallman v. Tallman*, 5 Cush. (Mass.) 325; *Call v. Ballard*, 65 Wis. 187; *Parsons v. Aldrich*, 6 N. H. 264; *Furber v. Chamberlain*, 29 N. H. 405; *Ford v. Burleigh*, 60 N. H. 278; *Darst v. Collier*, 86 Ill. 96; *Hadaway v. Kelly*, 78 Ill. 286; *M'Near v. Bailey*, 18 Me. 251; *Dolbier v. Wing*, 3 Me. 421; *Hayes v. Forskoll*, 31 Me. 112; *Young v. Kinney*, 48 Vt. 22; *Bowman v. Downer*, 28 Vt. 532; *Ott v. Schroepel*, 5 N. Y. 482; *Harris v. Wilson*, 1 Wend. (N. Y.) 511; *Wright v. Wright*, 5 Cow. (N. Y.) 193; *M'Kinstry v. Solomons*, 2 Johns. (N. Y.) 57; *Dougherty v. McWhorter*, 7 Yerg. (Tenn.) 239; *Pollock v. Sutherland*, 25 Gratt. (Va.) 78; *Clark v. Reins*, 12 Gratt. (Va.) 98; *Strong v. Beronjon*, 18 Ala. 168; *Hewitt v. Furman*, 16 S. & R. (Pa.) 135; *Karthauss v. Ferrer*, 1 Pet. (U. S.) 222; *Day v. Bonnin*, 3 Bing. N. Cas. 219.

An arbitrator stated his conclusion in his award, and added: "In arriving at this result I have excluded every claim—including those for intoxicating liquors—submitted by said parties, except the following, which I have allowed." *Held*, that the meaning of the award is that the arbitrator disallowed the claims stated to have been excluded in arriving at the result. *Hammond v. Dedham*, 7 Eastern Repr. (Me.) 544.

So where a submission was of all actions real and personal, and the award is only of actions personal, it will be good. It will be presumed that no actions real were pending between the parties. *Kyd on Aw.* 172; *Karthauss v. Ferrer*, 1 Pet. (U. S.) 222; *Kleine v. Catara*, 2 Gall. (U. S.) 61; *Horrel v. M'Alexander*, 3 Rand. (Va.) 94.

2. *Muldrow v. Norris*, 12 Cal. 331;

*M'Near v. Bailey*, 18 Me. 251; *Page v. Foster*, 7 N. H. 392; *Varney v. Brewster*, 14 N. H. 49; *Ballance v. Underhill*, 4 Ill. 453; *Hodges v. Hodges*, 9 Mass. 320; *Warfield v. Holbrook*, 20 Pick. (Mass.) 531; *Hewitt v. Furman*, 16 S. & R. (Pa.) 135; *Moore v. Cockroft*, 4 Duer (N. Y.), 133; *Karthauss v. Ferrer*, 1 Pet. (U. S.) 222; *Jones v. Welwood*, 71 N. Y. 208.

Where a deed described land by metes and bounds, and as being one hundred and sixty-five acres, more or less, all conveyed for a certain sum, and it did not appear that it was sold by the acre, but that a certain tract was sold for a specific sum, and this deed had been accepted, and the plaintiff in error had been in possession of the land for several years, without complaint, on the trial of the issues between the parties before arbitrators the court cannot say that they made a mistake of law, or even committed error, in rejecting parol evidence to show that there were not as many acres as set forth in the deed. *Lester v. Callaway*, 73 Ga. 730.

But where it appears on the face of the award that matters have been presented to the arbitrators, and they failed to pass upon it, the award will be void. *Wright v. Wright*, 5 Cow. (N. Y.) 197.

Or where they expressly decline to decide on matters actually submitted, their award is void. *Richards v. Drinker*, 6 N. J. L. 307; *Harker v. Hough*, 7 N. J. L. 428; *Smith v. Potter*, 27 Vt. 304; s. c., 65 Am. Dec. 198.

In an action upon an award of arbitrators, under a submission to them of all matters in dispute between the parties, evidence is admissible in defence to show that the arbitrators refused to consider and pass upon a claim submitted to them by the defendant. *Gaylord v. Norton*, 130 Mass. 74.

Where two neighbors submit their respective claims for damages resulting from depredations by cattle to arbitration, and the arbitrators consider the claims of one and give an award and refuse to consider the claims of the other, the latter may pay the award and then maintain an action upon his original claims. *Pritchard v. Daly*, 73 Ill. 523.

*Part of Submission Withdrawn.*—The parties to an arbitration have the right at any time during the proceedings to withdraw part of the matters submitted; and such matters need, of course, not be decided upon.<sup>1</sup>

**19. Awards must be Final and Certain.**—That is, they shall be so plainly expressed as that there may remain no uncertainty as to the manner in which they are to be executed. This certainty, however, is judged of only according to a common intent, consistent with fair and probable presumptions.<sup>2</sup>

1. *Varney v. Brewster*, 14 N. H. 49; *Ballance v. Underhill*, 4 Ill. 453.

And they are afterward precluded from objecting to the award because such matters have not been decided upon. *Page v. Foster*, 7 N. H. 392; *Brewer v. Bain*, 60 Ala. 153.

Where the submission is under seal, such withdrawal can, however, not be made by parol. *Howard v. Cooper*, 1 Hill (N. Y.), 44.

2. *Schuyler v. Vanderveer*, 2 Cai. (N. Y.) 235; *Purdy v. Delavan*, 1 Cai. (N. Y.) 315; *Perkins v. Giles*, 50 N. Y. 228; *Waite v. Barry*, 12 Wend. (N. Y.) 377; *Vosburgh v. Bane*, 14 Johns. (N. Y.) 302; *Jackson v. Ambler*, 14 Johns. (N. Y.) 96; *Cox v. Jagger*, 2 Cow. (N. Y.) 638; s. c., 14 Am. Dec. 522; *Wright v. Wright*, 5 Cow. (N. Y.) 197; *Butler v. Mayor of N. Y.*, 7 Hill (N. Y.), 329; *Hiscock v. Harris*, 74 N. Y. 108; *Perkins v. Giles*, 53 Barb. (N. Y.) 342; *Brown v. Hankerson*, 3 Cow. (N. Y.) 70; *White v. Barry*, 12 Wend. (N. Y.) 377; *Case v. Ferris*, 2 Hill (N. Y.), 75; *M'Kinstry v. Solomons*, 13 Johns. (N. Y.) 27; *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268; *Hollingsworth v. Pickering*, 24 Ind. 435; *Pettibone v. Perkins*, 6 Wis. 616; *Dundon v. Starin*, 19 Wis. 261; *Harris v. Social Mfg. Co.*, 9 R. I. 99; *McCracken v. Clarke*, 31 Pa. St. 498; *Gratz v. Gratz*, 4 Rawle (Pa.), 411; *Wood v. Earle*, 5 Rawle (Pa.), 44; *Young v. Shook*, 4 Rawle (Pa.), 304; *Gonsales v. Deavens*, 2 Yeates (Pa.), 539; *Carson v. Carter*, 64 N. Car. 332; *Howard v. Babcock*, 21 Ill. 259; *Ingraham v. Whitmore*, 75 Ill. 24; *Burrows v. Guthrie*, 61 Ill. 70; *Henrickson v. Reinbach*, 33 Ill. 299; *Alfred v. Kankakee*, etc., R. Co., 92 Ill. 609; *Porter v. Scott*, 7 Cal. 314; *Jacob v. Ketcham*, 37 Cal. 197; *Pierson v. Norman*, 2 Cal. 599; *Carter v. Ross*, 2 Root (Conn.), 507; *Parkhurst v. Powers*, 2 Root (Conn.), 531; *Aldrich v. Jessiman*, 8 N. H. 519; *Hayes v. Bennett*, 2 N. H. 422; *Hazeltine v. Smith*, 3 Vt. 535; *Akely v. Akely*, 16 Vt. 450; *Woodward v. Atwater*, 3 Iowa, 61; *Shepard v. Stites*, 2

*Halst.* (N. J.) 90; *McKeen v. Oliphant*, 18 N. J. L. 442; *Stephenson v. Price*, 30 Tex. 715; *Turpin v. Banton*, *Hardin* (Ky.), 312; *Brown v. Warnock*, 5 Dana (Ky.), 492; *Rhodes v. Hardy*, 53 Miss. 587; *Toomey v. Nichols*, 6 Heisk. (Tenn.) 159; *Parker v. Parker*, 103 Mass. 167; *Dubery v. Clifton*, *Cooke* (Tenn.), 329; *Doolittle v. Malcomb*, 8 Leigh. (Va.) 608; s. c., 31 Am. Dec. 671; *Coxe v. Gent*, 1 McMull. (S. Car.) 302; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Smith v. Holcomb*, 99 Mass. 552; *Peters v. Pierce*, 8 Mass. 398; *Comer v. Thompson*, 54 Ala. 78; *McCrary v. Harrison*, 36 Ala. 577; *Carter v. Calvert*, 4 Md. Ch. 199; *Archer v. Williamson*, 2 H. & G. (Md.) 67; *Colcord v. Fletcher*, 50 Me. 398; *Manuel v. Campbell*, 3 Ark. 324; *Lee v. Onstott*, 1 Ark. 206; *King v. Cook*, T. U. P. Charlt. (Ga.) 286; s. c., 42 Am. Dec. 534; *Grier v. Grier*, 1 Dall. (U. S.) 173; *Kingston v. Kincaid*, 1 Wash. (U. S.) 448; *Lyle v. Rodgers*, 5 Wheat. (U. S.) 394; *Talbot v. Hartley*, 1 Cranch (C. C.), 31; *Faw v. Davy*, 1 Cranch (C. C.), 440; *Strong v. Barbour*, 1 Mack. (D. C.) 209.

An award is in the nature of a judgment; it ought to be wholly decisive, for if it does not determine the matter it becomes a cause of a new controversy. *Bacon's Abr.* 331; *Patton v. Baird*, 7 Ired. Eq. (N. Car.) 255; *Hattier v. Etinaud*, 2 Desau. (S. Car.) 571; *Waite v. Barry*, 12 Wend. (N. Y.) 377; *Colcord v. Fletcher*, 50 Me. 398; *Semple v. Hutchinson*, 4 Phil. (Pa.) 249; *Lincoln v. Whittenden Mills*, 12 Metc. (Mass.) 31.

An award to do a certain act should be so certain that specific performance could be enforced. *Banks v. Adams*, 23 Me. 259; *Etnier v. Shope*, 43 Pa. St. 110; *Cauthorn v. Courtney*, 6 Gratt. (Va.) 381.

The rule that an award should be certain and final does not require that no more shall remain to be done to complete its execution, but that the things to be done shall be determined and defined to a reasonable certainty. *Strong v. Strong*, 9 Cush. (Mass.) 560.

An award to which the arbitrators at-



*Intentments and Presumptions.*—An award is considered final and certain, and in general valid, until the contrary is proved. "It is a settled rule in the construction of awards, that no intentment will be indulged to overturn an award, but every reasonable intentment shall be allowed to uphold it."<sup>1</sup>

tach the condition that neither one of the parties should be bound by it is void. *Sartwell v. Horton*, 28 Vt. 370.

It has been held that there is no objection to arbitrators making first a preliminary and then a final award if the submission warrants it and the circumstances render it proper. *Truesdale v. Straw*, 58 N. H. 207.

An award requiring a railroad company to pay a certain amount at any time fixed by the company upon giving the landowner three days notice of time and place of payment, the landowner then to deliver a deed, was held to be void for uncertainty. *Alfred v. Kankakee*, etc., R. Co., 92 Ill. 609.

1. *Merritt v. Merritt*, 11 Ill. 565; *McMillan v. James*, 105 Ill. 194; *Haywood v. Harmon*, 17 Ill. 477; *Karhaus v. Ferrer*, 1 Pet. (U. S.) 228; *Dougherty v. McWhorter*, 7 Verg. (Tenn.) 239; *Neib v. Hinderer*, 42 Mich. 451; *Borrets v. Patterson*, 1 Tayl. (N. Car.) 37; s. c., 1 Am. Dec. 576; *Green v. Franklin*, 1 Tex. 497; *Truesdale v. Straw*, 58 N. H. 207; *Bancroft v. Grover*, 23 Wis. 463; *McCourt v. McCabe*, 46 Wis. 597; *Call v. Ballard*, 65 Wis. 187; *Dolph v. Clemens*, 4 Wis. 181; *Monitor Iron Works v. Ketchum*, 44 Wis. 126; *Richards v. Brockenbrough*, 1 Rand. (Va.) 449; *Forrer v. Coffman*, 23 Gratt. (Va.) 871; *Coupland v. Anderson*, 2 Call. (Va.) 106; *Armstrong v. Armstrong*, 1 Leigh. (Va.) 491; *Kendrick v. Tarbell*, 26 Vt. 416; *King v. Cook*, T. U. P. Chart. (Ga.) 286; s. c., 4 Am. Dec. 715; *Ott v. Schroepel*, 5 N. Y. 482; *Archer v. Williamson*, 2 Har. & G. (Md.) 67; *Roloson v. Carson*, 8 Md. 208; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Smith v. Minor*, 1 N. J. L. 16; *Wheeler v. Woodward*, 66 Pa. St. 158; *Berkheimer v. Geise*, 82 Pa. St. 64; *Tomlinson v. Hammond*, 8 Iowa, 40; *Fryeburg Canal v. Frye*, 5 Me. 38.

An award is certain which may be rendered certain. *Sheffield v. Clark*, 73 Ga. 92.

Technical precision and certainty are never necessary in an award. If it be expressed in such language as plain men acquainted with the subject-matter can understand, that is enough. *Rogers v. Corrothers*, 26 W. Va. 238, 246.

Where an action on an insurance policy was submitted, and the award held

that no sufficient proof had been produced to establish a claim against the company, the award was held to be final. *McDermott v. U. S. Ins. Co.*, 3 S. & R. (Pa.) 604.

Where the arbitrators in their award gave costs to one of the parties and said nothing further about the matter in dispute, the court said: "As to the validity of the report in reference to the objection that it does not adjudicate upon the subject-matter submitted to the referees, we think it sufficient; because by necessary implication it must be considered as a determination upon the question. They award that the defendant shall recover the costs of the action. This they could not have done without having decided the point in controversy in their favor. At least the legal presumption is that they so determined." *Buckland v. Conway*, 16 Mass. 396; *Stickles v. Arnold*, 1 Gray (Mass.), 418; *Hodges v. Raymond*, 9 Mass. 316; *Traquair v. Redinger*, 4 Yeates (Pa.), 282; *Lamphire v. Cowan*, 39 Vt. 420; *Rixford v. Nye*, 20 Vt. 132. And see *Purdy v. Delavan*, 1 Cai. (N. Y.) 304.

Where an award decided that the parties should hold certain real estate "according to their respective possessions forever," the court held that this description was sufficiently certain. "An actual possession is susceptible of clear and definite proof," and, "for aught we know, they may be included within the most permanent inclosures; and if necessary to support the award we ought to intend that to be the case." *Jackson v. Ambler*, 14 Johns. (N. Y.) 109.

An award under a submission concerning the ownership of certain oxen sold by A to B and claimed by C simply stated "that B should pay certain sums respectively to A and C." It was held that this was sufficiently certain to infer that the ownership was adjudged to B. *Hanson v. Webber*, 40 Me. 194.

In a partnership matter to be settled by arbitration the award decided that one of the partners should pay the partnership debts from certain moneys in his hands. The amount of the partnership's debts was not fixed. The court held the award sufficiently certain. "For aught we can see or is averred, the debts due in the case before us might be quite easy of liquidation—

*Award need not Specify all Matters Submitted.*—Under a submission of several matters an award is not uncertain because it did not pass upon each matter separately, but embodies them all in one general award, unless the submission specially or impliedly

perhaps were agreed on by the parties; and if a thing extrinsic, ordered to be done by an award, may be certain, the rule now is to intend that it is certain till the contrary appear by averment." *Case v. Ferris*, 2 Hill (N. Y.), 75. And see *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268. Compare *Colcord v. Fletcher*, 50 Me. 398.

Where an award ordered a quitclaim of all defendant's right and title to all lands which he had heretofore deeded or attempted to deed to plaintiff, it was held to include a fifty-acre lot which defendant had formerly conveyed to plaintiff under condition that he should not come into possession until after the decease of defendant, as there was no other land attempted to be conveyed to which the award could refer. *Akely v. Akely*, 16 Vt. 450.

An award directing the payment of a specific sum is final and sufficient, without directing a release from the party to whom it is paid. A discharge from the defendant will be presumed from the payment of the sum awarded. *M'Kinstry v. Solomons*, 2 Johns. (N. Y.) 57; *Affirmed*, 13 Johns. (N. Y.) 27; *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268.

An award for a sum of money in gross, where several matters have been submitted, will be good. It will be supposed that all matters have been considered. *Strong v. Strong*, 9 Cush. (Mass.) 560; *Shirley v. Shattuck*, 4 Cush. (Mass.) 470; *Biglow v. Maynard*, 4 Cush. (Mass.) 317; *Harden v. Harden*, 11 Gray (Mass.), 435; *Dickerson v. Tyner*, 4 Blackf. (Ind.) 253; *Emery v. Hitchcock*, 12 Wend. (N. Y.) 156; *Darge v. Horicon Mining Co.*, 22 Wis. 691.

In an action for trespass upon real estate, caused by a dispute upon a boundary-line, the arbitrators found the title of the land trespassed upon to be in the plaintiff and assessed damages. *Held*, that it was not necessary for them to fix the boundary-line, and that the award was sufficiently certain. *Ballard v. Mitchell*, 8 Jones L. (N. Car.) 153.

And where in such a case the award decided that there was no trespass, the award was held to be certain. *Harralson v. Pleasants*. Phill. L. (N. Car.) 365.

The question of overflowing lands by a mill-dam having been submitted to ar-

bitration, an award that the owner of the dam pay to the owner of the land a specified sum annually "for each year he keeps his mill-dam up to a certain point indicated by the arbitrators on a certain stump," included the right of the dam owner to raise the water to the height indicated by the arbitrators. *Sitton v. Cureton*, 72 Ga. 207.

Where the award in partnership matters failed to state in what proportions certain amounts should be divided between the partners the courts refused to annul the award for uncertainty, it being held that in the absence of proof to the contrary the partners were supposed to be entitled to equal shares in the proceeds of the partnership. *Henrickson v. Reinbach*, 33 Ill. 299.

An award giving D. the sole possession "of all the interests which he and B then jointly had in a certain brewery near the village of P." was upheld, the description of the brewery being sufficiently certain, as it did not appear that the parties had joint interest in any other brewery, or that there was another brewery in the vicinity. *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268.

The submission described a certain lot in dispute as "lying in the city of B." The arbitrator in the award referred to it as "lying partly in the city of B. and partly in B. county." *Held* to be sufficiently certain. *Northern Centr. R. Co. v. Canton Co.*, 24 Md. 492.

An award deciding upon the property in a certain fence gave the stakes and rails put into the fence by a former owner to one of the parties. *Held* to be sufficiently certain to give the residue of the fence to the other party. *Whittemore v. Mason*, 14 Ill. 392.

If an award settling a corner and lines between two tracts of land shows that two points, one in each of two lines, are ascertained, they will be regarded as fixed and certain, unless the record shows that they are uncertain; and if the award gives directions to ascertain where the corner which must settle the dispute is located by the award, and in such a manner that any competent surveyor could from such award find the corner and lines, the award is certain. *Rogers v. Corrothers*, 26 W. Va. 238, 248; *Crawford v. Orr*, 84 N. Car. 246.

requires a separate award for each matter or one or more of them.<sup>1</sup>

*Title to Real Estate.*—Where an award decides upon the title of real estate it is sufficient that it decides to whom it belongs. It need not order a conveyance to make it certain.<sup>2</sup>

*Award in the Alternative.*—An award is not void for uncertainty because it is in the alternative and contingent, nor because one of the alternatives requires the party to do an act in conjunction with others not parties to the submission and over whom the award has no control.<sup>3</sup>

*Certain as to Subject-matter.*—An award to be valid must de-

1. *Stearns v. Cope*, 109 Ill. 340; *Vannah v. Carney*, 69 Me. 221; *Blackwell v. Goss*, 116 Mass. 394; *Shirley v. Shattuck*, 4 Cush. (Mass.) 470; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Houston v. Pollard*, 9 Metc. (Mass.) 164; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Mickles v. Thayer*, 14 Allen (Mass.), 114; *Emery v. Hitchcock*, 12 Wend. (N. Y.) 156; *Morewood v. Jewett*, 2 Robt. (N. Y.) 496; *Wood v. Auburn, etc., R. Co.*, 8 N. Y. 160; *Brewer v. Bain*, 60 Ala. 153; *Shackelford v. Purket*, 2 A. K. Marsh. (Ky.) 435; s. c., 12 Am. Dec. 422; *Bowman v. Downer*, 28 Vt. 532; *Soper v. Frank*, 47 Vt. 368; *Heckers v. Fowler*, 2 Wall. (U. S.) 123; *Karthauss v. Ferrer*, 1 Pet. (U. S.) 222. *Compare Murray v. Mills*, 1 Neb. 456.

Neither is it necessary that the arbitrators should go into particulars and give reasons for their award. A simple announcement of the result of their investigation is sufficient, although it will not invalidate the award when the reasons are inserted. *Patton v. Baird*, 7 Ired. Eq. (N. Car.) 255; *Osborne v. Calvert*, 83 N. Car. 365; *Keener v. Goodson*, 89 N. Car. 273; *Clanton v. Price*, 90 N. Car. 96; *Blossom v. Van Amringe*, 63 N. Car. 65; *Lamphire v. Cowan*, 39 Vt. 420; *Stewart v. Cass*, 16 Vt. 663; s. c., 42 Am. Dec. 534; *McKnight v. McCullough*, 21 Iowa, 111; *Vaughan v. Smith*, 69 Ala. 92; *Sides v. Brendlinger*, 14 Neb. 491.

A statement in the award that all the necessary conditions have been fulfilled is not necessary to make it certain, as that notice has been given of time and place of the meetings. *Rigden v. Martin*, 6 Har. & J. (Md.) 403; *Upshaw v. Hargrove*, 14 Miss. 286; *Mayor of N. Y. v. Butler*, 1 Barb. (N. Y.) 325.

Or that the arbitrators were sworn, or that the parties appeared before them. *Negley v. Stewart*, 10 S. & R. (Pa.) 207; *Houghton v. Burroughs*, 18 N. H. 499.

Or that they heard all the parties. *Yates v. Russell*, 17 Johns. (N. Y.) 461; *Shultz v. Halsey*, 3 Sandf. (N. Y.) 405;

*Warner v. Collins*, 135 Mass. 26; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Ackley v. Finch*, 7 Cow. (N. Y.) 290. *Compare Short v. Pratt*, 6 Mass. 496; *Blin v. Hay*, 2 Tyler (Vt.), 304; *Bixford v. Nye*, 20 Vt. 132.

Or that they acted within the scope of their authority. *Hoffman v. Hoffman*, 26 N. J. L. 175.

They need not make the evidence part of their award, although requested to do so. *Allen v. Miles*, 4 Harr. (Del.) 234; *State v. Petticrew*, 19 Mo. 373.

Nor that all the legally-offered evidence was received. *Leominster v. Fitchburg, etc., R. Co.*, 7 Allen (Mass.), 38.

An award in a dispute about a lot is not void for uncertainty because it does not appear on the face of the award that the lot described in it is the identical lot of the submission. This may be proved on trial. *Rogers v. Tatum*, 25 N. J. L. 281.

An award which fixes with accuracy the terminal points of a disputed line between adjacent land-owners, and its course and distance, is not obnoxious to the allegation of uncertainty. A simple response to the inquiry submitted, in analogy to a jury verdict, is sufficient. Submission and award constitute an executory agreement, and certainty to a common intent is all that is required in the award to admit of its specific enforcement. *Crawford v. Orr*, 84 N. Car. 246.

2. *Crabtree v. Green*, 8 Ga. 8. And see *Blossom v. Van Amringe*, 63 N. Car. 65.

3. *Thornton v. Carson*, 7 Cranch. (U. S.) 596; *Com. v. Pejepsct Proprs.*, 7 Mass. 399; *Hanson v. Webber*, 40 Me. 194; *Williams v. Williams*, 19 Miss. 393; *Curtis v. Gokey*, 68 N. Y. 300.

And where one part of an award in the alternative is impossible, the other part will be good. *Clement v. Comstock*, 2 Mich. 359; *McDonald v. Arnout*, 14 Ill. 58.

scribe the things awarded with sufficient certainty to make it possible to identify them. So is an award to finish "the house" or pay a certain sum for "the stone," without further description of the house or the stone, void for uncertainty.<sup>1</sup>

*Certainty about Boundary-lines.*—In general it has been said that an award concerning the title of real estate or boundary-lines is sufficiently certain only where it would enable an officer to give possession of the premises, and to designate the limits by metes and bounds. If it falls short of this it is indecisive of the matter in issue, and therefore bad.<sup>2</sup>

*Certainty as to Persons.*—The award must be certain as regards the persons who are required to do an act and those who are to be benefited by it. But it need not indicate them by name. Any description through which they can be readily ascertained will suffice. So where an amount was awarded to the executors of J. G. the award was held to be certain, it being easily ascertained who the executors are.<sup>3</sup>

*As to Time.*—An award must also be certain as to the time of performance. Where arbitrators in their award decreed that a

1. Schuyler v. Vanderveer, 2 Cal. (N. Y.) 235; Sicard v. Peterson, 3 S. & R. (Pa.) 468; Thomas v. Molier, 3 Ohio, 266.

Also an award ordering a party to deliver "the said farm" without further describing the farm. Brown v. Hankerson, 3 Cow. (N. Y.) 70.

Or an award of three quarters of the whole section of certain land to be "taken of the upper part" of said land. Duncan v. Duncan, 1 Ired. (N. Car.) 466.

And an award ordering one party to give security to the other if required without further specifying the security. Jackson v. De Long, 9 Johns. (N. Y.) 43; Barnet v. Gilson, 3 S. & R. (Pa.) 340. And see Stanley v. Chappell, 8 Cow. (N. Y.) 235; Peck v. Wakeley, 2 McCord (S. Car.), 279. Compare Cutter v. Cutter, 48 N. Y. Super. Ct. 470.

An award of a sum of money to the plaintiff "at the time the plaintiff will make a correct deed, of conveyance to the heirs of A. for two acres and a half of land," without further description of the land, is uncertain and void. Murray v. Bruner, 6 S. & R. (Pa.) 276.

Also an award that one party shall "deliver or account for on oath all bonds, notes, bills, or other securities heretofore given to them as collateral security," without specifying what bonds or other securities were either conveyed or pledged as collateral security. Lyle v. Rodgers, 5 Wheat. (U. S.) 394.

An award directed one of the parties to surrender a bond bearing a certain date, but without giving the names of the par-

ties to the bond, or any other particulars by which it could be identified. Held to be void. Sheppard v. Stites, 7 N. J. L. 90; M'Keen v. Allen, 7 N. J. L. 506.

Also is an award void determining certain matters now in dispute and undetermined between the parties, without stating these matters and accounts. Turpin v. Banton, Hard. (Ky.) 312.

2. Morse on Arb. 428; Aldrich v. Jesiman, 8 N. H. 516; Rogers v. Corrothers, 26 W. Va. 238, 248; Crawford v. Orr, 84 N. Car. 246.

So is a boundary-line fixed from one known monument to another by land of one of the parties uncertain. Clark v. Burt, 4 Cush. (Mass.) 396.

Or when one of the monuments named in the award is by parol evidence proved not to exist. Giddings v. Haddaway, 28 Vt. 342.

But an award ordering a conveyance of real estate up to the original claim line is not void for uncertainty, as such a line may be ascertained. Williams v. Warren, 21 Ill. 541.

3. Grier v. Grier, 1 Dall. (U. S.) 173.

But where claims against a party both in his own and in a representative character are submitted, and the award does not distinctly state what sums are to be paid by such party in his representative character and those for which he is personally bound, the award will be void. Lyle v. Rodgers, 5 Wheat. (U. S.) 394; Hoffman v. Hoffman, 26 N. J. L. 175; Dorsey v. Dorsey, 11 Gill & J. (Md.) 299. Compare Strong v. Beronjon, 18 Ala. 168.

certain sum should by A be placed to the credit of B, provided B should give or cause to be given a clear, unincumbered, and satisfactory title of certain lands to A, without limiting the time in which such title should be given, leaving the question whether this credit is to be allowed or disallowed indefinitely open, the award was held not to be final, and therefore void.<sup>1</sup>

*Amount.*—The amount awarded must also be certain to make the award valid. Awarding the balance due on a certain account after deduction of an unsettled account is uncertain.<sup>2</sup>

But the award will not be uncertain where certain amounts to be paid are not named; but where it sufficiently indicates the means by which the amount can be ascertained. "It is not indispensable that the award should state in words or figures the precise amount to be paid. If nothing remains to be done in order to render it certain and final but a mere ministerial act or an arithmetical calculation, it will be good."<sup>3</sup>

1. *Carnochan v. Christie*, 11 Wheat. (U. S.) 446. Compare *Russell on Arb.* 292.

An award in an action against the supervisors of a township, that the defendant pay the plaintiff a certain sum "as soon as the defendant shall be in possession of the township's funds to do so," is bad, because the money is to be paid *in futuro*, and on a contingency. *Williams v. Landon*, 14 S. & R. (Pa.) 399; *Evans v. Sheldon*, 69 Ga. 100.

Where an action on an account was submitted to arbitration, and one of the defences was the statute of limitations, and the arbitrators framed their award so that it was left uncertain whether the last payment was made within the time required to bring it within the statute, the award was held to be void. *Doyle v. Reilly*, 18 Iowa, 108.

But if the award be without a date, and the arbitrator direct a party to do a thing a certain number of days after the date of the award, this will not be so uncertain as to be invalid; for the date will be computed from the delivery of the award. *Russell on Arb.* 292.

An award ordering a certain sum to be paid, without specifying the time of payment, is not void for uncertainty. The money becomes payable immediately. *Blood v. Shine*, 2 Fla. 127. See *Soper v. Frank*, 47 Vt. 368.

An award providing for the payment of a stipulated sum annually by one of the parties to the other for the latter's life is valid. *Remelee v. Hall*, 31 Vt. 582; s. c., 76 Am. Dec. 140.

2. *Zerger v. Sailer*, 6 Binn. (Pa.) 24; *Ingraham v. Whitmore*, 75 Ill. 24.

So is an award for a certain sum less an allowance for hauling 620 staves,

without naming the amount so to be deducted, void for uncertainty. *Parker v. Eggleston*, 5 Blackf. (Ind.) 128.

Also an award giving to one of the parties costs of reference, costs of court, and all costs paid by plaintiff. *Leominster v. Fitchburg, etc., R. Co.*, 7 Allen (Mass.), 38.

An award is void for uncertainty which declares that A shall pay to B the sum of money which B paid to A for the purchase of one of two horses which were sold together for \$300, although it was averred that the horse was in fact sold for \$150. *Howard v. Babcock*, 21 Ill. 259.

3. *Kyd on Awards*, 126, 198, 216; *Russell on Arb.* 297; *Waite v. Barry*, 13 Wend. (N. Y.) 377; *Brown v. Hankerson*, 3 Cow. (N. Y.) 72; *Butler v. Mayor of N. Y.*, 1 Hill (N. Y.), 489; *Gudgell v. Pettigrew*, 26 Ill. 305; *Carsley v. Lindsay*, 14 Cal. 390; *Wilson v. Brown*, 82 Pa. St. 437; *Warder v. Whitall*, 1 N. J. L. 84; *Colcord v. Fletcher*, 50 Me. 398; *Chase v. Jeffs*, 51 N. H. 491; *Bush v. Davis*, 34 Mich. 190.

And where the award provides for the correction of any mistake in the addition or calculation of interest it will not invalidate the award. *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57.

An award ordering the payment of a certain sum with interest is certain. *Emery v. Hitchcock*, 12 Wend. (N. Y.) 156; *McKinstry v. Solomons*, 13 Johns. (N. Y.) 27; *White v. Jones*, 8 S. & R. (Pa.) 349; *Skeels v. Chickering*, 7 Metc. (Mass.) 316.

But the award will be void for uncertainty where neither the amount is named nor sufficient means are indicated by

*Arbitrators can Reserve no Authority.*—In making the award the arbitrator may not reserve to himself the authority to decide upon some matter after he has delivered his award, or to delegate in his award the decision of some difficult question to another, much less to one of the parties. Such an award is not final.<sup>1</sup>

*Ministerial Acts.*—This rule does not refer to acts of a purely ministerial character.<sup>2</sup>

**20. Awards must be Mutual.**—They must not be on one side only. They are void unless something be arbitrated for the defendant's benefit as well as for the plaintiff's. Less strictness and critical nicety's, however, now used in construing these instruments than formerly. It is not now necessary, whatever it may have been, that an award should express that a sum awarded to be paid or an act to be done in favor of one of the parties shall be in satisfaction, or that it should contain any equivalent terms; a discharge to the other must necessarily be presumed from the payment of the sum or the performance of the act.<sup>3</sup>

which it can be found; and those means should be of such a nature that no dispute can arise concerning it. *Waite v. Barry*, 12 Wend. (N. Y.) 377; *Fletcher v. Webster*, 5 Allen (Mass.), 566; *Spalding v. Irish*, 4 S. & R. (Pa.) 322; *Hays v. Hays*, 2 Ind. 28; *Alexander v. M'Near*, 28 Fed. Rep. 403.

Where in a pending case the arbitrators award that one of the parties shall pay the costs of the suit, without ascertaining the amount, it is sufficiently certain, as the amount can be ascertained from the court. *Macon v. Crump*, 1 Call. (Va.) 575; *Nichols v. Rensselaer Mut. Ins. Co.*, 22 Wend. (N. Y.) 125; *Brown v. Warnock*, 5 Dana (Ky.), 492; *Wright v. Smith*, 19 Vt. 110; *Boughton v. Seamans*, 16 N. Y. Supr. Ct. 392; *Benson v. White*, 101 Mass. 48.

1. *Archer v. Williamson*, 2 Har. & G. (Md.) 62; *Calvert v. Carter*, 6 Md. 135; *Byars v. Thompson*, 12 Leigh. (Va.) 550; s. c., 37 Am. Dec. 680; *Porter v. Scott*, 7 Cal. 312; *Sutton v. Horn*, 7 S. & R. (Pa.) 228; *Kingston v. Kincaid*, 1 Wash. (U. S.) 448; *Levezey v. Gorgas*, 4 Dall. (U. S.) 71.

An award which ordered that A, besides paying a certain sum to B, should, beg B's pardon in such manner and such place as B should appoint, was held void as to the latter direction because giving B the power to determine the time and place was making him a judge in his own cause, which the arbitrator ought to have determined. *Glover v. Barrie*, 1 Salk. 71.

An award which is made subject to future alterations for correction of errors upon request of the parties is not final

and void. *McCrary v. Harrison*, 36 Ala. 577; *Hooker v. Williamson*, 60 Tex. 524.

2. *Owen v. Boerum*, 23 Barb. (N. Y.) 187; *Carter v. Calvert*, 4 Md. Ch. 199; *Archer v. Williamson*, 2 Har. & G. (Md.) 62.

So where the award provided that a subsequent survey should fix the boundary-line of tracts of land in dispute, the award was held to be valid. *Galloway v. Webb*, Hard. (Ky.) 318.

An award provided that by one of the parties a deed should be executed sufficient in the opinion of the supreme court or of the attorney-general to bar them from any future claims to the land conveyed. The award was held to be valid. *Com. v. Pejepsicut Prop'rs*, 7 Mass. 399.

3. *Russell on Arb.* 302, 303; *Morse on Arb.* 377, 378; *Doolittle v. Malcomb*, 8 Leigh. (Va.) 608; s. c., 31 Am. Dec. 671.

Where an award ordered that in settlement of some disputed accounts B. should pay to S. the balance found due on these accounts, the award was objected to as not "mutual." The court said: "The rule is that an award must be mutual. But the meaning of that is that the award must be so constructed as not to leave him who is to pay liable to be sued for the same cause for which he is awarded to pay; but here it sufficiently appears by looking into the bill, pleadings, reference, and award for what they order this sum to be paid; and then it follows that if he should be again sued for the same cause, he may produce these proceedings and show he has already discharged himself of these demands. It is not necessary that they should have awarded anything to be paid or done by S."

To be mutual an award need not require from both parties the same thing or things which may be enforced by the same legal process. One may be required to pay a sum of money which can be enforced by execution, and the other to execute a certain conveyance which can be enforced by attachment; but if the court cannot enforce both things it will enforce neither.<sup>1</sup>

**Mutuality Must not Rest on Outside Circumstances.**—The mutuality must be in the award itself, and not rest upon circumstances outside of the award. An award which directed the payment by R.

Blackledge v. Simpson, 2 Hayw. (N. Car.) 30; s. c., 2 Am. Dec. 614; Borret v. Patterson, Taylor (N. Car.) 37; s. c., 1 Am. Dec. 576; Purdy v. Delavan, 1 Cal. (N. Y.) 304; Cox v. Jagger, 2 Cow. (N. Y.) 638; s. c., 14 Am. Dec. 522; McKinstry v. Solomons, 2 Johns. (N. Y.) 57; Weed v. Ellis, 2 Cal. (N. Y.) 254; Spofford v. Spofford, 10 N. H. 254; Gibson v. Powell, 13 Miss. 712; McKeen v. Oliphant, 18 N. J. L. 442; Power v. Power, 7 Watts (Pa.), 205; Karthaus v. Ferrer, 1 Pet. (U. S.) 222.

An award may be mutual by implication. So where one was ordered to pay for certain oxen, it was held to imply that the oxen were the property of the other party. Hanson v. Webber, 40 Me. 194. And see Reynolds v. Reynolds, 15 Ala. 398; Gordon v. Tucker, 6 Me. 247; Weed v. Ellis, 3 Cal. (N. Y.) 254; Gaylord v. Gaylord, 4 Day (Conn.), 422.

In a dispute about a boundary line the arbitrator ordered only the party through whose land the line fixed by the award runs to execute a release. The award was held not to be void for lack of mutuality. Jones v. Boston Mill Corp., 6 Pick. (Mass.) 148.

But an order to an heir to take real estate and to pay out a certain sum of money to the other heirs is not mutual unless a conveyance of the real estate be ordered to the other party. Miller v. Moore, 7 S. & R. (Pa.) 164.

And where one was ordered to pay a certain sum for stock held by the other party without an order for the transfer of the stock, the award was held not to be mutual and void. *In re Williams*, 4 Den. (N. Y.) 194.

1. Kunckle v. Kunckle, 1 Dall. (U. S.) 364; Munroe v. Alaire, 2 Cal. (N. Y.) 320.

If an award directs the performance of acts by both parties, and the award is void as to the acts to be done by one party, and the void act is the consideration or recompense of the thing to be done by the other party, the whole award will be void for lack of mutuality. Nichols v. Rensselaer Co. Ins. Co., 22 Wend. (N. Y.) 125.

An award against a stranger to the arbitrator is, of course, not binding on him; and when one party cannot enforce an award so given in his favor, the part of the award which operates against him will also be void as not mutual. Brazil v. Isham, 1 E. D. Smith (N. Y.) 437.

Where a person submits to arbitration on behalf of another and without authority, the award following will not be mutual; and the party in whose behalf the matters were submitted has no right to ratify the submission after the award is rendered, if it should be rendered in his favor. Furbish v. Hall, 8 Me. 315; Belmont v. Tyson, 3 Blatchf. (U. S.) 530.

Although an award under a submission by two parties, one of whom is incompetent to submit, may be void for mutuality. Furbish v. Hall, 8 Me. 315.

It has been held that when the fact of such incompetency was known to the other party at the time of the submission such party will be bound by it. Palmer v. Davis, 28 N. Y. 242; Smith v. Van Nostrand, 5 Hill (N. Y.), 419; Horrell v. M'Alexander, 3 Rand. (Va.) 94.

Where one partner is ordered to pay the partnership's debts to a stranger to the arbitration, the award will be mutual as between the parties, although the creditor's right to look to either one of them for payment is not affected by it. Lamphire v. Cowan, 39 Vt. 420.

Where the submission gives the arbitrator power to order mutual releases, an award ordering several releases where one of the parties to the arbitration consists of several individuals was upheld. Smith v. Demarest, 3 Halst. (N. J.) 195.

A submission by D. & M. on one side and W. and his partner on the other side authorizes an award against W. only. Dater v. Wellington, 1 Hill (N. Y.), 319; Fidler v. Cooper, 19 Wend. (N. Y.) 285.

Where an award ordered that one party should execute a general release at a certain date and that the other party should execute a like release after the first one had been executed, the award was upheld as mutual. Munroe v. Alaire, 2 Cal. (N. Y.) 327.

of a sum of money to one of his joint creditors was held not to be mutual. The court held that "though payment of the award would operate to discharge R., yet his discharge would not rest upon the award, but upon the prior and contingent right of O. as one of the joint creditors to receive payment of the debt for himself and his co-creditors. Thus it would seem that no protection or benefit whatever could result to R. from the submission or award."<sup>1</sup>

21. *The Award must be Entire.*—According to the English rule an award must be entire in itself;<sup>2</sup> but this strict rule has been much relaxed in the United States.<sup>3</sup>

*Award may Refer to Extrinsic Documents.*—An award may refer to documents, books, accounts, or any other instrument outside of the award, provided these instruments are sufficiently described in the award to be easily identified and the parties have access to them.<sup>4</sup>

1. *Onion v. Robinson*, 15 Vt. 510.

2. *Russell on Arb.* 369 *et seq.*

Matters between two parties A and B were submitted, and subsequently, after the reference had begun, C was also made a party to the arbitration. The arbitrator made two awards, in one of which he awarded that A was indebted to C, without mentioning B; in the other he awarded that A was indebted to B, without mentioning C. Both awards were held to be bad because there was no one award determining all the matters in dispute. *Winter v. Munton*, 2 Moore, 723. See *Davis v. Dyer*, 54 N. H. 146.

3. *Morse on Arb.* 370.

Several distinct matters in difference between two parties were submitted to arbitration, the parties agreeing to abide by "the award." The arbitrators found separately upon each matter, but embodied their separate findings in one apparently single instrument, so that the one document contained what in terms purported to be seven different awards. The court held that these awards are but the detail of "the award" which the submission seems to have contemplated, and we do not perceive how the award is in any sense invalidated because the decision upon each claim is stated in detail. *Kendrick v. Tarbell*, 26 Vt. 416.

Two parties submitted to arbitration two questions: 1st, the amount which had been actually paid upon a certain contract, and to indorse the amount so found on said contract; 2d, of and concerning all actions, debts, demands, etc. The arbitrators indorsed upon the contract the payment of a certain sum, and delivered their award in regard to the other matters. The court held (*per Paige, J.*) that

the indorsement on the contract may be regarded as a part of the principal award, the indorsement and the award being simultaneous acts of the arbitrators, and (*per Foot, J.*) "It appears to me that there is no room to doubt that the parties not only submitted two distinct matters, but provided for separate awards upon them. The language of their bonds is clear and explicit on this point. It is unreasonable that the parties may not provide for separate awards." The award was upheld. *Ott v. Schroepel*, 5 N. Y. 484, 490; *Fay v. Bond*, 1 Allen (Mass.), 211.

Arbitrators, after completing their award, added an addendum relating to the legality of the contract, and providing that if the arbitrators should become satisfied "that no recovery can be had under such a contract, this award is to be changed and an award given that neither party is entitled to recover from the other." Held, that the addendum did not avoid the award, but had to be taken as a part of it, although the award with the addendum was void for uncertainty. *Rhodes v. Hardy*, 53 Miss. 587.

4. *Henricksen v. Reinback*, 33 Ill. 299; *Farr v. Johnson*, 25 Ill. 522; *Butler v. Mayor of N.Y.*, 1 Hill (N. Y.), 489; *Hollingsworth v. Pickering*, 24 Ind. 435; *Hays v. Miller*, 12 Ind. 187; *Clement v. Comstock*, 2 Mich. 359; *Coxe v. Gent*, 1 McMull. (S. Car.) 302; *Santee v. Keister*, 6 Binn. (Pa.) 36; *Bowman v. Downer*, 28 Vt. 532; *Benson v. White*, 101 Mass. 48; *Kingston v. Kincaid*, 1 Wash. (U. S.) 448.

An award of the "Peter tract," the "Riley tract," and the "Mill tract" was held sufficiently certain where said tracts



*Awards under Statute.*—But an award on which, under a statutory submission, a judgment is to be rendered must be complete in itself, and may not depend on extrinsic documents.<sup>1</sup>

**22. Must be Possible.**—The award must be possible. If the arbitrator awards a thing impossible in itself, as to do a thing in the past or to turn the course of a river, the award will be void. The impossibility must, however, appear on the face of the award. To order a party to pay a sum of money which he does not possess is, however, not such an impossibility which will avoid the award.<sup>2</sup>

**23. Publication of the Award.**—If the submission so requires, an award must be published before it becomes effective.<sup>3</sup>

It is impossible to give a stated rule by which to determine what is a sufficient publication. Anything done which enables the parties to receive a knowledge of its contents may be called a publication.<sup>4</sup>

were well described in the deeds. *Farris v. Caperton*, 1 Head. (Tenn.) 606.

And so was an award upheld which ordered that A should make and execute a deed of all the lands he holds by a certain conveyance of B. *Whitcomb v. Preston*, 13 Vt. 53.

A marginal note in the award does not make it void. The note is to be considered as part of the award, and must receive the same construction as if it had been inserted in the body of the instrument. *Platt v. Smith*, 14 Johns. (N. Y.) 368.

1. *Day v. Laffin*, 6 Metc. (Mass.) 280.

2. *Russell on Arb.* 305; *Young v. Reuben*, 1 Dall. (U. S.) 119.

An award ordering a stranger to the submission to do an act is void for impossibility, as the arbitrator has no power over such stranger. *Martin v. Williams*, 13 Johns. (N. Y.) 264; *Kratzer v. Lyon*, 5 Pa. St. 274; *Brazil v. Isham*, 1 E. D. Smith (N. Y.) 437.

So is an award ordering a thing to be done which is illegal in itself void. *Maybin v. Coulon*, 4 Dall. (U. S.) 298; *Yeamans v. Yeamans*, 99 Mass. 585.

3. *Parsons v. Aldrich*, 6 N. H. 264; *Denman v. Bayless*, 22 Ill. 300.

4. *Thompson v. Mitchell*, 35 Me. 281; *Knowlton v. Homer*, 30 Me. 552.

So far as the validity of the award is affected, it will in general be considered as "published" as soon as the arbitrator has done some act whereby he becomes *functus officio*, and has declared his final mind and can no longer change it; that is, as soon as he has made a complete award. *Russell on Arb.* 255.

Provision for a publication of the award in the submission is said not to

imply a formal notification to the parties. *Hunt v. Wilson*, 6 N. H. 36.

Reading the award to the parties was held to be a publication. *Rundell v. La Fleur*, 6 Allen (Mass.), 480; *Perkins v. Wing*, 10 Johns. (N. Y.) 143.

The delivery of a copy of the award is considered a publication. *Low v. Nolte*, 16 Ill. 475.

An award executed in duplicate and delivered to each of the parties is published. *Plummer v. Morrill*, 48 Me. 184.

The delivery of the award to the prevailing party, who gives notice to the other party and demands payment, is a sufficient publication. *Knowlton v. Homer*, 30 Me. 552; *Rixford v. Nye*, 20 Vt. 132.

An award which is to be returned into court is published by reading and filing it in court. *Den v. Curtis*, 1 Halst. (N. J.) 415.

When the submission is silent about the time when the award is to be made, notice of the award must be given to both parties. *Francis v. Ames*, 14 Ind. 251.

When an award is required to be under seal a written notice to the parties of its contents is a publication. *Morse v. Stoddard*, 28 Vt. 445.

Where a submission required that the award shall be published in ten days, it was held sufficient that it was written, signed, and witnessed at that time. *McClure v. Shroyer*, 13 Mo. 104.

The question was about a boundary-line, and the arbitrator fixed the line with the assistance of the parties. *Held*, that no further publication was necessary. *Jones v. Dewey*, 17 N. H. 596.

Where copies of an award were delivered to the parties, but the arbitrator

**Delivery.**—Unless the submission stipulates that the award should be delivered at a certain date actual delivery is not necessary. It will be sufficient if it is made and ready for delivery at the day fixed by the submission.<sup>1</sup>

When the submission requires the award to be delivered nothing short of actual delivery of the original award will satisfy the requirement.<sup>2</sup>

told them verbally that a correction may possibly have to be made in a boundary-line, upon consultation with the surveyor, and he kept the original award for that purpose and afterwards made the correction and said nothing further about it to the parties, the court held that the written award had not been published. *Caldwell v. Dickinson*, 13 Gray (Mass.), 365.

1. *Rundell v. La Fleur*, 6 Allen (Mass.), 480; *Houghton v. Burroughs*, 18 N. H. 499; *Crawford v. Orr*, 84 N. Car. 246; *Martin v. McCormick*, 34 N. J. L. 23; *Boots v. Canine*, 58 Ind. 450.

But it must be complete, and nothing must remain to be done to it. *Bloomer v. Sherman*, 5 Paige (N. Y.), 575; *Wilson v. Wilson*, 1 Saund. 327.

Where a submission required an award to be ready at a certain date, it was not called for until the day after, when it was delivered, bearing the date of delivery. The court held that it was no objection to the award that the day of its date was a day later than that named, it not being demanded before that time. *Owen v. Boerum*, 23 Barb. (N. Y.) 187.

A submission required that the award should be made and ready for delivery in ninety days. Held, that if the award was ready to be delivered on payment of the arbitrators' fees within the time it was within the provision of the submission. *Willard v. Bickford*, 39 N. H. 536.

Where the submission does not require the arbitrator to deliver the award, both parties are bound to take notice of it, and the party suing on it need not give the other notice of the execution of the award. *Houghton v. Burroughs*, 18 N. H. 199. *Compare Woodbury v. Northy*, 3 Greenl. (Me.) 85; s. c., 14 Am. Dec. 214; *Wright v. Smith*, 19 Vt. 110.

And where one party fails to demand a copy he cannot defeat the award by showing that if he had demanded a copy within the time it would not have been ready for him. *Burnap v. Losey*, 1 Lans. (N. Y.) 111.

2. *Russell on Arb.* 256.

Although it is not necessary that a copy should be delivered to each party unless specially required by the submission

or by statute. *Wade v. Powell*, 31 Ga. 1; *Houghton v. Burroughs*, 18 N. H. 499; *Buck v. Wadsworth*, 1 Hill (N. Y.), 321; *Pratt v. Hackett*, 6 Johns. (N. Y.) 14.

Where a party is in possession of the award delivery to him will be presumed. *Lansdale v. Kendall*, 4 Dana (Ky.), 613; *Thompson v. Mitchell*, 35 Me. 281.

An oral award is delivered by pronouncing it to the parties. *Morse on Arb.* 283.

Where delivery is required by the submission to one party or to both parties the parties may expressly or impliedly waive an actual delivery, as by accepting sworn copies instead of the original award, or by telling the arbitrator that they need not make a duplicate copy, for he will not receive it. *Coulter v. Coulter*, 81 Ind. 542; *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Gidley v. Gidley*, 65 N. Y. 169; *Houghton v. Burroughs*, 18 N. H. 499; *Buck v. Wadsworth*, 1 Hill (N. Y.), 321; *Perkins v. Wing*, 10 Johns. (N. Y.) 143. And see *Tracy v. Herrick*, 25 N. H. 381.

Where, by the terms of an arbitration bond, the arbitrators are required to seal up their award when completed, and retain it until the first day of a certain term of court beginning six weeks after the date of the bond, the statutory right of the parties to a copy of the award, and to service of notice thereof within fifteen days after the award is made, must be regarded as waived. *Marsh v. Curtis*, 71 Ind. 377.

Execution, publication, or delivery of an award on Sunday is, as a rule, void. *Story v. Elliott*, 8 Cow. (N. Y.) 27; s. c., 18 Am. Dec. 423. *Compare Isaacs v. Beth Hamedash*, 1 Hilt. (N. Y.) 469; *Kiger v. Coats*, 18 Ind. 153; *Blood v. Bates*, 31 Vt. 147; *Van Riper v. Van Riper*, 1 South. (N. J.) 156; s. c., 7 Am. Dec. 576.

Arbitrators may refuse to deliver the award until their fees are paid. *Ott v. Schroepel*, 3 Barb. (N. Y.) 56.

And an attorney may by verbal agreement obtain a valid lien on an award in favor of his client in an action for malicious prosecution. Such lien is valid against a creditor of the client without

**24. Impeachment of Awards.**—As a general rule the courts are very liberal in the construction of awards. All reasonable presumptions will be made in their aid. No intendment will be indulged to overturn them, but every reasonable intendment allowed to uphold them. To warrant a court in reviewing an award upon its merits, something more than error in the decision must be shown; such as an attempt to award upon a matter not submitted; a substantial failure to make a complete and final determination; a clear and gross mistake; an error in judgment so palpable as to evince partiality, corruption, or grave misconduct; or some violation of statute requirements on which the defeated party had a legal right to rely.<sup>1</sup>

notice of the assignment. *Williams v. Ingersoll*, 89 N. Y. 508.

1. *Wade v. Powell*, 31 Ga. 1; *Anderson v. Taylor*, 41 Ga. 10; *Tomlinson v. Hardwick*, 45 Ga. 547; *Overby v. Thrasher*, 47 Ga. 10; *McCullough v. Mitchell*, 42 Ga. 495; *Peachy v. Ritchie*, 4 Cal. 205; *Coupland v. Anderson*, 2 Call. (Va.) 106; *Willoughby v. Thomas*, 24 Gratt. (Va.) 521; *Richards v. Brockenbrough*, 1 Rand. (Va.) 449; *Head v. Minor*, 3 Rand. (Va.) 122; *Shermer v. Beale*, 1 Wash. (Va.) 11; *Wheatley v. Martin*, 6 Leigh. (Va.) 62; *Sherfey v. Graham*, 72 Ill. 158; *Van Landingham v. Lowery*, 2 Ill. 240; *Ross v. Watt*, 16 Ill. 99; *Kimball v. Walker*, 30 Ill. 482; *Struthers v. Clark*, 40 Iowa, 508; *Kendrick v. Turbell*, 26 Vt. 416; *Rixford v. Nye*, 20 Vt. 132; *Webber v. Ives*, 1 Tyler (Vt.), 441; *Harris v. Social Mfg. Co.*, 8 R. I. 133; *McKinney v. Western Stage Co.*, 4 Iowa, 420; *Liverpool, etc., Ins. Co. v. Goehring*, 99 Pa. St. 13; *Bernus v. Clark*, 29 Pa. St. 251; *Neal v. Shields*, 2 Pa. 300; *Wynn v. Bellas*, 34 Pa. St. 160; *Messick v. Ward*, 1 Grant's Cas. (Pa.) 437; *Carter v. Carter*, 109 Mass. 309; *Leominster v. Fitchburg, etc., R. Co.*, 7 Allen (Mass.), 38; *Spear v. Hooper*, 22 Pick. (Mass.) 144; *Boston Waterpower Co. v. Gray*, 6 Metc. (Mass.) 131; *McDowell v. Thomas*, 4 Neb. 542; *Cooper v. Andrews*, 44 Mich. 94; *Chicago, etc., R. Co. v. Hughes*, 28 Mich. 186; *Pierce v. Pierce*, 60 N. H. 355; *Sanborn v. Murphy*, 50 N. H. 65; *Ebert v. Ebert*, 5 Md. Ch. 353; *Sisson v. Baltimore*, 51 Md. 83; *Goldsmith v. Tilley*, 1 Har. & J. (Md.) 361; *Baker v. Crockett, Hard.* (Ky.) 388; *Jenkins v. Meagher*, 46 Miss. 84; *Cobb v. Parham*, 4 La. Ann. 148; *Bird v. Laycock*, 7 La. Ann. 171; *Deane v. Coffin*, 17 Me. 52; *Cushing v. Babcock*, 38 Me. 452; *Halstead v. Seaman*, 52 How. Pr. (N. Y.) 415; *Fudickar v. Guardian, etc., Ins. Co.*, 62 N. Y. 392; *Barlow v. Todd*, 3 Johns. (N. Y.) 367; *Cranston v. Kenny*,

9 Johns. (N. Y.) 212; *McKinney v. Newcomb*, 5 Cow. (N. Y.) 425; *Herrick v. Blair*, 1 Johns. Ch. (N. Y.) 101; *Shepard v. Merrill*, 2 Johns Ch. (N. Y.) 276; *Perkins v. Giles*, 53 Barb. (N. Y.) 342; *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 356; s. c., 8 Am. Dec. 513; *Bridgman v. Bridgman*, 23 Mo. 272; *Mitchell v. Curran*, 1 Mo. App. 453; *Bennett v. Russell*, 34 Mo. 524; *Richardson v. Lanning*, 26 N. J. L. 130; *Bell v. Price*, 22 N. J. L. 578; *West Jersey R. Co. v. Thomas*, 21 N. J. Eq. 205; *Veghte v. Hoagland*, 10 N. J. Eq. 45; *Mulder v. Cravat*, 2 Bay. (S. Car.) 370; *Sumpter v. Murrell*, 2 Bay. (S. Car.) 450; *Askew v. Kennedy*, 1 Bailey (S. Car.), 46; *Aylwin v. Perkins*, 3 Desau. (S. Car.) 297; *Fitzpatrick v. Smith*, 1 Desau. (S. Car.) 340; *Radcliffe v. Wightman*, 1 McCord (S. Car.), 408; *Bumpass v. Webb*, 4 Port. (Ala.) 65; s. c., 29 Am. Dec. 274; *Young v. Laird*, 30 Ala. 371; *Forshey v. G. H., etc., R. Co.*, 16 Tex. 516; *Bridgeport v. Eisenman*, 47 Conn. 34; *Brown v. Green*, 7 Conn. 536; *Ormsby v. Bakewell*, 7 Ohio, 98; *Davy v. Faw*, 7 Cranch (U. S.), 171.

When parties submit certain matters in controversy to arbitrators to be appointed by a committee of an association, the award is not invalidated by an error in a notice of their appointment, given to the arbitrators by a clerk of the committee, the error having no legal or actual effect upon the arbitration or the rights of the parties. *Ford v. Burleigh*, 60 N. H. 278.

Error in judgment in the arbitrators is not a sufficient ground for setting aside an award; nor will it be set aside as contrary to evidence if there is any evidence to support it. *Lester v. Callaway*, 73 Ga. 730.

An award will never be set aside upon the complaint of the party benefited by it; and the complainant must show not only a sufficient cause for setting aside the award, but also injury resulting from it. *Thompson v. Blanchard*, 2 Iowa, 44;

*Arbitrators—Fraud, Partiality, Corruption, or wilful misconduct of the arbitrators are causes for which an award may be set aside.*<sup>1</sup>

Tomlinson v. Hammond, 8 Iowa, 40; Tomlinson v. Tomlinson, 3 Iowa, 575; Pomroy v. Kibbee, 2 Root (Conn.), 92; Netleton v. Buckingham, 1 Root (Conn.), 149; Daniels v. Willis, 7 Minn. 374; Gudgell v. Pettigrew, 26 Ill. 305; Galvin v. Thompson, 13 Me. 367; Boston v. Brazier, 11 Mass. 447; Warfield v. Holbrook, 20 Pick. (Mass.) 531; Plummer v. Sanders, 55 N. H. 23; Penniman v. Patchin, 6 Vt. 325; Davy v. Faw, 7 Cranch (U. S.), 171.

Where arbitrators have made and published their award, and at the instance of one of the parties they change the award, and the award so changed is returned to court, and the other party moves to have the changed award entered up as the judgment of the court, and it is so entered up against the protest of the party at whose instance the original award was changed by an addition thereto, whereby it was made more favorable to him, said party is not prejudiced by the entering up of the second or changed award instead of the first, and cannot object. Rogers v. Corrothers, 26 W. Va. 238, 249.

Neither can a stranger to the award object to it. Penniman v. Patchin, 6 Vt. 325. Compare Denham v. Williams, 39 Ga. 312.

A party cannot object to an award on the ground of a cause of which he was advised at the time of the execution and to which he then did not object; his objection will be considered to have been waived. Willingham v. Harrell, 36 Ala. 583; McRae v. Buck, 2 Stew. & P. (Ala.) 155; Hall v. Morris, 30 Tex. 280; Hoogs v. Morse, 31 Cal. 128; Cromwell v. Owings, 6 Har. & J. (Md.) 10; Christman v. Moran, 9 Pa. St. 487; McCord v. Scott, 4 Watts (Pa.), 11; Rector v. Hunter, 15 Tex. 380; McDaniel v. Bell, 3 Hayw. (Tenn.) 258; Estice v. Cockerell, 26 Miss. 127; Fox v. Hazleton, 10 Pick. (Mass.) 275; Hite v. Hite, 1 B. Mon. (Ky.) 177; Plumer v. Wausan Boom Co., 49 Wis. 449. See Gaines v. Clark, 23 Minn. 64.

Objections to an award must be apparent on its face, and in the absence of fraud no extrinsic facts will be received in evidence to impeach it. Todd v. Barlow, 2 Johns. Ch. (N. Y.) 551; Ebert v. Ebert, 5 Md. 353; Dorsey v. Jeffray, 3 Har. & M. (Md.) 121; Cromwell v. Owings, 6 Har. & J. (Md.) 10; Withington v. Warren, 10 Metc. (Mass.) 431; Lewis v. Wildman, 1 Day (Conn.), 153; Brown v. Green, 7 Conn. 536; Wheatley

v. Martin, 6 Leigh. (Va.) 62; Head v. Muir, 3 Rand. (Va.) 122; Pleasants v. Ross, 1 Wash. (Va.) 156; s. c., 1 Am. Dec. 449; Shermer v. Beale, 1 Wash. (Va.) 11; Jocelyn v. Donnel, Peck. (Tenn.) 274; s. c., 14 Am. Dec. 753; Bumpass v. Webb, 4 Port. (Ala.) 55; s. c., 29 Am. Dec. 274.

Objections to an award must be specified. A statement that an award is not complete and does not conform to the submission is too general. Powell v. Ford, 4 Lea (Tenn.), 278; Spencer v. Curtis, 57 Ind. 221; Phipps v. Tompkins, 50 Ga. 641; Overby v. Thrasher, 47 Ga. 10; Chisolm v. Cothran, 40 Ga. 273; Snodgrass v. Snodgrass, 32 Ind. 406; Mitchell v. Brunswick, 41 Ga. 370; Sharp v. Loyless, 39 Ga. 7, 678.

Evidence will not be allowed to show that a claim which legally could not have been submitted was considered by the arbitrators when the award is unobjectionable on its face and no fraud or partiality is alleged. Rundell v. La Fleur, 6 Allen (Mass.), 480.

Newly discovered evidence which by due diligence could have been discovered before is no sufficient reason to set aside an award, unless it is so decisive and so suppressed by the other party that a court of equity will set it aside. Aubel v. Ealer, 2 Binn. (Pa.) 58; Lankton v. Scott, Kirby (Conn.), 356; Allen v. Ranney, 1 Conn. 569; Todd v. Barlow, 2 Johns. Ch. (N. Y.) 551; Hardin v. Almand, 64 Ga. 582; Adams v. Hubbard, 25 Gratt. (Va.) 129.

A common-law award can no more be impeached when pleaded in defence than when the subject of an action. Hartwell v. Penn. F. Ins. Co., 60 N. H. 293.

Any objection to an award should be made before judgment is rendered on it. Burrows v. Guthrie, 61 Ill. 70; Clark v. Clark, 46 Ga. 97. See Thurmond v. Clark, 47 Ga. 500.

1. Rand v. Redington, 13 N. H. 72; Torrance v. Amsden, 3 McLean (U. S.), 509; Smith v. Cooley, 5 Daly (N. Y.), 401; Newland v. Douglass, 2 Johns. (N. Y.) 61; Underhill v. VanCortlandt, 2 Johns. Ch. (N. Y.) 339; Lee v. Patilla, 4 Leigh. (Va.) 436; Fluharty v. Beatty, 22 W. Va. 698; Dickinson v. Railr. Co., 7 W. Va. 390; Speer v. Bidwell, 44 Pa. St. 23; Paul v. Cunningham, 9 Pa. St. 106; Emerson v. Udall, 13 Vt. 477; Eaton v. Eaton, 8 Ired. Eq. (N. Car.) 102; Hyeronimus v. Allison, 52 Mo. 102; Conrad v. Massasoit Ins. Co., 4 Allen (Mass.),

An arbitrator who has so misconducted himself that his award was rendered unavailing cannot recover for his services.<sup>1</sup>

*Fraud of Parties.*—An award will be set aside upon proof of fraud by one of the parties in obtaining the award.<sup>2</sup>

*Irregularity in Proceedings.*—An award will be set aside for irregularity in the proceedings, as where the parties did not receive due notice of the hearings.<sup>3</sup>

20; Boston Waterpower Co. v. Gray, 6 Metc. (Mass.) 131; Strong v. Strong, 9 Cush. (Mass.) 560; Brown v. Bellows, 4 Pick. (Mass.) 179; Beam v. Macomber, 33 Mich. 127; Sisk v. Garey, 27 Md. 401; Cleland v. Hedley, 5 R. I. 163; Bash v. Christian, 77 Ind. 290; Cothran v. Knox, 13 S. Car. 496.

But slight irregularities in the conduct of the arbitrators will not avoid an award when they have acted in good faith and no injustice is done. Plummer v. Sanders, 55 N. H. 23.

An award will be set aside where the arbitrators acted while in a state of intoxication. Smith v. Smith, 28 Ill. 56.

Though the intention of the arbitrators was perfectly honest, yet if their acts were decidedly partial the award will be set aside. Sullivan v. Frink, 3 Iowa, 66.

It is sufficient ground for setting aside an award that one of the three arbitrators after his appointment conversed fully on the merits of the dispute with one who had previously acted as arbitrator in respect to the same matter, and whose award had been set aside. Moshier v. Shear, 102 Ill. 169; s. c., 40 Am. Rep. 573.

Where an arbitrator pending the proceedings solicited favors of defendant which defendant refused to grant, and he made an award against defendant, it was set aside. Burrows v. Dickinson, 35 Hun (N. Y.), 492.

A party who wishes to impeach an award on the ground of fraud on the part of the arbitrators, must specify his charges. Phillips v. Phillips, 81 Ky. 147.

And object to the misconduct at the time, and not after an award against them has been rendered. Noyes v. Gould, 57 N. H. 20.

1. Bever v. Brown, 56 Iowa, 565; s. c., 41 Am. Rep. 118; Sanborn v. Murphy, 50 N. H. 65.

He is, however, not liable in an action for damages. Jones v. Brown, 54 Iowa, 74; s. c., 37 Am. Rep. 185; Phelps v. Dolan, 75 Ill. 90.

And where an arbitrator conspires with the attorney of one of the parties to induce the other arbitrator to join him in an unjust award, he will not be liable in damages. The attorney, however, is lia-

ble even where the award is not reversed. Hoosac Tunnel, etc., Co. v. O'Brien, 137 Mass. 424; s. c., 50 Am. Rep. 323.

2. Bulkley v. Starr, 2 Day (Conn.), 552; Baird v. Crutchfield, 6 Humph. (Tenn.) 171; Chambers v. Crook, 42 Ala. 171; Branden v. Forrest Co., 59 Pa. St. 187; Emerson v. Udall, 13 Vt. 477; Spurck v. Crook, 19 Ill. 415; Conway v. Duncan, 28 Ohio St. 102; Mathews v. Mathews, 1 Heisk. (Tenn.) 669; Craft v. Thompson, 51 N. H. 536.

An act of one of the parties before submission, without design to deceive the arbitrators, but which may affect their opinion, is not a sufficient ground for setting aside an award. Ellmaker v. Buckley, 16 S. & R. (Pa.) 72.

It is sufficient to authorize a court of equity to enjoin a suit at law upon an award, and set aside the award, that one of the parties in interest made a statement to one of the arbitrators, in the absence of the adverse party, designed and having a tendency to improperly affect his decision as an arbitrator, without showing that such statement, in fact, produced any harmful result to such other party. A party to an arbitration who by overt acts attempts to corrupt or improperly influence the arbitrators, or any one of them, to make an award in his favor, will not be heard to say that he was impotent to accomplish what he sought, and to raise an issue thereupon. Catelett v. Dougherty, 114 Ill. 568.

A party who himself has been the only cause of misbehavior on the part of the arbitrators, or either of them, cannot be heard to complain of such misbehavior. Rogers v. Corrothers, 26 W. Va. 238, 246.

3. McFarland v. Mathes, 10 Ark. 560; Cobb v. Wood, 32 Me. 455; Emery v. Owings, 7 Gill (Md.) 488; s. c., 48 Am. Dec. 580; Rigden v. Martins, 6 H. & J. (Md.) 403; Elmendorf v. Harris, 23 Wend. (N. Y.) 628; s. c., 35 Am. Dec. 587; Jordan v. Hyatt, 3 Barb. (N. Y.) 275; Peters v. Newkirk, 6 Cow. (N. Y.) 103; Hook v. Philbrick, 23 N. H. 288; Goodall v. Cooley, 29 N. H. 48; Lincoln v. Taunton Copper Mfg. Co., 8 Cush. (Mass.) 415; Crowell v. Davis, 12

**Oath of Arbitrator.**—In States where it is required that the arbitrators should be sworn before they proceed to hear the evidence, an omission of the oath is such a fatal irregularity that their award will be set aside.<sup>1</sup>

**Adjournments.**—Any excess of the power of the arbitrator in the matter of adjournments will avoid an award.<sup>2</sup>

**Evidence.**—An award will be set aside where illegal, *ex parte*, or otherwise incompetent evidence has been received and the reception of such evidence appears upon the face of the award; or where evidence has been refused which ought to have been received.<sup>3</sup>

**Irregularity in Form.**—An award may be set aside upon proof of irregularity in form, lack of finality, certainty, or mutuality, or of the fact that the arbitrator has exceeded his authority.<sup>4</sup>

**Mistakes of Fact.**—Another ground for setting aside an award is a mistake of fact, apparent upon the award itself; and this is held to invalidate the award, upon the principle that the award does not conform to the judgment of the arbitrators, and the mistake apparent in some material and important particular shows that the result is not the true judgment of the arbitrator. The mistake must be, therefore, of such a nature, so affecting the principles upon which the award is based, that if it had been reasonably known and disclosed to the arbitrators, if the truth had been known and understood by them they would probably have come to a different result. A familiar instance of this class of mistakes is an obvious error in computation, by which the apparent result in sums, or times, or other things of like kind is manifestly erroneous. In such case it is clear that the result stated is not that intended. It does not express the real judgment of the arbitrators.<sup>5</sup>

Metc. (Mass.) 293; Tate v. Vance, 27 Gratt. (Va.) 571; McCormick v. Blackford, 4 Gratt. (Va.) 133; Webber v. Ives, 1 Tyler (Vt.), 441; Falconer v. Montgomery, 4 Dall. (U. S.) 232; Lutz v. Linthicum, 8 Pet. (U. S.) 165; Rivers v. Walker, 1 Dall. (U. S.) 81. Compare Sweeney v. Vaudry, 2 Mo. App. 352. (See page 677 *et seq.*)

1. Overton v. Alpha, 13 La. Ann. 558; Toler v. Hayden, 18 Mo. 399; Walt v. Huse, 38 Mo. 210; Fassett v. Fassett, 41 Mo. 516; Combs v. Little, 4 N. J. Eq. 310. (See page 674.)

2. Coryell v. Coryell, 1 N. J. L. 385; Passmore v. Pettit, 4 Dall. (U. S.) 271; Forbes v. Frary, 2 Johns. Cas. (N. Y.) 234; Woodsworth v. Van Buskirk, 1 Johns. Ch. (N. Y.) 432; Cole v. Blunt, 2 Bosw. (N. Y.) 116. (See page 682.)

3. Thompson v. Blanchard, 2 Iowa, 44; Conrad v. Massasoit Ins. Co., 4 Allen (Mass.), 20; Jocelyn v. Donnel, Polk (Tenn.), 275; s. c., 14 Am. Dec. 753; Lowndes v. Campbell, 1 Hall (N. Y.), 598; Hogaboom v. Herrick, 4 Vt. 131;

Cutting v. Carter, 29 Vt. 72; Bulkley v. Starr, 2 Day (Conn.), 552; Fluharty v. Beatty, 22 W. Va. 698. (See page 679.)

But the party wishing to impeach the award must prove that the refused evidence was pertinent to the question at issue and material. Halstead v. Seaman, 52 How. Pr. (N. Y.) 415.

But objection must be made by the parties at the time the evidence is received. Patten v. Hunnewell, 8 Me. 19. (See page 673.)

4. Tudor v. Scovell, 20 N. H. 171; Price v. Thomas, 4 Md. 514; Stanton v. Henry, 11 Johns. (N. Y.) 133; Perkins v. Giles, 53 Barb. (N. Y.) 342; Rea v. Gibbons, 7 S. & R. (Pa.) 204; Gonsales v. Deavins, 2 Yeates (Pa.), 539; Burnam v. Burnam, 6 Bush (Ky.), 389; Heath v. Tenney, 3 Gray (Mass.), 380; Day v. Laffin, 6 Metc. (Mass.) 280; Dundon v. Starin, 19 Wis. 261; Archer v. Williamson, 2 Harr. & G. (Md.) 62; Crane v. Barry, 54 Ga. 500. (See page 692 *et seq.*)

5. Shaw, Ch. J., in Boston Water-power Co. v. Gray, 6 Metc. (Mass.) 137.

*Must be Apparent.*—The mistake for which an award will be set aside must be palpably apparent upon its face, in some material point, and extremely prejudicial to the losing party.<sup>1</sup>

*Award part Good, part Bad.*—An award in part good and in part bad may be divided and the objectionable part rejected as mere surplusage, if it can be readily distinguished from the rest, and the good part will be sustained.<sup>2</sup>

And see *Spoor v. Tyzzer*, 115 Mass. 40; *Eisenmeyer v. Santer*, 77 Ill. 515; *Kleine v. Catara*, 2 Gall. (U. S.) 61; *Garvey v. Carey*, 4 Abb. (N. Y.) Pr. N. S. 159; *Rogers v. Cruger*, 7 Johns. (N. Y.) 557; *Underhill v. Van Cortlandt*, 2 Johns. (N. Y.) 339; *Roloson v. Carson*, 8 Md. 208; *American Screw Co. v. Sheldon*, 12 R. I. 324.

A *bona-fide* error in judgment by arbitrators holding that certain claims were not barred by the statute of limitations is not such an error for which the award will be set aside. *Tennant v. Divine*, 24 W. Va. 387. And see *Portsmouth v. Norfolk Co.*, 31 Gratt. (Va.) 727.

The arbitrator must have been mistaken about some actual fact. Where one arbitrator signed the award drafted by the other arbitrator without reading it, and afterwards found that the award did not contain what he supposed, it was held not to be such a mistake as would avoid an award. *Withington v. Warren*, 10 Metc. (Mass.) 431.

One seeking to set aside an award on the ground of mistake must show that the award would have been different had the mistake not occurred. *Gorham v. Millard*, 59 Iowa, 554; *De Castro v. Brett*, 56 How. Pr. (N. Y.) 484; *Halstead v. Seaman*, 52 How. Pr. (N. Y.) 415.

1. *Williams v. Paschall*, 4 Dall. (U. S.) 285; *Morris v. Ross*, 2 Hen. & Munf. (Va.) 408; *Polard v. Lumpkin*, 6 Gratt. (Va.) 398; *Ross v. Overton*, 3 Call. (Va.) 309; s. c., 2 Am. Dec. 552; *Hartshorne v. Cuttrell*, 1 Green Ch. (N. J.) 297; *Green v. Lundy, Cox* (N. J.), 435; *Bumpass v. Webb*, 4 Port. (Ala.) 65; s. c., 29 Am. Dec. 224; *Sumpter v. Murrell*, 2 Bay. (S. Car.) 450; *Askew v. Kennedy*, 1 Bailey (S. Car.), 46; *Pullian v. Pensoneau*, 33 Ill. 375; *Allen v. Miles*, 4 Harr. (Del.) 234; *M'Calmont v. Whitaker*, 3 Rawle (Pa.), 84; s. c., 23 Am. Dec. 314; *Spier v. Bidwell*, 44 Pa. St. 23; *Horton v. Stanley*, 1 Miles (Pa.), 418; *Learned v. Bellows*, 8 Vt. 79; *Conger v. James*, 2 Swan (Tenn.), 213; *Halstead v. Seaman*, 52 How. Pr. (N. Y.) 415; *Bissell v. Morgan*, 56 Barb. (N. Y.) 369; *Platt v. Smith*, 14 Johns. (N. Y.) 368; *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.)

339; *Spofford v. Spofford*, 10 N. H. 254.

The award will not be reviewed upon a question of fact where evidence is conflicting and it is not contrary to the weight of evidence. *Kalbfleisch v. Long Island R. Co.*, 3 Centr. Rep. 663.

Mistakes in charging interest and the like do not furnish a ground for a court of equity to interfere and set aside an award. *Gardner v. Masters*, 3 Jones Eq. (N. Car.) 462.

An error in computation which may be made certain by mathematical calculation will not avoid an award. Such error may be cured by remittal. *Clement v. Foster*, 69 Me. 318.

An award may, however, be objected to on the ground of usury in the computation. *Woods v. Matchett*, 47 Md. 390.

Where the losing party, by mere negligence, caused a mistake of fact to take place or prevented its discovery, the award will not be set aside. *Vallé v. North Missouri R. Co.*, 37 Mo. 445; *Davis v. Henry*, 121 Mass. 150; *Harper v. Comm'r's of Pike*, 52 Ga. 659.

2. *Reynolds v. Reynolds*, 15 Ala. 398; *Bogan v. Danghrill*, 51 Ala. 312; *Adams v. Ringo*, 79 Ky. 211; *Carson v. Carson*, 1 Metc. (Ky.) 434; *Galloway v. Webb*, Hard. (Ky.) 326; *Ebert v. Ebert*, 5 Md. 353; *Cromwell v. Owings*, 6 Har. & J. (Md.) 10; *Caton v. McTavish*, 10 Gill. & J. (Md.) 192; *Garitee v. Carter*, 16 Md. 309; *Stanwood v. Mitchell*, 59 Me. 121; *Rawson v. Hall*, 56 Me. 142; *Day v. Hooper*, 51 Me. 178; *Banks v. Adams*, 23 Me. 259; *Orcutt v. Butler*, 42 Me. 83; *Clement v. Durgin*, 1 Me. 300; *Gordon v. Tucker*, 6 Me. 247; *Blossom v. Van Amringe*, 63 N. Car. 65; *Chase v. Strain*, 15 N. H. 535; *Tracy v. Herrick*, 25 N. H. 381; *Warner v. Collins*, 135 Mass. 26; *Barrows v. Capen*, 11 Cush. (Mass.) 37; *Gilmore v. Hubbard*, 12 Cush. (Mass.) 220; *Harrington v. Brown*, 9 Allen (Mass.), 579; *Sears v. Vincent*, 8 Allen (Mass.), 507; *Peters v. Peirce*, 8 Mass. 399; *Dickey v. Sleeper*, 13 Mass. 244; *Skillings v. Coofidge*, 14 Mass. 43; *Hoagland v. Veghte*, 23 N. J. L. 92; *Rogers v. Tatum*, 25 N. J. L. 281; *South v. South*, 70 Pa. St. 195; *Babb v. Stromberg*, 14

*Power of Court over Objectionable Award.*—The court has no power to modify an award even to correct an obvious miscalculation unless the authority be expressly given by statute. Its authority is only to confirm, reject, or recommit. A judgment different from the award cannot be entered.<sup>1</sup>

**25. Effect of the Award.**—A valid award has the same effect as a judgment, and concludes the parties to the controversy effectually from litigating the same matters anew.<sup>2</sup>

Pa. St. 397; *Wynn v. Bellas*, 34 Pa. St. 160; *Hartland v. Henry*, 44 Vt. 593; *Bixford v. Nye*, 20 Vt. 132; *Darling v. Darling*, 16 Wis. 644; *Parmelee v. Allen*, 32 Conn. 115; *Richardson v. Payne*, 55 Ga. 167; *Walker v. Walker*, 28 Ga. 140; *Carson v. Earlywine*, 14 Ind. 256; *Gibson v. Broadfoot*, 3 Desau. (S. Car.) 11; *Gibson v. Powell*, 13 Miss. 712; *Keep v. Keep*, 17 Hun (N. Y.), 152; *M'Bride v. Hagan*, 1 Wend. (N. Y.) 326; *Martin v. Williams*, 13 Johns. (N. Y.) 264; *Cox v. Jagger*, 2 Cow. (N. Y.) 638; s. c., 14 Am. Dec. 522; *Bacon v. Wilber*, 1 Cow. (N. Y.) 117; *Doke v. James*, 4 N. Y. 567; *Moore v. Luckess*, 23 Gratt. (Va.) 160; *Taylor v. Nicolson*, 1 Hen. & M. (Va.) 67; *Stearns v. Cope*, 109 Ill. 340; *Stevens v. Brown*, 82 N. Car. 460.

But where it cannot be readily distinguished the whole award must fall. *Sawyer v. Freeman*, 35 Me. 542; *Bullitt v. Musgrave*, 3 Gill (Md.), 31; *White v. Arthur*, 59 Cal. 33; *Bullock v. Bergman*, 46 Md. 270; *Whitcher v. Whitcher*, 49 N. H. 176.

And where the rejection of the objectionable part should do apparent injustice to one of the parties, as where it is the consideration for the other part, the whole award will be void. *Brown v. Warnock*, 5 Dana (Ky.), 492; *Boynton v. Frye*, 33 Me. 216; *Philbrick v. Preble*, 18 Me. 255; s. c., 36 Am. Dec. 718; *Clement v. Durgin*, 1 Greenl. (Me.) 300.

1. *Morse on Arb.* 330; *Smith v. Cutler*, 10 Wend. (N. Y.) 589; *Com. v. Pejepsut Props.*, 7 Mass. 399; *Phelps v. Goodman*, 14 Mass. 252; *Hiscock v. Harris*, 80 N. Y. 402. *Compare Com. v. Roxbury*, 9 Gray (Mass.), 451; *Henley v. Menefee*, 10 W. Va. 771.

An award may be recommitted to the arbitrators for correction of an acknowledged error. *Kleine v. Catara*, 2 Gall (U. S.) 61; *Blood v. Robinson*, 1 Cush. (Mass.) 389; *Yeaton v. Brown*, 52 N. H. 14; *Brann v. Vassalboro*, 50 Me. 64. *Compare Black v. Harper*, 63 Ga. 752.

Or for informality. *Bowers v. Worrell*, 1 Browne (Pa.), 170; *Snyder v. Hoffman*, 1 Binn. (Pa.), 43; *Shaw v. Pearce*, 4 Binn. (Pa.) 485; *Thompson v.*

*Warder*, 4 Yeates (Pa.), 336; *Heslop v. Bush*, 80 Pa. St. 70.

Or on the ground of newly-discovered evidence. *Depew v. Davis*, 2 Green (Iowa), 260.

And in some cases for the correction of substantial errors which can only be cured by a rehearing of the case. *Cumberland v. North Yarmouth*, 4 Greenl. (Me.) 459; *Algona v. Lott's Creek*, 54 (Iowa), 286.

It is within the discretion of the court either to recommit or to reject the award. *Walker v. Sanborn*, 8 Greenl. (Me.) 288; *Cumberland v. North Yarmouth*, 4 Greenl. (Me.) 459; *Boardman v. England*, 6 Mass. 70; *Whitney v. Cook*, 5 Mass. 143; *Treasurer v. Champaign Co. v. Norton*, 1 Ohio, 270; *Eastman v. Burleigh*, 2 N. H. 484; *Johnston v. Paul*, 22 Minn. 17.

Where a statute determines on what grounds an award may be reviewed, the court will have no authority to review it on any other grounds. *Dibble v. Camp*, 10 Abb. Pr. (N. Y.) 92.

A request of the arbitrators for the recommitment of an award on the ground of a change of opinion on the subject cannot be granted except by consent of the parties. *Cleveland v. Dixon*, 4 J. J. Marsh. (Ky.) 226.

After an award was once rejected it cannot be again recommitted. *Smith v. Smith*, 28 Ill. 56. *Compare Evans v. Sheldon*, 69 Ga. 100.

Where an award is recommitted the full power of the arbitrators revives, the recommitment must be of the whole cause, and his power is then only restricted by the terms of the submission. *French v. Richardson*, 5 Cush. (Mass.) 450; *Smith v. Warner*, 14 Mich. 152; *Maner v. Wilson*, 16 S. Car. 469.

The question whether an award is illegal and void upon its face is a question of law for the court, and cannot be submitted to the jury. *Cobb v. Morris*, 40 Ga. 671; *Tucker v. Allen*, 47 Mo. 488.

2. *Buck v. Buck*, 2 Vt. 417; *Preston v. Whitcomb*, 11 Vt. 47; *Jones v. Harris*, 58 Miss. 293; *Handy v. Cobb*, 44 Miss. 699; *Leonard v. Wading River, etc., Co.*,



**Merger.**—An award on a matter properly submitted is a merger of the original claim, which is completely extinguished; unless the award contains a condition by which the performance of certain acts must be proved before a party can avail himself of the award. Such performance must first be shown.<sup>1</sup>

**Matters not Submitted.**—The decisions in the various States do

113 Mass. 235; *Hewitt v. Furman*, 16 S. & R. (Pa.) 135; *Evans v. Kamphaus*, 59 Pa. St. 379; *Speer v. McChesney*, 2 Watts & S. (Pa.) 253; *Spencer v. Curtis*, 57 Ind. 221; *Rogers v. Holden*, 13 Ill. 293; *Strite v. Reiff*, 55 Md. 92; *Richardson v. Lanning*, 26 N. J. L. 130; *Martin v. Bevan*, 58 Ind. 282; *Johnston v. Paul*, 23 Minn. 46; *Wilkinson v. Sitton*, 54 Ga. 71; *Coleman v. Wade*, 6 N. Y. 44; *Freeman v. Kendall*, 41 N. Y. 518; *Wheeler v. Van Houten*, 12 Johns. (N. Y.) 311; *Fidler v. Cooper*, 19 Wend. (N. Y.) 285; *Truesdale v. Straw*, 58 N. H. 207; *Ford v. Burleigh*, 60 N. H. 278; *Girdler v. Carter*, 47 N. H. 305; *Varney v. Brewster*, 14 N. H. 49; *Barrett v. Henry*, 85 N. Car. 321; *Moore v. Austin*, 85 N. Car. 179; *Chambers v. Crook*, 42 Ala. 171; *Bunnell v. Pinto*, 2 Conn. 431; *Curley v. Dran*, 4 Conn. 259; s. c., 10 Am. Dec. 140; *McArthur v. Oliver*, 53 Mich. 299; *Day v. Bonner*, 3 Bing. (N. Car.) 219.

Even when erroneous if fairly made. *Morse v. Bishop*, 55 Vt. 231.

The award under a common law arbitration is not required to be made the judgment of any court; it is binding between the parties until set aside. *Sheffield v. Clark*, 73 Ga. 92.

But is no bar to a suit until properly set up in the answer. *Martin v. Rexroad*, 15 W. Va. 512.

Land was conveyed to a trustee in trust to allow A. to occupy the land during the life of the grantor, A. to support the grantor during his life, and, in case A. should be unable or neglect to fulfil his obligations, the trustee to appoint arbitrators to pass upon the matters submitted to them, with power to determine the trust, if requested by either party, in which case the trustee should hold the land for the benefit of the grantor. *Held*, on a writ of entry by the trustee against A., after an award of arbitrators determining the trust, that parol evidence was inadmissible to show that A. had fulfilled the obligations imposed on him by the deed. *Cook v. Gardner*, 130 Mass. 313.

An award is in a very limited and restricted sense a contract, but does not involve a promise to perform. *Johnson v. Maxey*, 43 Ala. 521.

And where the submission is entered

into under bonds the award may be pleaded in bar to an action on the same matter before the award is performed. *Pickering v. Pickering*, 19 N. H. 389; *Armstrong v. Master*, 11 Johns. (N. Y.) 189.

For the same principle applied to an award under a parol submission, see *Jessiman v. Haverhill Iron Co.*, 1 N. H. 68.

A plea of an award in bar need not aver a promise to abide by it or to perform it. Such intention is implied from the submission. *Evans v. McKinsey*, 6 Litt. (Ky.) 265.

Where the award confirms the document in dispute as a mortgage or an indenture and orders a performance of the covenants it contains, the original cause retains its force. *Howett v. Monical*, 25 Ill. 122; *Keeler v. Harding*, 23 Ark. 697.

An award which for any reason is void or not final and decisive is no bar to the original claim. *Mayor of N. Y. v. Butler*, 1 Barb. (N. Y.) 325; *Haggart v. Morgan*, 5 N. Y. 422; s. c., 55 Am. Dec. 350; *Hart v. Lanman*, 29 Barb. (N. Y.) 410; *Morton v. Cameron*, 3 Robt. (N. Y.) 189; *Smith v. Holcomb*, 99 Mass. 552; *Canfield v. Watertown Ins. Co.*, 55 Wis. 419.

And an award will not protect a party in rights acquired by fraud or mistake. It will only put the party to strict proof of the fraud or mistake. *Thornton v. McNeill*, 23 Miss. 369.

Judgment on an award is not granted as of course, and the party aggrieved may defend himself against the motion for judgment, even though he neglected to apply in time to have the award vacated. *Shores v. Bowen*, 44 Mo. 396.

1. *Com. v. Pejepsutt Prop'rs*, 7 Mass. 399; *Homes v. Aery*, 12 Mass. 134; *Tevis v. Tevis*, 4 T. B. Mon. (Ky.) 47; *Evans v. McKinsey*, 6 Litt. (Ky.) 263; *Curley v. Dean*, 4 Conn. 259; s. c., 10 Am. Dec. 140; *Bulkley v. Stewart*, 1 Day (Conn.), 130; s. c., 2 Am. Dec. 57; *Preston v. Whitcomb*, 11 Vt. 47; *Varney v. Brewster*, 14 N. H. 49; *Girdler v. Carter*, 47 N. H. 305; *Duren v. Getchell*, 55 Me. 241; *Armstrong v. Master*, 11 Johns. (N. Y.) 189; *Groat v. Pracht*, 31 Kans. 656.

not agree upon the question whether under a general submission actions upon matters not brought before the arbitrators, and consequently not decided upon, are barred by the award. In some States it is held that under a general submission all matters are barred whether submitted or not.<sup>1</sup> In others, actions upon matters included in the submission but not actually submitted are not barred.<sup>2</sup>

*Award in Matters concerning Real Estate.*—An award deciding upon matters of real estate, although conclusive between the parties, cannot pass the title. It merely acts as an estoppel, and prevents the losing party from denying the superiority of the title of the other party.<sup>3</sup>

1. *Wheeler v. Van Houten*, 12 Johns. (N. Y.) 311; *Fidler v. Cooper*, 19 Wend. (N. Y.) 285; *Emmet v. Hoyt*, 17 Wend. (N. Y.) 410; *Brazil v. Isham*, 12 N. Y. 9; *Owen v. Boerum*, 23 Barb. (N. Y.) 187; *Stipp v. Washington Hall Co.*, 5 Blackf. (Ind.) 473. Compare *Coleman v. Wade*, 2 Seld. (N. Y.) 44.

2. *Smith v. Whiting*, 11 Mass. 445; *Edwards v. Stevens*, 3 Allen (Mass.), 315; *Webster v. Lee*, 5 Mass. 334; *King v. Savory*, 8 Cush. (Mass.) 312; *Hodges v. Hodges*, 9 Mass. 320; *Hopson v. Doolittle*, 13 Conn. 236; *Bunnel v. Pinto*, 2 Conn. 431; *Buck v. Buck*, 2 Vt. 417; *Green v. Danby*, 12 Vt. 338; *Mt. Desert v. Tremont*, 75 Me. 252; *Yarmouth v. Cumberland*, 6 Greenl. (Me.) 21; *Bixby v. Whitney*, 5 Greenl. (Me.) 192; *Whittemore v. Whittemore*, 2 N. H. 26; *Hewitt v. Furman*, 16 S. & R. (Pa.) 135; *Lee v. Dolan*, 39 N. J. Eq. 193; *Keaton v. Mulligan*, 43 Ga. 308.

It has been held that an action on matters so omitted in the award can only be sustained where the omission was unintentional or by mistake, but will be barred if the omission was intentional or fraudulent. *Robinson v. Morse*, 26 Vt. 392; *Warfield v. Holbrook*, 20 Pick. (Mass.) 531.

Where the submission embraces all the accounts in a certain transaction, the accounts will be considered as a whole; and the omission of some items, even unintentionally, will be no ground for an action upon the original matter. *Briggs v. Brewster*, 23 Vt. 100.

Where it is doubtful whether a matter omitted was embraced in the submission the court will suppose that the matter has not been included. *Harris v. Wilson*, 1 Wend. (N. Y.) 511.

Where it can be proved that at the time of the submission of all matters "in difference" a certain matter between the same parties was not then in dispute,

an action upon such matter can be maintained after the award was made and judgment entered upon it. *Webster v. Lee*, 5 Mass. 334; *Hale v. Huse*, 10 Gray (Mass.), 99; *Newman v. Wood, Mart. & Y.* (Tenn.) 190; *Birkbeck v. Burrows*, 2 Hall (N. Y.), 51. Compare *Wheeler v. Van Houten*, 12 Johns. (N. Y.) 311; *Bunnel v. Pinto*, 2 Conn. 431; *Park v. Halsey*, 2 Root (Conn.), 100; *Fidler v. Cooper*, 19 Wend. (N. Y.) 285; *Harris v. Wilson*, 1 Wend. (N. Y.) 511.

The burden of proof to show that the matter was included in the arbitration is upon the party who seeks to interpose the award as a bar. *Robinson v. Morse*, 26 Vt. 392; *Webster v. Lee*, 5 Mass. 334.

Under a general submission intended to settle all matters between the parties one cannot after award rendered aver that certain matters have not been included. *Gardiner v. Oden*, 24 Miss. 382.

An award may be pleaded as a set-off in a suit which has been instituted after the award was made. *Varney v. Brewster*, 14 N. H. 49.

3. *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 650; s. c., 14 Am. Dec. 522; *Sellick v. Adams*, 15 Johns. (N. Y.) 197; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Shepherd v. Ryers*, 15 Johns. (N. Y.) 497; *Shelton v. Alcox*, 11 Conn. 240; *Murray v. Blackledge*, 71 N. Car. 492; *Thompson v. Deans*, 6 Jones Ev. (N. Car.) 22; *Girdler v. Carter*, 47 N. H. 305; *Gray v. Berry*, 9 N. H. 473; *Page v. Foster*, 7 N. H. 392; *Goodridge v. Dustin*, 5 Metc. (Mass.) 363; *Loring v. Whittemore*, 13 Gray (Mass.), 228; *Shackleford v. Purket*, 2 A. K. Marsh. (Ky.) 435; s. c., 12 Am. Dec. 422; *Calhoun v. Dunning*, 4 Dall. (U. S.) 120. Compare *Whitney v. Holmes*, 15 Mass. 152.

Even if the award, although in writing, be not under seal, it will act as an estoppel. *Shelton v. Alcox*, 11 Conn. 240.

If arbitrators wish to convey real es-

**Inadequate Award.**—Where arbitrators gave an inadequate award by ordering security to be given which in fact was no security, the award was held good. The court said: "It was submitted to them to point out the security. This has been done, and the parties cannot object."<sup>1</sup>

**Strangers to the Award.**—An award will bind only the parties to a submission, and not a stranger to it.<sup>2</sup>

**Ratification of the Award.**—Where an award, either because the arbitrators have exceeded their authority, or because all matters submitted have not been considered, or for any other reason, is voidable, the parties may expressly or impliedly ratify it. After such ratification it can no more be objected to.<sup>3</sup>

tate, they should specifically order the parties to execute and deliver a deed. *Loring v. Whittemore*, 13 Gray (Mass.), 228.

An award in matters concerning real estate may be used in evidence. *Byam v. Robbins*, 6 Allen (Mass.), 63.

An award fixing a boundary-line will be a good defence in a case of trespass. *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Gaylord v. Gaylord*, 3 Jones L. (N. Car.) 367. *Compare Drane v. Hodges*, 1 Har. & M. (Md.) 262.

An action of ejectment may be sustained on it. *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Jackson v. De Long*, 9 Johns. (N. Y.) 43; *Calhoun v. Dunning*, 4 Dall. (U. S.) 120.

1. *Cox v. Jagger*, 2 Cow. (N. Y.) 638; s. c., 14 Am. Dec. 522.

2. *Chapman v. Champion*, 2 Day (Conn.), 101; *Wyatt v. Benson*, 23 Barb. (N. Y.) 327; *Woody v. Pickard*, 8 Blackf. (Ind.) 55.

An award binding a party and his assigns to an annual payment is void unless the submission makes reference to the assigns. *Littlefield v. Smith*, 74 Me. 387.

But a stranger to it may bring himself within the operation of the award by accepting its conditions or receiving benefits under it. Thus where an heir, not a party to the submission, received the amount awarded him, he was held to be bound by the award. *George v. Johnson*, 45 N. H. 456.

Or where he actually assents to it, or is present when it is made, with a full knowledge that it is to be made, and does not dissent. *McGehee v. McGehee*, 12 Ala. 83; *Humphreys v. Gardner*, 11 Johns. (N. Y.) 61.

Although a stranger is not bound by the award, the parties to it are. *Sears v. Vincent*, 8 Allen (Mass.), 507.

A stranger may become a party to the award by assignment of the subject-mat-

ter. *Hodges v. Saunders*, 17 Pick. (Mass.) 470; *Shelton v. Alcox*, 11 Conn. 240.

An award may be binding on some of the parties and not on the others. Where parties competent to submit and parties incompetent, as adults and minors, unite in a submission, the adults will be bound, but not the minors. *Fort v. Battle*, 21 Miss. 133. (See page 23.)

3. *Cogswell v. Cameron*, 136 Mass. 518; *De Castro v. Brett*, 56 How. Pr. (N. Y.) 484; *Culver v. Ashley*, 19 Pick. (Mass.) 300; *Fudickar v. Guardian, etc.*, Ins. Co., 62 N. Y. 392; *Hays v. Hays*, 23 Wend. (N. Y.) 363; *Jones v. Phoenix Bank*, 8 N. Y. 428; *Perry v. Mulligan*, 58 Ga. 479; *Cross v. Cross*, 14 N. J. L. 288; *Stipp v. Washington Hall Co.*, 5 Blackf. (Ind.) 473; *Peniston v. Somers*, 15 La. Ann. 679; *State v. Gurnee*, 14 Kans. 111; *George v. Johnson*, 45 N. H. 456; *Ellison v. Weathers*, 78 Mo. 115; *Reynolds v. Roebuck*, 37 Ala. 408; *McCullough v. Myers*, Hard. (Ky.) 197; *Belt v. Poppleton*, 11 Or. 201. *Compare Munson v. Munson*, 3 Day (Conn.), 260.

Where one of the parties accepts from the other performance of his part of the obligations imposed by the award, it is a ratification. *Culver v. Ashley*, 19 Pick. (Mass.) 300; *Taylor v. St. Johnsbury, etc.*, R. Co., 57 Vt. 106.

Where matters in controversy between two parties were submitted to arbitration, and the party in whose favor the award was made received money and notes of other persons from the opposite party, in full settlement thereof, knowing at the time that there was a mistake in the calculation by which the full amount of interest due him had not been allowed, he could not retain the amount received under the arbitration, and also sue for the balance claimed to be due by reason of the mistake. If he received the money and notes in full settlement under the award, after notice of the mistake, he

*Executors and Administrators.*—It was formerly held that when an administrator or executor submitted the matters of an estate to an arbitration under the common-law rule he did so at his peril, and that he was personally bound by the award as well as the estate.<sup>1</sup>

This rule has, however, been much modified and is not law now. An executor acting fairly and prudently incurs no personal liability when acting in his official capacity, and the intention to act in such capacity is clearly shown on the face of the submission.<sup>2</sup>

**26. Enforcement of the Award.**—As an award is as conclusive upon the parties as a judgment and ends the litigation on the original cause effectually, it follows that in case of non-performance of the award an action for specific performance will lie at once after it is published. When money is awarded a demand is not even necessary unless required by the award itself.<sup>3</sup>

must abide the settlement. *Neel v. Field*, 72 Ga. 201. See *Phillips v. Couch*, 66 Mo. 219.

Giving of a note for the amount of an award is a ratification and a waiver of all irregularities in the proceedings. *Miller v. Brumbaugh*, 7 Kans. 343.

This applies only to a ratification made with full knowledge of all the facts. Where it is done without such knowledge the ratifying party may rescind the ratification as soon as he comes to a knowledge of the facts, and where the rescission works no injury to the other parties. *Culver v. Ashley*, 19 Pick. (Mass.) 300; *Payne v. Moore*, 2 Bibb. (Ky.) 163; s. c., 4 Am. Dec. 689. Compare *Tyler v. Stephens*, 7 Ga. 278.

An award void under a statute cannot be ratified. *Wiles v. Peck*, 26 N. Y. 42.

A valid award needs no ratification. *Sears v. Vincent*, 8 Allen (Mass.), 507.

Concurrence in an award for a long period of time acts as a ratification. *Jarvis v. Fountain Water Co.*, 5 Cal. 179; *Gove v. Richardson*, 4 Greenl. (Me.) 327; *McDaniel v. Bell*, 3 Hayw. (Tenn.) 258. Compare *Wheaton v. Crane*, 27 N. J. Eq. 368.

The ratification may be done by an agent if duly authorized. Authority to submit does, however, not imply authority to ratify a voidable award. *Bullitt v. Musgrove*, 3 Gill (Md.), 31.

An award may be repudiated by consent of both parties, who thereupon will be restored to their original rights. An award once repudiated cannot be restored. *Eastman v. Armstrong*, 26 Ill. 216; *Marshall v. Piles*, 3 Bush (Ky.), 249.

Where the matter about which an award has been rendered is submitted again to arbitration, it will be presumed

that the first award is waived. *Rollins v. Townsend*, 118 Mass. 224.

1. *Overly v. Overly*, 1 Metc. (Ky.) 117; *Tallman v. Tallman*, 5 Pick. (Mass.) 325.

That in submitting he admitted to have assets on hand to pay the amount awarded, and had to from his own funds if he had not. *Konigmacher v. Kimmel*, 1 Pen. & W. (Pa.) 207; s. c., 21 Am. Dec. 374.

That if less was awarded by the arbitrators than could have been recovered at common law he was to make up the deficiency. *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Overly v. Overly*, 1 Metc. (Ky.) 117; *Yarborough v. Leggett*, 14 Tex. 677; *Wheatley v. Martin*, 6 Leigh. (Va.) 62.

2. *Konigmacher v. Kimmel*, 1 Pen. & W. (Pa.) 207; s. c., 21 Am. Dec. 374; *McKeen v. Oliphant*, 18 N. J. L. 442; *Wood v. Tunnick*, 74 N. Y. 46; *Ferrin v. Myrick*, 41 N. Y. 315; *Sumner v. Williams*, 8 Mass. 162; s. c., 5 Am. Dec. 83.

Specially when the submission is entered into under a statute. *Overly v. Overly*, 1 Metc. (Ky.) 117; *Yarborough v. Leggett*, 14 Tex. 677.

Equity will set aside an award made under a submission agreed to by an administrator in the mistaken belief that his intestate had been served with process. *Bright v. Ford*, 11 Heisk. (Tenn.) 252.

3. *Morse on Arb.* 546; *Thompson v. Mitchell*, 35 Me. 281; *Plummer v. Morrill*, 48 Me. 184; *Parsons v. Aldrich*, 6 N. H. 264; *Nichols v. Rensselaer Co. Ins. Co.* 22 Wend. (N. Y.) 125; *Wilkes v. Cotter*, 28 Ark. 519; *Kingsley v. Bill*, 9 Mass. 198; *Carnochan v. Christie*, 11

## ARBITRATION—ARDENT SPIRITS—ARGUMENT.

**Must have Performed his Part.**—Where an award requires both parties to do certain things and the performance is to be concurrent, independent of each other, or on a condition precedent to the other, the party who wishes to enforce the award must show that he has performed his part, has tendered performance or has a legal excuse for non-performance.<sup>1</sup>

**ARDENT SPIRITS.**—In an indictment under a statute was held to mean the simple liquors named in the statute, viz., wine, rum, gin, brandy, whiskey, or cider spirits.<sup>2</sup> Alcohol is neither *ardent* nor *vinous* spirits.<sup>3</sup>

**ARE CHARGED.**—Applied to the estates of a covenantor, as distinguished from "he *will* charge," create a clear charge upon the covenantor's lands.<sup>4</sup>

**ARGUMENT.**—The speeches of the opposing counsel on a matter, involving a question of law as a demurrer, case stated, appeal, etc.<sup>5</sup>

Wheat. (U. S.) 446; Webb v. Zeller, 70 Ind. 408; Burke v. Parke, 5 W. Va. 122.

The action must be upon the award, not upon the submission. Rank v. Hill, 2 Watts & S. (Pa.) 56; s. c., 37 Am. Dec. 483.

But where the submission is by mutual bonds an action will lie upon the bond or upon the award. If a party sues upon the award and obtains satisfaction he stands in the same position toward the bond as if the award had been paid voluntarily. Nolthe v. Lowe, 18 Ill. 437; Shockey v. Glasford, 6 Dana (Ky.), 9; Thompson v. Childs, 7 Fred. L. (N. Car.) 435.

One in whose favor an award has been rendered cannot sue both on the award and the penalty. Jackson v. Hoffman, 31 La. Ann. 97.

1. Jesse v. Cater, 28 Ala. 475; Pomroy v. Gold, 2 Metc. (Mass.) 500; Huy v. Brown, 12 Wend. (N. Y.) 591; Shearer v. Handy, 22 Pick. (Mass.) 417; Hugg v. Collins, 18 N. J. L. 294; Matthews v. Matthews, 2 Curtis (U. S.), 105; Leitch v. Beaty, 23 Ill. 642.

Not so when the performance is not to be concurrent and independent of each other and can be enforced independently. Girdler v. Carter, 47 N. H. 305; Pickering v. Pickering, 19 N. H. 389; Schoff v. Bloomfield, 8 Vt. 472; Nichols v. Renselaer Co. Ins. Co., 22 Wend. (N. Y.) 125; Loring v. Whittemore, 13 Gray (Mass.), 228.

A tender which is refused is equal to a performance. Smith v. Stewart, 5 Ind. 220; Preston v. Whitcomb, 11 Vt. 47; Lincoln v. Cook, 3 Ill. 61.

Where money is awarded and mutual

releases ordered, a tender of the release is not necessary before action for the money can be brought. Dudley v. Thomas, 23 Cal. 365.

Where arbitrators award a sum of money payable at some future day, the payment to be secured by a bond, an action for the money will accrue at once upon refusal to execute the bond. Bayne v. Morris, 1 Wall. (U. S.) 97.

A suit upon an award need not cover the whole of it. The performance of any part of it may be enforced which is independent in itself, and can be enforced without doing injustice. Schuyler v. Vanderveer, 2 Cal. (N. Y.) 235; Lamphire v. Cowan, 39 Vt. 420.

An award under a general submission ordering that one of the parties should pay a certain sum to the creditor of the other party can be enforced by the creditor although a stranger to the arbitration. Scarce v. Scarce, 7 Ind. 286.

Although a judgment rendered upon an award may be unauthorized and void, such judgment does not avoid the award. Hume v. Hume, 3 Pa. St. 144.

**Authorities for Arbitration and Award.**

—Morse on Arb. and Award; Russell on Awards; Kyd on Awards; Blacks. Com.; Parsons on Contr.; Bouvier Inst.; Bouvier Law Dict.; Worcester Law Dict.

2. Townley *adms.* State, 3 Harr. (N. J.) 11.

3. State v. Martin, 34 Ark. 340.

4. Falkner v. O'Brien, 2 Ball & B. 223.

5. "Before the Argument," in a Rule of Court prescribing that exceptions must be noted and filed "at least one day before the argument," was held to mean

**ARISE.**—To proceed; to issue; to spring.<sup>1</sup>

**ARISEN—ARISING—AROSE.** See **ARISE**, *n*.

**ARM—ARMED.**—To furnish; furnished with arms. (See **ARMS**.)  
By armed vessel is meant ordinarily one having cannon.<sup>2</sup> A schooner having on board but one musket, a few ounces of powder, and a few balls, and possessing little capacity for offence was held not to be an "armed vessel."<sup>3</sup>

"an oral argument before the court;" but it was also held that "agreeing to waive argument before the court; and taking time to file briefs on the merits of the case, was the same in effect as an oral argument." *State of Nev. v. Cal. M. Co.*, 13 Nev. 210.

So where the copies of the judgment-roll of the court below were to be delivered "four clear days before the day appointed for argument," those words were held to refer, not to a day on which the judges met for the purpose of appointing the days for hearing arguments, but to the day on which the argument had been appointed to take place. *Parr v. Jewell*, 16 C. B. 700.

**Use any Argument in his Charge.**—The words in a statute prohibiting a judge from using "any argument in his charge calculated to rouse the sympathy or excite the passion of the jury" do not forbid his making his charge "argumentative" so long as it comes within the limitation prescribed by the latter words. *Cesure v. The State*, 1 Tex. App. 23.

1. *In re Bogart*, 2 Sawy. (U. S.) 405.

**Case Arising in the Land or Naval Force.**—An offence committed by one while in the naval service comes within the above class, although the charge is not actually framed and presented till after the offender ceases to be in the service. "What does 'arising' mean as here used? Certainly not merely making a statement of the pre-existing facts, which constitutes a case for judicial cognizance. . . . A case arising in the land or naval forces . . . appears to us to be a case proceeding, issuing, or springing from acts in violation of the naval laws and regulations committed while in the naval forces or service." *In re Bogart*, 2 Sawy. (U. S.) 396.

**Cause of Action shall have Arisen.**—Where an action by an administrator is barred unless "commenced within one year after the cause of action shall have arisen," it was held that no cause of action can arise or exist in favor of an administrator until he comes into existence as such, and that a suit brought within one year after his appointment is

not barred. *Andrews v. Hartford, etc. R. Co.*, 34 Conn. 57.

**Arise Out of the Same Transaction**, referring to "several causes of action," means "founded upon." *Scarborough v. Smith*, 18 Hun (N. Y.), 405.

**Arising During the Course of the Trial.**

—After an issue of fact is joined in a criminal case, every step thereafter taken for the purpose of a determination of that issue, up to and including the verdict, is a step or proceeding "arising during the course of the trial" within the meaning of a statute regulating motions for new trials. *People v. Turner*, 39 Cal. 371. See also *Reg. v. Martin*, Temp. & M. 78.

**Where the Cause of Action Arose**, in a statute, referring to the county where trial was to take place, means "where the debt was contracted or originated." *Steele v. Comm'rs*, 70 N. C. 139.

**Cases Arising under Treaties**, in the Constitution, means cases in which a party's right grows out of or is protected by a treaty. *Owings v. Norwood's Lessee*, 5 Cranch (U. S.), 348.

**Cases Arising in a Justice's Court** is synonymous with "actions originally commenced" in that court. *Cook v. Nellis*, 18 N. Y. 127.

**Crimes Arising under the Revenue Laws** include specific acts in violation of the laws made to protect the revenue, but not, in any just sense, a conspiracy to defraud the government, though it may be directed to the revenue as its object. *U. S. v. Hirsch*, 10 Otto (U. S.), 35.

**Duties Arising on Goods Imported**, in a statute regulating the commissions to be received by the collectors of duties on account of such duties, was held to have a future signification. The word "arising" refers to the present time or time to come, but cannot with any propriety relate to time past and embrace former transactions." *U. S. v. Heth*, 3 Cranch. (U. S.) 413.

2. *Attorney-General v. Sillem*, 2 H. & C. 537.

3. *Murray v. Schr. Betsy*, 2 Cranch. (U. S.) 121.

**British Armed Vessel-of-War.**—Under

**ARM OF THE SEA.**—A navigable body of water where the tide flows and reflows, and so far only as the tide flows and reflows.<sup>1</sup> But "it does not follow that any creek or rivulet in which the tide ebbs and flows, and which may be used at certain tides by small boats for individual convenience, is to be dignified with the appellation of an arm of the sea."<sup>2</sup>

**ARMS**, as used in the Constitution in the provision that "the right of the people to keep and bear arms shall not be infringed," refers to the arms of a militiaman or soldier, and the word is used in its military sense.<sup>3</sup> The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster, pistols, and carbine; of the artillery, the field-piece, siege-gun, and mortar, with side-arms.<sup>4</sup> But laws punishing the carrying of "concealed weapons" are not unconstitutional.<sup>5</sup>

Also, coats-of-arms, escutcheons, crests, cognizances of families.<sup>6</sup>

an act permitting any person to destroy "any British armed vessel-of-war," it was held not necessary that she should have any particular or specified armament. If she belonged to the British navy, and was used for hostile purposes, being armed with muskets, pikes, cutlasses, etc., it was enough to bring her within the intention of the act. *Parlin v. U. S.*, 1 Ct. of Cl. (U. S.) 174.

1. *Adams v. Pease*, 2 Conn. 484.

2. *Glover v. Powell*, 2 Stockt. Ch. (N. J.) 223.

Long Island Sound was held to be an arm of the sea "within the common-law acceptance of the term, being navigable tide-water, . . . and more specifically an arm of the sea than mere rivers, bays, or inlets; because, in addition to its tide-water and navigable quality, it is without the territorial limits of any county." *The Sloop Martha Anne, Olcott (U. S.)*, 21.

3. *English v. State*, 35 Tex. 476. In this case it is said: "The provision protects only the right to 'keep' such arms as are used for the purpose of war in distinction from those which are employed in quarrels and broils and fights between maddened individuals, since such only are properly known by the name of 'arms,' and such only are adapted to promote the 'security of a free State.' In like manner the right to 'bear' arms refers merely to the military way of using them, not to their use in bravado and affray."

To the same effect are *Fife v. State*, 31 Ark. 455; *Andrews v. State*, 3 Heisk. (Tenn.) 179, in which cases acts prohibiting the carrying of such weapons as pistols, dirk, and bowie-knives, etc., were held constitutional. See, *contra*, *Munn v. State*, 1 Kelly (Ga.), 251, where so much of a similar act as con-

tained a prohibition against bearing arms openly was held in conflict with the Constitution and void. "The right of the whole people, old and young, men, women, and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon in the smallest degree. . . . Lexington, Concord, Camden, River Raisin, Sandusky, and the laurel-crowned field of New Orleans plead eloquently for this interpretation!"

**Loaded Arms.**—On indictments for attempts to discharge "loaded arms," under stat. 9 Geo. IV. c. 31, §§ 11 and 12, the following were held not to be "loaded arms:" a pistol loaded with gunpowder and balls, but with its touch-hole so plugged that it could not by any possibility be fired; a tin box sent, to a person, containing gunpowder and two detonators intended to ignite the powder when any one opened the box. *Rex v. Harris*, 5 C. & P. 159; *Rex v. Mountford*, 7 C. & P. 242.

**Arms to Aid his Escape.**—Sending a prisoner an instrument of writing informing him that he has a friend and can be released from confinement is no violation of a statute prohibiting the conveying to any person lawfully imprisoned of "any disguised instrument, arms, or other thing proper or useful to aid any prisoner in his escape." *Hughes v. State*, 1 Eng. (Ark.) 131.

4. *English v. State*, 35 Tex. 476.

5. See cases cited in n. 3, and *Hill v. State*, 53 Ga. 572; *Wright v. Commonwealth*, 77 Pa. St. 470; *Chatteaux v. State*, 52 Ala. 388; *Cooley on Const. Lim.* sec. 350, n.

6. *Rap. and Lawr. L. Dict.*

**Arms of this Territory.**—"Arms" in a

## AROMATIC—ARRAIGNMENT—ARREARS—ARREST.

**AROMATIC.**—A quality possessed by liquor.<sup>1</sup>

**ARRAIGNMENT.**—The calling of the prisoner to the bar of the court to answer the matter charged upon him in the indictment.<sup>2</sup>

**ARRANGEMENT.**—The natural meaning of this word is, setting in order.<sup>3</sup>

**ARREARS.**—Money due and owing; as, where calls on stock are not paid when due the holder is said to be in arrears.<sup>4</sup>

**ARREST (CIVIL CASES).** (See also **ARREST (CRIMINAL CASES).**)

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|--|---|
| 1. <i>By Statute.</i>                              | 7. <i>Privilege.</i>                      |
| 2. <i>The Law Determining the Right to Arrest.</i> | 8. <i>Married Women.</i>                  |
| 3. <i>Process—How Obtained.</i>                    | 9. <i>Foreign Ministers.</i>              |
| 4. <i>Execution for Costs.</i>                     | 10. <i>Waiver.</i>                        |
| 5. <i>Breaking Doors.</i>                          | 11. <i>Discharge from Illegal Arrest.</i> |
| 6. <i>Time of Arrest.</i>                          | 12. <i>Second Arrest.</i>                 |
|  | 13. <i>Contempt.</i>                      |

1. **By Statute.**—In most jurisdictions the arrest of the defendant in a civil action or suit is permitted by statute in certain cases.<sup>5</sup>

statute enacting that the "arms of this territory" should be engraved on notarial seals was held to mean "the armorial ensigns of a State or political community intended to distinguish it from others, which is usually transferred to its national flag or banner. Yet perhaps a public flag cannot always be considered as a true indication of the arms of the country to which it belongs; for most countries have two banners—the one borne by vessels of war, and the other by those engaged in commerce." *Kirkrey v. Bates*, 7 Port. (Ala.) 534.

1. "The word 'aromatic' is employed as expressive of one of the qualities of the plaintiff's liquor, and therefore can not be claimed as a trademark." *Burke v. Cassin*, 45 Cal. 480.

2. *Goodwin v. The State*, 16 Ohio St. 346, quoting *Bla. Com.* 4, 322, and *Ros. Crim. Ev.* 224; *Jackson v. Com.* 19 Gratt. (Va.) 656

**Arraignment of the Prisoner.**—"To take order that he appear and for the certainty of the person to hold up his hand and to plead a sufficient plea to the indictment or other record." *Com. v. Hardy*, 2 Mass. 306, quoting *Co. Litt.* 263, a.

3. *Tetley v. Taylor*, 1 El. & Bl. 540.

It is a very wide and indefinite term and does not necessarily mean a positive agreement. *Manning v. Eastern Co. R. Co.*, 12 M. & W. 253.

4. *Kahn v. The Bank of St. Joseph*, 70 Mo. 262.

**Arrears of Rent.**—Under a devise of "arrears of rent and interest due at my death," an annuity due at testator's

death would pass. *Hele v. Gilbert*, 2 Ves. Sr. 430.

**Arrears of Taxes.**—Arrears means something behind in payment; it implies a duty and a default; therefore taxes could not be in arrears until the rate was fixed. *Corbett v. Taylor*, 23 U. C. S. B. 454.

5. At common law, the arrest of the defendant upon civil process was only allowed for civil injuries accompanied by force. 1 *Tidd Prac.* 128; 3 *Blk. Comm.* 281; *Freeman on Executions*, § 451. But in any action where the king was plaintiff he could take the body of the defendant in execution. *Freeman on Execution*, § 451; *Harbert's Case*, 3 Co. 12, b.

By successive statutes the right of arrest upon mesne process was given in all or nearly all kinds of actions. 3 *Black. Com.* 281; *Freeman on Executions*, § 451. Moreover, it was the practice to bring an original writ of trespass *vi et armis* in all cases under which defendant could be arrested, and then, by connivance of the court, to prosecute for any less forcible injury. 3 *Black. Com.* 281.

At the present day, civil arrest is everywhere regulated by statute, and the right of arrest, formerly existing in nearly all classes of actions, has been materially restricted. *Freeman on Executions*, § 451. The right of arrest is now generally confined to cases of tort for personal injury, or where fraud or a breach of a fiduciary duty on the part of the defendant is involved, or where the defendant attempts to dispose of his property or conceal it from levy. *Freeman on Executions*, § 451.



A civil arrest may be either on mesne or final process.<sup>1</sup>

The object of arrest on mesne process is to compel the defendant to appear in the cause.<sup>2</sup>

In most States there are constitutional provisions prohibiting arrest or imprisonment for debt. Ala. Const. art. 1, § 22; Ariz. B. Rights, 18; Ark. Const. art. 1, § 14; Cal. Const. art. 1, § 15; Fla. Constit. Decl. of Rights, 15; Ga. Const. art. 1, ch. 1, § 21; Ind. Const. art. 1, § 22; Iowa Const. art. 1, § 19; Kan. Const. Bill of Rights, 16; Md. Const. art. 3, § 38; Mich. Const. art. 6, § 33; Minn. Const. art. 1, § 12; Miss. Const. art. 1, § 11; Mo. Const. art. 2, § 16; Neb. Const. art. 1, § 20; N. J. Const. art. 1, § 17; Nev. Const. art. 1, § 14; N. Car. Const. art. 1, § 16; Ohio Const. art. 1, § 15; Oreg. Const. art. 1, § 19; S. Car. Const. art. 1, § 20; Tenn. Const. art. 1, § 18; Texas Const. art. 1, § 18; Wis. Const. art. 1, § 16; Stimson Am. Stat. Law, § 80. But such constitutional provisions ordinarily permit arrest for fraud either in civil or criminal actions. Stimson Am. Stat. Law, § 80. Constitutional provision prohibiting arrest in case of debt held not to apply to arrest in actions of tort. Long v. McLean, 88 N. Car. 3; *Ex parte Hardy*, 68 Ala. 303; *McKindley v. Rising*, 28 Ill. 337. But where the constitution prohibits imprisonment for debt, except in case of fraud, a statute allowing the arrest of the defendant in actions of breach of promise of marriage is unconstitutional. Moore v. Mullen, 77 N. Car. 327.

Where, in bail-trover, by election of the plaintiff, the jury returned an alternative verdict for a specified amount of money, to be discharged by the delivery of property within twenty days, and the defendant failed to deliver it within such time, the verdict became absolute for money. Therefore, further imprisonment under the bail process would be for a debt, and hence unconstitutional. Southern Express Co. v. Lynch, 65 Ga. 240.

A statute allowing a judge to imprison a debtor for refusal to obey an order for personal examination, in aid of execution, is not in violation of a constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Eikenbury v. Edwards, 25 N. W. Repr. (Iowa) 832.

Where *capias ad satisfaciendum* had been expressly abolished (by statute), it was held that the right of the State to enforce the payment of a judgment for a fine and costs by a *capias pro fine* was

not affected thereby. Com. v. Webster, 8 Gratt. (Va.) 702.

1. The mesne process at common law was called a writ of *capias ad respondendum*, the final, a writ of *capias ad satisfaciendum*. 1 Tidd Pr. 128, 1025; 3 Black. Comm. 281, 414.

The early English statutes enlarging the right of arrest, provided for arrest on mesne process only, but the courts assumed that, whenever arrest on mesne process was allowed, the defendant might be arrested on final process as well. Freeman on Executions, § 451; 2 Tidd Pr. 1025.

2. 3 Blk. Comm. 290, 414.

The object of the arrest being only to compel an appearance, the defendant was, under the former English practice, entitled to release on furnishing special bail to appear, his appearance being effected by furnishing bail to the action—that is, to pay any judgment that might be entered against him in the action. 3 Blk. Comm. 290, 291.

The writ of *capias ad respondendum* appears originally to have been a writ by the court to compel obedience to its summons, which, in theory, though not in practice, was served upon the defendant before the *capias* was issued, and in contempt of which the defendant was, by fiction of law, supposed to stand when the *capias* was issued. 3 Blk. Comm. 287.

Where a defendant was in custody under a writ of *capias ad respondendum*, the plaintiff could not, after judgment, proceed against his body, unless he first charged him in execution, and if he failed to do so within two terms after judgment, the defendant was entitled to be released. 1 Tidd Pr. 362, 363; U. S. v. Griswold, 6 Sawy. (U. S. C. Ct.) 255.

Where judgment in an action has been perfected against the defendant, and he has been charged in execution, a provisional order of arrest issued thereon is extinguished, and is thereafter of no force or validity; it is not revived by a reversal of the judgment. Accordingly held, that, upon such reversal, the relators, who were held in confinement under the execution, could not be held under the order of arrest, but were entitled to their discharge. As to whether a new order of arrest may be obtained, *quære*. People v. Bowe, 81 N. Y. 43.

Statutes generally provide the time in which the body of a defendant arrested

Arrest on final process is for the purpose of taking the body of the defendant in execution upon a judgment of some court.<sup>1</sup>

**2. The Law Determining the Right to Arrest.**—Arrest being wholly a matter of remedy, the right of arrest depends upon the law of the jurisdiction where the action is brought.<sup>2</sup>

**3. Process—How Obtained—Affidavit and Bond.**—In most jurisdictions the filing by the plaintiff of an affidavit making a case for arrest within the provisions of the statute,<sup>3</sup> and of a bond to indemnify the defendant in case the arrest is adjudged unauthorized,<sup>4</sup> are prerequisites to the issuance of mesne process of arrest.

on mesne process must be charged in execution. *U. S. v. Griswold*, 6 Sawy. (U. S. C. Ct.) 255.

1. Where the body of the defendant is taken on a *ca. sa.*, the judgment is satisfied conditionally; that is, no proceedings can be had upon it while the defendant is held. *Freeman on Executions*, § 462.

And an arrest of the defendant and his subsequent release by the plaintiff is an absolute satisfaction of the judgment. *Freeman on Executions*, § 464, and cases cited; *Magniac v. Thompson*, 15 How. (U. S.) 281; *Harden v. Campbell*, 4 Gill (Md.), 29.

But where the imprisoned debtor escapes, the judgment thereupon revives. *Freeman on Executions*, § 463.

So also where he is discharged for non-payment of court fees or on taking the poor debtors' oath. *Freeman on Executions*, § 463.

*2. Imlay v. Ellefsen*, 2 East. 453; *Robinson v. Bland*, 2 Burr. 1077; *Hinckley v. Marean*, 3 Mason (U. S. C. Ct.), 88; *Titus v. Hobart*, 5 Mason (U. S. C. Ct.), 378; *Peck v. Hozier*, 14 Johns. (N. Y.) 346; *Smith v. Spinolla*, 2 Johns. (N. Y.) 198, 200; *Atwater v. Townsend*, 4 Conn. 47; *Woodbridge v. Wright*, 3 Conn. 523.

Accordingly it was held that poor debtor laws of the State, under which the person of the debtor was exempted from arrest, but which did not release the debt, would not be observed in the Federal courts sitting within the State. *Read v. Chapman*, Peters (U. S. C. Ct.), 404; *Campbell v. Claudius*, Peters (U. S. C. Ct.), 484.

By act of Congress Federal courts are now required to observe the laws of the State in which they sit, limiting or restricting the power to imprison for debt. U. S. R. S. §§ 990, 991.

**3. The requirements of the affidavit** are governed by statute. In some States it cannot be made by an attorney. *Ex parte Hartley*, 5 Ark. 32.

1 C. of L.—46

In others it can. *Wilson v. Nettleton*, 12 Ill. 61.

**Information and Belief.**—Under some statutes it has been held that a creditor must swear positively, of his own knowledge, as to the existence and amount of his claim. *Herwig v. Beach*, 15 La. Ann. 261; *Herf v. Schulze*, 10 Ohio, 263; *Crane v. Fish*, 2 Miles (Pa.), 165; *In re Nicholson*, 2 Miles (Pa.), 322. *Compare Com. v. Fritz*, 2 Miles (Pa.), 336. See also *Lewis v. Brackenridge*, 1 Blackf. (Ind.) 112.

In the absence of any express statutory provision as to whether the affidavit must state the knowledge of the affiant, or whether a statement of information and belief is sufficient, it has been held that it must in general state the affiant's knowledge. *McGilvery v. Morehead*, 2 Cal. 607; *Meddaugh v. Williams*, 48 Mich. 172; *De Long v. Briggs*, 47 Mich. 624; *Whitlock v. Roth*, 5 How. Pr. (N. Y.) 143; *Crandall v. Bryan*, 15 How. Pr. (N. Y.) 48; *Satow v. Reisenberger*, 25 How. Pr. (N. Y.) 164; *Union Bank v. Mott*, 9 Abb. Pr. (N. Y.) 106.

But the affidavit may be an information and belief if it states the sources whence information was derived, and where the informants reside, if the residence of such informants be so remote that their sworn affidavits cannot be had in time to make a successful arrest. *City Bank v. Lumley*, 28 How. Pr. (N. Y.) 397; *Whitlock v. Roth*, 5 How. Pr. (N. Y.) 143; *Crandall v. Bryan*, 15 How. Pr. (N. Y.) 48; *Mattoon v. Eder*, 6 Cal. 57.

If the information is derived from documents, this should be stated, and the documents presented with the application or copies of them furnished. *De Nierth v. Snider*, 25 How. Pr. (N. Y.) 419.

**4. Newell v. Doran**, 21 How. Pr. (N. Y.) 427.

The validity of the process depends upon the validity of the affidavit. If the

**4. Execution of Process.**—The law as to what constitutes an arrest<sup>1</sup> and as to the manner of making an arrest, the rights, duties,<sup>2</sup> and liabilities of officers, killing of officers, etc., is the same for both criminal and civil arrests, and the reader is referred to the treatment of those topics under the head of CRIMINAL ARREST, *post*, p. 730.

**5. Breaking Doors.**—In arresting civilly, an officer may enter the house of the person to be arrested, if the outer door be open.<sup>3</sup> But he may not break the outer door,<sup>4</sup> unless he has once been lawfully in the house in making the arrest; in which case he may re-enter, using as much force as may be necessary.<sup>5</sup>

A *ca. sa.* or a *fi. fa.*, executed by breaking outer doors was

affidavit is defective the writ is void. *Hauss v. Kohlar*, 25 Kan. 640; *Tennent v. Weymouth*, 25 Kan. 21; *Devrees v. Summit*, 86 N. Car. 126; *McGilvery v. Morehead*, 2 Cal. 607; *Meddaugh v. Williams*, 48 Mich. 172; *Tower v. Kingston*, 1 Browne (Pa.), 33; *Lewis v. Bracsenridge*, 1 Blackf. (Ind.) 112; *Hitchcock v. Baker*, 2 Allen (Mass.), 431.

In New York no affidavit is necessary in order to arrest the defendant on final process where the facts warranting arrest appear on the face of the record and are essential to support the judgment. *Freeman on Executions*, § 453; *Richtmeyer v. Remsen*, 38 N. Y. 206; *Niver v. Niver*, 19 Abb. Pr. (N. Y.) 14; *Elwood v. Gardner*, 45 N. Y. 349; *Keeler v. Clark*, 18 Abb. Pr. (N. Y.) 154.

But if the facts necessary to warrant an arrest are extrinsic to the cause of action and need not appear on the face of the record, an affidavit averring such facts is necessary, and process of arrest must be sued out before judgment. *Freeman on Executions*, § 453; *Atocha v. Garcia*, 15 Abb. Pr. (N. Y.) 303; *Elwood v. Gardner*, 45 N. Y. 349.

**Execution for Costs.**—No affidavit is necessary in case of an arrest upon an execution for costs. *Gibbs v. Taylor*, 9 N. E. Rep. (Mass.) 576.

1. Arresting the defendant while privileged as a suitor, the defendant being subsequently released by the officer, is not an execution of the writ. *Wheeler v. Barry*, 6 Vt. 579.

2. A return of rescue is a good return of a mesne process of arrest, but not of a final. In the latter case the sheriff must call in aid the *posse comitatus*. *Buckminster v. Applebee*, 8 N. H. 546.

3. *Semayne's Case*, 5 Co. 91, a.

So if the door be unlatched or ajar. *Allen v. Martin*, 10 Wend. (N. Y.) 301; *Com. Dig. Exec. c. 5*.

Where sheriff, on a *ca. sa.*, touched his

prisoner, through a broken pane, and then broke outer door, *held*, a good arrest. The English rule is that sheriff may lift the latch of the outer door, or enter the house in the ordinary way, and make a good arrest. 2 *Add. Torts* (Wood's Ed.), p. 122. The rule is universal, however, in the United States, so far as the point has been up, that the officer may not enter without license, unless the outer door be open. *Boggs v. Vandyke*, 3 Harr. (Del.) 288; *Curtis v. Hubbard*, 4 Hill (N. Y.), 437.

If the officer gets in, in the absence of evidence as to the manner of his entry, it will not be presumed that he broke in. *Kneas v. Fidler*, 2 S. & R. (Pa.) 263.

He may not use pretence (as that he had a note for the defendant) to gain admittance. *Rex v. Backhouse, Loftt*, 61.

4. Year B., 18 Ed. 4, p. 4, pl. 19; *Hemminway v. Saxton*, 3 Mass. 222; *White v. Wiltshire*, 2 Rolle, 137; *Cook's Case*. Cro. Car. 537; 3 Bl. Com. 288; *Buckingham v. Francis*, 11 Moore, 40; *Curtis v. Hubbard*, 4 Hill (N. Y.), 437; *Kerbey v. Denby*, 1 M. & W. 336; *Hooker v. Smith*, 19 Vt. 151; *Snydacker v. Brosse*, 51 Ill. 357.

Even on demand made. *Semayne's Case*, 5 Co. 91, a.

If he do, it is trespass. *Anon.*, 6 Mod. 105, case 147.

When once in, he may break the outer door to get out. *Pugh v. Griffith*, 7 A. & E. 826; *Com. Dig. Exec. c. 5*.

5. *Genner v. Sparks*, 6 Mod. 173.

In general, after the arrest has been made, outer doors may be broken to retake. *Case of John Fish v. William Fish*, cited, 2 Rolle, 138; 3 Black Com. 288; *Anon.*, 7 Mod. 8, case 6; *Sandon v. Jervis*, E. B. & E. 935; *Glover v. Whittenhall*, 6 Hill (N. Y.), 597; *Sanders v. Millward*, 4 Harr. (Del.) 246; *Allen v. Martin*, 10 Wend. (N. Y.) 301.

originally held valid, and the injured party left to his action of trespass.<sup>1</sup> Such is not now the law.<sup>2</sup>

The protection of the outer door extends only to a man, his family, and proper goods.<sup>3</sup>

After entering the house, either of the debtor or a third person, an officer may break inner doors, to execute civil process.<sup>4</sup>

He may likewise break the inner or outer doors of barns, stores, or other buildings, not the dwelling of the debtor.<sup>5</sup>

The authorities seem to make no distinction between the rights and duties of officers in the matter of breaking doors to execute civil process, whether the person or the goods of a man be sought to be taken.<sup>6</sup>

**6. Time of Arrest.**—At the common law, service of process might be had by night or day,<sup>7</sup> or on Sunday.<sup>8</sup>

By Stat. 29 Car. II. c. 756, however, arrests on Sunday were prohibited, except for treasons, felonies, and breaches of the peace. Proceedings on Sunday coming within this provision are void.<sup>9</sup>

A debtor, however, who escapes may be retaken, notwithstanding 29 Car. II.<sup>10</sup> Not, however, after a voluntary escape.<sup>11</sup>

1. Year B., 18 Ed. 4, p. 4, pl. 14.

2. *Curtis v. Hubbard*, 4 Hill (N. Y.), 437; *People v. Hubbard*, 24 Wend. (N. Y.) 369, and cases; *Ilsley v. Nichols*, 12 Pick. (Mass.) 270.

3. Com. Dig. Exec. c. 5; *Semayne's Case*, 5 Co. 91, a; 3 Blk. Comm. 288.

Officer may not break outer door of a third person on the mere suspicion that the debtor or his goods are within. *Johnson v. Leigh*, 6 Taunt. 246. And on a writ *de homine replegiando* it was held that sheriff may not break the outer door of a stranger, unless the man he was commanded to take was there. *Stanhope v. Dawson*, 2 Lut. 1428.

Residence of a person must be *bona fide* in a house for the protection of the outer door to extend to him or his goods. *Gordon v. Clifford*, 28 N. H. 402.

As to who are residents in their own dwellings, and who in the house of a third person (lodgers, etc.), see *King v. Rogers*, 11 Moore, 40; *King v. Trapshaw*, 11 Moore, 429; *King v. King v. Carrel*, 11 Moore, 237; *Oysted v. Shed*, 13 Mass. 520; *Swain v. Minzer*, 8 Gray (Mass.), 182; *Williams v. Spencer*, 5 Johns. (N. Y.) 352; *Tracy v. Talbot*, 6 Mod. 214; 2 Wood's Add. Torts, 124, n. 1.

Bail may enter the house of a third person to take his principal. *Sheers v. Brooks*, 2 H. Black, 120.

4. Com. Dig. Exec. c. 5; *Morrish v. Murray*, 13 M. & W. 52; *Lee v. Gansel Cowp.* 1; *Hutchison v. Birch*, 4 Taunt. 619; 33.

*Hubbard v. Mace*, 17 Johns. (N. Y.) 127; *Prettyman v. Dean*, 2 Harr. (Del.) 494; *Rex v. Bird*, 2 Show. 87.

Should demand admission before breaking inner door. *Ratcliffe v. Burton* 3 B. & P. 223. See, *contra*, *Hutchinson v. Birch*, 4 Taunt. 619. Officer may break window of a room to effect arrest, after entering outer door. *Lloyd v. Sandilands*, 2 Moore, 207. Illness does not protect against forcing inner doors. *Smith v. Butler*, Comb. 326.

As to what are outer and what inner doors, see *Hopkins v. Nightingale*, 1 Esp. 99; *Whalley v. Williamson*, 7 C. & P. 294; *Stedman v. Crane*, 11 Metc. (Mass.) 295.

5. *Penton v. Brown Sid.* 186; *Fullerton v. Mack*, 2 Aik. (Vt.) 415; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287; *Stitt v. Wilson*, Wright (Ohio), 505.

6. *Ilsley v. Nichols*, 12 Pick. (Mass.) 270.

7. Com. Dig. Exec. c. 5; *Stone's Case*, 129 Mass. 156; *Mackallay's Case*, 9 Co. 65, b.

8. *Mackallay's Case*, 9 Co. 65, b; *Keith v. Tuttle*, 28 Me. 28.

9. 3 Chit. Gen. Pr. 75, Am. Ed.; *Lyford v. Tyrrel*, 1 Anstr. 85; *Wilson v. Tucker*, 1 Salk. 78; *King v. Strain*, 6 Blackf. (Ind.) 447; *Brookes v. Warren*, Bl. R. 1273.

10. *Atkinson v. Jameson*, 5 T. R. 25; *Parker v. Moore*, 2 Salk. 626.

11. *Featherstonehaugh v. Atkinson*, Barnes, 373; *Rayner v. Sharp*, Cooke,

**Privilege.—Attendance upon Court.—Suitors,<sup>1</sup> Witnesses,<sup>2</sup> At-**

1; *Henegar v. Spangler*, 29 Ga. 217; *Salhinger v. Adler*, 2 Robt. (N. Y.) 704; *Hlight v. Fisher*, Pet. (U. S. C. Ct.) 41; *Harris v. Grantham*, 1 N. J. L. 142; *Commonwealth v. Ronald*, 4 Call. (Va.) 97; *Richards v. Goodson*, 2 Va. Cas. 381; *Hurst's Case*, 4 Dall. (U. S.) 387; *McNeil's Case*, 6 Mass. 245; *Hammer-skold v. Rose*, 7 Jones (N. Car.) L. 629; *Contra*, see *Hannum v. Askew*, 1 Yeates (Pa.), 25. *Accord*, *McFerran v. Wherry*, 5 Cranch. (U. S. C. C.) 677; *Steinmetz v. Wade*, 3 W. N. C. (Pa.) 187; *Ex parte Hurst*, 1 Wash. (U. S. C. C.) 186; *Solomon v. Underhill*, 1 Camp. 229.

The suitor's privilege applies in the case of non-resident suitors. *Henegar v. Spangler*, 29 Ga. 217; *Pelt's Case*, 1 Rich. (S. Car.) L. 197. It also applies in the case of one who should have been, but was not, joined as a party. *Ex parte Britten*, 4 Jur. 943.

A petitioning bankrupt is privileged as a suitor. *In re Kimball*, 2 Ben. (U. S.) 38. So is a creditor attending to prove his claim. *Ex parte King*, 7 Ves., Jr. 312; *Selby v. Hills*, 8 Bing. 166; *Wood v. Neale*, 5 Gray (Mass.), 538.

**Criminal Proceedings.**—The suitor's privilege does not cover the case of a defendant in a criminal prosecution. *Commonwealth v. Daniel*, 4 Pa. L. J. 49; *Moore v. Green*, 73 N. Car. 394; *Key v. Jetto*, 1 Pitts. (Pa.) 117; *Scott v. Curtis*, 27 Vt. 762; *Lucas v. Albee*, 1 Den. (N. Y.) 666; *Jacobs v. Jacobs*, 3 Dowl. P. 675; *Anonymous*, 1 Dowl. P. 157; *Goodwin v. Lordon*, 1 Ad. & El. 378; *Hare v. Hyde*, 16 Q. B. 394; *Slade v. Joseph*, 5 Daly (N. Y.) 187; *Williams v. Bacon*, 10 Wend. (N. Y.) 636.

A defendant in a criminal proceeding may be immediately arrested on civil process after acquittal and discharge. *Commonwealth v. Daniel*, 4 Pa. L. J. 49; *Moore v. Green*, 73 N. Car. 394; *Hare v. Hyde*, 16 Q. B. 394; *Goodwin v. Lord*, 1 Ad. & El. 378; *Anon.*, 1 Dowl. P. 157. Or after conviction and discharge on payment of fine. *Lucas v. Albee*, 1 Den. (N. Y.) 666.

One discharged from arrest by an examining magistrate may be immediately arrested. *Jacobs v. Jacobs*, 3 Dowl. P. 675. So one admitted to bail in criminal proceedings or released on recognizance may be immediately arrested. *Moore v. Green*, 73 N. Car. 394; *Key v. Jetto*, 1 Pitts. (Pa.) 117. *Compare* *Callans v. Sherry*, Al. & Nap. (Canada) 125; *Gilpin v. Cohen*, L. B. 4 Exch. 131; *Bours v.*

*Tuckerman*, 7 Johns. (N. Y.) 538. The arrest is not invalid, although made before the defendant has left the courtroom. *Hare v. Hyde*, 16 Q. B. 394; *Moore v. Green*, 73 N. Car. 394.

A defendant brought into the jurisdiction on a criminal charge may be arrested for debt. *Slade v. Joseph*, 5 Daly (N. Y.), 187; *La Grave's Case*, 14 Abb. Pr. N. S. (N. Y.) 333, n. But where the criminal charge is used merely as a pretext to get the defendant within the jurisdiction, he cannot, upon his discharge, be arrested on civil process by the persons instrumental in procuring his arrest on the criminal charge. *Benninghoff v. Oswell*, 37 How. Pr. (N. Y.) 235; *Slade v. Joseph*, 5 Daly (N. Y.), 187; *La Grave's Case*, 14 Abbott Pr. N. S. (N. Y.) 333, n.

**Habeas Corpus.**—One discharged on writ of *habeas corpus* is entitled to the suitor's privilege while returning home. *King v. Blake*, 2 Nev. & M. 312; *R. v. Douglas*, 7 Jur. 39.

**Common Informer.**—A common informer cannot claim the suitor's privilege. *Ex parte Cobbett*, 7 El. & Bl. 955.

2. *Dickenson's Case*, 3 Harr. (Del.) 517; *Ballinger v. Elliott*, 72 N. Car. 596; *May v. Shumway*, 16 Gray (Mass.), 86; *Thompson's Case*, 122 Mass. 428; *McNeil's Case*, 6 Mass. 264; *Huntington v. Schultz*, Harp. (S. Car.) 452; *Ex parte Edme*, 9 S. & R. (Pa.) 147; *Sandford v. Chase*, 3 Cow. (N. Y.) 381; *In re Kimball*, 2 Ben. (U. S.) 38; *Hopkins v. Coburn*, 1 Wend. (N. Y.) 292; *Dixon v. Ely*, 4 Edw. (N. Y.) 557; *Norris v. Beach*, 2 Johns. (N. Y.) 294; *Meekins v. Smith*, 1 H. Blk. 636; *Walpole v. Alexander*, 3 Doug. 45; *Ex parte Temple*, 2 Ves. & B. 391, 395; *Spencer v. Newton*, 6 Ad. & El. 623; *Persse v. Persse*, 5 H. of L. C. 671; *Rishton v. Nisbett*, 1 M. & Rob. 347.

A witness voluntarily attending (without being subpoenaed) in his own State, is not privileged. *Hardenbrook's Case*, 8 Abb. Pr. (N. Y.) 416; *Rogers v. Bullock*, 2 Pen. (N. J. L.) 517; *McNeil's Case*, 6 Mass. 264. But a witness residing in another State, is privileged, though attending voluntarily. *Jones v. Knauss*, 31 N. J. Eq. 211; *May v. Shumway*, 16 Gray (Mass.), 86; *Ballinger v. Elliott*, 72 N. Car. 596; *Hopkins v. Coburn*, 1 Wend. (N. Y.) 292; *Dixon v. Ely*, 4 Edw. (N. Y.) 557; *Norris v. Beach*, 2 Johns. (N. Y.) 294.

**Bankrupt.**—A petitioning bankrupt at-

torneys,<sup>1</sup> judges,<sup>2</sup> jurors, and other officers of the court<sup>3</sup> are exempt from civil arrest<sup>4</sup> while attending in court<sup>5</sup> in their re-

tending before commissioners to be examined is privileged as a witness. *In re Kimball*, 2 Ben. (U. S.) 38; *Ex parte Ross*, 1 Rose, 260.

**Public Prosecutor.**—One attending court as public prosecutor is privileged. *Montague v. Harrison*, 3 C. B. N. S. 292.

1. Attorneys, like suitors and witnesses, are privileged from arrest while in attendance in court upon professional business, and while going so to attend, and while returning after such attendance. *Attorney-General v. Skinners Co.*, 8 Sim. 377; *Newton v. Harland*, 8 Scott, 70; *Anon.*, Lofft, 434; *Castle's Case*, 16 Ves. 412; *Williams v. Webb*, 5 Scott N. S. 898; *Ogden v. Hughes*, 2 South. (N. J.) 178; *Gibbs v. Loomis*, 10 Johns. (N. Y.) 463; *Secor v. Bell*, 18 Johns. (N. Y.) 52; *Commonwealth v. Ronald*, 4 Call. (Va.) 97.

To entitle to exemption, the attendance must be in behalf of a party to some cause or proceeding. One attending the justification of bail as legal adviser for bail, is not privileged. *Jones v. Marshall*, 2 C. B. N. S. 615.

Attorneys have no general perpetual exemption from arrest. *Respublica v. Fisher*, 1 Yeates (Pa.), 350; *Gibbs v. Loomis*, 10 Johns. (N. Y.) 463; *Elam v. Lewis*, 19 Ga. 608.

According to the former English practice, an attorney had the right to be sued by bill in the court of which he was an attorney, and he could not in that court be arrested on mesne process. Weeks on Attorneys, § 108; *Brooks v. Bryant*, 7 T. R. 25; *Redman's Case*, 1 Mod. 10; *Anon.*, Lofft, 151; *Lewis Case*, 2 Mod. 181; *Scott v. Van Alstyne*, 9 Johns. (N. Y.) 216; *Fowler v. Hunt*, 10 Johns. (N. Y.) 463.

This practice has not been generally followed in this country, and has been changed in England by statute 1 & 2 Vict. ch. 110; Weeks on Attorneys, § 108. It did not apply to arrest on final process. Weeks on Attorneys, § 108.

2. Judges, like attorneys, were entitled to be sued by bill in their own court, and were not subject to mesne process of arrest. *In re William Livingston*, 8 Johns. (N. Y.) 351.

This rule was held not to apply to the case of a judge of a federal court, that being a court of limited jurisdiction. *Gratz v. Wilson*, 6 N. J. L. 419.

Judges are exempted from arrest on mesne or final process while in attend-

ance upon their public duties. *Lyell v. Goodwin*, 4 McLéan (U. S. C. Ct.), 29.

3. Jurors.—Jurors have the same exemption from arrest that witnesses have. *McNeil's Case*, 3 Mass. 288; *Brookers v. Chesley*, 4 Harr. & M. (Md.) 295.

**Sheriff.**—The office of sheriff does not protect the incumbent from civil arrest. *Day v. Brett*, 6 Johns. (N. Y.) 22; *Hill v. Lott*, 10 How. Pr. (N. Y.) 46. Unless while in necessary attendance in court. *Morgan v. Bower*, 1 Dall. (U. S.) 295.

Under a statute exempting sheriffs from civil arrest, deputy sheriffs are not exempted. *George v. Fellows*, 58 N. H. 494.

4. By civil arrest is meant arrest on mesne or final process. A commitment of a debtor out upon a prison-bonds bond is not breach of a party's privilege to exemption from arrest. *Ex parte Bill*, 3 Cranch (U. S. C. Ct.), 117.

5. Attendance in Court.—**Suitors.**—A suitor attending at the registrar's office with his solicitor to settle the terms of a decree is entitled to exemption from arrest. *Newton v. Askew*, 6 Ha. 319.

Or attending before a master under a warrant to produce papers. *Franklyn v. Colqhoun*, 1 Madd. 580.

Or to verify a charge. *Brown v. McDermott*, 2 Ir. Eq. Rep. 438.

Or attending a reference. *Vincent v. Watson*, 1 Rich. (S. Car.) L. 194.

Or attending in court to see if anything is to be done in his case. *Salhinger v. Adler*, 2 Robt. (N. Y.) 704.

Or attending from another State to hear an argument in his own case in the court of appeals. *Pelt's Case*, 1 Rich. (S. Car.) L. 197.

Or while attending in the very suit in which the process of arrest is issued. *Atkinson v. Fraser*, 5 Rich. (S. Car.) L. 519.

In *Sidgier v. Birch*, 9 Ves. 69, it was held that a suitor returning from an appointment with his solicitor for the purpose of attending with him to inspect a paper in his adversary's possession, in preparation for an examination before a master, is privileged. *Lidgier v. Birch*, 9 Ves. 69.

**Witness.**—A witness attending upon arbitrators, under an arbitration by order of the court, is privileged. *Ex parte Temple*, 2 Ves. & B. 391, 395.

**Attorneys.**—The privilege of an attorney covers attendance at a master's office taxing costs. *In re Hope*, 9 Jur. 856.

spective capacities, and while going to and returning from court.<sup>1</sup>

Or at an arbitration. *Webb v. Taylor*, 1 Dowl. & L. 676.

Or on summons at a judge's chambers. *In re Jewett*, 10 Jur. N. S. 814. See *Cole v. McClellan*, 4 Hill, (N. Y.) 59, where it was held that an attorney attending before a master, examiner, or judge out of court was not privileged.

Or at an appeal before the House of Lords. *Attorney-General v. Skinners Co.*, 8 Sim. 377.

1. **Duration of Privilege.**—The privilege lasts only from the time the suitor, witness, attorney, etc., starts from home to attend, until he returns thither. *Childerston v. Barrett*, 11 East. 439; *Gibbs v. Phillipson*, 1 Russ. & My. 19; *Burke v. Higgins*, 2 Hogan (Irish), 110; *Ex parte Hurst*, 4 Dall. U. S.) 387.

A party, witness, etc., attending court in a place remote from that where he resides, is privileged while going to the place where the court is held, while detained there by reason of his attendance upon court, and while returning home. *Ex parte Hurst*, 1 Wash. (U. S. C. Ct.) 186; *Persse v. Persse*, 5 H. of L. C. 671; *Burke v. Higgins*, 2 Hogan (Ir.), 110; *Gibbs v. Phillipson*, 1 Russ. & My. 19.

The person is privileged during the entire time of his necessary sojourn in the place where the court is held, and not merely while going from and returning to his lodgings. *Burke v. Higgins*, 2 Hogan (Ir.), 110; *Gibbs v. Phillipson*, 1 Russ. & My. 19; *Burk v. Higgins*, 2 Hog. 110.

But one who comes to the city on private business, and is there subpoenaed, is only privileged while in court or while going from or returning to his lodgings. *Burke v. Higgins*, 2 Hogan, 110.

A witness called from his place of residence to testify in another town, need not return by the next train. His privilege extends a reasonable time. *Wilbur v. Boyer*, 1 W. N. C. (Pa.) 154.

Where the assizes were over Friday, a witness going home in a coach Saturday evening were held privileged. *Hatch v. Blisset*, 2 Stra. 986.

A suitor coming up to London long before it was necessary to do so, in order to attend the hearing of his cause, is privileged after his cause is actually in the paper, although he would not have been privileged before. *Persse v. Persse*, 5 H. of L. C. 671.

The fact that a person has not money enough to enable him to leave town after the trial is over does not extend the

period of his privilege. *Spencer v. Newton*, 6 Ad. & E. 623.

A non-resident witness is privileged during a short adjournment of the proceedings which he is attending. *Spencer v. Newton*, 6 Ad. & El. 623; *Rex v. Piatt*, 3 W. N. C. (Pa.) 187. But not pending an adjournment for a long time. *Spencer v. Newton*, 6 Ad. & El. 623.

A solicitor is privileged only while actually going towards or to the court. He is not protected, while engaged on other errands, by the fact that ultimately he intends to attend court. *Strong v. Dickenson*, 1 M. & W. 488.

A party to an action, waiting in a tavern near the court for his cause to be reached, is privileged. *Childerston v. Barrett*, 11 East. 439.

A witness is privileged during an adjournment of the proceeding until a later time on the same day. *Ex parte Temple*, 2 Ves. & B. 391, 395.

A suitor is not privileged while awaiting to hear the report of arbitrators, for they may separate after the hearing and not report for many days. Otherwise as to a suitor awaiting a return of a verdict, since the jury cannot separate until verdict is returned. *Clark v. Grant*, 2 Wend. (N. Y.) 257.

**Deviation.**—The exemption *cumdo et redeundo* is only while the person is going from home to attend, or while returning home after attendance. A deviation destroys privilege. *Heron v. Stoke*, 6 Ir. Eq. 125; *Shults v. Andrews*, 54 How. Pr. (N. Y.) 380; *Selby v. Hills*, 8 Bing. 166; *Pitt v. Coomes*, 5 B. & Ad. 1078.

Thus, where a suitor goes from the court to transact other business before going home, he is not privileged. *Heron v. Stokes*, 6 Ir. Eq. 125.

A witness who proceeds about his business instead of returning home is not privileged. *Shults v. Andrews*, 54 How. Pr. (N. Y.) 380.

The privilege is not lost by reason of a slight deviation to obtain refreshment or speak to friends. *Attorney-General v. Skinners Co.*, 8 Sim. 377; *Pitt v. Coomes*, 5 B. & Ad. 1078; *Ex parte Clark*, 2 Dea. & Ch. 99.

Privilege is not lost by a deviation, if the deviation was necessary for business to be transacted in court,—as where a suitor deviates to procure papers to use in court. *Ricketts v. Gurney*, 7 Price, 699.

A slight deviation to attend, for a few minutes, at an exhibition of paintings

By the common parliamentary law, members of legislature are exempt from civil arrest while attending a session of the legislature, and for a reasonable time before and after, to allow them to come from and return to their homes.<sup>1</sup>

In most States voters are exempted from civil arrest, by constitutional or statutory provision, while attending at the polls, and in going and returning.<sup>2</sup>

Soldiers and sailors, though in actual service, are not exempt from civil arrest, unless by statute.<sup>3</sup>

**8. Married Women.**—At common law a married woman was exempt from civil arrest if she had no separate estate.<sup>4</sup>

**9. Foreign Ministers.**—Ambassadors and representatives of foreign powers are exempt from arrest.<sup>5</sup>

does not destroy a suitor's privilege. *Mahon v. Mahon*, 2 Ir. Eq. 440.

Where the defendant was arrested while in the direct line of road for returning, the burden of proving a deviation is on the other party. *Selby v. Hills*, 8 Bing. 166.

But when arrested out of such direct line he must disprove a deviation. *Jones v. Rose*, 11 Jur. 379.

1. *King v. Coit*, 4 Day (Conn.), 127, 133; *Gibbes v. Mitchell*, 2 Bay (S. Car.), 406; *Bolton v. Martin*, 1 Dall. (U. S.), 296; *Lewis v. Elmendorf*, 2 Johns. Cas. (N. Y.) 222; *Hoppin v. Jenckes*, 8 R. I. 453; s. c., 5 Am. R. 597; *Holiday v. Pitt*, 2 Str. 985.

The common-law exemption of legislators is recognized and confirmed as to members of Congress by the federal constitution. Similar constitutional provisions are included in most State constitutions.

In *Hoppin v. Jenckes*, 8 R. I. 453; s. c., 5 Am. R. 597, it was held that whether the rule of English parliamentary practice allowed a period of exemption of at least forty days before or after a session for going and returning or not, no such period of exemption could be claimed under the provisions of the federal constitution.

The privilege from arrest guaranteed by the constitution to members of Congress extends to delegates from the Territories, as well as to senators and representatives. *Doty v. Strong*, 1 Pinn. (Wis.) 84.

The privilege of a legislator from arrest is not personal, but is that of the people. *Anderson v. Rountree*, 1 Pinn. (Wis.) 115.

2. A voter waiting in a house near the polls while the votes are being counted is "attending on the business of the election," and therefore exempt from civil arrest under the constitution. *Swift v. Chamberlain*, 3 Conn. 537.

The privilege does not extend to an elector preparing to go to the polls, if he has not already proceeded on his way. *Hobbs v. Getchell*, 8 Me. 187.

3. *White v. Lowther*, 3 Ga. 397; *Ex parte McRoberts*, 16 Iowa, 600; *Moses v. Mellett*, 3 Strobb. (S. Car.) 210.

A lieutenant of a State company raised under an act of Congress, is not exempt, under the provisions of a statute applying to State militia. *White v. Lowther*, 3 Ga. 397.

A member of a State militia force which has been mustered into the service of the United States does not thereby lose the privilege from civil arrest, given by statute to members of the State militia. *People v. Campbell*, 40 N. Y. (1 Hand.) 133.

The act of Congress relative to the arrest of soldiers does not apply to a soldier at home on furlough. *Ex parte McRoberts*, 16 Iowa, 600. Or to commissioned officers. *Moses v. Mellett*, 3 Strobb. (S. Car.) 210.

4. *Sparks v. Bell*, 8 B. & C. 1; *Anon*, 8 How. Pr. (N. Y.) 134; *Henry v. Cornelius*, 1 Cranch (U. S. C. Ct.), 37; *O'Neil v. Hogan*, 2 Cranch (U. S. C. Ct.), 524; *Neville v. Neville*, 22 How. Pr. (N. Y.) 500.

In many States, the power to arrest women on civil process is closely restricted by statute. See *Hatheway v. Jones*, 20 Ark. 109, statute; *Wheeler v. Hartwell*, 4 Bosw. (N. Y.) 684; *Disprang v. Davis*, 3 McCord (S. Car.), 16.

5. *Holbrook v. Henderson*, 4 Sandf. (N. Y.) 619; *Dupont v. Pichon*, 4 Dall. (U. S.) 321.

A foreign ambassador, accredited to another foreign country, and travelling through the country on his way thither, is exempt from arrest. *Holbrook v. Henderson*, 4 Sandf. (N. Y.) 619.

A *chargé d'affaires* of a foreign government who has been superseded by a superior, but is delayed in this country



10. **Waiver.**—Illegality of the arrest by reason of defects in the process and service thereof,<sup>1</sup> or by reason of privilege,<sup>2</sup> may be waived.<sup>3</sup>

11. **Discharge from Illegal Arrest.**—Where the arrest is illegal, the party arrested may obtain his release on motion in the court issuing process, or by writ of *habeas corpus* in any court having jurisdiction to issue the writ.<sup>4</sup>

by circumstances beyond his control, is exempted from arrest on civil process. *Dupont v. Pichon*, 4 Dall. (U. S.) 321.

A commander of a war vessel of a foreign belligerent power is exempted from civil arrest. *United States v. Peters*, 3 Dall. (U. S.) 121.

An ex-president of a foreign republic is exempt from arrest for injuries received at his hands while acting as president. *Hatch v. Baez*, 7 Hun (N. Y.), 596.

Under the act of Congress of 1825, imposing a fine upon any one obstructing or hindering mail-carriers, a mail-carrier is exempt from civil but not from criminal arrest. *Penny v. Walker*, 64 Me. 430; s. c., 18 Am. Rep. 269.

1. *Howe Machine Co. v. Lincoln*, 24 Kans. 123.

2. *Stevenson v. Smith*, 28 N. H. 12; *Green v. Bonaffon*, 2 Miles (Pa.), 219; *Petrie v. Fitzgerald*, 1 Daly (N. Y.), 401.

A member of the State legislature may waive his privilege from arrest. *Chase v. Fish*, 16 Me. 132.

The statutory privilege of a person entitled to vote at town meeting may be waived. *Wood v. Davis*, 34 N. H. 328.

3. Privilege must be set up within a reasonable time after arrest or it will be waived. *Green v. Bonaffon*, 2 Miles (Pa.), 219.

Giving prison-bounds bond waives privilege. *Tipton v. Harris*, Peck. (Tenn.) 414.

A plea in bar waives privilege from arrest. *Randall v. Crandall*, 6 Hill (N. Y.), 342.

Giving bail bond waives defects in issuance of process for arrest. *Saunders v. Gullaher*, 2 Humph. (Tenn.) 445. Compare *Baker Mfg. Co. v. Knotts*, 30 Kan. 356 (statutory), and *Washburn v. Phelps*, 24 Vt. 506.

Jurisdictional defects in an affidavit for a *capias* are not waived by giving special bail and pleading. Matter of *Stephenson*, 32 Mich. 60. See *Maxwell v. Deens*, 46 Mich. 35.

By the provision of the New York code, a motion to vacate an order of arrest must be made before judgment. *Roberts v. Carter*, 17 How. Pr. (N. Y.) 479; *Wicker v. Harmon*, 21 How. Pr.

(N. Y.) 462; *Throop's Code*, 1885, § 567.

Or within twenty days after the entry of the order. *Pelo v. Clukey*, 36 How. Pr. (N. Y.) 179; *Throop's Code*, 1885, § 567.

Formerly the motion must be made before giving bail. *McKenzie v. Hackstaff*, 2 E. D. Smith (N. Y.), 75; *Crowell v. Brown*, 17 How. Pr. (N. Y.) 68.

As to whether one can waive a privilege of exemption from arrest before he knows of it. See *Randall v. Crandall*, 6 Hill (N. Y.), 342; *Green v. Bonaffon*, 2 Miles (Pa.), 219.

4. *Armstrong v. Ayres*, 19 Conn. 540.

Release can be obtained by *habeas corpus* only where the arrest was absolutely void. *Hurd Habeas Corpus*, 333.

Pendency of an action for the same cause in a foreign jurisdiction in which an arrest could be had is no ground for vacating an order for arrest. *Arthurton v. Dalley*, 20 How. Pr. (N. Y.) 311.

A State court cannot release one imprisoned by a federal court for a cause of action in which, by the State statute, no arrest could be had, although by act of Congress the federal courts are required to follow the local statutes in the matter of arrests. The prisoner must apply to the federal court. *Duncan v. Klinefelter*, 5 Watts (Pa.), 141.

A district court will release a discharged bankrupt from arrest on process of a State court, if the debt was such that a discharge in bankruptcy would release him. *In re L. Glaser*, 2 Ben. (U. S. C. Ct.) 180; *In re Borst*, 2 N. B. R. 171; *State v. Rollins*, 13 Mo. 179; *U. S. v. Dobbins*, 1 Pa. L. J. 5; *Ex parte Mifflin*, 1 Pa. L. J. 29.

The proper method of procedure in such a case is by writ of *habeas corpus* sued out of the federal court. *In re Williams*, 11 N. B. R. 145; s. c., 7 C. L. N. 49.

Application should be made to the State court for release before taking proceedings in the federal court. *In re O'Mara*, 4 Biss. (U. S. C. Ct.) 506. But the decision of the State court is not final, and in case it refuses to release the bankrupt the question may be reopened on *habeas corpus* in the federal

Where the arrest was illegal because the defendant was privileged at the time he may obtain his release on motion in the court issuing process.<sup>1</sup>

The officer arresting is not bound to take notice of the privilege of the defendant,<sup>2</sup> and he is not a trespasser in making the arrest.<sup>3</sup> And the fact that the defendant is at the time privileged is no ground for abating the writ.<sup>4</sup>

## 12. Second Arrest.—Where a defendant has been arrested and dis-

court. *In re Wiggers*, 2 Biss. (U. S. C. Ct.) 71.

1. *Walker v. Webb*, 3 Anstr. 941; *Lyell v. Goodwin*, 4 McL. (U. S. C. Ct.) 29; *Selby v. Hills*, 8 Bing. 166; *Moore v. Green*, 73 N. Car. 394. Compare *Plomer v. McDonough*, 1 De G. & Sm. 232.

Or in the case of suitors, witnesses, etc., by motion in the court in which defendant was suitor, witness, etc. *Walker v. Webb*, 3 Anstr. 941; *Kimpton v. London*, etc., R. Co., 9 Exch. 766; *Commonwealth v. Daniel*, 4 Pa. L. J. R. 49; *Kinsman v. Reinex*, 2 Miles (Pa.), 200; *U. S. v. Edme*, 9 S. & R. (Pa.) 147, 149.

The application may be made to the court *in banc*, although the witness arrested was summoned in the court of *nisi prius*. *Kimpton v. London*, etc., R. Co., 9 Exch. 766.

In *Plomer v. McDonough*, it was held that the application for release must be to the court contemned by the arrest, not to the court out of which process issued. *Plomer v. McDonough*, 1 De G. & Sm. 232.

It seems that one arrested while privileged may obtain his release by writ of *habeas corpus*. *Crocker v. Duncan*, 6 Blackf. (Ind.) 278; *Smith v. Jones*, 76 Me. 138; s. c., 49 Am. Rep. 598; *Bell v. State*, 4 Gill (Md.), 301.

A house of legislature will order the release of its members arrested in violation of its privilege. *Cooley Const. Lims.* (4th ed.) p. 163. So the court from which process issued, should on application discharge the defendant. *Cooley Const. Lims.* (4th ed.) p. 163. Any other court may release him on writ of *habeas corpus*. *Cooley Const. Lims.* (4th ed.) p. 163.

An application to relieve a suitor from arrest on the ground of privilege is addressed to the discretion of the court, and the court may grant it on such terms as it shall deem proper, as that no action for wrongful arrest shall be brought. *Taft v. Hoppin*, Anth. (N. Y.) 255; *Snelling v. Watrous*, 2 Paige (N. Y.), 314.

If the writ of arrest is absolutely void, the judge cannot make its vacation conditional upon defendant undertaking that he will not bring an action on account

of the arrest. *Re Bradner*, 87 N. Y. 171.

Where a court has decided that one of its suitors was not privileged to exemption from arrest, the supreme court will not reopen the question on writ of *habeas corpus*. *Commonwealth v. Humbright*, 4 S. & R. (Pa.) 149.

2. *Ray v. Hogeboom*, 11 Johns. (N. Y.) 433; *Secor v. Bell*, 18 Johns. (N. Y.) 52; *Chase v. Fish*, 16 Me. 132; *Sperry v. Willard*, 1 Wend. (N. Y.) 32; *Cooley on Torts*, p. 192, and cases cited.

3. *Chase v. Fish*, 16 Me. 132; *Sperry v. Willard*, 1 Wend. (N. Y.) 32.

But the privilege exonerates the officer from failure to make the arrest, or for allowing an escape. *Ray v. Hogeboom*, 11 Johns. (N. Y.) 433; *Secor v. Bell*, 18 Johns. (N. Y.) 52.

4. *Hart v. Kennedy*, 15 Abb. Pr. (N. Y.) 290; *Booraem v. Wheeler*, 12 Vt. 311; *Hubbard v. Sanborn*, 2 N. H. 468.

A previous arrest, illegal because the defendant was at the time privileged, does not invalidate a second arrest, made on the same process, after the period of exemption has expired. *Petrie v. Fitzgerald*, 1 Daly (N. Y.), 401; *Van Wezel v. Van Wezel*, 1 Edw. Ch. (N. Y.) 113; *Humphrey v. Cumming*, 5 Wend. (N. Y.) 90; *Barrack v. Newton*, 1 Q. B. 525; *Andrewes v. Walton*, 1 McN. & G. 380.

No action for wrongful or malicious arrest lies against one causing the arrest, on civil process, of one privileged from arrest because going to court. *Smith v. Jones*, 76 Me. 138; s. c., 49 Am. Rep. 598.

A party released from arrest upon stipulating not to sue for false imprisonment is precluded from maintaining any action upon the bond given by the plaintiff on obtaining the order for arrest. *Schuyler v. Englert*, 62 How. Pr. (N. Y.) 479.

A direction to the officer to make the arrest immediately does not mean to make it while the defendant is temporarily privileged. It must be understood that the officer was not to make the arrest until the defendant became subject to arrest. *Sewell v. Lane*, 1 Ind. 293.

charged because of a defect in the process, he may, in the discretion of the court, be rearrested.<sup>1</sup>

13. **Contempts**.—Attachments for contempt generally partake of the nature of criminal rather than civil arrests.<sup>2</sup>

**ARREST (CRIMINAL CASES).** (See also **ARREST (CIVIL CASES)**; **BAIL**; **ESCAPE**; **FALSE IMPRISONMENT**; **HOMICIDE—OFFICERS**; **WARRANT**.)

1. *What Constitutes.*
2. *Without Warrant.*
3. *Notice of Officer's Authority.*
4. *By Private Person.*
5. *Assisting an Officer.*
6. *Authority cannot be Delegated.*

7. *Manner of making—Force.*
8. *Breaking Doors.*
9. *Hue and Cry.*
10. *Illegal.*
11. *Jurisdiction.*
12. *Resisting Arrest.*

1. **What Constitutes**.—No manual touching the body or actual force is necessary to constitute an arrest. It is sufficient if the party be within the power of the officer, and submits to the arrest.<sup>3</sup>

1. *Butterworth v. White*, 2 Miles (Pa.), 141; *Schadle v. Chase*, 16 How. Pr. (N. Y.) 413; *Meucci v. Raudnitz*, 20 Hun (N. Y.), 343.

But a second process will not be granted unless the court is satisfied that a second arrest will not be vexatious. *McGiverty v. Morehead*, 2 Cal. 607; *State v. Brittain*, 3 Ired. (N. Car.) 17; *U. S. v. Watkins*, 4 Cranch (U. S. C. Ct.) 271; *Doane v. Baker*, 6 Allen (Mass.), 260.

Where a defendant has been held to bail in a federal court, he cannot be arrested in an action for the same cause in a State court. *Hernandez v. Carnobeli*, 10 How. Pr. (N. Y.) 433.

One discharged from imprisonment (but not from the debt) in another State may be arrested. *Joice v. Scales*, 18 Ga. 725.

A debtor arrested in another State and discharged from imprisonment under the insolvency laws of such State, is subject to arrest. *Hubbard v. Wentworth*, 3 N. H. 43; *Woodbridge v. Wright*, 3 Conn. 523; *Peck v. Hozier*, 14 Johns. (N. Y.) 346.

Where the plaintiff discovers that the bail is insufficient he may discontinue and arrest the defendant again in a second action for the same cause, after first giving defendant notice of discontinuance. *Jewett v. Lock*, 6 Gray (Mass.), 233.

2. An arrest for contempt made on Sunday is not contrary to 29 Car. 2, ch. 7, § 6, prohibiting arrest on Sunday, save for treason, felony, or breach of the peace. A contempt is in the nature of a breach of the peace. *Ex parte Whitchurch*, 1 Atk. 55.

A statute prohibiting the arrest of women on any mesne process or process of

execution, does not apply to attachments for contempt. *Clark v. Grant*, 38 N. J. L. 257.

Contempts are of two kinds, civil and criminal. A criminal contempt is of the nature of a breach of the peace, and hence a member of Parliament is not privileged from commitment for a criminal contempt. *Mr. Long Wellesley's Case*, 2 Russ. & My. 667; *Catmur v. Knatchbull*, 7 T. R. 448; *Walker v. Lord Geo. Grovesnor*, 7 T. R. 171.

A witness committed for contempt for disorderly behavior in court, is privileged while returning at the expiration of his imprisonment. *R. v. Wigley*, 7 Car. & P. 4.

3. *Bissell v. Gold*, 1 Wend. (N. Y.) 210; s. c., 19 Am. Dec. 480. See, generally, *Whithead v. Keyes*, 3 Allen (Mass.), 495; *Mowry v. Chase*, 100 Mass. 79; *Field v. Ireland*, 21 Ala. 240; *Floyd v. State*, 12 Ark. 43; s. c., 54 Am. Dec. 250; *Pike v. Hanson*, 9 N. H. 491; *Emery v. Chesley*, 18 N. H. 198; *Strout v. Gooch*, 8 Me. 126; *Woodward v. Washburn*, 3 Denio (N. Y.), 369; *Searls v. Viets*, 2 Thomp. & C. (N. Y.) 224; *McNeice v. Weed*, 50 Vt. 728; *Lyon v. Rood*, 12 Vt. 233; *State v. Green*, 66 Mo. 631; *Brushaber v. Stegemann*, 22 Mich. 266; *Herring v. State*, 3 Tex. App. 108; *Hart v. Flynn*, 8 Dana (Ky.), 199; *Courtoy v. Dozier*, 20 Ga. 369; *Jones v. Jones*, 13 Ired. L. (N. Car.) 448; *Huntington v. Schultz*, Harp. (S. Car.) 452; *Lawson v. Buzines*, 3 Harr. (Del.) 416; *Murphy v. Countiss*, 1 Harr. (Del.) 143; *Smith v. State*, 7 Humph. (Tenn.) 43; *Bloomer v. State*, 3 Sneed (Tenn.), 66; *U. S. v. Benner*, 1 Baldw. (U. S.) 239. Compare *Hunt-*

ington v. Blaisdell, 2 N. H. 317; Genner v. Sparks, 1 Salk. 79; Berry v. Adamson, 6 B. & C. 528.

In Searls v. Viets, 2 Thomp. & C. (N. Y.) 224, Potter, J., said: "I have not been able to find any real conflict between English and American authorities as to what constitutes an arrest. By all the authorities a person may or may not be arrested without a manual or actual touching by the officer. Each case must depend upon its own peculiar circumstances. Bare words alone will not make an arrest if the party resists the arrest.

"This was held in Genner v. Sparks, 1 Salk. 79. Genner, a bailiff, had a warrant against Sparks, and went to him in his yard and told him he had a warrant for him, and said, 'I arrest you.' Sparks had a fork in his hand, and kept the bailiff from touching him. Neither the power to arrest nor the words 'I arrest you' made an arrest; but the court said if the bailiff had touched him, that had been an arrest, and the bailiff might have pursued him, broken open his house, or had an attachment and rescous against him. See also Russen v. Lucas, 1 C. & P. 153; Chinn v. Morris, 2 C. & P. 360.

"In another case, however, in Homer v. Battle, Bull. N. P. 62, it was held that the words, 'You are my prisoner,' 'I have a writ against you,' was a sufficient arrest, where the prisoner submitted, turned back, and went with the officer, though there was no touching; but it was also said, if the defendant, instead of going with the bailiff, had fled from him, the words and the warrant would not have made an arrest. To the same effect, see also Pocock v. Moore, Ryan & Moody, 321.

"In the case of Arrowsmith v. Messurier, Sir James Mansfield, Ch. J., says, 'I suppose an arrest can take place without an actual touch,' and refers to the case of Williams v. Jones, Cas. Temp., Hard. 298, where a bailiff comes into a room and tells the defendant he arrests him and locks the door; that is an arrest without touching, for he is in the custody of the officer. 'But,' the chief-justice remarks, 'here the plaintiff went voluntarily before the magistrate. The warrant was made no other use of than as a summons. The constable brought a warrant, but did not arrest the plaintiff.'

"So the case of Berry v. Adamson, 6 Barn. & Cress. 528. 'A sheriff's officer, to whom process was given, sent a message to the defendant and asked him to fix a time, and call and give bail; and he accordingly fixed a time, went, and gave bail. Held, that this was not an arrest,

although the party suing out the writ had no cause of action. And it was said that an action for the arrest would not lie.' Lord Ch. J. Tenterden held that the plaintiff had been neither actually nor constructively arrested.

"Of the American authorities, which are claimed to be in conflict, is Gold v. Bissell, 1 Wend. (N. Y.) 210. In this case the constable took the warrant, went to Bissell, and informed him what he had. Bissell submitted without a manual touching, went with the constable about half a mile; procured a person to become his bail next day, and did appear and give bail. The court, per Ch. J. Savage, say: 'We understand the law to be well settled, that no manual touching of the body is necessary to constitute an arrest and imprisonment. It is sufficient if the party be within the power of the officer and submits to the arrest.' I am unable to see any conflict between the English cases and this.

"So, too, in the case of Mowry v. Chase, 100 Mass. 79. . . . The judge charged that no actual force or manual touching of the body was necessary to constitute an arrest; that if the officer had a precept which authorized an arrest, and gave defendant to understand that he was arrested thereon, or under restraint, and if the defendant did so understand and submitted to the custody and control of the officer, and the defendant's movements were directed by the officer, no matter for how short a time, this was a legal arrest. On appeal the court held this charge to be sound. The jury found an arrest. . . .

"We are referred to Pike v. Hanson, 9 N. H. 491. That was the case of an officer, with a collector's warrant for the payment of taxes, with power of arrest. He called upon the plaintiff, after having given her due notice; being in the room with her, called upon her to pay her tax, which she declined doing until arrested. He then told her he arrested her, but did not lay his hand upon her, and thereupon she paid the tax. In an action for false imprisonment, the case being carried to the court *in banc*, all the English authorities above cited, as well as the case of Gold v. Bissell, 1 Wend., were reviewed, and this was held to be a sufficient arrest to sustain an action. The judge questions, but does not condemn Arrowsmith v. Messurier. He distinguishes it from the other cases by saying there was no declaration of arrest by the officer, and that the warrant was, in fact, only used as a summons, and says, if it cannot be sustained upon this distinction, it must be regarded as of doubtful authority. The

As soon as an arrest is effected the prisoner should be taken before a magistrate.<sup>1</sup>

**2. How Made—Without a Warrant.**—An officer may arrest, with-

case of *Emery v. Chesley*, 18 N. H. 202, adopts the law as laid down in the preceding case.

"It is seen, upon a review of the preceding cases, though each differs from the others, that but one rule can be laid down as to what 'constitutes an arrest, which, if unlawful, is sufficient to maintain an action for false imprisonment.' I think by the modern practice, as drawn from the cases, that an actual manual touching of the body is not required, but only whatever is equivalent, amounting to a restraint of liberty of the person, as when the officer or other person claims the right to exercise the power of arrest, is in possession of a precept which authorizes or directs an arrest, and gives notice of the intention to execute it; or if the officer goes for the purpose of executing his process, and has the party in his presence and power, if the party so understands it, and in consequence thereof submits and allows the officer to direct his movements without resistance, as by going before a magistrate by direction of the officer: that amounts to an arrest, though the officer did not touch his body."

Arrest is constituted where there has been submission to an authority over one's person, asserted by virtue of a pretended warrant. *Haskins v. Young*, 2 Dev. & B. L. (N. Car.) 527; s. c., 31 Am. Dec. 426.

In an action for false imprisonment, it appeared that R., a constable, having a warrant for plaintiff and his sons, issued by a justice, met the plaintiff and one of his sons in a wagon. R. said, "I have a warrant for you and your two sons." Plaintiff asked for what. R. replied, "For stealing pumpkins." Plaintiff started to get out of the wagon and R. said, "You can go home and get your horses put up, and take your tea and come down." Plaintiff went home, took his tea, employed a lawyer, and with him and his two sons went to R.'s, and calling out R. said, "Here's your prisoners." R. said, "You move on and I will overtake you." They went on, and R. overtook them as they got to the house of the justice. The matter was then, after discussion, adjourned to another day, without bail, and on the adjourned day the plaintiff appeared, an examination was had, and the justice discharged the case. *Held*, that the evidence showed an arrest of the

plaintiff. *Searls v. Viets*, 2 Thomp. & C. (N. Y.) 224.

Where a warrant is first obtained, the person executing it will be protected, whether the one arrested be proved guilty or innocent; but if the statute alone is relied upon, the person making the arrest can have protection only by establishing that the person arrested was found violating the law. *Davis v. Amer. Soc.*, etc., 75 N. Y. 362.

The person must be conscious that he is arrested. *Jones v. Jones*, 13 Ired. L. (N. Car.) 448; *Herring v. Boyle*, 1 Crompt. & R. 377.

There must be a restraint of the person, a restriction of the right of locomotion. *Hart v. Flynn*, 8 Dana (Ky.), 190; *French v. Bancroft*, 1 Metc. (Mass.) 502.

Commanding a party to submit to arrest constitutes an arrest. *Com. v. Sheriff*, 1 Grant's Cas. (Pa.) 187.

A deputy constable who holds an appointment in writing, and has been sworn, may execute process though his appointment has not been filed in the office of the clerk of the county court, as required by statute. *State v. Underwood*, 75 Mo. 230.

**What is Not.**—Where an officer reads a warrant to a person and requests him to appear before a magistrate, and leaves him without taking him into custody, it is not an arrest. *Baldwin v. Murphy*, 82 Ill. 485.

An officer having a warrant against A. went to him in his yard, and being at some distance, told him he had a warrant and said he arrested him; A. having a pitchfork in his hand kept off the officer, and retreated into his house and shut the door against the officer. *Held*, not an arrest. *Genner v. Sparks*, 6 Mod. 173.

Service of a writ of *capias ad respondendum* by a delivery of a copy thereof is not an arrest. *Huntington v. Shultz*, Harp. (S. Car.) 452; s. c., 18 Am. Dec. 660.

1. *Green v. Kennedy*, 46 Barb. (N. Y.) 16. If he delays an unreasonable time the arrest becomes illegal. *Johnson v. Americus*, 46 Ga. 80; *Flinn v. Graham*, 3 Pittsb. (Pa.) 195. See *Schneider v. McLane*, 4 Abb. App. Dec. (N. Y.) 154; *Phillips v. Fadden*, 125 Mass. 198.

It is no defence to a charge for assaulting an officer while making an arrest that he failed to take the prisoner before a magistrate. *Com. v. Tobin*, 108 Mass. 426; s. c., 11 Am. Rep. 375.

out warrant, for felony committed in his view, and carry such person before a magistrate; he also has a right at common law to arrest, without a warrant, any one he suspects to be guilty of felony, whether he acts upon his own knowledge or upon facts communicated by others.<sup>1</sup>

1. *State v. Underwood*, 75 Mo. 231; *State v. Grant*, 76 Mo. 236; *Roberts v. State*, 14 Mo. 138; s. c., 55 Am. Dec. 97, 15 Mo. 28; *State v. Crocker*, 1 *Houst. Cr. Cas.* (Del.) 434; *State v. Oliver*, 2 *Houst. (Del.)* 585; *Eanes v. State*, 6 *Humph. (Tenn.)* 53; s. c., 44 Am. Dec. 289; *Alford v. State*, 8 *Tex. App.* 545; *Tiner v. State*, 44 *Tex.* 128; *Long v. State*, 12 *Ga.* 293; *Boyd v. State*, 17 *Ga.* 194; *Brockway v. Crawford*, 3 *Jones (N. Car.)* 433; s. c., 67 Am. Dec. 250; *State v. Belk*, 76 *N. Car.* 10; *Neal v. Joyner*, 89 *N. Car.* 287; *State v. McNinch*, 90 *N. Car.* 695; *Com. v. Carey*, 12 *Cush. (Mass.)* 246; *Com. v. McLaughlin*, 12 *Cush. (Mass.)* 615; *Rohan v. Sawin*, 5 *Cush. (Mass.)* 281; *Wrexford v. Smith*, 2 *Root (Conn.)* 171; *Holley v. Mix*, 3 *Wend. (N. Y.)* 350; s. c., 20 Am. Dec. 702; *Phillips v. Trull*, 11 *Johns. (N. Y.)* 486; *Burns v. Erben*, 40 *N. Y.* 463; *Wakely v. Hart*, 6 *Bin. (Pa.)* 316; *Drennan v. People*, 10 *Mich.* 169; *Shanley v. Wells*, 71 *Ill.* 78; *Keenan v. State*, 8 *Wis.* 132; *Samuel v. Payne*, 1 *Doug.* 358; *Beckwith v. Philby*, 6 *Barn. & C.* 635; *Davis v. Russell*, 5 *Bing.* 354; *Samuel v. Payne*, 1 *Doug.* 359; *Ledwith v. Catchpole*, *Caldecott's Cas.* 291; *Cowles v. Dunbar*, 2 *C. & P.* 565; *Davis v. Russell*, 2 *M. & P.* 590; *Lawrence v. Hedger*, 3 *Taunt.* 14; *Beckwith v. Philby*, 6 *B. & C.* 35; *Hobbs v. Brandscumb*, 3 *Camp.* 420; *R. v. Woolmer*, 1 *Moody C. C.* 334.

At common law the power of a peace officer to apprehend and detain offenders is much greater than that of private persons; for they may exercise all the powers of the latter, and their right to apprehend persons indicted for felony is undoubted. 1 *East. P. C.* 298, 300.

And they may, which private persons cannot do, apprehend persons on a reasonable suspicion of felony. *Samuel v. Payne*, *Dougl.* 359; 1 *East. P. C.* 301; 2 *Hale P. C.* 83, 84, 89.

Although no felony has been committed. *Beckwith v. Philby*, 6 *B. & C.* 635.

What is a reasonable suspicion of felony cannot, of course, be stated with precision. But it has always been considered that a charge of felony by a person not manifestly unworthy of credit is sufficient to justify the apprehension. 1 *East. P. C.* 302.

The jury must judge of the reasonable-

ness of the grounds upon which the officer acted. *State v. McNinch*, 90 *N. Car.* 695; *Harris v. Atlanta*, 62 *Ga.* 291; *Cochran v. Toher*, 14 *Minn.* 385.

The peace officer should also make such inquiries as his experience teaches him are best suited to ascertain the nature of the offence, and there are few that are without special directions how to act in such cases. *Roscoe's Cr. Ev.* (10th Ed.) 264.

If the officer acts upon suspicion, the crime supposed to have been committed must amount in law to a technical felony. *R. v. Thompson*, 1 *Moody C. C.* 80.

If the arrest is upon the charge or accusation of another, that charge or accusation must amount in fact to a charge of felony. *R. v. Curvan*, 1 *Moody C. C.* 132; *Bowditch v. Balchin*, 5 *Exch.* 378.

But if an arrest be for a past act, whether misdemeanor or felony, it can be made without warrant only when the officer has grounds of reasonable suspicion, such as would justify him at common law in arresting for a past felony. *State v. Grant*, 76 Mo. 236.

An officer may arrest without warrant when he shows satisfactory reasons for his belief of the fact and the guilt of the suspected party and that delay in procuring a warrant might enable to escape. In such case proof of the actual commission of the crime is not necessary. *Neal v. Joyner*, 89 *N. Car.* 287.

An officer is not bound to procure a warrant before arresting a person whom he has probable cause to believe guilty of a felony, even though there may be no reason to fear the escape of such person in consequence of the delay in procuring the warrant. *Wade v. Chaffee*, 8 *R. I.* 224; s. c., 5 *Am. Rep.* 572.

An officer will be justified for an assault upon one endeavoring to assist the arrested person in escaping, without showing that such person was guilty of the offence charged. *Doering v. State*, 49 *Ind.* 56; s. c., 19 *Am. Rep.* 669.

The defendant T. created some disturbance of a violent and disorderly character at G.'s store. G. sent for the police, and very soon W., S., and H. appeared; by this time the disturbance had ceased, though T. was still present and drunk. G. pointed out T. to the peace officers as

Officers who by virtue of their office are conservators of the peace have at common law the right to arrest without warrant all persons who are guilty of a breach of the peace or other violation of the criminal laws in their presence.<sup>1</sup> The arrest must

the party who had created the disturbance, and ordered them to arrest him. The officers attempted the arrest, but T. resisted; a scuffle ensued, and a crowd collected. T. was tied, but finally escaped, as it was alleged, by the assistance of the defendants. The arrest was made by W., S., and H., as policemen under the city authorities, and was made without a warrant. *Held*, that the officers were authorized to make the arrest without a warrant. *State v. Sims*, 16 S. Car. 486.

Where a criminal offence has been committed, as shooting at a person, and an officer is informed of that fact, so that he has reasonable grounds for believing the person to be arrested has committed such offence, he is authorized to arrest such person without a warrant. *Cahill v. People*, 106 Ill. 621.

Where on an indictment for wounding with intent to prevent the lawful apprehension of the prisoner, the evidence was that the prosecutor, a police constable, went with a brother officer, both being in plain clothes, and with two other policemen in uniform, to a public-house, and told the prisoner that he wanted him on a charge of a highway robbery; he had no warrant, but from information he had received he thought it his duty to apprehend the prisoner. The prisoner asked him for further information relative to the charge, which he refused to give, and the prisoner then told him that he would not go to the station-house unless he was told why or by what authority he was apprehended, and he wounded the officer on his proceeding to apprehend him; it was objected that the prisoner must be aware at the time that the apprehension was lawful, and there was nothing here to show that that was the fact. *Talfourd, J.*, held, that to support this charge it was enough that the prisoner was lawfully apprehended. If the apprehension was in fact lawful, the question whether or not the prisoner believed it to be lawful could not be permitted to be considered. The prisoner was not to erect a tribunal in his mind to decide whether he was legally accused or not. He was taken into custody by an officer of the law, and it was his duty to obey the law. *R. v. Bentley*, 4 Cox C. C. 406.

**Arrest upon Information.**—If an officer without a warrant arrests a person upon charge of felony which is made by a third

party, the officer will be justified; but the person making the charge will be liable for the arrest if no felony was committed and if the charge is false. *Holley v. Mix*, 3 Wend. (N. Y.) 350; s. c., 20 Am. Dec. 702; *Burns v. Erben*, 40 N. Y. 463; *Farnam v. Feeley*, 56 N. Y. 451; *Hawley v. Butler*, 54 Barb. (N. Y.) 490.

The mere fact that the information given an officer upon which he arrests a party turns out untrue does not make the informer liable in trespass to the party arrested. So where private persons cause an arrest to be made without process, they are liable in some form of action, unless it appear that the crime has been committed and that they had reasonable cause to believe that the person actually arrested was the guilty person; but the law does not go so far as to require them to show that he is guilty of the charge. *Benham v. Vernon*, 3 Cent. Repr. (D. C.) 276.

**Fugitive from another State.**—An officer has no authority without a warrant to arrest a fugitive from another State who is charged with crime. *State v. Shelton*, 79 N. Car. 605.

A city marshal, under Missouri statute, has no authority to make arrests for an offence not committed in his presence, without a warrant. *State v. Underwood*, 75 Mo. 230.

1. *White v. Kent*, 11 Ohio St. 550; *Wolf v. State*, 19 Ohio St. 248; *Thompson v. State*, 30 Ga. 430; *City Council v. Payne*, 2 N. & Mc. C. (N. Car.) 475; *State v. Belk*, 76 N. Car. 10; *Brooks v. Commonwealth*, 61 Pa. St. 352; *Com. v. Deacon*, 8 Serg. & R. (Pa.) 47; *State v. Russell*, 1 Houst. Cr. Cas. (Del.) 122; *State v. Brown*, 5 Harr. (Del.) 595; *Vandever v. Mattocks*, 3 Ind. 479; *Pow v. Beckner*, 3 Ind. 475; *Burns v. Erben*, 40 N. Y. 463; *Boyleston v. Kerr*, 2 Daly (N. Y.) 220; *Phillips v. Trull*, 11 John. (N. Y.) 486; *Taylor v. Strong*, 3 Wend. (N. Y.) 384; *Meyer v. Clark*, 41 N. Y. Super. Ct. 107; *Wahl v. Walton*, 30 Minn. 506; *Com. v. Hastings*, 9 Metc. (Mass.) 259; *State v. Lafferty*, 5 Harr. (Del.) 491; *Main v. McCarty*, 15 Ill. 441; *Shanley v. Wells*, 71 Ill. 78; *Bryan v. Bates*, 15 Ill. 87; *Cahill v. People*, 106 Ill. 621; *People v. Haley*, 48 Mich. 495; *Roberts v. State*, 14 Mo. 138; s. c., 55 Am. Dec. 97; *State v. Bowen*, 17 S. Car. 58; *Cook v. Nethercote*, 6 C. & P. 741; *Clifford v. Bran-*

be made at the time of the offence or immediately after its commission.

don, 2 Camp. 358; *Derecourt v. Corbishley*, 5 El. & Bl. 188.

An arrest for misdemeanor without a warrant by one who does not see the offence is illegal. *Ross v. Leggett*, 28 N. W. Repr. (Mich.) 695; *Black v. State*, 2 Md. 376; *State v. Beekman*, 27 N. J. L. 124; s. c., 72 Am. Dec. 352; *People v. Smith*, 5 Cow. (N. Y.) 258; *Pow v. Beckner*, 3 Ind. 479; *R. v. Thompson*, 1 R. & M. C. C. 80; *R. v. Bright*, 4 C. & P. 487; *Cook v. Nethercote*, 6 C. & P. 741.

The officer may arrest upon seeing such acts as show a reasonable ground of arrest. *O'Connor v. Bucklin*, 59 N. H. 589.

There is no distinction as to the power to apprehend between one kind of misdemeanor and another, as between a breach of the peace and fraud; but the rule is general that in all cases of misdemeanor there is no power to apprehend after the misdemeanor has been committed. 1 Russ. on Cr. (9th Am. Ed.) 808.

Mr. Roscoe says (Roscoe's Cr. Ev. 10th Ed. 264): "Whether a constable or other peace officer is warranted in arresting a person after a breach of the peace has been committed is a point which has occasioned some doubt. There are, indeed, some authorities to the effect that the officer may arrest the party on the charge of another, though the affray is over, for the purpose of bringing him before a justice to find security for his appearance. 2 Hale P. C. 90; *Williams v. Dempsey*, 1 East P. C. 306, *π*.

But the better opinion was always said to be the other way. 1 East P. C. 305; *Hawk. b. 2, c. 12, s. 20*; 1 Russ. on Cr. (5th Ed.) 394, 724. See *Timothy v. Simpson*, 1 C. M. & R. 757; *R. v. Carey*, 14 Cox C. C. 214."

An officer has no authority to arrest without warrant a common prostitute unless disorderly conduct is committed in his presence. *People v. Pratt*, 22 Hun (N. Y.), 300.

At common law officers are authorized to arrest street-walkers. *Miles v. Weston*, 60 Ill. 361.

Also night-walkers or prowlers. *Roberts v. State*, 14 Mo. 138; s. c., 55 Am. Dec. 97; *Brown v. State*, 2 Lea (Tenn.), 158; *Com. v. Sullivan*, 5 Allen (Mass.), 511; *Com. v. Carter*, 108 Mass. 17; *State v. Maxcy*, 1 McM. (S. Car.) 503.

By night-walkers is meant such persons as are in the habit of being out at

night for some wicked purpose. *Watson v. Carr*, 1 Lewin, 6.

A breach of the peace must have proceeded far enough to sustain proceedings against the person, to authorize his arrest without a warrant. *Quinn v. Heisel*, 40 Mich. 576.

A person shouting and making a noise at night may be arrested without a warrant. *State v. Russell*, 1 Houst. Cr. Cas. (Del.) 122.

Arrest on Sunday by railroad policeman without warrant, who kept the prisoner till Monday, when the necessary papers were made, *held* legal. *Corbett v. Sullivan*, 54 Vt. 619.

A peace officer may arrest for a breach of the peace committed against himself as well as for those committed against others. *Davis v. Burgess*, 54 Mich. 514.

A peace officer has the right to arrest without warrant for a misdemeanor where the arrest is made *flagrante delicto*; and he is possessed of the same powers in making such arrest, and is authorized to employ the same force, and to resort, where necessary, to the same extreme measures in overcoming resistance, as in case of a felony. *State v. McNally*, 87 Mo. 644.

**Concealed Weapons.**—An officer of a municipal corporation has authority without warrant to arrest a person found on the public street carrying concealed weapons contrary to law, although he had no previous knowledge of the fact, if he acted *bona fide* upon such information as induces an honest belief that the person arrested is in the act of violating the law. *Ballard v. State*, 43 Ohio St. 340.

**Municipal Ordinances.**—Power to a city corporation to make ordinances for the security or good order or government of the place, and to appoint or elect officers to carry out ordinances, authorizes the appointment of city guards, or police officers, or peace officers, and such officers may arrest without a warrant persons engaged in breaches of the peace when such a course is not repugnant to the general law of the State. *Com. v. Hastings*, 9 Metc. (Mass.) 259; *Bryan v. Bates*, 15 Ill. 87; *State v. Lafferty*, 5 Harr. (Del.) 491; *White v. Kent*, 11 Ohio St. 550; *Thompson v. State*, 30 Ga. 430; *City Council v. Payne*, 2 N. & McC. (S. Car.) 475; *State v. Bowen*, 17 S. Car. 58.

Where an officer, under a city ordinance, arrests without a warrant, it is in-



**Municipal Ordinances.**—*Continued.*

cumbent on him, when sued for trespass therefor, to show by satisfactory evidence that the offence was in fact committed in his presence. An offer to prove that he had received information which led him to make the arrest in good faith is properly rejected. *Shanley v. Wells*, 71 Ill. 78.

Where a person interferes with and resists an officer while arresting another person for the violation of a city ordinance, the officer will not be liable for arresting him without a warrant. *Montgomery v. Sutton*, 25 N. W. Repr. (Iowa) 748.

So officers may be authorized by ordinance to arrest without warrant for breaches of the city ordinances committed in their presence. *Main v. McCarty*, 15 Ill. 441; *Bryan v. Bates*, 15 Ill. 87; *State v. Lafferty*, 5 Harr. (Del.) 491; *Shanley v. Wells*, 71 Ill. 78; *Roberts v. State*, 14 Mo. 138; s. c., 55 Am. Dec. 97; *State v. Freeman*, 86 N. Car. 683. *Compare State v. Beek*, 67 N. Car. 10.

A vagrant may under municipal ordinances be arrested without a warrant. *Roberts v. State*, 14 Mo. 138; s. c., 55 Am. Dec. 97; *Jones v. State*, 14 Mo. 409. See *Shanley v. Wells*, 71 Ill. 78. *Compare Re Way*, 41 Mich. 299.

An officer is not justified in arresting a vagrant without a warrant for a breach of promise to leave the place. *Roberts v. State*, 14 Mo. 138; s. c., 55 Am. Dec. 97.

A police officer may arrest without warrant for violation of municipal ordinances committed in his presence; but the offender must be taken before the mayor as soon as practicable, a warrant obtained, and trial had. If the arrest be made at a time and under such circumstances as that a trial cannot be had without delay, the officer may keep the offender in custody—commit him to jail or the "lock-up;" but if the officer be guilty of a gross abuse of authority he is liable to indictment. *State v. Freeman*, 86 N. Car. 683.

In determining the power of the marshal of a municipal corporation to arrest without warrant, a statute one section which makes it the duty of that officer to arrest any person "in the act of committing any offence," etc., and another section "to arrest and detain any person found violating any law," etc., should be construed together to determine the extent of such power. Under a proper construction of these sections, a marshal of a municipal corporation is authorized without warrant to arrest a person found

on the public streets of the corporation carrying concealed weapons contrary to law, although he has no previous personal knowledge of the fact, if he acts *bona fide* and upon such information as induces an honest belief that the person arrested is in the act of violating the law. *Ballard v. State*, 43 Ohio St. 340.

Where the offender in question is openly and notoriously engaged in breaking the law, as, for example, where he is maintaining a gambling-table in a public place, it is sufficient for the officer to announce his official position and demand a surrender. If this is refused, he may use force to secure his prisoner. Where an officer is empowered by law to arrest without warrant, he is not in every case bound before making the arrest to give the party to be arrested clear and distinct notice of his purpose to make the arrest, and also of the fact that he is legally qualified to make it. *Shovlin v. Commonwealth*, 106 Pa. St. 369.

**Drunken Persons.**—A police officer arresting a person without a warrant for being intoxicated in a public street is not liable criminally therefor if he acted in good faith and had reasonable cause to believe such person to be intoxicated, although he was not in fact intoxicated. If such officer is indicted for an assault, a judgment of conviction of the arrested person of the crime of drunkenness, rendered by a police court on the day after the arrest, is not conclusive evidence in favor of the officer, at the trial of the indictment, that such person was intoxicated when arrested. *Com. v. Cheney*, 141 Mass. 102.

Where the statute makes it the imperative duty of an officer to arrest for drunkenness without a warrant, if he finds an intoxicated person in a public place, etc., *held*, that if he acted in good faith upon reasonable and probable cause of belief, without rashness or negligence, he is not to be regarded as a criminal because he is found to have been mistaken. *Com. v. Presby*, 14 Gray (Mass.), 103.

The defendant was indicted for an assault on an officer while under arrest. He had been arrested without a warrant for drunkenness, and on trial was acquitted. The point was made that being acquitted he could not be held for the assault, as the officer, acting without a warrant, was a trespasser. The court said: "The mere fact that the defendant had been acquitted of the crime of drunkenness, which is drunkenness by the voluntary use of intoxicating liquor, was not conclusive ev-

idence that he was not drunk when arrested, nor that the officer was not in the discharge of his duty when he made the arrest." *Com. v. Coughlin*, 123 Mass. 436.

**Entering Houses.**—An officer has a right, by virtue of his office and without warrant, to enter any house the door of which is unfastened, in which there is a noise amounting to a breach of the peace, and to arrest any person disturbing the peace there in his presence. *Com. v. Tobin*, 108 Mass. 426; s. c., 11 Am. Rep. 375; *Com. v. Hastings*, 9 Metc. (Mass.) 259.

**Cruelty to Animals.**—Under the N. Y. statute for prevention of cruelty to animals, its authorized officers have power to arrest without warrant any offender violating the statute. *Davis v. Amer. Soc.*, etc., 75 N. Y. 362.

The plaintiff, a pedler, went to the house of Mr. B. and a small dog of Mr. B.'s ran out at the plaintiff, who with a stick gave the dog a blow, which knocked out one of its eyes. The plaintiff then went away, and Mrs. B. immediately sent a boy to fetch a constable; the boy returned with the constable, and Mrs. B. directed them to go after the plaintiff, and apprehended him for the injury done to the dog. They went in pursuit of the plaintiff, and found him at a public-house about a mile from Mr. B.'s, and the constable apprehended him and took him before a magistrate. *Tindal, C. J.* (in summing up): The jury will have to consider, first, whether the plaintiff had committed a wilful injury to the dog; and secondly, whether he was found committing that offence and immediately apprehended. "With respect to the second question, the words of the 7 and 8 Geo. IV. certainly differ materially from those of 1 Geo. IV. c. 56, and were obviously meant to restrict the powers given by that act. The object of the legislature seems to have been to allow the immediate apprehension of a party taken in the commission of a crime of this nature, because otherwise such offences would frequently be committed by persons passing through or having no fixed domicile in the place, and they would therefore entirely escape, if the party injured were obliged to wait for the formalities of a charge before a magistrate, or a warrant. Where the offender is fixed in the country, so that he can be found and apprehended at a subsequent time, there is no reason why that apprehension should not be after a regular proceeding; and the statute therefore differs from the 1 Geo. IV. c. 56, and does not allow a stale ap-

1 C. of L.—47

prehension on an old charge, without a warrant. Still the words of the present statute must not be taken so strictly as to defeat its reasonable operation. Suppose a party seen in the act of committing the crime were to run away, and immediate and fresh pursuit to be made, I think that would be sufficient. So, in this case, the party is actually seen in the commission of the act complained of; as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence could be required; and that being the case, I think it must be treated as an 'immediate apprehension' for an offence which the plaintiff, supposing under the circumstances that it was an offence at all, was 'found committing.'" *Hanway v. Boulbee*, 4 C. & P. 350.

**Interval of Time after Commission of Offence.**—The arrest may be made within a reasonable time after the offence. *Taylor v. Strong*, 3 Wend. (N. Y.) 384.

Five hours having intervened during which the officer was not about anything connected with the arrest, the authority to arrest ceased. *Wahl v. Walton*, 30 Minn. 506. See *Shanley v. Wells*, 71 Ill. 78.

In *R. v. Walker*, 1 Dears. C. C. R. 358; 23 L. J. M. C. 123. The prisoner had assaulted a police constable, who went away, and after two hours' time returned and took him into custody; the court held that this was an unlawful apprehension. *Pollock, C. B.*, said, "The assault for which the prisoner might have been apprehended was committed some time before, and there was no continued pursuit. The interference of the officer, therefore, was not for the purpose of preventing an affray, or of arresting a person whom he had seen recently committing an assault. The apprehension was so disconnected from the offence as to render it unlawful." A police constable having been struck by the prisoner went for assistance, and after an interval of an hour returned with three other constables, when he found the prisoner at home and the door closed; and after another interval the constables forced the door open and endeavored to apprehend the prisoner, who resisted and wounded the prosecutor, but was at last apprehended. The court held, that as there was no danger of any renewal of the original disturbance, and as the facts of the case did not constitute a fresh pursuit, the arrest was illegal. *R. v. Marsden*, D. R. 1 C. C. R. 131; 37 L. J., M. C. 80.

In *R. v. Light*, Dears. & B. C. C. 332, the defendant was convicted on an indict-

Or it may be made upon fresh pursuit, while the offender is fleeing from the scene of the crime.<sup>1</sup>

ment charging him with assaulting a constable in the execution of his duty. It appeared that the constable, whilst standing outside the defendant's house, saw him take up a shovel, and hold it in a threatening attitude over his wife's head, and heard him at the same time say, "If it was not for the policeman outside, I would split your head open." About twenty minutes after the defendant left the house, saying that he would leave his house altogether, and he was then taken into custody by the policeman, who had no warrant. It was on this apprehension that the assault took place, and it was held that the policeman was justified under the circumstances in apprehending the defendant, and that the conviction was right. The court, no doubt, in this case, were strongly actuated by the feeling that the policeman, as always happens on such occasions, is placed in a very difficult position. When a man has recently committed an act of violence, the court might very well be extremely unwilling to say that in no view could the peace officer reasonably believe that he was about to commit another similar act, and so be justified in apprehending him. Much, in such a case, ought to be presumed in favor of an officer of justice, and it is a point upon which the opinion of the jury might be very properly taken. See *Baynes v. Brewster*, 11 L. J., M. C. 5, which is in accordance with this view.

A. went to a house at night, demanding to see the servant. He was told to depart, and would not. A constable was sent for, and A. went from the house to the garden. When the constable arrived A. said that if a light appeared at the windows he would break them; upon which the constable took him into custody. *Held*, that the constable was not justified in so doing. *R. v. Bright*, 4 C. & P. 387.

Where in an action for assaulting the plaintiff and giving him into custody, the defendant justified having done so, and his witnesses stated that the plaintiff, who was the butler of the defendant, was making a great noise in the defendant's house, and had quarrelled with the coachman, and that when the defendant came down stairs the plaintiff was abusive to him and violent in his manner, and making a great noise, and laid hold of him, and they struggled together; Lord Campbell, C. J., directed the jury that if

a person came into a house, or was in it, and made a noise and disturbed the peace of the family, although no assault had been committed, the master of the house might turn him out or call a policeman to do so; and if the plaintiff had assaulted his master and misconducted himself in the manner described by the defendant's witnesses, the defendant would be justified in giving the plaintiff in charge to the policeman, to be dealt with according to law. *Shaw v. Chairtie*, 3 C. & K. 21.

**Verbal Order of Magistrate.**—An officer is justified in making an arrest without a warrant upon the verbal orders of a magistrate. *Farrist v. Leavitt*, 52 N. H. 481. See *Town of Odell v. Schroeder*, 58 Ill. 353. Compare *State v. James*, 78 N. Car. 455.

The prosecutor having received a warrant whereby he was commanded "to apprehend the prisoner and to bring him before me to answer unto the said complaint (assaulting W.) and to be further dealt with according to law," went in search of the prisoner, and brought him before the magistrate who granted the warrant and another magistrate; he was ordered to find bail; he said he would not; upon which he was ordered to be committed; whilst the commitment was making out he made his escape; the prosecutor was ordered to go after him; there was no authority in writing; but in consequence of the verbal directions of the magistrates to the clerk, who was making out the commitment, the latter ordered the prosecutor to go after the prisoner; the prosecutor accordingly did so, and in attempting to apprehend the prisoner was cut by him with a knife; it was objected on the part of the prisoner that the count was not proved, for that the party having been taken before the magistrate, the warrant was *functus officio*; and the second taking was for having made his escape from the office; secondly, that the count was bad, as it did not follow that the assaulting W. was an offence for which the prisoner was liable to be apprehended: but Gaselee, J., thought the warrant continued in force, and that the second objection was upon the face of the record; and the jury having found the prisoner guilty, upon a case reserved, the conviction was held good. *R. v. Williams, R. & M. C. C. R.* 387.

1. *Hanway v. Boulton*, 4 C. & P. 350; *People v. Pool*, 27 Cal. 572.

At common law, a person's insanity justifies his arrest, without legal process, in a case of reasonable necessity.<sup>1</sup>

**3. Notice of Officer's Authority.**—Some notice of the officer's authority should be given. The notice may be either expressed or implied.<sup>2</sup>

1. *Keleher v. Putnam*, 60 N. H. 30.

2. *State v. Spaulding*, 25 N. Western Rep. (Minn.) 793; *State v. Bryant*, 65 N. Car. 327; *Brooks v. Commonwealth*, 61 Pa. St. 352; *Bellows v. Shannon*, 2 Hill (N. Y.), 86.

Notice of the officer's authority may be implied from his uniform and insignia of office. *Yates v. People*, 32 N. Y. 509. See *Com. v. Tobin*, 108 Mass. 426.

No particular form of words is necessary. It is enough that the officer and his business be known. Where an officer used the words, "You are my prisoner," held, competent evidence of notification by him of his business. *State v. Spaulding*, 25 N. W. Repr. (Minn.) 793.

Every one is bound to know the character of an officer acting within his proper jurisdiction. *State v. Townsend*, 5 Harr. (Del.) 487.

Y. was pursued by a shouting mob in the night, threatening his life. In his flight he was seized by an officer whom he killed. Y. was indicted for murder and convicted. On appeal the court said, in granting a new trial, "In the progress of the trial it soon became a material inquiry whether the prisoner was aware of the character of the pursuer. There was no proof of actual knowledge, and then occurred the inquiry whether the jury might not be warranted to infer his knowledge from attending circumstances. Hence the proof of the officers' uniform and the prisoner's defective vision, the street lamp, and the vicinity thereto of the prisoner at the time of the killing, all these circumstances became of vital consequence; for if there was nothing from which the prisoner's knowledge of the official character of the deceased might be inferred, the measure of the offence charged would descend from murder into one of the degrees of manslaughter. And there was no evidence that he demanded him to surrender, or that he told him he arrested him. There was no evidence that he personally knew the officer." *Yates v. People*, 32 N. Y. 509.

An officer not in uniform told the prisoners, "You are my prisoners; surrender;" at the same time he pointed a gun at them. Held, that these words were sufficient notice of his character as an officer. *People v. Pool*, 27 Cal. 572.

An officer is not bound to exhibit his authority or process when he arrests a defendant; a special deputy is. But if it were his duty to exhibit it when demanded, his refusal would not constitute him a trespasser, if he could show that he had a regular legal process in his possession which authorized the arrest. *Arnold v. Steeves*, 10 Wend. (N. Y.) 514. See 1 Bish. Cr. Pro. § 648; *State v. Caldwell*, 2 Tyler (Vt.) 214; *State v. Curtis*, 1 Hayw. (N. Car.) 471; *Bellows v. Shannon*, 2 Hill (N. Y.), 86; *Com. v. Field*, 13 Mass. 322; *Com. v. Cooley*, 6 Gray (Mass.), 356; *State v. Townsend*, 5 Harr. (Del.) 487; *Johnson v. State*, 30 Ga. 426.

As to special deputy. See *State v. Kirby*, 2 Ired. L. (N. Car.) 201; *Frost v. Thomas*, 24 Wend. (N. Y.) 418.

Where a policeman found the prisoner in a garden at night, stooping down close to the ground, and the prisoner jumped up and ran away, and the policeman ran after him and caught him; and it appeared that the prisoner was cutting or plucking some picketees and carnations in the garden, and the jury found that the prisoner had wilfully and maliciously plucked and cut flowers from plants or roots in the garden with intent to steal them, and that he was found by the policeman committing that offence, but that the policeman did not inform the prisoner by word of mouth that he belonged to the police force; it was held, on a case reserved, that the policeman had authority to apprehend the prisoner. *R. v. Fraser*, R. & M. C. C. R. 419.

Where the officer and the cause of arrest are known to the offender, an officer need not inform him of the cause of the arrest. *Wolf v. State*, 19 Ohio St. 248. See *People v. Pool*, 27 Cal. 572.

Reading the warrant is notice of the officer's authority. *State v. Green*, 66 Mo. 631.

An officer is not required to part with the possession of his warrant. 1 East. P. C. 319.

If he allows a prisoner to take it into his hand to read it, and he refuses to return it, the officer may use necessary force to repossess it. *R. v. Milton*, *Moody & M.* 107.

Where a party is apprehended in the commission of an offence, or upon fresh

**3. Showing Warrant.**—Where the officer is a known public officer he is not bound to show his warrant before making the arrest, even if demanded.<sup>1</sup>

**4. By Private Person.**—A private person may arrest without a warrant if he sees a felony committed, or to prevent one. If a private person makes an arrest upon suspicion of felony he is justifi-

pursuit afterward, notice is not necessary, because he must know the reason why he is apprehended. *R. v. Howarth*, 1 Moody, 207; *R. v. Hunt*, 1 Moody, 93; *People v. Wolven*, 7 N. Y. Legal Obser. 89. See *Roberts v. State*, 14 Mo. 138; s. c., 55 Am. Dec. 97; *State v. Belk*, 76 N. Car. 10; *Cahill v. People*, 106 Ill. 621; *Com. v. Tobin*, 108 Mass. 426; s. c., 11 Am. Rep. 375; *R. v. Woolmer*, 9 Moody, 334; 1 Hale P. C. 470; *Gordon's Case*, 1 East. 315.

1. *Arnold v. Steeves*, 10 Wend. (N. Y.) 514; *State v. Caldwell*, 2 Tyler (Vt.), 214; *State v. Spaulding*, 25 N. West'n Repr. (Minn.) 793; *State v. Curtis*, 1 Hayw. (N. Car.) 471. See *Williams v. State*, 44 Ala. 41; *Jamison v. Gaernett*, 10 Bush (Ky.), 221; *Com. v. McLaughlin*, 12 Cush. (Mass.) 615; *Com. v. Coughlin*, 123 Mass. 436; *State v. Green*, 66 Mo. 631; *State v. Wetherell*, 5 Harr. (Del.) 487.

"The accused is required to submit to the arrest, to yield himself immediately and peaceably into the custody of the officer, who can have no opportunity, until he has brought his prisoner into safe custody, to make him acquainted with the cause of his arrest, and the nature, substance, and contents of the warrant under which it is made. These are obviously successive steps. They cannot all occur at the same instant of time. The explanation must follow the arrest; and the exhibition and perusal of the warrant must come after the authority of the officer has been acknowledged, and his power over his prisoner has been acquiesced in." *Com. v. Cooley*, 6 Gray (Mass.), 350. See *State v. Townsend*, 5 Harr. (Del.) 487; *Kernan v. State*, 11 Ind. 471; *Drennan v. People*, 10 Mich. 169; *State v. Freeman*, 8 Iowa, 428; s. c., 74 Am. Dec. 317; *Plasters v. State*, 1 Tex. App. 673; *Arnold v. Steeves*, 10 Wend. (N. Y.) 514; *State v. Garrett*, 1 Winst. (N. Car.) 144.

A special deputy or a private person to whom a warrant is addressed is bound to show his warrant, or the arrest is illegal. *Frost v. Thomas*, 24 Wend. (N. Y.) 418; *Arnold v. Steeves*, 10 Wend. (N. Y.) 515; *State v. Kirby*, 2 Ired. (N. Car.) 201; *State v. Curtis*, 1 Hayw. (N. Car.) 471; *Com. v. Field*, 13 Mass. 321; *Burton v. Wilkinson*, 18 Vt. 186; s. c., 46 Am. Dec. 145.

A warrant had been issued addressed to all the peace officers of Devon for arrest of C. for trespassing in pursuit of conies. *Held*, that C. was justified in resisting an officer who attempted to arrest him without having the warrant in his possession. *Codd v. Cabe*, L. R. 1 Exch. 352.

In order to justify an arrest, even by an officer, under a warrant, for a misdemeanor, it is necessary that he should have the warrant with him at the time. *R. v. Chapman*, 12 Cox C. C. 4.

A warrant was issued by a justice of a county, directed to the constable of the township, and generally to all her majesty's officers of the peace in and for the county, commanding them, or some of them, forthwith to apprehend G. and convey him before two justices to answer for not obeying a bastardy order for payment of money. The warrant was delivered to the superintendent of police, and had subsequently been in the possession of D., one of the police constables. Afterwards D. & S., police constables, while on duty in uniform, arrested G. under the warrant, but they had it not in their possession at the time of the arrest, it being at the station-house. G. was rescued by several persons, who assaulted the constables, whereupon informations for the rescue and assault were laid against the parties by the constables, and at the hearing before justices the complaint as to rescue was withdrawn, and that for the assault proceeded with, and the parties were convicted. *Held*, that the conviction was bad, as the arrest by the constables was illegal, they not having the warrant in their possession at the time. *Galliard v. Laxton*, 9 Cox C. C. 127.

A man was summoned to answer an information charging him with trespass in pursuit of conies; as he did not appear in obedience to the summons, a warrant was issued for his apprehension. A police officer to whom the warrant was directed, but not having it in his possession, attempted to arrest the man, who thereupon committed an assault upon him. *Held*, that he could not be convicted upon an information charging him with assaulting the police officer in the execution of his duty. *Codd v. Cabe*, 1 L. R. Exch. Div. 352.

fied if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, then such arrest is illegal.<sup>1</sup>

1. *Holley v. Mix*, 3 Wend. (N. Y.) 350; s. c., 20 Am. Dec. 702; *Phillips v. Trull*, 14 Johns. (N. Y.) 486; *Burns v. Erben*, 1 N. Y. 463; *Reuck v. McGregor*, 32 No. J. L. 70; *Wrexford v. Smith*, 2 Root (Conn.), 171; *State v. Holmes*, 48 N. H. 377; *Wakely v. Hart*, 6 Binn. (Pa.) 316; *Brockway v. Crawford*, 3 Jones (N. Car.), 433; s. c., 67 Am. Dec. 250; *Neal v. Joyner*, 89 N. Car. 287; *Eanes v. State*, 6 Humph. (Tenn.) 53; s. c., 44 Am. Dec. 289; *Long v. State*, 12 Ga. 293; *Rohan v. Sawin*, 5 Cush. (Mass.) 281; *Doughty v. State*, 33 Tex. 1; *Drennan v. People*, 10 Mich. 169; *Dodds v. Board*, 43 Ill. 95; *Kindred v. Stitt*, 51 Ill. 401; *Keenan v. State*, 8 Wis. 132; *Wasson v. Canfield*, 6 Blackf. (Ind.) 406; *Simmerman v. State*, 16 Neb. 615; s. c., 4 Am. Cr. R. 91; *Brooks v. Commonwealth*, 61 Pa. St. 352; *Neal v. Joyner*, 89 N. Car. 287; *State v. Bryant*, 65 N. Car. 327; *Adams v. Moore*, 2 Selw. N. P. 910; *Allen v. Wright*, 8 C. & P. 522. Compare *Ashley v. Dundas*, 5 Up. Can. Q. B. 754; *McKenzie v. Gibson*, 8 Up. Can. Q. B. 100.

There must be in fact a felony committed by some person; for were there no felony there can be no ground of suspicion. The party that arrests (if a private person) must suspect the person arrested to be the felon. He must have reasonable cause for such suspicion, and these must be alleged and proved. 2 Hale's P. C. 78.

"And even when there is only probable cause of suspicion, a private person may without warrant, at his peril, make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest."—*Tilghman, C. J. Wakely v. Hart*, 6 Binn. (Pa.) 316. See *Com. v. Deacon*, 8 Serg. & R. (Pa.) 49; *Findlay v. Pruitt*, 9 Port. (Ala.) 295; *Johnson v. Tompkins*, 1 Baldw. (U. S.) 578.

More suspicion will not justify the arrest. *Findlay v. Pruitt*, 9 Port. (Ala.) 195. See *Hall v. Suydam*, 6 Barb. (N. Y.) 84; *Winebiddle v. Porterfield*, 9 Barb. (Pa.) 137; *Hall v. Hawkins*, 5 Humph. (Tenn.) 357; *Wilmarth v. Mountford*, 4 Wash. (C. C.) 82; *Wills v. Noyes*, 12 Pick. (Mass.) 324.

Reasonable ground for suspecting that the person arrested had committed the felony may be shown in mitigation of damages. *Phillips v. Trull*, 11 Johns. (N. Y.) 486; *Wrexford v. Smith*, 2 Root (Conn.), 171; *Wasson v. Canfield*, 6 Blackf.

(Ind.) 406; *Rogers v. Wilson*, Minor (Ala.), 407; s. c., 12 Am. Dec. 61; *Eanes v. State*, 6 Humph. (Tenn.) 53; s. c., 44 Am. Dec. 289; *Drennan v. People*, 10 Mich. 169.

A personal resemblance will not justify the arrest. *Sugg v. Pool*, 2 S. & P. (Ala.) 196.

At common law all private persons are justified, without a warrant, in apprehending and detaining until they can be carried before a magistrate all persons found committing or attempting to commit a felony. *R. v. Hunt*, 1 Moo. C. C. 93.

In cases of suspicion of felony, and in cases of offences less than felony, a private person has at common law no right to apprehend offenders. *Fost. 318.*

The principle of the common law in reference to arrests is thus stated by Lord Tenterden in *Beckwith v. Philby*, 6 B. & C. 635:

"There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that an actual felony has been committed. Whereas, a constable having reasonable ground to suspect that a felony has been committed is authorized to detain the party suspected until an inquiry shall be made by the proper authorities." And to this effect are the authorities in the absence of controlling legislation. See *Allen v. Wright*, 8 Car. & P. 522; *Rohan v. Sawin*, 5 Cush. (Mass.) 281; *Burns v. Erben*, 40 N. Y. 463; *Neal v. Joyner*, 89 N. Car. 287; *Brockway v. Crawford*, 3 Jones (N. Car.), 433; s. c., 67 Am. Dec. 250; *Cooley on Torts*, 175. Compare *Reuck v. McGregor*, 32 N. J. L. 70.

Whether or not a private person may arrest a person who stands indicted for felony does not appear to be well settled. Lord Hale inclines to the opinion that the protection does not extend to a private person in such case, because a person innocent may be indicted, and because there is another way of bringing him to answer, viz., process of *capias* to the sheriff, who is a known responsible officer. 2 Hale P. C. 84.

The reasoning of Mr. East, however, is rather in favor of the protection. It may be urged, he observes, that if the fact of the indictment found against the party be known to those who endeavor

to arrest him, in order to bring him to justice, it cannot be truly said that they act upon their own private suspicion or authority, and therefore they ought to have equal protection with the ordinary ministers of the law. At any rate, it is a good cause of arrest by private persons if it may be made without the death of the felon. Dalton, c. 170, s. 5.

And if the fact of the prisoner's guilt be necessary for their complete justification, the bill of indictment found by the grand jury would (he conceives) for that purpose be *prima-facie* evidence of the fact till the contrary should be proved. 1 East P. C. 300.

Where a breach of the peace is actually being committed any private person may interfere to prevent it, even though no felony be committed or attempted, after proper warning, and calling upon the parties to desist. Fost. 272, 311.

And as they may take all necessary measures to end the breach and to prevent its recurrence, they may apprehend and detain any persons taking part in the disturbance. Whether or no, when all danger of any further breach is over, no felony having been committed, they are bound to set at liberty the persons in their custody, or whether they may take them before a magistrate, or give them into the custody of a peace officer, does not appear to have been discussed.

It is said by Hawkins that at common law every private person may arrest any suspicious night-walker, and detain him till he give a good account of himself. Hawk. P. C. b. 2, c. 13, s. 6. v

But this would be an authority even more general than that of peace officers, and the passage is not law. See 1 Russ. on Crim. (5th Ed.) 726.

It was held in the same case that a person, who was not a regularly-appointed game-keeper, but who was employed as a watcher to watch for poachers, had authority to apprehend poachers, and that it was not necessary that he should have any written authority. R. v. Price, 7 C. & P. 178.

If a person who has been arrested for felony escapes, any one may arrest him without a warrant. Com. v. Sheriff, 1 Grant (Pa.), 187; Dow's Case, 18 Pa. St. 37; Statist v. Holmes, 48 N. H. 377.

When the arrest is made under the belief that the party arrested is guilty of a felony, when in fact he is only guilty of a misdemeanor, the party arresting will be justified. Smith v. Donnelly, 66 Ill. 464.

Where H., being called up in the night by one of his servants, found that his

stable had been attempted, and the door cut in such a manner that the bolt was exposed, and found the prisoner and another person concealed in the yard; and a steel instrument was also found, by which the door of the stable appeared to have been cut, and some house-breaking instruments were also found near the spot where the prisoner and his companion were concealed, and under these circumstances they had been apprehended and detained by H. and his servant, and during such detention, and in the course of the same night, the prisoner had cut H.'s servant with a knife, a point was made that such cutting was not within the 43 Geo. III., c. 58, on the ground that the prisoner was not lawfully in custody, there being no warrant, and an attempt to commit a felony being only a misdemeanor. But the judges held that the prisoner being detected in the night attempting to commit a felony, might be lawfully detained without a warrant, until he could be carried before a magistrate. R. v. Hunt, R. & M. C. C. 93.

Where an arrest is made by a citizen for an offence committed in his presence, he must, to justify himself, show that without unnecessary delay he took the prisoner before a magistrate, or delivered him to a peace officer. Judson v. Reardon, 16 Minn. 431.

In an action for damages for an unlawful arrest, proof that the defendant did not act from malice towards the arrested party is no defence. Neal v. Joyner, 89 N. Car. 287.

Upon an indictment for maliciously wounding, it appeared that near midnight two men were seen near a board-house belonging to O.; on two persons going up to the board-house, they heard a noise there, and they found the door of the board-house half open, and saw the prisoner inside the board-house, and heard a noise among the boards, and the prisoner said "Bring the board;" the two persons then went to O.'s house to call him up; one of them then went to the bottom of the road, which was about one hundred yards from the board-house, and in a quarter of an hour O. came up with a carving-knife in his hand, and having also got another person to assist him, they went to the board-house, the door of which was then closed; the hasp was over the staple, and the padlock was in the staple, but not locked; nobody was in the board-house; they went in, and O. found two planks removed from the place, where he had seen them four days before, to another part of the board-house, nearer the door; they then went on from

A private person may arrest a person he sees committing any criminal offence.<sup>1</sup>

the board-house, and after searching in several places, found the prisoner in the garden of another person, crouched down under a tree, and with a drawn sword in his hand; the prisoner was asked twice what he did there; he made no answer, and then he started off; one of the witnesses ran and caught hold of him, but the prisoner compelled him to leave hold of him; the prisoner fell over something, and then the other witnesses came up; the prisoner struck O. on the side with his sword, but did not cut him; then the prisoner again attempted to get away, but was prevented by some paling; the prisoner then turned round and struck O. with his sword, cut through O.'s hat into his head, and produced a slight wound on his head; up to that time O. had not struck the prisoner any blow; the jury negatived the felony in removing the boards from one part of the board-house to another; and it was objected that the prosecutor had no right to apprehend either at common law or under the Vagrant Act, 5 Geo. IV., c. 83, s. 6; for at common law the power to arrest for offences inferior to felony was confined to the time of committing the offence, and it was the same under the Vagrant Act; that the prisoner was not found by the prosecutor committing the offence, but, on the contrary, had ceased from the attempt and abandoned the intention, which distinguished this case from *Rex v. Hunt*, R. & M. C. R. 93; but the judges, on a case reserved, held that he might lawfully be apprehended, for, as he was seen in the board-house, and was taken on fresh pursuit before he had left the neighborhood, it was the same as if he had been taken in the outhouse, or in running away from it. *R. v. Howarth*, R. & M. C. C. R. 207.

**Crimes not Felony at Common Law.**—A private person is not by common law justified in arresting a party upon suspicion for a crime that is not felony by the common law. Of such crimes are adultery, perjury, assault with intent to kill, mayhem, involuntary manslaughter by negligence, piracy, obstructing an officer in the performance of his duty. See *State v. Cooper*, 16 Vt. 551; *State v. Noyes*, 25 Vt. 415; *Com. v. Newell*, 7 Mass. 245; *Com. v. Gable*, 7 S. & R. (Pa.) 423; *Anderson v. Commonwealth*, 5 Rand. (Va.) 627; s. c., 16 Am. Dec. 776; *State v. Boyden*, 13 Ired. (N. Car.) 505; *State v. Brunson*, 2 Bailey (S. Car.), 149; *Anonymous R. M. Charl.* (Ga.) 228;

*Adams v. Barrett*, 5 Ga. 404; *Shields v. Yonge*, 15 Ga. 349; s. c., 60 Am. Dec. 698; *Mauro v. Almeida*, 10 Wheat. (U. S.) 495; *R. v. Morphey*, 1 Salk. 85; *Bowditch v. Balchin*, 5 Exch. 378.

1. *Taylor v. Strong*, 3 Wend. (N. Y.) 384; *People v. Adler*, 3 Park. Cr. (N. Y.) 249; *Phillips v. Trull*, 11 Johns. (N. Y.) 486; *Knot v. Gay*, 1 Root (Conn.) 66; *Mayo v. Wilson*, 1 N. H. 53; *Re Powers*, 25 Vt. 261; *Vanderveer v. Matlocks*, 3 Ind. 479; *State v. Bryant*, 65 N. Car. 327; *City Council v. Payne*, 2 N. & McC. (S. Car.) 475; *People v. Pool*, 27 Cal. 572. See *Ryan v. Donnelly*, 71 Ill. 100.

Where the owner of a horse and carriage left the horse tied to a post, and the same is taken away without lawful authority by boys, though without intent to steal, a private citizen is justified in arresting them. *Smith v. Donnelly*, 66 Ill. 464.

Upon an indictment for wounding it appeared that the prisoner had asked leave to take a basket of ashes from the prosecutor's ashpit, which he was permitted to do. As he was carrying away the ashes the prosecutor's apprentice saw the spout of a new tea-kettle, which had stood on a shelf near the ashpit, among the ashes, and having given the alarm, the prosecutor seized the prisoner to detain him while a constable was sent for; the prisoner resisted, and in the struggle both fell, and the prisoner cut the prosecutor with a knife; a rattle of copper had been heard while the prisoner was at the ashpit; it was objected that the prosecutor had no right to detain the prisoner, *Alderson, B.*: "That will depend on whether the jury are satisfied that the prisoner had in fact stolen the tea-kettle. If he had stolen the tea-kettle, the prosecutor had a right to detain him, and this wounding will be felony." *R. v. Price*, 8 C. & P. 282.

The plaintiff went into the defendant's shop, and offered to purchase an article at a price marked on a ticket; the plaintiff disputed with the shopman about the price, and was desired to leave the shop, which he refused to do, and declared he would strike any man who laid hands on him; a shopman then struck him on the face; the plaintiff returned the blow, and a contest commenced, the noise of which brought down the defendant from the room above; when he came down the plaintiff was scuffling with the shopman; the defendant sent for a policeman, and on his arrival the plaintiff was



**5. Assisting an Officer.**—A private person must assist an officer in making an arrest when called upon;<sup>1</sup> but a person thus aiding an officer is bound to know whether he is authorized to make the arrest. If the officer is a trespasser, any one assisting him is also a trespasser.<sup>2</sup> If a private person refuses to assist an officer when he is called upon, such refusal will subject him to indictment.<sup>3</sup>

**6. Authority cannot be Delegated.**—An officer cannot delegate his authority to a private person.<sup>4</sup>

requested by the defendant to go from the shop quietly, but he refused; he was standing still in the shop, insisting on his right to remain there, and a mob gathering round the door, when the defendant gave him in charge to the policeman, who took him to the police-station. It was held that the defendant had a right, the danger continuing, to deliver the plaintiff into the hands of the policeman, and that the circumstance that the plaintiff was not guilty of the first illegal violence made no difference; for at the time the defendant interfered he was ignorant of that fact: he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighborhood, and the persons of all those concerned, from violence. *Timothy v. Simpson*, 1 C. M. & R. 757.

And it seems to be clear, that if either party be dangerously wounded in such an affray, and a stander by, endeavoring, to arrest the other, be not able to take him without hurting or even wounding him, yet he is in no way liable to be punished, inasmuch as he is bound, under pain of fine and imprisonment, to arrest such an offender, and either detain him till it appear whether the party will live or die, or carry him before a justice of peace. 1 Hawk. P. C. c., 63 § 12; 3 Inst. 158.

**Deserters.**—An officer of the army may lawfully arrest a deserter and hold him for trial by court-martial without a warrant, and proof that the person making the arrest was *de facto* such an officer was sufficient. It was not even suggested that the arrest could be supported without any evidence of his military authority. *Hutchings v. Van Bokkellen*, 34 Me. 126.

In *Trask v. Payne*, 43 Barb. (N. Y.) 569, it was decided that a civil officer or private citizen could not lawfully arrest a deserter without express order or warrant. See *Kurtz v. Moffitt*, 115 U. S. 487.

1. *McMahan v. Green*, 34 Vt. 69; *Cole-*

*man v. State*, 63 Ala. 93; *Coyles v. Hur-*  
*tin*, 10 Johns. (N. Y.) 85; *Comfort v.*  
*Commonwealth*, 5 Whart. (Pa.) 437; *State*  
*v. Shaw*, 3 Ired. (N. Car.) 20; *State v.*  
*Hailey*, 2 Strobb. (S. Car.) 73; *State v.*  
*Deniston*, 6 Blackf. (Ind.) 277; *Mitchell*  
*v. State*, 12 Ark. 50; s. c., 54 Am. Dec.  
253.

Where a sheriff, having a warrant to apprehend several persons who had riotously assembled together and committed an assault, etc., came to the house where they were assembled, and being resisted and unable to make the arrest commanded A. and others to guard the house in which the persons were assembled and prevent their escape while he went to the next town, about four miles distant, to get a sufficient force to enable him to execute the warrant, it was held that A. and the others were bound to aid and assist the sheriff on his order or summons in preserving the peace or apprehending the offenders, and that the sheriff was to be deemed constructively present so as to justify A. and others to arrest the offenders during his temporary absence for the purpose of getting further assistance, of which fact the jury were to decide, and that if A. and others, so ordered by the sheriff to assist him during his temporary absence for such purpose should permit or assist the offenders to escape, they would be liable to punishment. *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85. See *State v. Deniston*, 6 Blackf. (Ind.) 277; *Comfort v. Commonwealth*, 5 Whart. (Pa.) 437.

Persons assisting an officer, although the officer may not be acting in good faith, or illegally, are justified. *Forrist v. Leavitt*, 52 N. H. 481; *McMahan v. Green*, 34 Vt. 69; *Reed v. Rice*, 2 J. J. Marsh. (Ky.) 44; s. c., 19 Am. Dec. 122.

2. *Dietrichs v. Schaw*, 43 Ind. 175; *Mitchell v. State*, 12 Ark. 50; s. c., 54 Am. Dec. 253.

3. 1 Bish. Cr. Law, § 469.

4. A constable having a warrant to apprehend A., gave it to his son, who, in attempting to arrest A., was stabbed by him

**7. Manner of Making—Force.**—An officer may use such force, but no more, as is necessary to effect the arrest.<sup>1</sup>

An officer or citizen may kill a felon if necessary to secure him or to prevent his escape, or he may take the criminal's life if his own is threatened and in danger while making the arrest. An officer may kill a person he endeavors to arrest for misdemeanor if their resistance to arrest renders it absolutely necessary.<sup>2</sup>

with a knife which A. happened to have in his hand at the time, the constable then being in sight, but a quarter of a mile off. *Held*, that his arrest was illegal, and that, if death had ensued, this would have been manslaughter only, unless it was shown that A. had prepared the knife beforehand to resist the illegal violence. *R. v. Patience*, 7 C. & P. 795.

1. *Beaverts v. State*, 4 Tex. App. 175; *Skidmore v. State*, 43 Tex. 93; *Giroux v. State*, 40 Tex. 97; *Shooling v. Commonwealth*, 106 Pa. St. 369; *State v. Mahon*, 3 Harr. (Del.) 568; *Wright v. Keith*, 24 Me. 158; *Murdock v. Ripley*, 35 Me. 472; *Rhodes v. King*, 52 Ala. 272; *Golden v. State*, 1 S. Car. 292; *State v. McNally*, 87 Mo. 644.

The burden of proving excessive force is on the party arrested. *Henry v. Lowell*, 16 Barb. (N. Y.) 268. See *Wright v. Keith*, 24 Me. 158. Compare *Loring v. Aborn*, 4 Cush. (Mass.) 608; *Kreger v. Osborn*, 7 Blackf. (Ind.) 74.

The amount of force and the employment of the usual means in making the arrest and detention, when within the compass of the means ordinarily resorted to for securing one found committing a criminal act, must be left to the discretion and judgment of the officer, when, actuated by no ill-will or malevolent impulse, he is engaged in discharging a public and official duty. *State v. McNinch*, 90 N. Car. 695.

*Gaston, J.*, commenting on an instruction which directed the jury to determine "whether a man of ordinary prudence would not have deemed it necessary and proper to secure the prisoner by tying him," for doing which the accused constable then on trial had been indicted for an abuse of authority, said: "The act of tying is therefore within the limits of the officer's authority, and of the propriety and necessity of adopting this mode of securing the prisoner; the officer is the judge, and the jury cannot supervise the correctness of his judgment. *State v. Stalcup*, 2 Ired. (N. Car.) 50.

If he uses more force than is necessary he is guilty of assault and battery. *Golden v. State*, 1 S. Car. 292; *Beaverts v. State*, 4 Tex. App. 175.

He must not strike the prisoner, except in necessary self-defence. *Skidmore v. State*, 43 Tex. 93; *Kreger v. Osborn*, 7 Blackf. (Ind.) 74.

An officer whose life nor person were endangered killed a prisoner from a desire to prevent his escape. *Held*, murder in second degree. *Caldwell v. State*, 41 Tex. 87.

An officer was conducting a prisoner to the calaboose, when the latter stopped, refused to go farther, and tried to get away, whereupon the officer struck him over the head with his pistol. There was no evidence that the prisoner was assaulting the officer, and it was proved that aid was within call, but not sought by the officer. *Held*, that the officer was guilty of aggravated assault. *Skidmore v. State*, 2 Tex. App. 20. See *R. v. Hagan*, 8 C. & P. 167.

One of the marshals of the city of London, whose duty it was, on the day of a public meeting at Guildhall, to see that a passage was kept for the transit to their carriages of the members of the corporation and others, directed a person in the front of a crowd at the entrance to stand back, and, on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him. *Held*, that in so doing the marshal exceeded his authority, and that he should have confined himself to the use of pressure, and should have waited a short time to afford an opportunity for removing the party in a more peaceable way. *Imeson v. Cope*, 5 C. & P. 193.

2. 2 Bishop's Cr. L. § 647 *et seq.*; 1 East P. C. 298; 1 Hawk. P. C. § 11, p. 81; 1 Russell on Cr. (9th Am. Ed.) 857; Fost. 271, 321. See *U. S. v. Rice*, 1 Hugh (C. C.), 560; *U. S. v. Jailer*, 2 Abb. (U. S.) 265; *Carr v. State*, 43 Ark. 99; *Morton v. Bradley*, 30 Ala. 683; *Williams v. State*, 44 Ala. 41; *Clements v. State*, 50 Ala. 117; *State v. Rutherford*, 1 Hawks. (N. Car.) 456; s. c., 9 Am. Dec. 658; *State v. Roane*, 2 Dev. L. (N. Car.) 58; *State v. Garrett*, Winst. (N. Car.) 144; *State v. Anderson*, 1 Hill (S. Car.), 327; *State v. Mahon*, 3 Harr. (Del.) 568; *Wolf v. State*, 18 Ohio St. 248; *Duperrier v. Dantrive*, 12 La.

**8. Breaking Doors.**—Force may be used to effect an entrance to a house in order to effect an arrest, but in every case in which

Ann. 664; *Mesmer v. Commonwealth*, 26 Gratt. (Va.) 976; *Conraddy v. People*, 5 Park. Cr. (N. Y.) 234; *Brooks v. Commonwealth*, 61 Pa. St. 352; *Pond v. People*, 8 Mich. 150; *State v. Green*, 66 Mo. 631; *R. v. Dadson*, 2 Den. C. C. 42.

If an officer, in making an arrest for a misdemeanor, is resisted, he may apply force to accomplish the arrest, and if it become necessary to kill the offender to save his own life or person from great bodily harm, he may do so. *State v. McNally*, 87 Mo. 644.

Where a felony has been committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit, if he cannot otherwise be overtaken. And the same rule holds if a felon, after arrest, break away as he is carrying to jail, and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity it is at least manslaughter in him who kills him; and the jury ought to inquire whether it were done of necessity or not. 1 East P. C. c. 5. § 67, p. 298. In making arrests in cases of misdemeanor and breach of the peace (with the exception, however, of some cases of flagrant misdemeanors) it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him, and generally speaking it will be murder; but under circumstances it may amount only to manslaughter, if it appear that death was not intended. *Fost.* 271; 1 East P. C. c. 5, § 70, p. 302.

An excise officer, being in the execution of his office, had seized, with the assistance of another person, two smugglers in the act of landing whiskey from the Scottish shore, contrary to law; the deceased had surrendered himself quietly into the hands of the prisoner, but shortly afterwards, when the officer was off his guard, he assaulted him violently with an ash stick, which cut his head severely in several places, and he lost much blood, and was greatly weakened in the struggle which succeeded; the officer, fearing the deceased would overpower him, and having no other means of defending himself, discharged a pistol at the deceased's legs, in the hopes of deterring him from any further attack, but the discharge did not take effect, and the deceased prepared to make another assault; that, seeing this, the prisoner warned him to keep off, telling him he must shoot him if he did not;

but the deceased disregarded the warning, and rushed towards him to make a fresh attack; that he thereupon fired a second pistol, and killed him. *Holroyd, J.*, told the jury, "an officer must not kill for an escape, where the party is in custody for a misdemeanor; but if the prisoner had reasonable ground for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of making use of such weapon by the previous violence that he had received, then he was justified. If an affray arises, and blows are received, and weapons used in heat, and death ensues, although the party may have been at the commencement in the prosecution of something unlawful, still it would be manslaughter in the killer. In this case it is admitted that the custody was lawful. The question is, whether, under all circumstances, the deceased being in the prosecution of an illegal act, and having made the first assault, the prisoner had such reasonable occasion to resort to a deadly weapon to defend himself as any reasonable man might fairly and naturally be expected to resort to. *Foster's Case*, 1 Lewin, 187.

An attempt to escape will not justify killing. *Reneau v. State*, 2 Lea (Tenn.), 721; s. c., 31 Am. Rep. 626; 2 Bish. Cr. L. §§ 648, 649; 1 Wharton Cr. L. §§ 404, 406.

O. committed an assault and battery, but not in the presence of C., a police officer. C. arrested O. without a warrant, and while taking him to the station-house O. escaped, C. pursued, and O. being likely to escape, C. shot him, from the effects of which he died. C. was indicted for murder, and convicted of manslaughter in the fourth degree. Upon appeal the court said: "The prisoner, although an officer, was acting without a warrant. No warrant had been issued by or to any one against the deceased. Nor had he committed any offence in the view or presence of the officer. Under such circumstances, to justify taking life, even if the jury were satisfied of the necessity of the homicide to prevent an escape, it must be shown that a felony had actually been committed. The distinction is marked between cases of misdemeanor and of felony. It is only in the latter that a homicide is justifiable by any person acting without a warrant, even when it is the only means to prevent an escape of the criminal. When no warrant is

doors may be broken open in order to make an arrest there must be a previous notification of the business, and a demand to enter on the one hand and a refusal on the other before the parties proceed to that extremity.<sup>1</sup>

out for the offender even, an officer cannot take his life to prevent his escape upon his own belief of the commission of a felony, however reasonable a ground he may have for such belief. If he act without a warrant he must be prepared to show the fact of the felony in order to justify taking the life of a person whom he is endeavoring to arrest or to secure." *Conrodoy v. People*, 5 Park. Cr. (N. Y.) 235.

An officer is not justified in shooting a criminal, who is endeavoring to escape, when the attempt to arrest is illegal. *Lacy v. State*, 7 Tex. App. 403.

Where a police officer, without warrant, arrested a man who was guilty of no offence, and in preventing an escape struck and killed the prisoner, these facts would at least warrant a verdict of involuntary manslaughter in the commission of an unlawful act. *O'Connor v. State*, 64 Ga. 125.

If, instead of flying, the criminal stands and resists the officer, then the officer may press forward in his pursuit, even though the case be not one of felony, but misdemeanor; and if, not desisting, but still pressing forward, he is obliged to take the life of the other, as in self-defence, he will be justified. 1 *Bishop Cr. Pro.* § 160. See 1 *Hale P. C.* 494; 1 *Hawk. P. C.* p. 28, §§ 17, 18; *Fost.* 270; 4 *Black. Com.* 179; 1 *East P. C.* ch. 5, p. 307, § 74.

The person arrested must have notice of the authority to arrest to justify killing him. *Williams v. State*, 44 Ala. 41.

If rioters and other like offenders stand their ground, and only by killing them can the disorder be suppressed, it is justifiable to do so. 2 *Bish. Cr. L.* § 655.

In misdemeanors the officer has no right to kill the offender unless he resists with violence. *Williams v. State*, 44 Ala. 41; *Clement v. State*, 50 Ala. 117.

He must secure his prisoner if possible without resort to deadly weapons. *Reneau v. State*, 2 Lea (Tenn.), 720; s.c., 31 *Am. Rep.* 626.

Mr. Russell says, 1 *Russ. on Cr.* (9th Am. Ed.) 747: "Though in cases civil or criminal an officer may repel force by force, where his authority to arrest or imprison is resisted, and will be justified in so doing if death should be the consequence; yet he ought not to come to extremities upon very slight interruption, nor without a reasonable necessity. 4 *Black. Com.* 180. And if he should kill

where no resistance is made, it will be murder; and it is presumed that the offence would be of the same magnitude if he should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to have cooled. 1 *East P. C.* c. 5, s. 63, p. 297. And again, though where a felon flying from justice is killed by the officer in the pursuit, the homicide is justifiable if the felon could not be otherwise overtaken. 1 *Hale*, 481; 4 *Black. Com.* 179; *Fost.* 271. Yet where a party is accused of a misdemeanor only, and flies from the arrest, the officer must not kill him, though there be a warrant to apprehend him, and though he cannot otherwise be overtaken; and if he do kill him, it will in general be murder. *Fost.* 271; 1 *Hale*, 481. So, in civil suits, if the party against whom the process is issued, fly from the officer endeavoring to arrest him, or if he fly after an arrest actually made, or out of custody in execution for debt, and the officer not being able to overtake him make use of any deadly weapon, and by so doing, or by other means, intentionally kill him in the pursuit, it will amount to murder. 1 *Hale*, 481; *Fost.* 271; 1 *East P. C.* c. 5, s. 74, pp. 306, 307. And also in the case of impressing seamen, if the party fly, it is conceived that the killing by the officer in the pursuit to overtake him would be manslaughter at least, and in some cases murder, according to the rules which govern the case of misdemeanors; paying attention, nevertheless, to those usages which have prevailed in the sea-service in this respect, so far as they are authorized by the courts, which have ordinary jurisdiction over such matters, and are not expressly repugnant to the laws of the land. 1 *East P. C.* c. 5, s. 75, p. 308; *Borthwick's Case*, *Dougl.* 207. If an officer make an arrest out of his proper district (except as he may be authorized by some act of Parliament), or if an officer have no warrant or authority at all, he is no legal officer, nor entitled to the special protection of the law; and if he purposely kill the party for not submitting to such illegal arrest, it will be murder in all cases, at least where an indifferent person acting in the like manner, without any such pretence, would be guilty to that extent. 1 *East P. C.* c. 5 s. 78, p. 312."

1. *Russell on Crimes* (9th Am. Ed.),

**9. Hue and Cry**—Is the old common-law process of pursuing with horn and with voice all felons, and such as have dangerously

840; *Com. v. Erwin*, 1 Allen (Mass.), 587; *Com. v. Reynolds*, 120 Mass. 190; s. c., 21 Am. Rep. 510; *McLennon v. Richardson*, 15 Gray (Mass.), 74; *Barnard v. Bartlett*, 10 Cush. (Mass.) 501; *State v. Smith*, 1 N. H. 346; *Kneas v. Fitler*, 2 Serg. & R. (Pa.) 263; *Bell v. Clapp*, 10 Johns. (N. Y.) 263; s. c., 6 Am. Dec. 339; *Williams v. Spenar*, 5 Johns. (N. Y.) 352; *Cahill v. People*, 106 Ill. 621; *State v. Shaw*, 1 Root (Conn.), 134; *Kelsey v. Wright*, 1 Root (Conn.), 83; *Barb. Cr. L.* 545; *Russell on Crimes*, 631; *Roscoe's Cr. Ev.* 628; *Hawkins v. Commonwealth*, 14 B. Mon. (Ky.) 395; s. c., 61 Am. Dec. 147.

Where a felony has been actually committed, or a dangerous wound given, a peace officer may justify breaking an entrance door to apprehend the offender without any warrant, but in cases of misdemeanors and breach of the peace a warrant is required; it likewise seems to be the better opinion that mere suspicion of felony will not justify him in proceeding to this extremity unless he be armed with a warrant. *Foster*, 320, 321; *Hawk. P. C. b. 2, c. 14, s. 7*; 1 Russ. Cri. 748, 749, 5th Ed.; *sed vide*, 1 Hale P. C. 583; 2 Hale P. C. 92.

In cases of writs, an officer is justified in breaking an outer door upon a *capias*, grounded on an indictment for any crime whatever, or upon a *capias* to find sureties for the peace, or the warrant of a justice for that purpose. *Hawk. P. C. b. 2, c. 14, s. 3*.

So upon a *capias utlagatum*, or *capiat pro fine*. *Hawk. P. C. b. 2, c. 14, s. 3*; 1 Hale P. C. 459.

Or upon an *habere facias possessionem*. 1 Hale P. C. 458.

Or upon the warrant of a justice of the peace for levying a forfeiture in execution of a judgment or conviction. *Hawk. P. C. b. 2, c. 14, s. 5*.

If there be an affray in a house, and manslaughter or bloodshed is likely to ensue, a constable having notice of it, and demanding entrance, and being refused, and the affray continuing, may break open the doors to keep the peace. 2 Hale P. C. 95; *Hawk. P. C. b. 2, c. 14, s. 8*.

And if there be disorderly drinking or noise in a house at an unreasonable hour of the night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder. 2 Hale P. C. 95; 1 East P. C. 322.

So if affrayers fly to a house, and he follows them with fresh suit, he may break open the doors to take them. *Hawk. P. C. b. 1, c. 63, s. 16*.

But it has been doubted whether a constable can safely break open doors in such a case without a magistrate's warrant, and it is said that at least there must be some circumstances of extraordinary violence to justify him in so doing. 1 Russ. Cri. 390 (t), 5th Ed.

The privilege is confined to the outer doors and windows only—for if the sheriff or a peace officer enter a house by the outer door, being open, he may break open the inner doors, and the killing in such case would be murder. 1 Hale P. C. 458.

If the party whom the officer is about to arrest, or the goods which he is about to seize, be within the house at the time, he may break open any inner doors or windows to search for them, without demanding admission. *Per Gibbs, J., Hutchinson v. Birch*, 4 Taunt. 619.

But it seems that if the party against whom the process is issued be not within the house at the time, the officer must demand admittance before he will be justified in breaking open an inner door. *Ratcliffe v. Burton*, 3 Bos. & Pul. 223.

So if the house be that of a stranger, the justification of the officer will depend upon the fact of the goods, or the persons against whom he is proceeding, being in the house at the time. *Cooke v. Birt*, 5 Taunt. 765; *Johnson v. Leigh*, 6 Taunt. 240; 1 Russ. on Cri. 751, 5th Ed.

The privilege likewise extends only to those cases where the occupier or any of his family who have their domestic or ordinary residence there are the objects of the arrest; and if a stranger, whose ordinary residence is elsewhere, upon pursuit, takes refuge in the house of another, such house is no castle of his, and he cannot claim the benefit of sanctuary in it. *Foster*, 320, 321; 1 East P. C. 323.

But this must be taken subject to the limitation already expressed in regard to breaking open inner doors in such cases, viz., that the officer will only be justified by the fact of the person sought being found there. *Supra*, 1 East P. C. 324; 1 Russ. Cri. 751, 5th Ed.

The privilege is also confined to arrests in the first instance; for if a man legally arrested (and laying hands on the prisoner, and pronouncing the words of arrest, constitute an actual arrest) escape

wounded others. The hue and cry may be raised by constables, private persons, or both. The constable and his assistants have

from the officer, and take shelter in his own house, the officer may, upon fresh pursuit, break open the outer door in order to retake him, having first given due notice of his business, and demanded admission, and having been refused. If it be not, however, on fresh pursuit, it seems that the officer should have a warrant from a magistrate. 1 Hale P. C. 459; Foster, 320; 1 East, P. C. 324.

The officer cannot be treated as a trespasser although he has failed to notify the owner of the house who the person sought to be arrested is, no inquiry having been made in relation thereto, and in fact the person sought for is not there. *Com. v. Reynolds*, 120 Mass. 190; s. c., 21 Am. Rep. 510.

An officer has a right and without a warrant to enter any house the door of which is unfastened in which there is a noise amounting to a breach of the peace, and to arrest any person disturbing the peace there in his presence. *Com. v. Tobin*, 108 Mass. 426; s. c., 11 Am. Rep. 375; *Com. v. Hastings*, 9 Metc. (Mass.) 259.

If there is an affray in a house in view or hearing of a constable, or where those who have made an affray in his presence fly to a house and are immediately pursued by him, and he is not suffered to enter in order to suppress the affray in the first case, or to apprehend the affrayers in either case, he may justify breaking open the doors. 1 Russell on Crimes (9th Am. Ed.), 841.

An officer may break open doors to effect an arrest for contempt of court. Russell on Crimes (9th Am. Ed.), 840; *Burdett v. Abbott*, 14 East, 157, where the process of contempt proceeded upon the order of the House of Commons.

Where A let a house except one room which he reserved for himself and occupied separately, and, the outer door of the house being open, a constable broke open the door of the inner room, occupied by A, in order to arrest him, it was held that trespass would not lie against the constable. *Williams v. Spencer*, 5 Johns. (N. Y.) 352.

An officer cannot break the door of a third person to arrest a criminal not dwelling there unless such person is then actually in the house; but the owner may permit a peaceable entrance and withdraw it at any time if the offender is not in the house, without unlawfully obstructing the officer. *Hawkins v. Common-*

*wealth*, 14 B. Mon. (Ky.) 395; s. c., 61 Am. Dec. 147.

But it should be observed that in all cases where the doors of strangers are broken open upon the supposition of the person sought being there, it must be at the peril of finding him there; unless, as it seems, where the parties act under the sanction of a magistrate's warrant. 2 Hale, 103; *Fost.* 321; 1 East P. C. c. 5, s. 87, p. 324.

Mr. Smith, in the note to *Semayne's Case*, 1 Sm. Lead. Cas. 114, says: "There may, perhaps, be another case in which the sheriff might justify entering the house of a stranger upon bare suspicion, viz.: if the stranger were to use fraud, and to inveigle the sheriff into a belief that the defendant was concealed in his house for the purpose of favoring his escape, while the officers should be detained in searching, or for any other reason, it might be held that he could not take advantage of his own deceit so as to treat the sheriff who entered under the false supposition thus induced as a trespasser; or, perhaps, such conduct might be held to amount to a license to the sheriff to enter." It certainly is reasonable in such a case that the party should not be permitted to show that in fact the defendant was not concealed in this house, and this would be in accordance with the principles established by *Pickard v. Sears*, 6 A. & E. 469; *Heane v. Rogers*, 9 B. & C. 586; *Kieran v. Sanders*, 6 A. & E. 515; and *Gregg v. Wells*, 10 A. & E. 90, in which last case it was held that a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.

**By Private Person.**—A private person in fresh pursuit may force an entrance to a house under circumstances which authorize him to make an arrest. 4 Black. Com. 293. He may break in a house and arrest a person to prevent murder. *Hancock v. Baker*, 2 B. & P. 260. But he cannot force an entrance and commit an assault in defence of persons therein. *Rockwell v. Murray*, 6 Up. Can. Q. B. 412.

**Escape.**—If the criminal escape, the officer may break open the doors of his house to rearrest him. *Cahill v. People*, 106 Ill. 621; *Com. v. McGahey*, 11 Gray (Mass.), 194.

the same powers, protection, and indemnification as if acting under the warrant of a magistrate. Private persons who join are justified, even though it should turn out that no felony has been committed. But if a person wantonly, and maliciously, and without cause raises the hue and cry, he is liable to punishment as a disturber of the peace.<sup>1</sup>

**10. Illegal Arrest.**—An officer is bound to know the law: and if he makes an arrest upon a supposed warrant which on its face is void, he is liable to the person arrested.<sup>2</sup> (See FALSE IMPRISONMENT.)

Where the pursuit is fresh and the party is consequently aware of the object of the officer, the outer door of the house of such party may be broken open by the officer without making known his business, demanding admission, and receiving refusal. *Allen v. Martin*, 10 Wend. (N. Y.) 300; s. c., 25 Am. Dec. 564.

The officer will not be authorized to break open doors in order to retake a prisoner in any case where the first arrest has been illegal. 1 East P. C. c. 5, § 87, p. 324.

Therefore, where an officer has made an illegal arrest on civil process, and was obliged to retire by the party's snapping a pistol at him several times, and afterwards returned again with assistants, who attempted to force the door, when the party within shot one of the assistants it was ruled to be only manslaughter. *Stevenson's Case*, 10 St. Tr. 462.

1. Harris Cr. L. (Force's Ed.) 251.

If a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavors to prevent an escape; and in such cases, if fresh suit be made, and *a fortiori*, if hue and cry be levied, all who join in aid of those who began the pursuit will be under the same protection of the law; and the same rule holds if a felon, after arrest, break away as he is being carried to jail, and his pursuers cannot retake him without killing him. 1 Hale, 489, 490; 1 Hawk. P. C. c. 28, s. 11; Fost. 309; 1 East P. C. c. 5, s. 67, p. 298.

Where, upon a robbery committed by several, the party robbed raised hue and cry, and the country pursued the robbers, and one of the pursuers was killed by one of the robbers, it was held that this was murder, because the country, upon hue and cry levied, are authorized by law to pursue and apprehend the malefactors, and that, although there were no warrant of a justice of the peace to raise hue and cry, nor any constable in the

pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons, and that therefore the killing of any of the pursuers was murder. *Jackson's Case*, 1 Hale, 464.

2. *Savacool v. Boughton*, 5 Wend. (N. Y.) 170; *Stevens v. Wilkins*, 6 Barr. (Pa.) 260; *Lewin v. Uzuber*, 3 Cent. Repr. (Md.) 234; *Hubbard v. Lord*, 59 Tex. 384; *State v. Wenzel*, 77 Ind. 428; *Rafferty v. People*, 69 Ill. 111; s. c., 72 Ill. 37; s. c., 18 Am. Rep. 601; *Moore v. Watts*, 1 Ill. 18; *State v. McDonald*, 3 Dev. (N. Car.) 471; *State v. Leach*, 7 Conn. 452; s. c., 18 Am. Dec. 118; *Grunmon v. Raymond*, 1 Conn. 40; s. c., 6 Am. Dec. 200; *Duckworth v. Johnston*, 7 Ala. 578; *Halstead v. Brice*, 13 Mo. 171; *Ex parte Burford*, 3 Cranch. (U. S.), 448. See FALSE IMPRISONMENT; WARRANT.

A void process affords no protection to the officer serving or attempting to serve the same. Process may be void as to the parties, but voidable only as to the officer. Where a process or warrant is regular and legal in its frame, bearing upon its face all the legal requisites to make it perfect, both in form and substance, and it appears to have been issued by a court or magistrate having jurisdiction of the subject-matter and of the person of the respondent, the officer will be protected in its service, notwithstanding any error or irregularity in the previous issuing of the same or any imposition practised upon the court in obtaining it. *State v. Weed*, 21 N. H. 262; s. c., 3 Am. Dec. 188. See *Sturbridge v. Winslow*, 21 Pick. (Mass.) 83; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170; s. c., 21 Am. Dec. 181; *Rogers v. Mulliner*, 6 Wend. (N. Y.) 597; s. c., 22 Am. Dec. 546; *Horton v. Hendershot*, 1 Hill (N. Y.), 118; *Fox v. Wood*, 1 Rawle (Pa.), 143; *Jones v. Hughes*, 5 S. & R. (Pa.) 299; s. c., 9 Am. Dec. 364; *Paul v. Van Kirk*, 6 Binn. (Pa.) 124; *Brother v. Cannon*, 1 Scam. (Ill.) 200; *Robinson v. Harlan*, 1 Scam. (Ill.) 237; *State v. Curtis*, 1 Hayw.

Where an arrest is clearly illegal, an attempt to make it under the circumstances will be such a provocation as will reduce the case to manslaughter if the party resisted, and in so doing killed the officer.<sup>1</sup> (See also HOMICIDE.)

(N. Car.) 471; *Faster v. Gault*, 2 McM. (S. Car.) 335.

An arrest without warrant becomes illegal if there is an unreasonable delay in procuring one after the arrest. *Johnson v. Americus*, 46 Ga. 80.

An officer may stop in the execution of process, regular on its face, whenever he becomes satisfied that there is a want of jurisdiction in the court or officer issuing the same. *Earl v. Camp*, 16 Wend. (N. Y.) 562. See *Housh v. People*, 75 Ill. 487.

When a warrant has been issued to apprehend a person for an offence less than felony, the police officer who executes it must have the warrant in his possession at the time of arrest. The appellant was summoned to answer an information charging him with trespass in pursuit of conies; as he did not appear in obedience to a summons, a warrant was issued for his apprehension. The respondent, being a police officer to whom the warrant was directed, but not having it in his possession, attempted to arrest the appellant, who thereupon committed an assault upon him. *Held*, that the appellant could not be convicted upon an information charging him with assaulting the respondent in the execution of his duty. *Codd v. Cabe*, L. R. 1 Ex. D. 352. See *State v. Lovell*, 23 Iowa, 304.

A United States marshal will be justified in making an arrest under a warrant issued by a United States commissioner who did not reside in the judicial district where the alleged offence was committed, describing the party arrested by a fictitious name, when in fact the party arrested is the party against whom the complaint was filed. *Williams v. Tidball*, 8 Pac. Repr. (Ariz.) 351.

**Arrest of Passenger.**—The Massachusetts statute does not authorize an arrest by officers not present when the offence is committed; upon complaint by a car conductor, and such an arrest is therefore unlawful. *Krulevitz v. Eastern R. Co.*, 3 N. Eng. Repr. (Mass.) 310.

1. *Com. v. Drew*, 4 Mass. 391; *Com. v. Carey*, 12 Cush. (Mass.) 246; *State v. Oliver*, 2 Houst. (Del.) 585; *Noles v. State*, 26 Ala. 31; s. c., 62 Am. Dec. 711; *Williams v. State*, 44 Ala. 41; *Roberts v. State*, 14 Mo. 138; s. c., 55 Am. Dec. 97; *State v. Belk*, 76 N. Car. 10; *State v. Craton*, 6 Ired. (N. Car.) 164; *Rafferty*

*v. People*, 69 Ill. 111; 72 Ill. 37; *Galvin v. State*, 6 Coldw. (Tenn.) 291; *R. v. Curran*, 3 C. & P. 397; *R. v. Patience*, 7 C. & P. 775; *R. v. Addis*, 6 C. & P. 388; *R. v. Phelps*, C. & M. 180; *R. v. Howath*, 1 Moody, 207; *R. v. Thompson*, 1 Moody, 80.

A person may resist an unlawful attempt at arrest, and, if necessary, rather than submit, may lawfully kill the person making it. *Simmerman v. State*, 16 Neb. 615; s. c., 4 Am. Cr. R. 91.

If a constable take a man without a warrant upon a charge of ill-using a person, which ill-usage was not in the presence of the constable, and therefore gives him no authority to do so, and the prisoner runs away, and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S. to prevent his retaking him, it will not be murder, but manslaughter only; because the arrest was illegal, and J. S. ought to have known it was, and then his attempt to retake was illegal also; and that though the prisoner, while in custody of the constable, struck the man by whom the charge was given; because a blow whilst he was under the influence of the provocation from the illegal arrest caused by such man would not justify the constable in detaining him; at least it will make no difference if the blow was not likely to be followed with dangerous consequences, nor made a new and distinct ground of detainer. Upon an indictment for maliciously cutting Walby, it appeared that a man travelling upon the highway told the constable that a man coming along the road had been ill-using him, and charged the constable, in the prisoner's hearing, to take the prisoner before a magistrate for so misusing him, on which the constable, meeting the prisoner passing along the highway, ordered him to stop for insulting a man on the road, laid hold of him, tapped him on the shoulder, said he was his prisoner, and that he should take him to a magistrate, and ordered Walby to assist him, which W. did, and to which the prisoner submitted. No particulars of what the supposed ill-usage or insult consisted of appeared in evidence, nor did they pass in the constable's view or hearing, and therefore the apprehension and detainer appeared clearly thus far to have been



unlawful. Afterwards, and whilst the prisoner was thus in custody and before they found a magistrate, the prisoner struck the man in the constable's presence, who had made the charge against him, and the constable then also told the prisoner he should take him before a magistrate; and sometime afterwards, as they were proceeding along to a magistrate's, the prisoner ran away and attempted to escape, but was pursued by W. by the constable's order; and being overtaken by him refused to stop, asking W. where his authority was, who said it was in his hand, alluding to a stick which W. then had in his hand and which the prisoner had given up to him at the commencement of the detainer; and without further information, when W. was going to take hold of him, the prisoner told him if he would not let him go he would stab him, and then gave him the cut in the face, for which he was thus indicted. Holroyd, J., doubted whether the effect of the first illegal custody might not operate upon the circumstances that subsequently took place, as a defence against the present indictment, either in rendering even the subsequent imprisonment tortious, or depriving the prisoner's conduct of the necessary legal ingredient of malice; and he reserved the case for the opinion of the judges, who held that the original arrest was illegal, and that the recaption would have been illegal; and therefore the case would not have been murder if death had ensued. *R. v. Curvan, R. & M. C. C. R. 132.*

In *R. v. Curtis, Fost. 135*, the prisoner being in the house of a man named Cowling, who had made his escape, swore that the first person who entered to retake Cowling should be a dead man, and, immediately upon the officers breaking open the door, struck one of them on the head with an axe and killed him. This was held murder, and a few of the judges were of opinion that even if the officers could not have justified breaking open the door, yet that it would have been a bare trespass in the house of Cowling, without any attempt on the property or person of the prisoner; and admitting that a trespass in the house, with an intent to make an unjustifiable arrest of the owner, could be considered as some provocation to a bystander, yet surely knocking a man's brains out, or cleaving him down with an axe, on so slight a provocation, savored rather of brutal rage, or, to speak more properly, of diabolical mischief, than of human frailty, and it ought always to be remembered that in all cases of homicide

upon sudden provocation the law indulges to human frailty, and to that alone.

So in *R. v. Stockley, 1 East P. C. c. 5, § 78, p. 310*, the fact that the prisoner deliberately resolved upon shooting Welsh, in case he offered to arrest him again, was, it has been argued, sufficient of itself to warrant a conviction for murder, independently of the legality of the warrant. *1 East P. C. 311.*

When a bailiff, having a warrant to arrest a man, pressed early into his chamber with violence, but not mentioning his business, and the man not knowing him to be a bailiff, nor that he came to make an arrest, snatched down a sword hanging in his chamber, and stabbed the bailiff, whereof he died; this was held not to be murder, for the prisoner did not know but that the party came to rob or kill him when he thus violently broke into his chamber without declaring his business. *1 Hale P. C. 470.*

A bailiff having a warrant to arrest C. upon a *ca. sa.*, went to his house and gave him notice. C. threatened to shoot him if he did not depart; but the bailiff, disregarding the threats, broken open the windows, upon which C. shot and killed him. It was ruled, 1, that this was not murder, because the bailiff had no right to break the house; 2, that it was manslaughter, because C. knew him to be a bailiff; but, 3, had he not known him to be a bailiff, it had been no felony, because done in defence of his house.

*Cook's Case, 1 Hale, 458; Cro. Car. 537; W. Jones, 429.* Upon these cases the following very sensible observations are made in *Roscoe's Cr. Ev. 801*: These decisions would appear to countenance the position that where an officer attempts to execute an illegal warrant and is in the first instance resisted with such violence by the party that death ensues, it will amount to manslaughter only. But it should seem that in analogy to all other cases of provocation this position requires some qualification. If it be possible for the party resisting to effect his object with a less degree of violence than the infliction of death, a great degree of unnecessary violence might, it is conceived, be evidence of such malice as to prevent the crime from being reduced to manslaughter.

In *Thompson's Case, 1 R. & M. C. C. R. 80*, where the officer was about to make an arrest on an insufficient charge, the judges adverted to the fact that the prisoner was in such a situation that he could not get away. In these cases it

would seem to be the duty of the party whose liberty is endangered to resist the officer with as little violence as possible, and that if he uses great and unnecessary violence, unsuited both to the provocation given and to the accomplishment of a successful resistance, it will be evidence of malice sufficient to support a charge of murder.

So also where, as in *Stockley's Case*, 1 East P. C. c. 5, § 78, p. 310, and *Curtis's Case*, Fost. 135, the party appears to have acted from motives of express malice, there seems to be no reason for withdrawing such a case from the operation of the general rule that provocation will not justify the party killing, or prevent his offence from amounting to murder, where it is proved that he acted at the time from express malice. And of this opinion appears to be Mr. East, who says, "it may be worthy of consideration whether the illegality of an arrest does not place the officer attempting it exactly on the same footing as any other wrongdoer." 1 East P. C. 328.

It may be remarked that this question is fully decided in the Scotch law, the rule being as follows: In resisting irregular or defective warrants, or warrants executed in an irregular way, or upon the wrong person, it is murder, if death ensue to the officer by the assumption of lethal weapons, where no great personal violence has been sustained. *Alison's Princ. Cr. Law of Scotland*, 25. If, says Baron Hume, instead of submitting for the time, and looking for redress to the law, he shall take advantage of the mistake to stab or shoot the officer when no great struggle has yet ensued and no previous harm of body has been sustained, certainly he cannot be found guilty of any lower crime than murder. 1 Hume, 250. The distinction appears to be, says Mr. Alison, that the Scotch law reprobates the immediate assumption of lethal weapons in resisting an illegal warrant, and will hold it as murder if death ensue by such immediate use of them, the more especially if the informality or error was not known to the party resisting; whereas the English practice makes such allowance for the irritation consequent upon the irregular interference with liberty, that it accounts death inflicted under such circumstances as manslaughter only. *Alison's Princ. Cr. Law of Scotland*, 28.

In this connection Mr. Greaves, the learned editor of *Russell on Crimes*, says: "In such cases it seems to me that it may be well deserving of consideration whether the first inquiry ought not to be

whether or no the act done was caused by the illegal apprehension. If the act done arose from other causes, and had no reference to the illegal arrest, as if it arose from previous ill-will, it should seem that the illegality of the arrest ought not to be taken into consideration, because it was not the cause of the act, and therefore could not be truly said to have afforded any provocation for it. Such a case would be like the cases where blows have been given by the deceased, but the fatal blow has been inflicted in consequence of previous ill-will. See *R. v. Thomas*, 7 C. & P. 817; *R. v. Kirkham*, 8 C. & P. 115. From the observations of Parke, B., in *R. v. Patience*, 7 C. & P. 775, I infer that the very learned baron was of opinion that if there were previous malice, the illegal arrest would not reduce the crime to manslaughter; because the previous malice was the cause of the act and not the illegality of the arrest. In such an inquiry the fact that the prisoner was ignorant at the time that the arrest was illegal would be most material, because it would almost conclusively show that the act did not arise from that cause. It should also be observed that if 'one has a legal and illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has is his justification.' Per Holt, C. J.; *Greenville v. The College of Physicians*, 12 Mod. 386; and see *Crowther v. Ramsbottom*, 7 T. R. 654; *The Governors of Bristol Poor v. Wait*, 1 Ad. & E. 264. So it might be contended that if the party apprehended had committed a felony, as he might be apprehended by any individual without a warrant, the apprehension by a constable under a defective warrant would not be illegal, as he might justify the arrest as a private individual. See per Tindal, C. J., in *Hoye v. Bush*, 1 M. & Gr. 775. See also as to a constable's authority to apprehend any person within his district, whom he has reasonable ground to suspect of having committed a felony, *Beckwith v. Philby*, 6 B. & C. 638. In such a case also it might be contended that he might justify the arrest, although in fact he did apprehend under an illegal warrant."

Where on an indictment for assaulting J. it appeared that the prisoner got into an empty third-class carriage proceeding from M. to S., and got out on the wrong side at N., and being asked by the guard for his ticket, he said he had none, and had intended to get out at the station for

**11. Jurisdiction.**—The party taking upon himself to execute process, whether by writ or warrant, must be a legal officer for that purpose, or his assistant; and if an officer make an arrest out of his proper district, or have no warrant or authority at all, or if he execute process out of the jurisdiction of the court from whence it issues, he will not be considered as a legal officer entitled to the special protection of the law; and, therefore, if a struggle ensue with the party injured and such officer be killed, the crime will be only manslaughter.<sup>1</sup>

C. No other demand was made on the prisoner; but the guard ordered him to get into a second-class carriage, and locked the doors. The train then proceeded to S., a distance of several miles. The prisoner, on getting out, was asked for his ticket; and on his not producing it, the second-class fare from M. to S. was demanded. It not being paid, the policeman at the station collared the prisoner, who gave him a blow and got away. He was pursued and retaken, when he cut the policeman's hand. The reason alleged for bringing the prisoner to S. was that it was the headquarters of the railway authorities, and there was no mode of dealing with the prisoner at N. Wightman, J., told the jury (after stating the facts that occurred at N.): "The guard, instead of then taking him on the specific charge of going so far without his ticket, which perhaps he might have done, takes him in a second-class carriage to S. several miles out of the way. A ticket from M. to S. is there demanded, and afterwards the full fare. It seems to me that this is clearly beyond the law, and that the railway authorities had no right to demand the fare from N. to S. I do not give any opinion as to the right to convey a person refusing to produce his ticket at one station on to another, on the charge of not paying his fare for that part of the journey which the prisoner had voluntarily and fraudulently performed; but whatever might have been the situation of the parties if, on demand and refusal of the ticket or fare at N., the charge was there made, and he had been conveyed to S. for the purpose of dealing with it; here, the arrest being for non-payment of the fare to S., the apprehension was illegal, and the prisoner had a right to resist it." *R. v. Mann*, 6 Cox C. C. 461.

1. 1 Hale, 457-459; 1 East P. C. c. 5, § 80, pp. 312-314; 1 Russ. on Cr. 823; *Krug v. Ward*, 77 Ill. 603; *Kindred v. Stitt*, 51 Ill. 401; *Ressler v. Peats*, 86 Ill. 275; *Sturm v. Potter*, 41 Ind. 181.

The portions of this subject relating to

murder and manslaughter will be fully treated under the title HOMICIDE.

It has been ruled that homicide committed upon a bailiff attempting to execute a writ within an exclusive liberty, such writ not having a *non-omittas* clause, will not amount to murder. *R. v. Mead*, 2 Stark. C. 205.

It has been held that if the constable of the vill of A came into the vill of B to suppress some disorder, and in the tumult the constable be killed in the vill of B, this will be only manslaughter, because he had no authority in B as constable. 1 Hale, 459. But it was considered that if the constable of the vill of A had a particular precept from a justice of peace directed to him by name, or by his name of office as constable of A, to suppress a riot in the vill of B, or to apprehend a person in the vill of B for some misdemeanor within the jurisdiction and consuance of the justice of the peace, and in pursuance of that warrant he went to arrest the party in B, and in executing his warrant was killed in B, this amounted to murder. 1 Hale, 459; 2 Hawk. P. C. c. 13, §§ 27, 30.

Where a warrant was directed "to C. S., one of the collectors of the parish of W., the constables of the said parish, and all others his Majesty's officers," to levy a distress, it was held that the constable of W. had no authority to execute it out of the parish of W.; the rule of law being that where a warrant is directed to officers as individuals, or to individuals who are not officers, they may execute it anywhere within the extent of the magistrate's jurisdiction; but where it is directed to men by the name of their office, it is confined to the districts in which they are officers. *R. v. Weir*, 1 B. & C. 288.

The sheriff of one county cannot make an arrest in another county except on fresh pursuit in case of an escape, nor can he detain in such other county an arrested prisoner, except under a writ of *habeas corpus*. Page v. Staples, 13 R. I.

**12. Resisting Arrest.**—If an officer be resisted while in the execution of his duty and the party so resisting kill the officer, it will be murder.<sup>1</sup> (See HOMICIDE.) Every one coming to the officer's aid and lending his assistance, whether commanded or not, is under the same protection as the officer himself. This protection extends, under certain limitations, to the cases of private persons interposing for preventing mischief from an affray, or using their endeavors to apprehend felons and to bring them to justice; such persons being likewise in the discharge of a duty required of them by the law.<sup>2</sup> (See HOMICIDE.)

306; *Platt v. The Sheriffs of London*, Plowd. 35; *Hammond v. Taylor*, 3 B. & A. 408; *Avery v. Seeley*, 3 W. & S. (Pa.) 494.

1. 1 Russ. on Cr. (9th Am. Ed.) 734; 1 Bish. Cr. L. § 441; 2 Ib. §§ 699, 705; 1 Whart. Cr. L. § 413; 1 Green. Cr. R. 155; *Desty's Cr. L.* § 129; *State v. Oliver*, 2 Houst. (Del.) 585; *Dill v. State*, 25 Ala. 15; *Johnson v. State*, 30 Ga. 426.

Killing an officer will amount to murder, though he has no warrant and was not present when any felony was committed, but takes the party on a charge only (see HOMICIDE); and though such charge does not in terms specify all the particulars necessary to constitute the felony. And it appears that it will be no excuse for killing an officer that such officer was proceeding to handcuff the party who was in his custody upon a charge of felony.

The prisoner had produced a forged bank-note; and from his conduct at the time, which justified a suspicion that he knew it to be forged, he was apprehended and taken to a constable, and delivered with the note to the constable; and the charge to the constable was, "because he had a forged note in his possession." After he had been in custody at the constable's some hours, the constable was handcuffing him to another man, when he pulled out a pistol and shot the constable. The constable was not killed, but the prisoner was indicted upon the 43 Geo. III, c. 58; and it was urged on his behalf that the charge imported no legal offence, for unless he knew the note to be forged he was no felon; and if the charge was insufficient, the arrest was illegal; and killing the officer (if that had taken place) would have been only manslaughter. But the judges were all of opinion that this defect in the charge was immaterial; that it was not necessary for such a charge to contain the same accurate description of the offence as would be required in an indictment; and that the charge in question must have been con-

sidered as imputing to the prisoner a guilty possession. *R. v. Ford*, R. & R. 329, and *MSS. Bayley*, J.

A peace officer has the right to arrest one who is committing a breach of the peace in his presence, and to use such force as is necessary to make it; and if the person so disturbing the peace knows that the person attempting the arrest is an officer and kills him, it is murder; if he does not know the fact, it is manslaughter. *Fleetwood v. Commonwealth*, 80 Ky. 1; s. c., 4 Am. Cr. R. 36; *Mockabee v. Commonwealth*, 78 Ky. 380.

**Officers De Facto.**—Under section 6, art. 14, Const. Mo., requiring all officers under the authority of the State to take an oath of office, a deputy constable regularly appointed who has not taken the oath of office is not an officer *de jure*, but is an officer *de facto*, and others have no right to resist him in the performance of the duties of a constable; and when such an officer is on trial under indictment for murder for killing one who had resisted him while attempting to make an arrest, he should be treated as an officer, and the instruction to the jury should proceed on the theory that he is one. *State v. Dierberger*, 2 S. W. Repr. (Mo.) 286.

2. 1 Russ. on Cr. (9th Am. Ed.) 734; *Coyles v. Hurlin*, 10 Johns. (N. Y.) 85; *Brooks v. Commonwealth*, 61 Pa. St. 352; *State v. Oliver*, 2 Houst. (Del.) 585; *Dill v. State*, 25 Ala. 15; *State v. Alford*, 80 N. Car. 445; *Galvin v. State*, 6 Coldw. (Tenn.) 283; *Angell v. State*, 36 Tex. 542; *People v. Moore*, 2 Doug. (Mich.) 1.

With respect to private persons using their endeavors to bring felons to justice, it should be observed, by way of caution, that they must be careful to ascertain, in the first instance, that a felony has actually been committed, and that it has been committed by the person whom they would pursue and arrest. For if no felony has been committed, no suspicion, however well founded, will bring the person so interposing within this especial protection of the law; nor will it be extended

Though resistance be made to an officer of justice, yet if the

to those who, where a felony has actually been committed, upon suspicion, possibly well founded, pursue or arrest the wrong person. [1 Hale, 490; Fost. 318.] But the law is otherwise in the case of an officer acting in pursuance of a warrant. For if A, being a peace officer, has a warrant from a proper magistrate for the apprehending of B by name, upon a charge of felony; or if B stands indicted for felony; or if the hue and cry is levied against B by name: in these cases, if B, though innocent, fly, or turn and resist, and in the struggle or pursuit is killed by A, or any person joining in the hue and cry, the person so killing will be indemnified; and, on the other hand, if A, or any person joining in the hue and cry, is killed by B, or any of his accomplices joining in that outrage, such killing will be murder; for A and those joining with him were in this instance in the discharge of a duty required from them by the law; and, in case of their wilful neglect of it, subject to punishment. [Fost. 318.] Upon these principles it may be laid down as a general rule that where persons having authority to arrest or imprison, using the proper means for that purpose, are resisted in so doing and killed, it will be murder in all who take a part in such resistance; for it is homicide committed in despite of the justice of the kingdom. This rule is laid down upon the supposition that resistance be made; and, upon that supposition, it is conceived that it will hold in all cases, whether civil or criminal; for under circumstances of resistance, in either case, the persons having authority to arrest or imprison may repel force by force, and will be justified if death should ensue in the struggle; while, on the other hand, the persons resisting will be guilty of murder. [Fost. 270, 271; 1 Hale, 494; 3 Inst. 56; 2 Hale, 117, 118.] And it has been decided that if in any quarrel, sudden or premeditated, a justice of peace, constable, or watchman, or even a private person, be slain in endeavoring to keep the peace and suppress the affray, he who kills him will be guilty of murder. [1 Hawk. P. C. c. 31, §§ 48, 54.] But in such case the person slain must have given notice of the purpose for which he came, by commanding the parties in the king's name to keep the peace, or by otherwise showing that it was not his intention to take part in the quarrel, but to appease it. [Fost. 272.] Unless, indeed, he were an officer within his proper district, and known or general-

ly acknowledged to bear the office he had assumed. [1 Hawk. P. C. c. 31, §§ 49, 50.] As if A, B, and C be in a tumult together, and D, the constable, come to appease the affray, and A, knowing him to be the constable, kill him, and B and C, not knowing him to be the constable, come in, and finding A and D struggling, assist and abet A in killing the constable, this is murder in A, but manslaughter in B and C. [1 Hale, 438.] Where a constable interferes in an affray to keep the peace, and is killed, such of the persons concerned in killing him as knew him to be a constable are guilty of murder; and such as did not know it, of manslaughter only. [1 Hale, 446.] 1 Russ. on Cr. (9th Am. Ed.) 735. See HOMICIDE.

The deceased having been required by a policeman to aid him in taking a man whom he had apprehended on suspicion of stealing potatoes to the station-house, did so for some time, and then was going away, when he was attacked and beaten to death; it was objected that he was not at the time aiding the policeman. Coltman, J.: "He is entitled to protection *cundo, morando, et redeundo*." R. v Phelps, C. & M. 180.

Where private persons use their endeavors to bring felons to justice, some cautions ought to be observed. In the first place, it should be ascertained that a felony has actually been committed, or that an actual attempt to commit a felony is being made by the party arrested; for if that be not the case, no suspicion, however well grounded, will bring the person so interposing within the protection which the law extends to persons acting with proper authority. If it is clear that a felony has been committed, the next consideration will be whether it was committed by the person intended to be pursued or arrested; for, supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavoring to arrest or imprison within the protection of the law so far as to excuse him from the guilt of manslaughter if he should kill; or, on the other hand, to make the killing of him amount to murder. It seems that, in either case, it would only be manslaughter; the one not having used due diligence to be apprised of the truth of the fact, the other not having submitted and rendered himself to justice. 1 Russ. on Cr. (9th Am. Ed.) 799.

officer kill the party after the resistance is over and the necessity has ceased, the crime will at least be manslaughter.<sup>1</sup>

If a person resist an officer through ignorance of his official character, and does not use undue violence in making such resistance, such ignorance will be a defence for making the resistance.<sup>2</sup>

With respect to the persons who shall be considered as taking a part in the resistance, it may be observed that if the party who is arrested yield himself and make no resistance, but others endeavor to rescue him and he do no act to declare his joining with them, if those who come to rescue him kill any of the officers, this is murder in them but not in the party arrested; but not so if he do any act to countenance the violence of the rescuers.<sup>3</sup>

1. Russ. on Cr. (9th Am. Ed.) §58.

2. Yates v. People, 32 N. Y. 509; Logue v. Commonwealth, 38 Pa. St. 265; s. c., 80 Am. Dec. 481; State v. Belk, 76 N. Car. 10; Johnson v. State, 26 Tex. 117.

It appeared that, in the morning of the day mentioned in the indictment, the prisoner stole some wheat from an out-house belonging to one S., and the wheat being soon after found concealed in an adjoining field, S., W., and others watched near the spot, expecting that the thief would come to carry it away, and that they should thus be able to discover and apprehend him. In the course of the day the prisoner and another man walked into the field and lifted up the bag containing the wheat. They were immediately pursued, and W. seized the prisoner without desiring him to surrender, or stating for what reason he was apprehended. A scuffle ensued, during which, before W. had spoken, the prisoner drew a knife and cut him across the throat. Lawrence, J., held that as W. did not communicate to the prisoner the purpose for which he seized him, the case did not come within the statute, for if death had ensued it would only have been manslaughter. But he said that if a proper notification had been made before the cutting, the case would have assumed a different complexion. *R. v. Ricketts*, 3 Camp. 68. See *R. v. Forbes*, 10 Cox. C. C. 362.

3. 1 Russ. on Cr. (9th Am. Ed.) 736.

If a man be arrested, and he and his company endeavor a rescue, and while they are fighting one who knows nothing of the arrest, coming by, act in aid of the party arrested, and one of the bailiffs be killed, the person so acting in aid is guilty of murder, for a man must take the consequence of joining in any unlawful act, such as fighting, and his ignorance will not excuse him where the fact is made murder by the law without any

actual precedent malice, as in the case of killing an officer in the due execution of his office [*Stanley's Case*, Kel. 87]. But it should be observed that in another report of the same case it is said to have been resolved that if a person, not knowing the cause of the struggle, had interposed between the bailiff and the party arrested, with intent to prevent mischief, it would not have been murder in such person, though the bailiff's assistant were killed by one of the rescuers [*R. v. Stanslie*, 1 Sid. 160, MSS.]; and it should seem that, in a case of this kind, the material inquiry would be whether the stranger interfered with the intention of preserving the peace and preventing mischief, for if he interposed for the express purpose of aiding one party against the other, he must abide the consequences at his peril. 1 East P. C. c. 5, § 83, p. 318. A beat B, a constable, who was in the execution of his office, and they were parted, and then C, a friend of A, rushed suddenly in and took up the quarrel, fell upon the constable and killed him in the struggle; but A was not engaged in this after he was parted from B; and it was holden by two judges that this was murder only in C, and A was acquitted, because it was a sudden quarrel and it did not appear that A and C came upon any design to abuse the constable [1 East P. C. c. 5, § 63, p. 296]. But if a man begin a riot, and that same riot continue, and an officer be killed, he that began the riot would, if he had remained present at it, be a principal murderer, though he did not commit the fact. *R. v. Wallis*, 1 Salk. 334; 1 Russ. on Cr. (9th Am. Ed.) 736.

J. and four others having committed a robbery, were pursued by the country upon hue and cry, and J. turned upon his pursuers (others of the robbers being in the same field and having often resisted the pursuers), and refusing to yield, killed one of the pursuers; it was held

An officer may arrest one who stands in his way for the purpose of preventing him from making an arrest, and where one encourages a person arrested, or being arrested, to resist the officer, he may be taken into custody.<sup>1</sup>

**ARREST OF JUDGMENT.** See JUDGMENT.

**ARRIVAL.**—The act of coming to or reaching a place.<sup>2</sup>

**ARSON.**

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|--------------------------------------|--|
| 1. <i>At Common Law.</i>             | 7. <i>House Completed—Occupied.</i>        |
| 2. <i>Proof of the Setting Fire.</i> | 8. <i>Possession, How to be Described.</i> |
| 3. <i>Property set Fire to.</i>      | 9. <i>Malicious and Wilful.</i>            |
| 4. <i>House.</i>                     | 10. <i>Intent.</i>                         |
| 5. <i>Out-buildings.</i>             | 11. <i>Corpus Delicti.</i>                 |
| 6. <i>Curtilage.</i>                 |  |

1. **At Common Law.**—The offence of arson, which is a felony at common law, is defined by Lord Coke to be the malicious and voluntary burning the house of another, by night or by day.<sup>3</sup>

that inasmuch as all the robbers were of a company and made a common resistance, and so one animated the other, all those of the company of the robbers that were in the same field, though at a distance from J., were principals, viz., present, aiding, and abetting; and it was also held that one of the malefactors who was apprehended a little before the party was hurt, being in custody when the stroke was given, was not guilty unless it could be proved that after he was apprehended he had animated J. to kill the party. *Jackson's Case*, 1 Hale, 464.

1. *Levy v. Edwards*, 1 C. & P. 40; *White v. Edmunds*, Peake, 89. See *McMahan v. Green*, 34 Vt. 69; *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85; *Roddy v. Finnegan*, 43 Md. 490.

A statute authorized the tax-collector to arrest the body of the delinquent taxpayer for want of goods or chattels whereon to make distress. The taxpayer pointed out cattle in a barn-yard, saying, "there are the oxen, cows, steers, etc.; take what you will," but declined upon request to turn them out of the barn-yard for the collector. *Held*, that the collector was justified in arresting him. *State v. Roberts*, 52 N. H. 492.

2. **Arrive and Enter.**—These words are not always synonymous, and there certainly may be an arrival without an actual entry or an attempt to enter. *U. S. v. An Open Boat and Lading*, 5 Mason (U.S.C.C.), 132.

**Arrival at Port.**—Where a vessel arrived at a harbor, therefore at some distance from the town, but did not go up to the town nor come to an entry, it, was not an

arrival at port. *Harrison v. Vose*, 9 How. (U. S.) 372.

Not an arrival in port by accident or necessity, but intentionally as one of the termini of the voyage. *U. S. v. Shackford*, 5 Mason (U.S.C.C.), 445.

But the voluntary coming into a foreign port in the course of a voyage, although for advices only, was an arrival. See *Parsons v. Hunter*, 2 Sumn. (U.S.C.C.) 419.

To be an arrival the vessel must have dropped its anchor or moored. *Gray v. Gardner et al.*, 17 Mass. 190.

**Arrival within the Limits of the United States.**—*Held*, the moment a vessel came voluntarily within the Chesapeake Bay there was an arrival within the United States. *Thomson & Dixon v. The United States*, 1 Brock. (U. S. C. C.) 407.

**In an Insurance Policy.**—Where the policy insured a vessel for a voyage to a certain port and for twenty-four hours after anchoring in safety, the risk is not terminated by an arrival and lying at anchorage outside the harbor for more than twenty-four hours. *Simpson v. Pacific Mut. Ins. Co.*, 1 Holmes (Mass.), 136.

3. 3 Inst. 66; 1 Hale P. C. 566.

The setting fire to the house of another, maliciously to burn it, is not at common law a felony, if either by accident or timely prevention the fire does not take place. 1 Hale P. C. 568.

The words "house or building" are synonymous. *State v. Moore*, 61 Mo. 276.

"House" imports a dwelling-house. *Com. v. Posey*, 4 Call (Va.), 109; s. c., 2 Am. Dec. 560.

## 2. Proof of the Setting Fire.—To constitute arson at common law it must be proved that there was an actual burning of the house

An indictment for burning the dwelling-house of another is not sustained by proof that the defendant burned the house by the owner's procurement, to enable him to obtain money from an insurer. *Com. v. Makely*, 131 Mass. 421.

When one burns the dwelling-house that he is lawfully occupying, in legal sense, it is not arson; for arson is a crime against the security of the dwelling-house as such, and not as property. *State v. Hannett*, 54 Vt. 83.

Where a prisoner sets fire to a jail intending only to burn a hole in the floor for the purpose of effecting his escape, it is not arson. *Delany v. State*, 41 Tex. 601; *People v. Cotteral*, 18 Johns. (N. Y.) 115; *State v. Mitchell*, 5 Ired. L. (N. Car.) 350. *Compare Jenkins v. State*, 53 Ga. 33.

The crime of arson was complete at common law by the burning of any part of a house, and a house is burned when it is charred, that is, when any of the wood therein is reduced to coal. *State v. Hall*, 93 N. Car. 571.

**Corpus Delicti.**—In a prosecution for arson, the *corpus delicti* is not the fact that a house was burned down, but that it was burned by the wilful act of some person criminally responsible for his acts, and not by natural or accidental causes. *Winslow v. State*, 76 Ala. 42; s. c., 5 Am. Cr. R. 43.

**A Burning must be Charged.**—Where an indictment under the statute charged the defendants with unlawful setting fire to a certain lot of fodder, etc., but did not charge that they burned it it was held fatally defective, and the judgment was arrested. *State v. Hall*, 93 N. Car. 571.

In *Howell v. Commonwealth*, 5 Gratt. Va. 664, the indictment alleged that the prisoner "set fire to a certain house," while the statute used the words "burn any house," etc., and both expressions are found in different sections of the enactment. It was held that the statutory offence was not sufficiently charged. See *State v. Hall*, 93 N. Car. 571; *Cochran v. State*, 6 Md. 400; *Mary v. State*, 24 Ark. 44.

**Attempt to Commit Arson.**—Defendant having made preparations for burning a building, left his supposed accomplice at the building, saying he would go and get some matches, but did not return, and an hour or so afterward was arrested; held, that his failure to return was not proof that he had abandoned his purpose. When

the evil intent is supplemented by the requisite act toward its commission, the offence is complete. *State v. Hayes*, 78 Mo. 307.

It is a sufficient overt act to render a person liable to be found guilty of attempting to set fire to a stack, if he go to the stack with the intention of setting fire to it, and light a lucifer match for that purpose, but abandon the attempt because he finds that he is being watched. *R. v. Taylor*, 1 F. & F. 511.

In this case Pollock, C. B., told the jury that, if they thought the prisoner intended to set fire to the stack, and that he would have done so if he had not been interrupted, this was, in his opinion, a sufficient attempt to set fire to the stack within the meaning of the statute. "It is clear," said the learned judge, "that every act committed by a person with the view of committing the felonies therein mentioned is not within the statute; as, for instance, buying a box of lucifer matches with intent to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances as that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument for the purpose, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature."

An attempt may consist in merely soliciting another to commit the arson. *People v. Bush*, 4 Hill (N. Y.), 132. *Compare McDade v. People*, 29 Mich. 50; s. c., 1 Am. Cr. R. 81. See generally as to attempts, *Com. v. Flynn*, 3 Cush. (Mass.) 525; *People v. Bush*, 4 Hill (N. Y.), 133; *Young v. Commonwealth*, 12 Bush (Ky.), 243.

**Setting Fire to Goods in a House.**—In *R. v. Lyons*, 28 L. J. M. C. 33, a question was raised whether a man could be indicted for setting fire to goods in his own house with intent thereby to defraud an insurance company. The house was not set fire to. It was contended that as merely setting fire to a man's own house without any special intent was not felony at common law, nor was made so by any statute, setting fire to goods in a man's own house even with a fraudulent intent was not felony either, as the 14 & 15 Vict. c. 19, s. 3, only made



or of some part of it, though it is not necessary that any part should be wholly consumed, or that the fire should have any continuance.<sup>1</sup>

it felony to set fire to goods in a building, the setting fire to which is made felony by that or any other statute. But the court held that the conviction was good, as the offence charged clearly came within the true meaning and intention of the legislature, giving the section a reasonable construction. An opinion was, however, expressed in the course of the argument, that the indictment ought to follow the words of the statute and expressly to state that the goods were set fire to in a building the setting fire to which was a felony, which was not done here; but the omission was not considered to be a ground for quashing the conviction. The terms of the present statute (24 & 25 Vict. c. 97, s. 7) are somewhat different. See *R. v. Lyons*, 5 Up. Can. L. G. 70.

Mr. Roscoe says (Cr. Ev. 10th Ed. 295): "The effect of the decision in *R. v. Lyons*, *supra*, has been very extraordinary. The statute in force at the time that case was decided made it a felony to set fire to goods in any house the setting fire to which is felony, *e.g.*, a dwelling-house. *Lyons's* house, however, was his own property, and it would not be a felony to fire it unless with an intent to injure or defraud with respect to the house, of which there was no evidence. Pollock, C. B., said: 'We think the offence is complete if there be a setting fire to the goods under such circumstances as, if shown with respect to a house set on fire, would render the setting fire to the house a felony. Here the intent to defraud is alleged with respect to the goods. The setting fire to the house with the like intent would be felony.' Instead of adhering strictly to the language of Pollock, C. B., the present statute speaks of setting fire to goods under such circumstances that if the building were thereby set fire to the offence would amount to felony. It has accordingly been held that the jury must be asked, supposing the house caught fire, would it have been wilful and malicious firing, and if the jury negative any malice or recklessness with respect to the house, the prisoner cannot be convicted of the felony, notwithstanding that he set fire to the goods maliciously meaning to destroy them. The facts of the case were as follows: The prisoner, from ill-will to the prosecutrix, broke up her chairs, tables, and other furniture, made a pile of them and her clothes on the stone floor of the kitchen of her lodgings, and

lit them at the four corners so as to make a bonfire of them. The building would almost certainly have been burned in consequence had not the police, who were sent for, succeeded in extinguishing the bonfire. The learned judge (Blackburn, J.) directed the jury, if they thought the prisoner was aware of what he was doing, and that it would probably set the building on fire, or was at best reckless whether it did or not, they would find him guilty of the felony. The jury, however, found him 'guilty, but not so that if the house had caught fire, the setting fire to the house would have been wilful and malicious.' It was held that the conviction was bad. *R. v. Child*, L. R. 1 C. C. R. 307; 40 L. J., M. C. 127; *R. v. Vattrass*, 15 Cox, 73; *R. v. Harris*, 15 Cox, 75."

1. 2 East P. C. 1020; 1 Hale P. C. 569; *Levy v. People*, 80 N. Y. 327; *People v. Butler*, 16 Johns. (N. Y.) 203; *Com. v. Van Schaack*, 16 Mass. 105; *Com. v. Tucker*, 110 Mass. 403; *People v. Haggerty*, 46 Cal. 354; *People v. Simpson*, 50 Cal. 304; *Hester v. State*, 17 Ga. 130; *Phillips v. State*, 20 Ga. 105; *Graham v. State*, 40 Ala. 659; *State v. Sandy*, 3 Ired. L. (N. Car.) 570; *State v. Mitchell*, 5 Ired. L. (N. Car.) 350; *Graham v. State*, 40 Ala. 650; *Mary v. State*, 24 Ark. 44; *State v. Babcock*, 51 Vt. 570; *State v. Dennin*, 32 Vt. 158. Compare *Com. v. Francis*, Thach. Cr. Cas. (Mass.) 240; *Com. v. Betton*, 5 Cush. (Mass.) 427; *State v. De Bruhl*, 10 Rich. L. (S. Car.) 23.

**Set Fire.**—In the 9 Geo. I. c. 22, the words "set fire" are used, and Mr. East observes, that he is not aware of any decision which has put a larger construction on those words than prevails by the rule of the common law. 2 East P. C. 1020. And he afterwards remarks, that the actual burning at common law, and the "setting fire" under the statute, in effect mean the same thing. 2 East P. C. 1038. The words "set fire" are used in all the subsequent statutes, so that this passage and the following decisions are still applicable.

The crime of arson is consummated by the burning of any, the smallest part of the house, and it is burned within the common-law definition of the offence, when it is charred, that is, when the wood is reduced to coal, and its identity changed, but not when merely scorched or discolored by heat. *State v. Hall*, 93

**3. Property Set Fire To.**—In order to constitute the felonious offence of arson at common law, the fire must burn the house of another. The burning of a man's own house is no felony at common law, but such burning in a town, or so near to other houses as to create danger to them, is at common law a misdemeanor and by statute a felony.<sup>1</sup>

N. Car. 571. See *People v. Haggerty*, 46 Cal. 354.

A. was indicted for setting fire to an out-house, commonly called a paper-mill. It appeared that she had set fire to a large quantity of paper, drying in a loft annexed to the mill, but no part of the mill itself was consumed. The judges held that this was not a setting fire to the mill within the statute. *R. v. Taylor*, 2 East P. C. 1020; 1 Leach, 49.

So on a charge of arson, it appeared that a small fagot was set on fire on the boarded floor of a room, and the fagot was nearly consumed; the boards of the floor were "scorched black, but not burned," and no part of the wood of the floor was consumed. Cresswell, J., said, "*R. v. Parker*, 9 C. & P. 45, is the nearest case to the present, but I think it is distinguishable. . . . I have conferred with my brother Patteson, and he concurs with me in thinking, that as the wood of the floor was scorched, but no part of it consumed, the present indictment cannot be supported. We think that it is not essential to this offence that the wood should be in a blaze, because some species of wood will burn and entirely consume without blazing at all." *R. v. Russell*, Car. & M. 541.

Where the prisoner was indicted under the 7 Will. IV. & 1 Vict. c. 89, s. 3, and it was proved that the floor near the hearth was scorched, and it was in fact charred in a trifling way; that it had been at a red heat, though not in a blaze; Parke, B., held that the offence was complete. *R. v. Parker*, 9 C. & P. 45. See *People v. Butler*, 16 Johns. (N. Y.) 203; *Com. v. Van Schaack*, 16 Mass. 105; *State v. Mitchell*, 5 Ired. L. (N. Car.) 350.

To constitute a setting on fire, it is not necessary that any flame should be visible. *R. v. Stallion*, 1 Moo. C. C. 398.

The ruins of a house after a fire do not constitute a building. *R. v. Labadie*, 32 Up. Can. Q. B. 429; s. c., 1 Green's Cr. R. 204.

Cotton stored in a warehouse was set on fire, but the fire was extinguished before any part of the building was burned. Held, not arson. *Graham v. State*, 40 Ala. 659.

The house need not be directly set on fire; if the fire is placed in any way in

connection with the house so that it will ignite, the crime is committed. *State v. Dennin*, 32 Vt. 158; *R. v. Cooper*, 5 C. & P. 535.

1. 1 Hale P. C. 568; 2 East P. C. 1027; *People v. Van Blaricum*, 2 Johns. (N. Y.) 105; *Shepherd v. People*, 19 N. Y. 537; *State v. Hannett*, 54 Vt. 83; *State v. Hurd*, 51 N. H. 176; *State v. Lyon*, 12 Conn. 487; *Bloss v. Tobey*, 2 Pick. (Mass.) 320; *Com. v. Tucker*, 110 Mass. 403; *Com. v. Erskine*, 8 Gratt. (Va.) 624; *Gage v. Shelton*, 3 Rich. (S. Car.) 242; *Sullivan v. State*, 5 S. & P. (Ala.) 175; *Roberts v. State*, 7 Coldw. (Tenn.), 359; *McDonald v. People*, 47 Ill. 533; *R. v. Bryans*, 12 Up. Can. C. P. 163; 2 East P. C. 1030, 1031. See *Woodford v. People*, 62 N. Y. 117; *People v. Hennessey*, 21 How. Pr. (N. Y.) 239.

A wife who burns her husband's house is not guilty of arson. *R. v. March*, R. & M. C. C. 182.

A house owned by a wife but occupied jointly by herself and husband, is his house as regards his burning it. *Snyder v. People*, 26 Mich. 106; s. c., 12 Am. Rep. 303.

One entitled to dower only out of a house which was leased to another, may commit arson by burning it. *R. v. Harris*, 2 East P. C. 1023.

It was determined that a widow entitled to dower, but not having it assigned, from a house, the equity of redemption of which had descended from her husband to his eldest son, for whose benefit she had let it and received the rent, was guilty of arson, by burning it while in the possession of her tenant. *Harris's Case*, Fost. 113.

A servant is included in the term owner where his master procures him to do the burning. *State v. Haynes*, 66 Me. 307; s. c., 22 Am. Rep. 569.

An indictment for burning the dwelling-house of another is not sustained by proof that the defendant burned the house by the owner's procurement. *Com. v. Makely*, 131 Mass. 421. See *State v. Haynes*, 66 Me. 307; s. c., 2 Am. Rep. 569.

If the owner burn his house while occupied by a tenant, it is arson. *Com. v. Erskine*, 8 Gratt. (Va.) 624; *Sullivan v.*

But it is a felony at common law if a man set fire to his own house with intent to burn that of another, or under such circum-

State, 5 S. & P. (Ala.) 175; *Snyder v. People*, 26 Mich. 106; s. c., 12 Am. Rep. 303. See *People v. Van Blaricum*, 2 Johns. (N. Y.) 105; *Com. v. Dailey*, 110 Mass. 503; *State v. Lyon*, 12 Conn. 487; *State v. Toole*, 29 Conn. 342; s. c., 76 Am. Dec. 602; *Ritchey v. State*, 7 Blackf. (Ind.) 168.

If a landlord, or reversioner, sets fire to his own house, of which another is in possession, under a lease from himself, or from those whose estate he hath, it shall be accounted arson; for during the lease the house is the property of the tenant. *Fost.* 115; 4 Black. Com. 221.

A lessee is not guilty of felony in burning the premises occupied by him as such. *Snyder v. People*, 26 Mich. 106; s. c., 12 Am. Rep. 303; *McNeal v. Woods*, 3 Blackf. (Ind.) 485; *State v. Lyon*, 12 Conn. 487; *State v. Fish*, 27 N. J. L. 323; *State v. Sandy*, 3 Ired. (N. Car.) 570. Compare *People v. Simpson*, 50 Cal. 304; *People v. Henderson*, 1 Park. Cr. (N. Y.) 560.

It was decided that a person in possession of a copyhold dwelling-house could not be guilty of arson by burning it, although he had a long time before surrendered it into the hands of the lord of the manor, to the use of another person, his heirs, and assigns, for securing the payment of money borrowed; for it was considered that, while the tenant continued in possession, it was his own house. *Spalding's Case*, 1 Leach, 218.

Upon the same principle it was decided that a tenant in possession under an agreement for a lease for three years from a person who held under a building lease, was not guilty of arson by burning the house. *Breeme's Case*, 1 Leach, 220; 2 East P. C. c. 21, § 6, p. 1026.

And this was recognized in *Pedley's Case*, 1 Leach, 242, where Lord Mansfield said that *Holmes's Case*. Cro. Car. 376, was confirmed to be good law, though he very much lamented that the law was so settled; and the bias of his mind was in favor of Mr. J. Foster's opinion in *Harris's Case*, *Fost.* 115. In a case which occurred shortly afterwards, Lord Mansfield said that "it was certainly true that it could be no felony in the defendant to burn a house of which he was in possession." *Scofield's Case*. Cald. 397; 2 East P. C. c. 21, § 7, p. 1028.

It matters not that but a part of the house was burned; it was a setting fire to the whole, and to the part occupied by another tenant, as well as tenanted by the

prisoner, even though no portion of the rooms occupied by such other tenant were burned. *Levy v. People*, 80 N. Y. 327.

In Louisiana a party is guilty of arson who burns his own house. *State v. Elder*, 21 La. Ann. 157. See also *Tuller v. State*, 8 Tex. App. 501; *Shepherd v. People*, 19 N. Y. 537.

It should be observed, however, that a mere residence in a house, without any interest therein, will not prevent it from being considered as the house of another. As where the prisoner was a poor man, maintained by a parish, and had, some time before the commission of the crime, been put by the parish officers to live in the house which he was charged with burning, and was resident therein with his family at the time of the fact being committed, having the sole possession and occupation of it, but without payment of any rent; all the judges held that it could not be considered as his house, and that he was properly convicted of the arson. *Gowan's Case*, 2 East P. C. c. 21, § 6, p. 1027.

**Communicating Fires.**—An information for burning a dwelling-house by setting fire to another building whereby the dwelling is burned, should set forth the ring of the one building, and that by means of the burning of such building the particular dwelling-house was burned. *People v. Fairchild*, 48 Mich. 31.

The accused set fire to a storehouse with intent that the fire should spread to a dwelling-house. *Held* guilty of arson. *Grimes v. State*, 63 Ala. 166.

The malicious and wilful burning effected need not correspond with the precise intent or design of the party. 2 Russ. on Cr. (9th Am. Ed., 1025).

If A have a malicious intent to burn the house of B, and in setting fire to it burn the house of C also, or if the house of B escape by some accident, and the fire take in the house of C and burn it, this shall be said in law to be the malicious and wilful burning of the house of C, though A did not intend to burn that house. 1 Hale, 569; 1 Hawk. P. C. c. 39, § 19.

And accordingly it has been said that if one man command another to burn the house of J. S., and he do so, and the fire thereof burn another house, the commander is accessory to the burning such other house. *Plowd.* 475; 2 East P. C. c. 21, § 7, p. 1031.

So it has been held that if a person set fire to a stack, the fire from which is

stances that the house of another would in all probability be burned.<sup>1</sup> Now, however, under the various State statutes the crime of arson has a much wider scope.<sup>2</sup>

likely to communicate to a barn, and it does so, and the barn is burned, he is in point of law indictable for setting fire to the barn. So where the prisoners set fire to a summer-house which was in a wood, and some of the trees overhung it and their branches were burnt by the fire, which consumed the summer-house and also burned some of the trees, it was held that the prisoners might be convicted, under the 7 & 8 Geo. 4, c. 30, § 17, of setting fire to the wood. *R. v. Price*, 9 C. & P. 729.

And such malicious and wilful burning of the house of another may be by the means of setting fire to the party's own house; and this though it should appear that the primary intention of the party was only to burn his own house. If in fact other houses were burned, being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful and malicious, and the consequences immediately and necessarily following from the original act done, the offence will be felony. 2 East P. C. c. 21, § 8, p. 1031.

Thus where the defendant was indicted for a misdemeanor, in burning a house in his own occupation, such house being alleged to be contiguous and adjoining to certain dwelling-houses of divers liege subjects, etc.; and the facts of the case, as opened by the counsel for the prosecution, appeared to be that the defendant set fire to his own house in order to defraud an insurance office, and that in consequence several houses of other persons adjoining to his own were burned down; Buller, J., said that if other persons' houses were in fact burned, although the defendant might only have set fire to his own, yet under these circumstances the prisoner was guilty, if at all, of felony (the misdemeanor being merged), and could not be convicted on this indictment, and therefore, he directed an acquittal. 2 East P. C. c. 21, § 8, p. 1031.

And in a case of a similar kind which occurred about the same time, Grose, J., in passing sentence in the Court of King's Bench, said that if it had so happened that any of the neighboring houses had been set on fire in consequence of the defendant's wilful and malicious act in setting fire to his own house (which was proved to have been done in order to cheat the insurance office), it would clearly have amounted to a capital felony. 2 East P. C. c. 21, § 7, p. 1031.

1. 2 East P. C. 1030, and the case of *R. v. Probert*, there cited; *Luke v. State*, 49 Ala. 30; *State v. Dennin*, 32 Vt. 158; *People v. Hennessy*, 21 How. Pr. (N. Y.) 239.

2. By Statute.—By statute it is a crime to burn a school-house. *Wallace v. Young*, 5 T. B. Mon. (Ky.) 156; *State v. O'Brien*, 2 Root (Conn.), 516; *Jones v. Hungerford*, 4 Gill & J. (Md.) 402.

A corn-crib. *Hester v. State*, 17 Ga. 130; *State v. Millican*, 15 La. Ann. 557; *Brown v. State*, 52 Ala. 345.

A barn. *Sampson v. Commonwealth*, 5 Watts & S. (Pa.) 385; *State v. Smith*, 28 Iowa, 565; *State v. Shaw*, 31 Me. 523; *People v. Taylor*, 2 Mich. 250.

A stable. *Dugle v. State*, 100 Ind. 259.

A grist-mill. *People v. Haynes*, 55 Barb. (N. Y.) 450; *Hudson v. State*, 61 Ala. 333.

A church. *Watt v. State*, 61 Ga. 66.

A gin-house. *McAdory v. State*, 62 Ala. 154.

A storehouse. *Hall v. State*, 3 Lea (Tenn.), 552; *Grimes v. State*, 63 Ala. 166.

A barrel-house attached to a cooperage establishment. *Pike v. State*, 8 Lea (Tenn.), 577.

A cotton-house. *Washington v. State*, 68 Ala. 85.

A warehouse. *Allen v. State*, 10 Ohio St. 287.

A school-house. *State v. O'Brien*, 2 Root (Conn.), 516; *Jones v. Hungerford*, 4 Gill & J. (Md.) 402; *Wallace v. Young*, 5 T. B. Mon. (Ky.) 156; *Hill v. Commonwealth*, 98 Pa. St. 192.

A house 18 feet long and 15 wide, built of logs notched up, the cracks covered inside with rough boards, roofed with rough boards, with a good plank floor, and a door about four feet high, containing at the time of the burning a quantity of corn, peas, and oats, though the only building on the farm used for storing the crop, is not a "barn" within the meaning of statute. *State v. Jim*, 8 Jones L. (N. Car.) 459. See *State v. Laughlin*, 8 Jones L. (N. Car.) 354; *State v. Cherry*, 63 N. Car. 493.

A saw-mill is not a building under a statute prohibiting the burning of "any building" other than a dwelling-house. *State v. Livermore*, 44 N. H. 386.

An indictment that the prisoner "feloniously, wilfully, and maliciously did set fire to and burn a certain barn of one J.

4. **House.**—The word "house" includes, as it seems, all such buildings as would come within that description, upon an indictment for arson at common law. That includes such buildings as burglary may be committed in at common law.<sup>1</sup>

there situate, contrary," etc., *held* bad; it neither charged an offence at common law nor under the code; the description of the property being too indefinite to bring the offence within the crime of arson, or within the statutory offence of burning "an out-house not parcel of any dwelling-house." *Gibson v. State*, 54 Md. 447.

The indictment charged the respondent with having set fire to and burned "a certain barn of one" B., . . . "it being an out-building adjoining the dwelling-house of the said" B. The offence charged was punishable by sec. 4126, R. L., as amended by the act of 1882, No. 84; the offence proved was punishable by sec. 4128, R. L. Both sections are to prevent the unlawful burning of buildings: the former to protect the dwelling-house; the latter, every building; by one section the offender could be imprisoned for life; by the other, not more than ten years. *Held*, that a conviction under the indictment can be had for the lesser offence. *State v. Thornton*, 56 Vt. 35.

Where an affidavit charging arson describes the property destroyed as "a certain frame building, commonly called a stable," it sufficiently indicates the purpose for which such building is, or is intended to be, used. *Dugle v. State*, 100 Ind. 259.

Sec. 4126, Vermont R. L., prescribes the penalty for burning a dwelling-house or its out buildings; sec. 4128 prescribes a less severe penalty for burning various other buildings specially named, "or other house or building of another not constituting a dwelling-house or its out-buildings;" the indictment charged the respondent with burning a "certain building commonly known and called a sugar-house," but without averment that the "sugar-house" did not constitute a dwelling-house or its out-buildings. The term "sugar-house" is not used in sec. 4128. *Held*, that the case does not come within the rule that a proviso or exception in a statute must be negated when descriptive of the offence; and that the indictment is sufficient. *State v. Ambler*, 56 Vt. 672. See *Com. v. Squires*, 1 Metc. (Mass.) 258; *Devoe v. Commonwealth*, 3 Metc. (Mass.) 316; *Larned v. Commonwealth*, 12 Metc. (Mass.) 240; *Com. v. Hamilton*, 15 Gray (Mass.), 480; *Com. v. Reynolds*, 122 Mass. 454.

The prisoner set fire to a quantity of straw placed in a lorry and left for the night in the yard of an inn on the way to market. *Held*, that upon these facts a conviction on an indictment charging him with setting fire to a stack of straw could not be sustained. *R. v. Satchwell*, 12 Cox C. C. 449; s. c., L. R. 2 C. C. R. 21.

1. A building intended for and constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, was held not to be a house, out-house, or barn, within the 9 Geo. I. c. 22. It was said, that it was not a house in which burglary or arson could be committed; that it was a house intended for residence, but not inhabited, and therefore not a dwelling-house, though intended to be one; that it was not an out-house, because not parcel of a dwelling-house; and that it was not a barn within the meaning of that word as used in the statute. *Elsmore v. Inhab. Hundred of St. Briavells*, 8 B. & C. 461.

So also *Lush, J.*, held that an unfinished structure, intended to be used as a dwelling-house when finished, was not a "house;" but he seemed to be doubtful whether it could be properly described as a "building" under section 6. *R. v. Edgell*, 11 Cox C. C. 132.

But where the wall and roof a structure and part of the flooring were finished and the internal walls prepared for plastering, it was held to be a "building" within section 6. *R. v. Manning*, L. R. 1 C. C. R. 338; 41 L. J. M. C. 11.

The ruins of a house after a fire do not constitute a building. *R. v. Labadie*, 32 Up. Can. Q. B. 429; s. c., 1 Green's Cr. R. 204.

Nor does a saw-mill. *State v. Livermore*, 44 N. H. 386.

**Apartments.**—Where a building is leased to different persons in distinct apartments, each apartment is the dwelling-house of the lessee. *Stedman v. Crane*, 11 Metc. (Mass.) 295; *Mason v. People*, 26 N. Y. 200.

The indictment charged the prisoner as accessory to the crime of arson in the first degree; it charged that the fire was set by the principals in the night-time, and burned the dwelling-house of K., in which he then was. It appeared that the

**5. Out-buildings.**—Include not only the very mansion-house, but all out-houses. An out-house is one that belongs to a dwelling-house and is in some respects parcel of the same, and situated within the curtilage.<sup>1</sup>

building was a five-story tenement-house, having a common entrance in front and in the rear. The front entrance opened into a hallway, used in common, and the apartments in the several floors opened into a common hall. The prisoner, with his wife, occupied three rooms; K., with his family, occupied three adjoining rooms; there was no direct communication between the rooms of K. and those occupied by the prisoner; the fire was set in the prisoner's rooms, and burned portions of them. *Held*, that the indictment was well drawn; that the building was a dwelling-house, and was the dwelling-house of K. within the meaning of the statute defining arson in the first degree. *Levy v. People*, 80 N. Y. 327. See *Com. v. Bullman*, 118 Mass. 456; s. c., 19 Am. Rep. 469; *State v. Garity*, 46 N. H. 61; *Shepherd v. People*, 19 N. Y. 537; *Dale v. State*, 27 Ala. 31; *Ullman v. State*, 1 Tex. App. 220; s. c., 27 Am. Rep. 85.

**What is not a House.**—Where the upper and lower stories of a building are respectively occupied by different tenants as a dwelling and as a store, and there is no mode of interior communication, the dwelling is not parcel of the store so that if burned by setting fire to the store the offence can be punished as if it were a burning of the dwelling. *People v. Fairchild*, 48 Mich. 31. See *State v. Toole*, 29 Conn. 342; s. c., 76 Am. Dec. 602; *Com. v. Wade*, 17 Pick. (Mass.) 395; *State v. Tenny*, 9 Iowa, 436; *Rex v. Egginton*, 2 B. & P. 508; *Rex v. Gibson*, 1 Leach (4th Ed.), 357; *Glandfield's Case*, 2 East P. C. 1034; *People v. Gates*, 15 Wend. (N. Y.) 159; 2 Bishop Crim. Pro. § 38; Bishop Statutory Crimes, §§ 280, 282, 283, 285, 287, and authorities cited; 2 East P. C. 494, 508; *Hale P. C.* 557, 558; 4 Bl. Com. 225, 226.

A shed or cabin, though built of stone, roofed, and with low fireplace and window, does not in a case of arson constitute a house within the 7 Will. IV. and 1 Vict. c. 89, s. 3, where the building was erected, not for habitation, but for workmen to take their meals and dry their clothes in, and had not been slept in with permission of the owner. *R. v. England*, 1 C. & K. 533.

1. *State v. Roper*, 88 N. Car. 656; *Page v. Commonwealth*, 26 Gratt. (Va.) 943; *Com. v. Posey*, 4 Call. (Va.) 109; s. c., 2 Am. Dec. 560. See *State v. Shaw*, 31

Me. 523; *Com. v. Estabrook*, 10 Pick. (Mass.) 293; *Quinn v. People*, 71 N. Y. 561; s. c., 27 Am. Rep. 87; *People v. Parker*, 4 Johns. (N. Y.) 424; *State v. Potts*, 75 N. Car. 129; *State v. Outlaw*, 72 N. Car. 598; *State v. Mordecai*, 68 N. Car. 207; *State v. Ginns*, 1 N. & McC. (S. Car.) 583; *Fisher v. State*, 43 Ala. 17; *Armour v. State*, 3 Humph. (Tenn.) 379; *Ratekin v. State*, 26 Ohio St. 420; *Pitcher v. People*, 16 Mich. 142; *People v. Taylor*, 2 Mich. 250.

The words "house or building" are synonymous. *State v. Moore*, 61 Mo. 276.

In the common and ordinary acceptance of the term "house" it includes everything appurtenant and accessory to a main building. *Workman v. Insurance Co.*, 2 La. 507; s. c., 22 Am. Dec. 141. See *State v. Shaw*, 31 Me. 523; *State v. Stewart*, 6 Conn. 47; *People v. Taylor*, 2 Mich. 250; *Gage v. Shelton*, 3 Rich. L. (S. Car.) 242; *State v. Laughlin*, 8 Jones L. (N. Car.) 354; *State v. Jim*, 8 Jones L. (N. Car.) 459; *State v. Cherry*, 63 N. Car. 493; *State v. Fish*, 27 N. J. L. 323.

A building where servants slept thirty-six feet distant is part of the dwelling-house. *Pond v. People*, 8 Mich. 150.

A jail is an inhabited dwelling-house. *People v. Cotteral*, 18 Johns. (N. Y.) 115. Compare *R. v. Connor*, 2 Cox Cr. Cas. 65.

Also a building used for night lodgings. *People v. Orcutt*, 1 Park. Cr. (N. Y.) 252.

If the building is so near to a dwelling-house as to endanger it, it is arson. *Gage v. Shelton*, 3 Rich. L. (S. Car.) 242.

And an indictment at common law must charge that the barn contained hay or grain, or is parcel of the dwelling-house. *State v. Porter*, 90 N. Car. 719.

Whether the out-house burned be in a city, town, or village, or not, does not affect the legal character of the offence. It affects the punishment only. *Smith v. State*, 64 Ga. 605.

It is not necessary to state that the barn burned was not a parcel of a dwelling-house. *Staeger v. Commonwealth*, 103 Pa. St. 469.

A barrel-house attached to a cooperage establishment is a "house" within the meaning of the Code, sec. 4668, for the burning of which a person may be convicted. *Pike v. State*, 8 Lea (Tenn.), 577.

A barn constituting part of the necessary buildings of a farm, and although not adjoining nor connected with the dwelling-house thereon, yet so situate that its destruction by fire would endanger the said dwelling-house, is a barn "belonging" to the dwelling-house, and the setting fire thereto consequently constitutes the offence of felonious arson. *Hill v. Commonwealth*, 98 Pa. St. 192.

An indictment charging that the respondent attempted to set fire to an out-building adjoining a dwelling-house is not supported by evidence that the building was near to but not in contact with the dwelling-house. "Adjoining" is a synonym for "adjacent to," "contiguous," that is, in contact with. *State v. Downs*, 59 N. H. 320.

"Adjoining" means in actual contact with. *Peverelly v. People*, 3 Park. Cr. (N. Y.) 59.

It is not arson at common law to burn an empty barn which is "not parcel of any dwelling-house." *Gibson v. State*, 54 Md. 447; *State v. Porter*, 90 N. Car. 719.

Otherwise if the barn has hay and grain in it. *Sampson v. Commonwealth*, 5 Watts & S. (Pa.) 385; *Chapman v. Commonwealth*, 5 Whart. (Pa.) 427; s. c., 34 Am. Dec. 565.

Nor a school-house. *Wallace v. Young*, 5 T. B. Mon. (Ky.) 156.

Nor a stack of hay. *Black v. State*, 2 Md. 376; *Com. v. Macomber*, 3 Mass. 254. Nor a quantity of straw left for the night in the yard of an inn. *R. v. Satchwell*, 12 Cox. C. C. 449.

Indictment under Bat. Rev. ch. 32, § 93, for burning an outhouse used as a storehouse, the proof being that it was an old building located at a cross-roads and occupied as a storehouse, but not enclosed or used in any way as a dwelling-house. *Held*, a fatal variance. This statute makes the offence a misdemeanor. *State v. Roper*, 88 N. Car. 656.

A dwelling-house is the apartment, building, or cluster of buildings in which a man with his family resides. He need not so construct his habitation that all the shelter he requires will be under one roof; therefore the word "dwelling-house" embraces in law the entire congregation of buildings, main and auxiliary, used for abode. *Bishop Stat. Cr.* § 278.

"Out-houses, such as kitchens, stables, barns, etc., are indispensably necessary to our comfort and convenience, and render it necessary that they should, even in country places, be located contiguous to the dwelling-house; and in towns and

villages they must, in general, be so located for the want of space; and when an out-house thus necessary to a dwelling-house is so situated that the burning of it would probably endanger the dwelling-house, whether it be under the same roof or within the same common fence, all the evils intended to be guarded against are involved to the same extent as if the dwelling-house itself had been set on fire, and for that reason the same protection ought to be extended to them; and that appears to me to be the only true rule. If the building set on fire is one appropriated to ordinary domestic uses, and is situated so near to the dwelling-house as probably to endanger it, then it is arson to burn it, and not otherwise." *Gage v. Shelton*, 3 Rich. L. (S. Car.) 242.

Upon the meaning of the word "outhouse," in the repealed statute, 9 Geo. I. c. 22, the following case was decided: It appeared that the prisoner (who was indicted for setting fire to an outhouse) had set fire to and burned part of a building of the prosecutor, situated in the yard at the back of his dwelling-house. The building was four or five feet distant from the house, but not joined to it. The yard was enclosed on all sides, in one part by the dwelling-house, in another by a wall, and in a third by a railing, which separated it from a field, and in the remaining part by a hedge. The prosecutor kept a public-house and was also a flax-dresser. The buildings in question consisted of a stable and chamber over it, used as a shop for the keeping and dressing of flax. It was objected that this was part of the dwelling-house, and not an out-house; but the prisoner having been convicted, the judges were of opinion that the verdict was right. It was observed that though, for some purpose, this might be part of the dwelling-house, yet that in fact it was an out-house. *R. v. North*, 2 East P. C. 1021.

The following case was decided upon the words of the same statute: The prisoner was indicted in some counts for setting fire to an out-house, in others to a house. The premises burned consisted of a school-room, which was situated very near to the house in which the prosecutor lived, being separated from it only by a narrow passage about a yard wide. The roof of the house, which was of tile, reached over part of the roof of the school, which was thatched with straw; and the school, with a garden and other premises, together with a court which surrounded the whole, were rented of the parish by the prosecutor at a yearly rent. There was a continued fence

round the premises, and nobody but the prosecutor or his family had a right to come within it. It was objected for the prisoner that the building was neither a house nor an out-house within the repealed statute, 9 Geo. I. c. 22; but the judges were of opinion that it was correctly described either as an out-house or part of a dwelling-house, within the meaning of the statute. *R. v. Winter*, Russ. & Ry. 295; 2 Russ. Cr. 911.

The following case, upon the construction of the same word, arose on an indictment under the 7 & 8 Geo. IV.: The place in question stood in an enclosed field, a furlong from the dwelling-house, and not in sight. It had been originally divided into stalls, capable of holding eight beasts, partly open and partly thatched. Of late years it was boarded all round, the stalls taken away and an opening left for cattle to come in of their own accord. There was neither window nor door, and the opening was sixteen feet wide, so that a wagon might be drawn through it, under cover. The back part of the roof was supported by posts, to which the side boards were nailed. Part of it internally was boarded and locked up. There was no distinction in the roof between the inclosed and the uninclosed part, and the inhabitants and owners usually called it the cow-stalls. Park, J., did not consider this an out-house within the statute, but reserved the point for the opinion of the judges. Six of the judges were of opinion that this was an out-house within the statute; but seven of their lordships being of a contrary opinion, a pardon was recommended. *R. v. Ellison*, 1 Moody C. C. 336. See also *Hilles v. Inhab. of Shrewsbury*, 3 East, 457; *R. v. Woodward*, 1 Moody C. C. 325.

The prisoner was tried before Little-dale, J., upon an indictment, one count of which charged him with setting fire to an out-house of W. D. The prosecutor was a laborer and poulterer, and had between two and three acres of land, and kept three cows. The building in question was in the prosecutor's farm-yard, and was three or four poles distant from the dwelling-house, from which it might be seen. The prosecutor kept a cart in it, which he used in his business of a poulterer, and also kept his cows in it at night. There was a barn adjoining the dwelling-house, then a gateway, and then another range of buildings which did not adjoin the dwelling-house or barn; the first of which from the dwelling-house was a pigsty, then another pigsty, then a turkey-house, adjoining to which was

the building in question. The dwelling-house and farm formed one side of the farm-yard, and the three other sides were formed by a fence inclosing these buildings. The building in question was formed by six upright posts nearly seven feet high, three in the front and three at the back, one post being at each corner, and the other two in the middle of the front and back, these posts supporting the roof; there were pieces of wood laid from one side to the other. Straw was put upon these pieces of wood, laid wide at the bottom and drawn up to a ridge at the top; the straw was packed up as close as it could be packed; the pieces of wood and straw made the roof. The front of the building to the farm-yard was entirely open between the posts, one side of the building adjoining the turkey-house which covered that side all the way up to the roof, and that side was nailed to the turkey-house. The back adjoined a field and was a rail fence, the rails being six inches wide; these came four or five feet from the ground, within two feet of the roof, and this back formed part of the fence before mentioned. The side opposite the turkey-shed adjoined the road, and was a pale fence, but not quite up to the top. One of the witnesses for the prosecution, a considerable farmer, said he should consider the building an out-house. The prisoner was convicted, and sentence of death passed upon him, but execution was respited to take the opinion of the judges. All the judges present (except Tindal, C. J.) thought the erection an out-house, and that the conviction was right. *R. v. Stallion*, 1 Moody C. C. 398.

The prisoner was charged in one count with setting fire to an out-house, and in another with setting fire to a stable; the place burned had been an oven to bake bricks, and the prosecutor had made a doorway (with a door) into it, and had put boards and turf over the vent-hole at the top. Two poles had been fixed across it at about half its height, on which boards had been laid so as to make a loft floor. In this place the prosecutor kept a cow; and adjoining to it, but not under the same roof, was a lean-to, in which a person named Cope kept a horse; but this latter building was not injured by the fire. The building was about a hundred yards from any dwelling-house, and the owner of the nearest dwelling-house had no interest in it, and no dwelling-house or farm-yard of the prosecutor was near it, and there was no wall to connect it with any dwelling-house. It was contended for the prisoner that this building



**6. Curtilage**—Is the yard, court-yard, or piece of ground lying near to a dwelling-house and included within the same fence.<sup>1</sup>

was neither a stable nor an out-house. The term "out-house" had, both at common law and under the repealed statutes, been held to apply to those buildings only which were within the curtilage, and in which, till the 7 and 8 Geo. IV., c. 29, a burglary might be committed, and the rule being that where any term which has obtained a precise and definite meaning at common law or in a statute, it will be presumed to have the same meaning there; it must be taken that the word "out-house" was used in the 7 and 8 Geo. IV., c. 30, in the same sense as it had at common law and under the former statutes; and unless such a construction were put upon that word, the words "stable, coach-house," etc., were useless. Taunton, J.: "I am clearly of opinion that this is not a case within the act of Parliament. It is true that the word 'out-house' occurs in the act of Parliament, but I apprehend that it has been settled from ancient times that an out-house must be that which belongs to a dwelling-house, and is in some respect parcel of such dwelling-house. This building is not parcel of any dwelling-house, and does not appear to be connected in any way, either with the premises of Mr. Sparrow, or of the prosecutor. It had been a brick-kiln, and the prosecutor kept his cow there afterwards. There is no such word as "cow-house" in the statute. The only word likely to be applicable in this case is the word out-house; and this building being wholly unconnected with the dwelling-house, it is not included in the legal definition of out-house. It is also not a stable; indeed, I do not see that it could be much more properly called a stable than it could be called a coach-house." *R. v. Haughton*, 5 C. & P. 555.

The prisoner was convicted before Mr. Justice Patteson at the Bedfordshire Spring Assizes, 1844, for feloniously setting fire to an out-house of B. The building set fire to was a pigsty, that shut up at the top, with boarded sides, having three doors opening into a yard in the possession of the prosecutor; the back of the pigsty formed part of the fence between the prosecutor's and the adjoining property. The state of the premises was this: first, the prosecutor's house fronting the public road, with a back-door opening into the yard; then a pale fence about two feet; then a cottage; then a barn attached to it; the cottage and barn were let by the prosecutor to a tenant; they opened to the road, and neither of

them had any door or opening into the yard. Next to the cottage and barn was a stable; then a barn; then the pigsty, all in the possession of the prosecutor, and opening into the yard. Next to the pigsty was a pale fence, and then a live hedge round to the house, in which hedge were three gates opening into an orchard and two fields. On the part of the prisoner it was contended that this pigsty was not an out-house within the repealed statute, 7 Will. IV. and 1 Vict. c. 89, s. 3. The above cases of *Ellison*, *Haughton*, and *Stallion* were referred to; as also the cases of *Parrot*, 6 C. & P. 402; *Woodward*, 1 Moody C. C. 323; and *Newill*, 1 Moody C. C. 458. The learned judge reserved the point for the opinion of the judges; and the case was considered at a meeting of all the judges, except Coleridge and Maule, JJ., in Easter term, 1844, when their lordships were unanimously of opinion that the conviction was right. *R. v. Jones*, 2 Moody C. C. 308.

Upon the construction of the statute (9 Geo. I. c. 22), it has been held that a common jail comes within the meaning of the word "house." The entrance to the prison was through the dwelling-house of the jailer (separated from the prison by a wall), and the prisoners were sometimes allowed to lie in it. All the judges held that the dwelling-house was to be considered as part of the prison, and the whole prison was the house of the corporation to whom it belonged. One of the counts laid it as the house of the corporation; another, of the jailer; and the third, of a person whom the jailer suffered to live in the "house." *R. v. Donnevan*, 2 East P. C. 1020; 2 W. Bl. 682; 1 Leach, 69.

But where a constable hired a cellar (as a lock-up house) under a cottage, and the cellar was independent of the cottage in all respects, it was held that the cellar was not properly described in an indictment for arson either as the dwelling-house of the constable, or as an outhouse of the cottage. *Anon. cor. Hullock*, B. 1 Lewin C. C. 8.

1. *Burrill's Law Dict.*; Page *v. Commonwealth*, 26 Gratt. (Va.) 943; *Com. v. Barney*, 10 Cush. (Mass.) 480; *State v. Roper*, 88 N. Car. 656; *Coddington v. Beebe*, 31 N. J. L. 477; *People v. Taylor*, 2 Mich. 250.

**Curtilage**.—A court-yard adjoining a messuage. *Sweet's Law Dict.*

A piece of ground lying near and be-

**7. House must be Completed—Occupied.**—The house must be completed,<sup>1</sup> and if it is a dwelling-house it must be occupied.<sup>2</sup>

**8. Possession—How to be Described.**—The house burned should be described as being in the possession of the occupier,<sup>3</sup> *i.e.*, the

longing to a dwelling-house, as a court, yard, or the like. *Brown's Law Dict.*

The inclosed space immediately surrounding a dwelling-house, contained within the same inclosure. *Bouvier's Law Dict.*

A space necessary and convenient, and habitually used for the family purposes and the carrying on of domestic employments. It includes the garden, if there is one, and need not be separated from other lands by a fence. *State v. Shaw*, 31 Me. 523; *Com. v. Barney*, 10 Cush. (Mass.) 478.

A barn on the other side of a highway, distant fifteen rods from the dwelling-house, is not within the curtilage. *Curkindale v. People*, 36 Mich. 309.

A barn eighty feet distant, situate upon a lane leading from the house, is within the curtilage. *People v. Taylor*, 2 Mich. 250.

1. It is not a dwelling-house, which it is arson to burn, where but a part of the frame was raised, and the part raised not entirely enclosed, and the stairs not up. *McGaray v. People*, 45 N. Y. 153.

Or where the house was not painted, though so intended to be, and some of the glass in an outer door had not been put in, and it had not been occupied. *State v. McGowan*, 20 Conn. 245; *s. c.*, 52 Am. Dec. 336.

A building formerly used and occupied as a carpenter-shop, but in the process of being altered, adapted, and designed to be converted and made into a dwelling-house, and not yet finished, is not a dwelling-house the burning of which is felonious. *Mead v. Boston*, 3 Cush. (Mass.) 404. See *State v. Wolfenberger*, 20 Ind. 242. Compare *Com. v. Squire*, 1 Metc. (Mass.) 258; *R. v. Manning*, 1 L. R. C. C. 338.

2. A house from which the owner is temporarily absent, and his household effects remain, is occupied. *Johnson v. State*, 48 Ga. 116. See *State v. McGowan*, 20 Conn. 245; *State v. Warren*, 33 Me. 30.

A house, as soon as built and fitted for residence, does not become a dwelling-house till some person dwells in it. *R. v. Allison*, 1 Cox Cr. Cas. 24. See, generally, *Woodford v. People*, 62 N. Y. 117; *McGary v. People*, 45 N. Y. 153; *Hooker v. Commonwealth*, 13 Gratt.

(Va.) 763; *State v. McGowan*, 20 Conn. 245; *State v. Wolfenberger*, 20 Ind. 242; *State v. Warren*, 33 Me. 30; *Com. v. Barney*, 10 Cush. (Mass.) 478; *Com. v. Squire*, 1 Metc. (Mass.) 258; *State v. Clark*, 7 Jones L. (N. Car.) 167; *Lacy v. State*, 15 Wis. 13; *State v. Wolfenberger*, 20 Ind. 242; *Stallings v. State*, 47 Ga. 572; *McLane v. State*, 4 Ga. 342; *Dick v. State*, 53 Miss. 384; *Elsmore v. St. Briavels*, 8 B. & C. 461; *R. v. Kimbrey*, 6 Cox Cr. Cas. 464.

When persons are considered as being in the house when set fire to.—A stable which adjoined a dwelling-house was set on fire; the flames communicated to the dwelling-house, in which members of the family had been sleeping; but it did not appear whether the house took fire before they left the house or after. *Alderson, B.*, in summing up the case to the jury, directed them to say by their verdict, should they find the prisoner guilty, whether the house took fire before the family were in the yard or after. If they were of opinion that it was after the family were in the yard, his lordship said that he thought they ought to acquit the prisoner of the capital charge, as to sustain that, in his opinion, it was necessary that the parties named in the indictment should be in the house at the very time the fire was communicated to it. But his lordship added that, the point being a new one and of very great importance, he should not take upon himself to decide it there, but should reserve it for the decision of the judges. The prisoner was acquitted of the entire charge. *R. v. Warren*, 1 Cox C. C. 68.

In *R. v. Fletcher*, 2 C. & K. 215, *Patteson, J.*, held in a similar case that if the fire caught the house after the inmates had left it, the charge could not be sustained.

3. *People v. Fairchild*, 48 Mich. 31; *Snyder v. People*, 26 Mich. 106; *People v. Gates*, 15 Wend. (N. Y.) 159; *State v. Lyon*, 12 Conn. 487; *State v. Toole*, 29 Conn. 342; *s. c.*, 76 Am. Dec. 602; *State v. Tannery*, 9 Iowa, 436; *State v. Fish*, 27 N. J. L. 323; *Com. v. Wade*, 17 Pick. (Mass.) 395; *Davis v. State*, 52 Ala. 345; *Young v. Commonwealth*, 12 Bush (Ky.), 243; *Com. v. Erskine*, 8 Gratt. (Va.) 624. See *Woodford v. People*, 62 N. Y. 117; *State v. Sandy*, 3 Ired. L. (N. Car.) 570; *Graham v. State*, 40 Ala. 659; *Com. v.*

Hamilton, 15 Gray (Mass.), 480; Carter v. State, 20 Wis. 647.

It is not even necessary to name the person occupying the house. State v. Aguila, 14 Mo. 130; State v. Hayes, 78 Mo. 307.

If one be indicted for burning the dwelling-house of another, it is sufficient if it be, in fact, the dwelling-house of such person. The court will not inquire into the tenure or interest which such person has in the house burned. It is enough that it was his actual dwelling at the time. People v. Van Blarcum, 2 Johns. (N. Y.) 105.

Arson is an offence against the habitation, and affects possession rather than property, and an information therefor is sufficiently exact if it describes the dwelling-house as that of the occupant. People v. Fairchild, 48 Mich. 31. See State v. Toole, 29 Conn. 342; s. c., 76 Am. Dec. 602; Snyder v. People, 26 Mich. 106.

Where a tenant burns a house of which he is in possession, the landlord can be named as the owner. People v. Simpson, 50 Cal. 304.

A description as the building of the owner is sufficient, though the building may have been held under lease by a tenant. People v. Fisher, 51 Cal. 319; Harvey v. State, 67 Ga. 639; People v. Van Blarcum, 2 Johns. (N. Y.) 105. Compare People v. Gates, 15 Wend. (N. Y.) 159; Com. v. Wade, 17 Pick. (Mass.) 395.

Property in B. with dower-right in A.—information rightly laid property in A. and B. People v. Eaton, 26 N. W. Repr. (Mich.) 702.

**At Common Law.**—It is material in an indictment at common law that the ownership of the house should be correctly stated so as to show it to be the house of another. And stating that the prisoner set fire to a house at, etc., without stating whose house it was, or alleging anything to excuse that statement, will not be sufficient. 2 Russ. on Cr. (9th Am. Ed.) 1046.

An indictment charged that the prisoner feloniously set fire to a house situated in the parish of E., and it was holden to be bad. Rickman's Case, 2 East P. C. c. 21, s. 11, p. 1034, MS. Bayley, J.

The facts were that the house belonged to a parish, and the parish permitted a person to live in it who was merely a servant of the parish, and it was wholly unknown who were the trustees, or in whom the legal estate was vested; and it appears to have been holden by

the judges that such house might have been laid to be the property of the overseer or of persons unknown. 2 East P. C. c. 21, s. 11, p. 1034, MS. Bayley, J.

In an indictment upon the 24 & 25 Vict. c. 97, it is, as we have seen, by the words of the statute, sufficient to show the house, etc., to be in the possession of the offender, or in the possession of any other person.

With respect to the nature of the possession, it appears from a recent case that a house, in part of which a man lives, and other parts of which he lets to lodgers, may be described as his house, though he has taken the benefit of the Insolvent Debtor's Act, and executed an assignment including the house, if the assignee has not taken possession; or at least no objection can be made if in other counts it is stated as the house of the assignee and also of the lodger whose room was set fire to. The indictment described the house first as F.'s, secondly as D.'s, and thirdly as the prisoner's. F. occupied part of it and let out the rest in lodgings, the room set fire to being let to the prisoner; five months before the fire F. was discharged as an insolvent debtor, and had previously executed an assignment, including this house, to D.; D. never took possession. A case was reserved upon the point whether the possession of the house was rightly described, and the judges held that it was; for the whole house was properly in the possession of F., the possession by his tenants being his possession; and if not, the prisoner's own room might be deemed his house. Rex v. Ball, MS. Bayley, J., and R. & M. C. C. R. 30.

It has been observed that it requires great nicety in some cases to distinguish the person who may be said to occupy property *suo jure*. 2 East P. C. c. 21, s. 11, p. 1034.

And it will in some cases be advisable to state the ownership or possession differently, in different counts, in order to obviate any objection on the ground of variance. In a case where the indictment laid the whole of the premises consumed by the fire as in the sole occupation of one B., widow, it appeared that the premises burned, consisting of out-houses, were the property of the widow, but were only made use of by her son who lived with her after his father's death, in the dwelling-house adjoining the out-houses, and took upon him the sole management of the farm, with which these out-houses were used, to the loss and profit of which he alone stood, though without any particular agreement between

person who is in the actual occupation, even though the possession be wrongful.<sup>1</sup>

**9. Malicious and Wilful.**—The burning must also be malicious and wilful; otherwise it is only a trespass. No negligence or mischance, therefore, will amount to such burning.<sup>2</sup>

him and his mother, and he paid all the servants, and purchased all the stock; but the legal property, both in the dwelling-house and farm, was in the mother, and she alone repaired the dwelling-house and the out-houses in question; and the indictment in this form was holden to be improper. And Heath, J., held that as to the stable, pound, and hog-sties, which the son alone used, the indictment must lay them to be in his occupation; and as to the brewhouse (another of the out-houses burned), the mother and son both occasionally paying for ingredients, the beer being used in the family, to the expenses of which the mother in part contributed, though without any particular agreement as to the proportion, that the same should be laid as in their joint occupation. The prisoner was afterwards convicted on a second indictment drawn agreeably to this opinion, and containing two counts; the first laying the occupation in the son alone, the other laying it in the mother and son; and he was executed. *Glandfield's Case*, 2 East P. C. c. 21, s. 11, p. 1034.

Where a laborer in husbandry was permitted to occupy a house as part of his wages, and after being discharged from his master's service, and told to quit the house in a month, remained in it after that period, it was held by the judges, upon an indictment for setting fire to the house, that it was rightly described as being in the possession of the laborer. *R. v. Wallis*, 1 Moody C. C. 344.

At the trial of an indictment for arson, alleging that the building burned was owned by the N. Company, and occupied as a warehouse by the W. Company, a registered copy of the deed to the N. Company is admissible, and, together with evidence that the N. Company had orally leased the building to the W. Company, is sufficient proof of the ownership and possession of the building alleged in the indictment. *Com. v. Preece*, 140 Mass. 276.

Where an indictment for arson charged that the house burned was the property of and in the possession of a certain person, and the proof showed the actual possession was held by the tenant of that person, there was no material variance. *Harvey v. State*, 67 Ga. 639.

If an indictment is *nolle pros* because

of a variation of proof of ownership from the allegation, it is no bar to a second indictment in which the ownership is properly laid. *Martha v. State*, 26 Ala. 72.

**Public Buildings.**—As regards public buildings, no ownership need be alleged. *Mott v. State*, 29 Ark. 147; *Lockett v. State*, 63 Ala. 5; *Stevens' Case*, 4 Leigh. (Va.) 683; *State v. Roe*, 12 Vt. 93.

1. *Snyder v. People*, 26 Mich. 106; *State v. Toole*, 29 Conn. 344; s. c., 76 Am. Dec. 602; *R. v. Wallis*, 1 Moody C. C. 344.

2. *Jenkins v. State*, 53 Ga. 33; s. c., 21 Am. Rep. 255; *Jesse v. State*, 28 Miss. 100; *McDonald v. People*, 47 Ill. 533; *Kellenbeck v. State*, 10 Md. 431; *State v. Mitchell*, 5 Ired. L. (N. Car.) 350; *Thomas v. State*, 4 Tex. 27; 3 Inst. 67; 4 Black. Com. 222. Compare *Luke v. State*, 49 Ala. 30; s. c., 20 Am. Rep. 269 and note.

With respect to the indictment, it may be observed that it is clearly necessary in an indictment for arson at common law to lay the offence to have been done wilfully and maliciously; and though the words "wilful and malicious" did not occur in the 9 Geo. I., c. 22, yet they seem to have been considered as necessary in an indictment upon that statute. 2 Russ. on Cr. (9th Am. Ed.) 1046.

The indictment under the 7 and 8 Geo. IV., c. 30 must have charged the offence to have been done "unlawfully and maliciously;" and stating that it was done "feloniously, voluntarily, and maliciously" was not sufficient. The first count alleged that the prisoners a certain barn "feloniously, voluntarily, and maliciously" did set fire to, etc. The second count stated that the prisoners a certain stack of straw "feloniously, voluntarily, and maliciously" did set fire to, etc. Upon reading the indictment, Parke, J., found that it did not pursue the words of the statute, as it omitted the word "unlawfully," and he referred to 1 Hawk. P. C. c. 25, s. 96, where it is laid down "that where a statute uses the word 'unlawfully' in the description of an offence, it is certain that an indictment grounded on it must use the word *illicit* or some other tantamount." The indictment, therefore, seemed to the learned judge to be bad; but he left the case to

the jury; and, upon a case reserved, the judges held that the indictment ought to have charged the act to have been done "unlawfully," and they thought it best to order a new indictment to be preferred at the following assizes. *R. v. Turner*, R. & M. C. C. R. 239.

Where the accused put matches among loose cotton, with the expectation that they would be ignited by the handling of the cotton, *held*, arson. *Overstreet v. State*, 46 Ala. 30.

If a person sets fire to a stack, the fire from which is likely to and which does communicate to a barn, which is thereby burned, the person is indictable for burning the barn. *R. v. Cooper*, 5 C. & P. 535. See *McDade v. People*, 29 Mich. 50.

The malicious and wilful burning effected need not correspond with the precise intent or design of the party. If A have a malicious intent to burn the house of B, and in setting fire to it burn the house of C also, or if the house of B escape by some accident and the fire take in the house of C and burn it, this shall be said in law to be the malicious and wilful burning of the house of C, though A did not intend to burn that house. And accordingly it has been said that if one man command another to burn the house of J. S., and he do so, and the fire thereof burn another house, the commander is accessory to the burning such other house. 2 Russell on Crimes (9th Am. ed.), 1025.

If the act of burning be done under a *bona-fide* belief in the existence of a right to burn (as where a woman set fire to some furze on a common), there is no criminal offence. *R. v. Twose*, 14 Cox C. C. 327.

It must be proved that the act of burning was both wilful and malicious, otherwise it is only a trespass and not a felony. 1 Hale P. C. 569.

Therefore if A shoot unlawfully at the poultry or cattle of B, whereby he sets the house of another on fire, it is not felony; for though the act he was doing was unlawful, he had no intention to burn the house. 1 Hale P. C. 569.

In this case, observes Mr. East, it should seem to be understood that he did not intend to steal the poultry, but merely to commit a trespass; for otherwise, the first attempt being felonious, the party must abide all the consequences. 2 East P. C. 1019.

But where a sailor on board a ship entered the hold for the purpose of stealing the rum, and, the rum coming in contact with a lighted match in his hand, the ship was set on fire and destroyed, it was held

by the Court of Crown Cases Reserved in Ireland that a conviction for arson could not be upheld. *Reg. v. Faulkner*, 13 Cox C. C. R. 550.

It is at least very doubtful whether the proposition laid down by Mr. East can now be considered law. If A has a malicious intent to burn the house of Band, without intending it, burns that of C, it is felony. 1 Hale P. C. 569; 2 East P. C. 1019.

So if A command B to burn the house of J. S., and he do so, and the fire burns also another house, the person so commanding is accessory to the burning of the latter house. *Plowd.* 475; 2 East P. C. 1019.

So where the primary intention of the offender is only to burn his own house (which is no felony), yet if in fact other houses are thereby burned, being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful, and the consequence immediately and necessarily flowing from the original act done, it is felony. 2 East P. C. 1031.

On an indictment for wilfully setting fire to a rick by firing a gun close to it, evidence was allowed to be given by Maule, J., with a view of showing that the fire was not accidental, that on a previous occasion the prisoner was seen near the rick with a gun in his hand, and that the rick was then also on fire. *R. v. Dossett*, 2 C. & K. 306.

Upon this point it was said by Tindal, C. J., in his charge to the grand jury at Bristol: "Where the statute directs that to complete the offence it must have been done with intent to injure or defraud some person, there is no occasion that either malice or ill-will should subsist against the person whose property is destroyed. It is a malicious act in contemplation of law when a man wilfully does that which is illegal and its necessary consequence must injure his neighbor, and it is unnecessary to observe that the setting fire to another's house, whether the owner be a stranger to the prisoner or a person against whom he had a former grudge, must be equally injurious to him; nor will it be necessary to prove that the house which forms the subject of the indictment in any particular case was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence if he is shown to have feloniously set on fire another house, from which the flames communicated to the rest. No man can shelter himself from punishment on the ground that the mischief he committed was wider in its con-

Generally, proof of the burning and the facts connected with it is sufficient proof that it was done maliciously.<sup>1</sup>

10. *Intent*.—The intent to injure or defraud is an important ingredient in this offence; but, like the proof of malice and wilfulness, it will generally be assumed.<sup>2</sup>

sequences than he originally intended.”  
5 Car. & P. 266, n.

But where two lads threw a lighted paper into a post-office letter-box, forming part of a house, whereby several letters were burned, Williams, J., said that no doubt if they intended the fire to do its worst they would be guilty, but if they only set fire to the letters, and it was contrary to their intention to burn the house, they would not be guilty, and would not be guilty even if the house had been burned. *R. v. Batstone*, 10 Cox, 20.

In *R. v. Gray*, 4 F. & F. 1102, evidence of other claims on other insurance companies in respect of fires, in other houses previously occupied by the prisoner, was admitted to show that the fire in question was not the result of accident.

A woman indicted for arson, with intent to defraud an insurance office, was allowed to give evidence that she was in easy circumstances, and so had no pecuniary motive for the crime. *R. v. Grant*, 4 F. & F. 322 (Pollock, C. B.). See also *R. v. Harris*, 4 F. & F. 342.

1. *People v. Haynes*, 55 Barb. (N. Y.) 450; *State v. Byrne*, 45 Conn. 273; *Brown v. State*, 52 Ala. 345; *Brooks v. State*, 51 Ga. 612; *State v. Rohfrisch*, 12 La. Ann. 382; *Tullis v. State*, 41 Tex. 598; *State v. Watson*, 63 Me. 128; *Com. v. McCarthy*, 119 Mass. 354.

2. *State v. Watson*, 63 Me. 128; *Com. v. Francis*, Thach. C. C. (Mass.) 240; *Com. v. Harney*, 10 Metc. (Mass.) 422; *Com. v. Goldstein*, 114 Mass. 272; *Com. v. McCarthy*, 119 Mass. 354; *Hennessey v. People*, 21 How. Pr. (N. Y.) 239; *Shepherd v. People*, 19 N. Y. 537; *People v. Henderson*, 1 Park. Cr. C. (N. Y.) 560; *State v. England*, 78 N. Car. 552; *Brooks v. State*, 51 Ga. 612; *Luke v. State*, 49 Ala. 30; *Brown v. State*, 52 Ala. 345; *Jesse v. State*, 28 Miss. 100; *Tullis v. State*, 41 Tex. 598; *People v. Shainwold*, 51 Cal. 468.

In the trial of an indictment for arson, evidence of threats by the accused to burn the same building he is charged with burning is admissible. *State v. Fenslason*, 8 Eastern Repr. (Me.) 644.

Where a man was indicted for setting fire to a mill (43 Geo. III. c. 58, s. 1, repealed), with intent to injure the occupier thereof, and it appeared from the prosecutor's evidence that the prisoner was an

inoffensive man, and never had any quarrel with the occupier, and that there was no known motive for committing the act, the judges held the conviction right, for that a party who does an act wilfully necessarily intends that which must be the consequence of his act. *R. v. Farrington*, Russ. & Ry. C. C. 207; *R. v. Philp*, 1 Moo. C. C. 263.

But it was held that on an indictment under the repealed statute, 7 Will. IV. & 1 Vict. c. 89, s. 2, for the capital offence of setting fire to a dwelling-house, some person being therein, in which there was no charge of any intent to injure or defraud any person, the prisoner could not be convicted of the transportable offence of setting fire to the house, under the 3d section of the statute, as an allegation of intent to injure or defraud some person was essential to an indictment under that section. *R. v. Paice*, 1 C. & K. 73.

Where the prisoner was a person of weak intellect, and the jury found that, though the prisoner set fire to the building as charged, they did not believe that he was conscious that the effect of what he did would be to injure any person, *Martin, B.*, ordered a verdict of not guilty to be entered. *R. v. Davies*, 1 F. & F. 69.

It has been held that a wife who set fire to her husband's house was not guilty of felony within the repealed statute, 7 & 8 Geo. IV. c. 30, s. 2. The indictment described the prisoner as the wife of J. Marsh, and charged her with setting fire to a certain house of the said J. Marsh, with intent to injure him, against the statute. It appeared that the prisoner and her husband had lived separate for about two years, and previous to the act, when she applied for the candle with which it was done, she said it was to set her husband's house on fire, because she wanted to burn him to death. On a case reserved upon the question whether it was an offence within the 7 & 8 Geo. IV. c. 30, s. 2 (repealed), for a wife to set fire to her husband's house for the purpose of doing him a personal injury, the conviction was held wrong, the learned judges thinking that to constitute the offence it was essential that there should be an intent to injure or defraud some third person, not one identified with herself. *R. v. Marsh*, 1 Moody C. C. 182.

**11. Corpus Delicti.**—The burning of the house, or whatever is made arson by statute constitutes the *corpus delicti*.<sup>1</sup>

Where the intent laid is to defraud insurers, the insurance must be proved. To prove this the policy must be produced, evidence of the books of an insurance company not being admissible, unless notice has been given to produce the policy, or the non-production of the policy is accounted for. *R. v. Doran*, 1 Esp. 126.

And it must be shown that the risk has attached. It has been held that the part-owner of a ship may be convicted of setting fire to it with intent to injure and defraud the other part-owners, although he has insured the whole ship and promised that the other part-owners shall have the benefit of the insurance. *R. v. Philp*, 1 Moo. C. C. 262; *R. v. Newill*, 1 Moo. C. C. 458.

A person may be convicted under the 7 Will. IV. & 1 Vict. c. 89, ss. 6 & 11 (repealed), for setting fire to a vessel of which he was at the time part owner. *R. v. Wallace, Car. & M.* 200.

The underwriters on a policy of goods fraudulently made are within the statute. *R. v. Wallace*, 2 Moo. C. C. 200.

Where a count in an indictment under the 7 & 8 Geo. IV. c. 30, s. 17 (repealed), charged the prisoner with setting fire to a certain stack of straw, but without alleging any intent to injure, the judges held that as that clause contained no words of intent, the count was good. *R. v. Newill*, 1 Moo. C. C. 458.

Under an indictment for arson, where the crime is alleged to have been committed for the purpose of defrauding an insurance company which had issued a policy of insurance upon the building burned, it is competent for the State to give in evidence a claim made by the defendant for the property destroyed, and to prove that he put a value upon it in excess of its real worth, not for the purpose of impeaching the character of the accused, but as tending to show a motive to commit crime. *Stitz v. State*, 104 Ind. 359.

In *State v. Cohn*, 9 Nev. 179, the appellant was charged with arson, and it was held that evidence of over-large insurance upon his goods was competent "to show a possible or probable motive, such motive being a material link in the chain of circumstances." The court said: "Now, it is not a natural thing for a man to fire his own premises: presumptively appellant was innocent. What, then, is the logical and natural course of human

thought at such a juncture? Is it not to inquire what motive, if any, existed which could have influenced a sane person to do such an act? Such was the course pursued by the prosecution; the motive was spught, and by it claimed to be found in the fact of an undue insurance—not only a perfectly proper proceeding, but indeed the only one open." The same principle is declared in *Com. v. Hudson*, 97 Mass. 565, and in *Shepherd v. People*, 19 N. Y. 537. In this last case the court said: "The prisoner's house had been burned and he was charged, upon circumstantial evidence, with having set it on fire. *Prima facie* he had no motive for the act, but a strong pecuniary one against it. But if he had a contract of indemnity, and especially if under it he might probably obtain more than the value of the property, the case would be quite different."

Mr. Bishop says: "Evidence that the insurance was for more than the worth of the building is pertinent, also that the defendant attempted to procure payment of what was thus excessive." 2 Bishop *Crim. Proc.* § 50.

The cases are in harmony with the general rule which that author thus states: "Hence proof of motive is never indispensable to a conviction; but it is always competent against the defendant." 1 Bishop *Crim. Proc.* § 1107; *Wills Circ. Ev.* 41; *Goodwin v. State*, 96 Ind. 550.

**Attempt.**—Defendant having made preparations for burning a building, left his supposed accomplice at the building, saying he would go and get some matches, but did not return, and an hour or so afterwards was arrested. *Held*, that the offence was complete. *State v. Hayes*, 78 Mo. 307.

**Accessories.**—The prisoner solicited K. to set fire to a barn, and gave him materials for the purpose. *Held*, sufficient to warrant conviction, though the prisoner did not mean to be present at the commission of the offence, and K. never intended to commit it. *People v. Bush*, 4 Hill (N. Y.), 133. See *Mackesey v. People*, 6 Park. Cr. (N. Y.) 114.

If A counsels and encourages B to set fire to a malt-house, and B attempts to set it on fire, both may be jointly indicted as principals, although A was not present at the time of the attempt. *R. v. Clayton*, 1 C. & K. 128.

1. *Sam v. State*, 33 Miss. 347; *Phillips v. State*, 29 Ga. 108; 76 Ala. 42.

**ART.**—A principle put in practice and applied to some art, machine, manufacture, or composition of matter.<sup>1</sup>

**ARTICLE—ARTICLES.**—Article, as defined by lexicographers, is “a distinct portion or part; a joint or a part or member; one of various things,” etc. It is a word of separation to individualize some particular thing from the general thing or whole of which it forms a part, as an article in an agreement, an article of faith, an article of a newspaper, or an article of merchandise. It is derived from the Greek, the original or radical word meaning to join or to fit as a part, and it is only very recently that it has been applied to denote such material or corporeal things as goods or physical property, and then only in the sense of something that is separate and individual in itself, as, salt is a necessary article, or, a hammer is a useful article.<sup>2</sup>

1. In the Patent Acts.—The word “art,” as used in the Patent Acts, means a useful art or a manufacture which is beneficial and which by the same law is required to be described with exactness in its mode of operation. *Smith v. Downing*, 1 Fish Pat. Cas. 64.

But a mere process *eo nomine* is not patentable, yet an art may require one or more processes or machines in order to produce a certain result. *Corning et al. v. Burden*, 15 How. (U. S.) 267. *E.g.*, the art of telegraphy. *Jacobs v. Baker*, 7 Wall. (U. S.) 295.

To Use an Art.—These words signify here, to use as a master or principal. *Clark v. Denton*, 1 B. & Ad. 100.

2. *Wetzell v. Dinsmore*, 4 Daly (N. Y.), 195.

**Article Forwarded.**—A transportation company received a package containing three cases of a particular drug separately addressed to the plaintiffs, and then wrapped up in a proper cover in a single package similarly addressed. The receipt or bill of lading contained a clause that the holder should not demand more than fifty dollars for any loss or damage to the “article forwarded.” But one of the cases reached the plaintiffs. Held, that “the article forwarded” was the single package, and that plaintiffs were not entitled to recover fifty dollars upon each of the missing cases; but *quære* whether if the cases had contained different kinds of drugs and the company had had knowledge of that fact, the decision would have been different. *Wetzell v. Dinsmore*, 54 N. Y. 496, overruling 4 Daly (N. Y.), 195, cited above.

**Any Article.**—A printed notice given by a carrier that he would not become liable for baggage for an amount exceeding one hundred dollars upon “any article” was held to qualify his responsibility,

not as to a trunk or piece of baggage and its entire contents in gross, but as to any article contained in the piece of baggage, not exceeding one hundred dollars for any single item. *Hopkins v. Westcott*, 6 Blatch. (U. S.) 64.

**Articles or Objects.**—Under an act requiring a certain statement to be made in returns or lists of “income or articles or objects charged with an internal tax,” it was held that the latter word included gross receipts, while “articles” might “be deemed to apply to enumerated goods in use or on sale, or produced by manufacture already specified in the law.” *Wells, Fargo & Co. v. Shook*, 8 Blatch. (U. S.) 257.

**Any other Article or Thing.**—An act forbidding the conveyance into any prison, with intent to facilitate the escape of a prisoner, of any mask, dress, or other disguise, or of “any other article or thing” was held to include a crowbar. *The Queen v. Payne*, L. R. 1 C. C. R. 27.

But where the words of the statute were “articles and effects,” they were held to be *ejusdem generis* with those which went before and not to apply to a “yacht.” *In re Blake*, 1 Jebb. 71.

**Article or Part of an Article**, in the Factory Acts Extension Act, 30 and 31 Vict. c. 103, s. 3, does not include a “ship,” though it does an “iron plate,” although the same may be used in shipbuilding. *Palmer's Co. v. Claytor*, L. R. 4 Q. B. 209 and 10 B. & S. 177.

**Article of Manufacture**, in an act passed to protect designers against copiers of their designs in respect of the application thereof to ornamenting any “article of manufacture,” by complying with certain provisions, was held to include pattern pieces of paper hangings. “It is equally an article of manufacture or an article of trade whether it be manufactured and



**ARTIFICER.**—In the Truck Act (1 and 2 Wm. IV., c. 37) it is enacted in the interpretation clause "that in the meaning and for the purposes of this act all workmen, laborers, and other persons in any manner engaged in the performance of any work, employment, or operation of what nature soever, in or about the several trades and occupations aforesaid, shall be and be deemed 'artificers.'" 1

sold as a pattern or for actual use." Heywood v. Potter, 1 El. & Bl. 439.

**Other Valuable Article,** in a statute making it a trespass to remove from the lands of another any tree, stone, timber, or "other valuable article," was held to include the removing of ice. State v. Pottmeyer, 33 Ind. 402 and 5 Am. Rep. 224.

**Article of Food.**—Rye-chop, which is food for horses, does not come within an act making it unlawful for any person to buy up "any provision or article of food coming to market." Boteler v. Corp. of Washington, 2 Cranch C. C. (U. S.) 676.

**Articles, Goods, or Things,** in an act making a railway company liable for loss or injury to "any articles, goods, or things" in the receiving, forwarding, or delivering thereof occasioned by negligence of the company or its servants, held to include a passenger's luggage. Cohen v. S. E. R. Co., L. R. 2 Ex. Div. 253.

**Articles of Gold and Silver Manufacture.** Gold and silver watches and watch-chains, though usually worn about the person, were held to come within this definition in an act limiting an innkeeper's liability on compliance with certain requirements. Stewart v. Parsons, 24 Wisc. 241.

**Articles and Necessaries.**—Under the Bankruptcy Act money cannot be set apart by the assignee to the bankrupt as coming within the description of "other articles and necessities of such bankrupt" unless such money is the proceeds of specific things which could be set apart under this head, and a classification of the goods sold as "dry and fancy goods" was held insufficient. *In re Welch*, 5 Ben. (U. S.) 230.

**All other Articles Perishable in their own Nature** in a policy of insurance means "those articles not particularly enumerated which are liable to perish of themselves in the course of the voyage, without any external injury." Astor v. Union Ins. Co., 7 Cow. (N. Y.) 216. But where "dried fish" were included in the memorandum, the above expression was held not to include "pickled fish" as *expressio unius exclusio est alterius*. Baker v. Ludlow, 2 Johns. Cas. (N. Y.) 289.

**Articles of Comfort and Support** for which the wife's estate might become liable were held to include medicines and the professional services of a physician. May v. Smith, 48 Ala. 483.

**Articles of Glass.**—Under the tariff act of July 30, 1846, imposing certain duties on "manufactures, articles, vessels, and wares of glass," all kinds of window-glass were held to be included. Roosevelt v. Maxwell, 3 Blatch. C. C. (U. S.) 391.

1. The term "artificers" in this act has been held to apply only to those who are actually and personally employed to do the work, and not where the procuring work to be done by the hands of others comprehends the whole of what a man contracts for, not even where the employee may do some portion of the work himself. Ingram v. Barnes, 7 El. & Bl. 134.

"If the contract is not for the labor, but for the result or effect of the labor, as for instance a contract for the removal of a quantity of clay, that is not within the act, because there the contract is not for the labor, but for that which the labor is to accomplish." Sleeman v. Barrett, 2 H. & C. 942. See to the same effect Sharman v. Sanders, 13 C. B. 166.

**Artificer or Handicraftsman.**—Skilled men employed to plate a vessel agreeing to serve subject to rules, and to execute the whole of the skilled and unskilled labor requisite to complete the work, and for this purpose to employ such assistants as the employer deemed requisite, were held to be "artificers and handicraftsmen" within the meaning of the 4 G. IV. c. 34, s. 3. Lawrence v. Todd, 14 C. B. (N. S.) 554.

And so a master-tailor employed to make clothes as should be required, each article to be paid for according to a fixed price, and he himself to work for his employer exclusively. *Ex parte Gordon*, 25 L. J. M. C. 12.

**Artificer, Laborer.**—A farmer is not within a statute enacting that "no tradesman, artificer, workman, laborer, or other person whatsoever" should pursue his ordinary calling on the Lord's Day. Reg. v. Cleworth, 4 B. & S. 927.

**AS.**—This word, which usually means like, of the same kind, in the same manner, is used in a number of phrases.<sup>1</sup> When

**Merchant, Artificer.**—"Only those who traffic in the way of commerce by importation or exportation or carry on business by way of emption, vendition, barter, permutation, or exchange, and who make it their living to buy and sell by continued assiduity or frequent negotiation in the mystery of merchandise are esteemed merchants. Those who buy goods to reduce them by their own art or industry into other forms and then to sell them are artificers only." Jac. L. Dict., quoted in *Lansdale v. Brashear*, 3 T. B. Mon. (Ky.) 335.

**1. As Aforesaid.**—Where a testator made a certain devise with limitations, and then in a second clause made a devise over, "as aforesaid," it was held that the words "as aforesaid" drew down to the second clause the limitations of the first, and showed that the testator meant that the devisees of the devise over should take the same estate as they would have done had the devise passed to them under the limitations in the first clause. *Meredith v. Meredith*, 10 East, 503.

So where an act (Stat. 12 and 11 Vict. c. 92, § 3) prohibited the keeping or using or acting in the management of any place, for the purpose of fighting or baiting, any bull, etc., and imposed a penalty therefor, and then went on "and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, etc., as aforesaid, shall forfeit and pay a penalty not exceeding £5 for every such offence," it was held that "as aforesaid" meant in a place so used as is mentioned before, and that a person does not incur this latter penalty by aiding and assisting at cock-fighting in any place; but only if the place be one so kept or used for the purpose, as to subject the keeper of it to the penalty imposed by the first clause of the section. *Clark v. Hague*, 2 Ell. & Ell. 281.

A trust in a will, in relation to devises and bequests previously given and by the words of the will restrained to property "devised and bequeathed as aforesaid," will not extend to different bequests subsequently given by codicil, in lieu of those given by the will. *Roberts v. Wills, Spencer* (N. J.), 591.

**As Follows.**—"As follows" is a sufficient averment of the tenor of a forged receipt in an indictment. *King v. Powell*, 2 Wm. Blackstone, 787; s. c., 1 Leach, 77.

The words "as follows (that is to say)" do not bind a party to an exact recital. *King v. Hart*, 1 Leach, 145; *King v. May*, 1 Leach, 192.

**As For.**—"As for" or "as touching" such worldly estate, etc., is one of the usual introductory clauses with which wills are begun. *French v. McIlhenny*, 2 Binney (Pa.), 13; *Campbell v. Carson*, 12 S. & R. (Pa.) 54; *Hall v. Goodwin*, Nott & McC. (S. C.) 383.

It usually indicates an intention to dispose of the whole of the testator's estate. *Willis v. Bucher*, 2 Binney (Pa.), 455. See *Caldwell v. Ferguson*, 2 Yeates (Pa.), 380; *Wyatt v. Sadler's Heirs*, 1 Munford (Va.), 537; *Wilce v. Wilce*, 7 Bingham, 664; *Winchester v. Tilghman*, 1 Harris & McH. (Md.) 452; *Brailsford v. Hayward*, 2 Desauss. (S. C.) 18, 32; *Clark v. Mikell*, 3 Desauss. (S. C.) 168.

**As the Crow Flies.**—"The plain and ordinary sense of these words is the actual distance, and I think they ought to be so understood, unless we can collect from the context that they were meant to be used in a different sense; and here the context raises no such inference. The phrase 'as the crow flies' is a popular and picturesque expression to denote a straight line, which I think is clearly the proper mode of measuring the distance from one given point to another." *Stokes v. Grissell*, 14 C. B. 678. See *Moufflet v. Cole*, L. R. 7 Ex. 70; s. c., L. R. 8 Ex. 32; *Reg. v. Saffron-Walden*, 9 Q. B. 76; *Lake v. Butler*, 5 E. & B. at page 99; s. c., 24 L. J. (Q. B.) 273; *Jewel v. Stead*, 6 E. & B. 350; s. c., 25 L. J. (Q. B.) 294; *Duignan v. Walker*, Joh. 446; s. c., 28 L. J. (Ch.) 867.

**As Soon as Possible.**—"As soon as possible" cannot mean instantly or directly, for it might be impossible to do the act instantly. *Duncan v. Topham*, 8 Man., Gr. & Scott, 229. See *Palmer v. The St. Paul F. & M. Ins. Co.*, 44 Wis. 201, 208; *Guild v. Hale*, 15 Mass. 455.

The words "as soon after as practicable" mean within a reasonable time. *Cammell v. Beaver Mut. Ins. Co.*, 39 U. C. (Q. B.) 1. See *Parsons v. Queen Ins. Co.*, 43 U. C. (Q. B.) 271; *Atwood v. Emery*, 1 C. B. 110; *Peck v. Waters*, 104 Mass. 345.

But this reasonable time must be construed in relation to the contract. See *Hydraulic Engineering Co. v. McHaffie*, where the plaintiffs, in July, 1877, contracted with J. to make for him a ma-

the context seems to require it, "as" is equivalent to "it" or "that." <sup>1</sup>

**ASCENDANT.** See DESCENT.

**ASPORTATION.** See LARCENY.

**ASSAULT—ASSAULT AND BATTERY.** (See also FALSE IMPRISONMENT; HOMICIDE; RAPE; SELF-DEFENCE; TRESPASS.)

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|---|--|
| 1. <i>Definition.</i>                     | 20. <i>Administering Drugs.</i>                                      |
| 2. <i>Battery.</i>                        | 21. <i>Indecent Assault.</i>   |
| 3. <i>Contributory Negligence.</i>        | 22. <i>Mutual Combat.</i>  |
| 4. <i>Consent.</i>                        | 23. <i>Unlawful Imprisonment.</i>                                    |
| 5. <i>On Official Persons.</i>            | 24. <i>Corporations.</i>   |
| 6. <i>Intent.</i>                         | 25. <i>Assault without Actual Violence Applied to the Person.</i>    |
| 7. <i>Assault on Several.</i>             | 26. <i>Assault with Violence not Directly Applied to the Person.</i> |
| 8. <i>Striking Distance.</i>              | 27. <i>Assault with Violence Applied to the Person.</i>              |
| 9. <i>Need not be Immediate.</i>          | 28. <i>Actual and Grievous Bodily Harm.</i>                          |
| 10. <i>Lawful Force.</i>                  | 29. <i>Assault with Deadly Weapon.</i>                               |
| 11. <i>By an Officer.</i>                 | 30. <i>Assault with Fire-arms.</i>                                   |
| 12. <i>Lawful Chastisement.</i>           | 31. <i>Dangerous or Deadly Weapon.</i>                               |
| 13. <i>Defence of Person or Property.</i> | 32. <i>Assault with Intent to Kill.</i>                              |
| 14. <i>Trespassers.</i>                   | 33. <i>Accessories.</i>  |
| 15. <i>Defence of Other Persons.</i>      | 34. <i>Evidence of Threats.</i>                                      |
| 16. <i>Prevention of Unlawful Acts.</i>   | 35. <i>Damages.</i>  |
| 17. <i>Husband and Wife.</i>              |  |
| 18. <i>Threatening Words.</i>             |  |
| 19. <i>Threatening Gestures.</i>          |  |

1. **Definition.**—All crimes of violence to the person include an assault, and the nature of the crime depends much more fre-

chine, to be delivered at the end of August. The defendants contracted with the plaintiffs to make "as soon as possible" part of the machine called a "gun." The defendants were aware that the machine was wanted by J. at the end of August, but they did not finish the "gun" until the latter part of September. J. then refused to accept the machine from the plaintiffs. The delay on the part of the defendants was owing to the circumstance that at the time of undertaking to manufacture the "gun" they had not a foreman competent to prepare certain patterns, without which it could not be made. *Held*, that the defendants had committed a breach of their contract, and that the plaintiffs were entitled to recover damages for the loss of profit upon the contract with J., and for the expenditure uselessly incurred by them in making other parts of the machine. L. R. 4 Q. B. Div. 670.

**As Far as Possible.**—The Towns Improvement Clauses Act, 1847, 10 and 11 Vict. c. 34, s. 108, imposes a penalty on persons so negligently using a furnace as not to "consume the smoke" arising from it. The Birmingham Improvement Act,

1851, 14 and 15 Vict. c. 93, s. 55, incorporates the above section, but provides that the words "consume the smoke" shall not be in all cases read as "consume 'all' the smoke;" and that the penalty may be remitted if the person summoned under that section has so constructed or altered his furnace as to consume "as far as possible" its smoke, "and has carefully attended to the same, and consumed 'as far as possible' its smoke. On an information against the appellant for so negligently using his furnace as not to consume its smoke, it was not shown that the furnace was improperly constructed; it was found that it was capable of consuming more smoke than it in fact did; but that to use the means provided for that purpose would render it impossible to carry on the appellant's trade with that furnace. The appellant was convicted. *Held* (assuming the furnace to be properly constructed), that "as far as possible" meant as far as possible consistently with carrying on the trade in which the furnace was employed, and that the appellant was wrongly convicted. *Cooper v. Woolley*, L. R. 2 Ex. 88.

1. Thus, where a statute made abortion

quently on the consequences of the act than any peculiarity of the act itself. The decisions on the various crimes of violence will, therefore, frequently serve to illustrate the principles applicable to all. These cases are ranged under the heads of the crimes to which they refer.

An assault is an attempt unlawfully to apply any the least actual force to the person of another directly or indirectly; the act of using a gesture towards another, giving him reasonable grounds to believe that the person using that gesture meant to apply such actual force to his person as aforesaid; the act of depriving another of his liberty; in either case without the consent of the person assaulted, or with such consent if it is obtained by fraud.<sup>1</sup>

Any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being, as raising a cane to strike him, pointing a loaded gun at him, and the like.<sup>2</sup>

a crime, "unless the same were done as necessary for the preservation of the mother's life," it was held that this exception might be read "unless the same were done as it were necessary," and that the exception was sufficiently negated by the words in the indictment, "it not being then and there necessary to administer said drug." *Beasley v. People*, 89 Ill. 571, 577.

1. Stephen's Dig. Cr. L. (Am. Ed.) 181.

The following are cases of assault without battery:

A strikes at B with a stick without hitting him. 1 Hawk. P. C. 110.

A aims a pistol at B, which A knows is not loaded, but which B believes to be loaded. *R. v. George*, 9 C. & P. 483.

In the following cases no assault or battery is committed: A lays his hand on B, to attract his attention. A, falling down, catches hold of B to save himself. A crowd of people, going into a theatre, push and are pushed against each other. Stephen's Dig. Cr. L. (Am. Ed.) 181. *Com. v. White*, 110 Mass. 407; *Hays v. People*, 1 Hill (N. Y.), 351; *State v. Davis*, 1 Ired. (N. Car.) 128; s. c., 35 Am. Dec. 735; *State v. Morgan*, 3 Ired. (N. Car.) 186; *Rictels v. State*, 1 Sneed (Tenn.), 606; *U. S. v. Hand*, 2 Wash. C. C. 435.

2. 2 Bishop's Cr. L. § 23. See *People v. Lilley*, 43 Mich. 521; *Hays v. People*, 1 Hill (N. Y.), 351; *U. S. v. Hand*, 2 Wash. C. C. 435; *Johnson v. Tompkins*, 1 Baldw. (C. C.) 571; *U. S. v. Ortega*, 4 Wash. C. C. 534.

An assault is an attempt or offer to do a corporeal hurt to another, as by striking him, or presenting a gun at him at car-

rying distance, or pointing a pitchfork at him, or holding up one's fist at him, or doing any such like act in an angry, threatening manner. Brown's Law Dict.

Strictly speaking, an assault is an unsuccessful attempt to do harm to the person of another, as by menacing with a stick a person who is within reach of it, although no blow be struck. Sweet's Law Dict.

An unlawful offer or attempt with force or violence to do a corporeal hurt to another. Force unlawfully directed or applied to the person of another under such circumstances as to cause a well-founded apprehension of immediate peril. Bouvier's Law Dict.

In *Chapman v. State*, 78 Ala. 463, the court said: "The approved definition of an assault involves the idea of an inchoate violence to the person of another, with the present means of carrying the intent into effect. 2 Greenl. Ev. § 82; Roscoe's Cr. Ev. (7th Ed.) 296; *People v. Lilley*, 43 Mich. 521.

Most of our decisions recognize the old view of the text-books, that there can be no criminal assault without a present intention, as well as present ability, of using some violence against the person of another." 1 Russ. Cr. (9th Am. Ed.) 1019; *State v. Blackwell*, 9 Ala. 79; *Tarver v. State*, 43 Ala. 354.

In *Lawson v. State*, 30 Ala. 14, it was said that, "to constitute an assault there must be the commencement of an act, which, if not prevented, would produce a battery."

"An assault is an intentional attempt, by violence, to do an injury to the person of another. It must be intentional, for

**Definition.**

**ASSAULT.**

**Definition.**

if it can be collected notwithstanding appearances to the contrary, that there is no present purpose to do an injury, there is no assault. And it must also amount to an attempt; for a purpose to commit violence, however fully indicated, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault." *State v. Davis*, 1 Ired. L. (N. Car.) 125; s. c., 35 Am. Dec. 735. See *State v. Vannoy*, 65 N. Car. 532; *State v. Neely*, 74 N. Car. 426; *State v. Myerfield*, Phil. L. (N. Car.) 109; *People v. Lilley*, 43 Mich. 521. See *Johnson v. State*, 35 Ala. 363; *Lawson v. State*, 30 Ala. 14; *People v. Yslas*, 27 Cal. 630; *People v. Campbell*, 30 Cal. 312.

Although force and violence are included in all definitions of assault, yet, where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts. *Com. v. Stratton*, 114 Mass. 303; s. c., 19 Am. Rep. 350, where a woman was given cantharides.

Violence must be either offered, menaced, or designed. *People v. Bransby*, 32 N. Y. 525.

The intention to injure must be a present one, and not one to inflict an injury at some other, or future time. *Johnson v. State*, 43 Tex. 576.

Mr. Roscoe says (Ros. Cr. Ev. (10th Ed. 304.): "An assault is an attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness, as by striking at him, or even holding up the fist to him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability, of actual violence against his person, as by pointing a weapon at him when he is within the reach of it. 1 East P. C. 406. Striking at another with a cane, stick, or fist, although the party striking misses his aim. 2 Roll. Abr. 545, l. 45. Drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike; presenting a gun at a man who is within the distance to which the gun will carry; pointing a pitchfork at him when within reach of it; or any other act indicating an intention to use violence against the person of another, is an assault. 1 Hawk. c. 62, § 1. It is an assault to point a loaded pistol at any one; but not an assault to point at another a pistol which is proved not to be so loaded as to be able to be discharged. *R. v. James*, C. & K. 530; *McKay v. State*, 44 Tex. 43. But in *R. v. St. George*, 9 C.

& P. 483, Parke, B., held otherwise, saying that it was an assault to present a pistol at a man at all, whether loaded or not. See *State v. Smith*, 2 Humph. (Tenn.) 457. Considerable doubt has been thrown on this decision by the case of *R. v. Brown*, 10 Q. B. D. 381; 52 L. J. M. C. 49. Although to constitute an assault there must be a present ability to inflict an injury, yet if a man is advancing in a threatening attitude to strike another, so that the blow would almost immediately reach him if he were not stopped, and he is stopped, this is an assault. *Stephens v. Myers*, 4 C. & P. 349."

There are no degrees of the offence of assault and battery, except that, in imposing the punishment, the circumstances of one case may demand a heavier punishment than another. *Cornelison v. Commonwealth*, 2 S. W. Repr. (Ky.) 235.

**Assault on Judge.**—An assault committed on a judge, or other dignitary of the State, is not a greater offence, in the absence of statute, than a similar assault on a private person. *Cornelison v. Commonwealth*, 2 S. W. Repr. (Ky.) 235.

**What Is.**—It is an assault to ride dangerously near a person, thus causing him to fear injury to his person. *State v. Sims*, 35 Strob. (S. Car.) 137; *Morton v. Shoppee*, 3 C. & P. 373.

To cut a man's clothes whilst on his person is an assault, although there is no intention to inflict any bodily injury, and in the ordinary case of a blow on the back there is clearly an assault, though the blow is received by the coat on the person. *R. v. Day*, 1 Cox C. C. 207.

A master who chastises a minor servant is guilty of assault. *Davis v. State*, 6 Tex. App. 133; *Cooper v. State*, 8 Baxt. (Tenn.) 324; s. c., 35 Am. Rep. 704.

A self-constituted vigilance committee who flog an obnoxious person are guilty of assault. *Boyle v. Case*, 18 Fed. Repr. 880.

If resistance be prevented by fraud, it is an assault. If a man, therefore, have connection with a married woman under pretence of being her husband, he is guilty of an assault. *R. v. Williams*, 8 C. & P. 286; *R. v. Saunders*, 8 C. & P. 265.

Making a female patient strip naked under the pretence that the defendant, a medical man, cannot otherwise judge of her illness is, if he himself takes off her clothes, an assault. *R. v. Rosinski*, 1 M. C. C. 19.

If a party is turning towards the wall in the street, at night, for a particular occasion, a watchman is not justified in collaring him to prevent him so doing. *Booth v. Hanley*, 2 C. & P. 288.

## Definition.

## ASSAULT.

## Definition.

### What is—Continued.

Defendant intruded upon the premises of prosecutor, who took hold of him to lead him off, when defendant put his hand in his pocket and partly drew out a knife, and thereupon the prosecutor desisted and went into the house, the defendant cursing him. *Held*, an assault. *State v. Marsteller*, 84 N. Car. 726; *State v. Hampton*, 63 N. Car. 13; *State v. Shipman*, 81 N. Car. 513.

The parties were disputing about a piece of land; the prosecutor on one side of a fence advanced towards the defendant with an axe; the defendant on the other side shot him across the fence. *Held*, the principle of self-defence has no application, but defendant is guilty of an assault. *State v. Leary*, 88 N. Car. 615.

Defendant being about twenty steps distant advanced towards prosecutor with knife and stick, cursing and threatening to do him bodily harm, in consequence of which the prosecutor went into a store and remained until a warrant was obtained, the defendant walking in front of the store saying he would whip the prosecutor if he came out. *Held*, an assault. *State v. Martin*, 85 N. Car. 508; s. c., 39 Am. Rep. 711.

B seized A by the arm, swung him round and let him go, throwing him against C, who instantly pushed him away, whereby A came violently against a hook and was injured. *Held*, that A might maintain an action for assault against B. *Ricker v. Freeman*, 50 N. H. 420; s. c., 9 Am. Rep. 267.

It is an assault for a priest to remove a person by violence who is lawfully in a room, where he wishes to administer the sacrament to a sick person. *Cooper v. McKenna*, 124 Mass. 284; s. c., 26 Am. Rep. 667.

A, a boy of about twelve years of age, said to B, a boy of about nine years of age, "I will shoot you." B ran into a school-house near which the boys were playing, and hid behind a fireboard standing before the fireplace in the school-room. A followed to the door of the school-room, and, saying, "See me shoot that basket," discharged an arrow. At that moment B raised his head above the fireboard, and the arrow struck him and injured his eye. *Held*, A was guilty of assault. *Bullock v. Babcock*, 3 Wend. (N. Y.) 391.

Two persons may be guilty of assault on two or more persons. *Fowler v. State*, 3 Heisk. (Tenn.) 154.

A mutual agreement to fight with fists renders each of the parties engaged in

the fight guilty of assault. *Com. v. Collberg*, 119 Mass. 350; s. c., 20 Am. Rep. 328.

Pointing a loaded gun at half-cock at a person is an assault; for there is a present ability of doing the act threatened, as the gun can be cocked in an instant. *Osborn v. Veitch*, 1 F. & F. 317.

By the law of nations an attack on the property of a foreign minister is an assault on him, but to constitute the offence the prisoner must have known that the house was the domicile of a foreign minister. *U. S. v. Hand*, 2 Wash. C. C. 435.

**Gun or Pistol.**—Pointing a loaded gun or pistol at another in a threatening manner is an assault. *Morgan v. State*, 33 Ala. 413; *State v. Shepard*, 10 Iowa, 126; *State v. Taylor*, 20 Kan. 643; *U. S. v. Kierman*, 3 Cranch. C. C. 435.

It is immaterial that the person so using the gun did not actually know that it was loaded. *Com. v. McLaughlin*, 5 Allen (Mass.), 507.

If the person assaulted had reasonable cause to believe that it was loaded, it is an assault though it is not loaded. *Com. v. White*, 110 Mass. 407. *Compare State v. Swails*, 8 Ind. 524.

**Injuries inflicted during Ceremonies of Fraternities, etc.**—In *State v. Webster*, 75 N. Car. 134, the prosecutrix was a member of a benevolent society known as the "Good Samaritans." Having been remiss in some of her obligations, the society proceeded to perform the ceremony of expulsion, which consisted of a suspension from the wall by a cord fastened around the waist. The same ceremony had before been performed in presence of the prosecutrix. As soon as she cried out that the cord hurt her she was released, and at once fainted. The court said: "When the prosecutrix refused to submit to the ceremony of expulsion established by this benevolent society, it could not be lawfully inflicted. Rules of discipline for this and all voluntary associations must conform to the laws. If the act of tying this woman would have been a battery had the parties concerned not been members of the society of 'Good Samaritans,' it is not the less a battery because they were all members of that humane institution. The punishment inflicted upon the person of the prosecutrix was wilful, violent, and against her consent, and thus contained all the elements of a wanton breach of the peace." *Bell v. Hansley*, 3 Jones L. (N. Car.) 131.

The plaintiff, during his initiation as a

An aggravated assault is one committed with the intention of committing some additional crime.<sup>1</sup>

member of the defendants' lodge, in the presence of the principal officers and a number of members, constituting a full and perfect meeting, was injured through the rough usage of some of the members. It appeared that this and other proceedings were taken with the knowledge of all those who were present, and that somewhat similar proceedings had happened on the occasion of other initiations, and that they were allowed and not checked. *Held*, that they must be taken to have been done with the consent of the corporate body, and that the defendants were liable in damages for the injuries sustained. *Kinver v. Phoenix Lodge*, 7 Ont. R. Q. B. Div. 377; s. c., 8 Am. & Eng. Corp. Cas. 251.

**Vigilance Committee.**—No plea of the public good or safety can justify a voluntary assemblage of people in inflicting a personal injury upon any individual; but in an action to recover damages therefor, the jury, in considering whether the plaintiff is entitled to punitive damages or not, may and ought to take into account the causes or motives which led the defendants to do the wrong complained of. *Boyle v. Case*, 18 Fed. Repr. 880.

**What Is Not.**—A, having the right to immediate possession of a house, entered it and forcibly took away the windows of the room in which B was sick in bed. Without evidence that A knew that B was in the house A's act does not amount to an assault. *Meador v. Stone*, 7 Metc. (Mass.) 147. See *Stearns v. Sampson*, 59 Me. 568; s. c., 8 Am. R. 442.

Where a policeman was stationed at a door to prevent a person from entering, it was held that if he was entirely passive, like a door or a wall put to prevent that person from entering the room and simply obstructing the entrance of that person, no assault was committed. *Innes v. Wylie*, 1 C. & K. 257.

One who negligently drives over another is not guilty of a criminal assault and battery, although he does it while violating a city ordinance against fast driving. *Com. v. Adams*, 114 Mass. 323; s. c., 19 Am. Rep. 362.

If one, without anger, moderately chastises another in order to preserve discipline, it is not an assault. *State v. Neff*, 58 Ind. 516. (See also **LAWFUL CHASTISEMENT**, *infra*, p. 794.)

A drew a pistol on B, but did not present or cock it. *Held*, not an assault. *Lawson v. State*, 30 Ala. 14.

A snatched a bank-note from the hand

of B. *Held*, not an assault with force and violence. *Com. v. Ordway*, 12 Cush. (Mass.) 210.

Where one is falling and to save himself grasps hold of another, it is not an assault. *Coward v. Baddeley*, 5 Up. Can. L. J. 262.

If a gun is not aimed directly at a person, and there does not exist an intention to fire, it is not an assault. *Lawson v. State*, 30 Ala. 14. See *Woodruff v. Woodruff*, 22 Ga. 237; *Tarver v. State*, 43 Ala. 354.

Presenting an unloaded gun at a person is not an assault. *State v. Shepard*, 10 Iowa, 126.

A pointed a gun at B, who was armed with a knife and threatened to assault A, but A did not intend to shoot unless in self-defence when actually attacked. *Held*, not an assault by A. *State v. Blackwell*, 9 Ala. 79.

A held out his arms as if to take hold of B, who ran away. *Held*, not an assault with intent to commit rape. *House v. State*, 9 Tex. App. 53.

An excise officer gave the defendant a search-warrant to look at, who then refused to deliver it up, and a scuffle ensued; on an indictment for an assault, the question left to the jury was whether the officer used more force than was necessary to recover possession of the warrant. *Rex v. Milton*, M. & M. 107; s. c., *nom.* *Rex v. Milton*, 3 C. & P. 31.

If one has an idiot brother who is bedridden in his house, and keeps him in a dark room without sufficient warmth or clothing, this will not be an assault or an imprisonment, nor will proof of this support an indictment for an assault or an imprisonment. *Rex v. Smith*, 2 C. & P. 449.

1. *Bouvier's Law Dict.*

**Aggravating Circumstances.**—The aggravating circumstances frequently consist in the intent. Sometimes, however, the consequences alone are sufficient to subject the prisoner to the more serious punishment; thus a man who commits an assault, the result of which is to produce grievous bodily harm, is liable to be convicted under s. 47 of the 24 & 25 Vict. c. 100, though the jury think that the grievous bodily harm formed no part of the prisoner's intention. *R. v. Sparrow*, 30 L. J. M. C. 43.

On an indictment for an assault occasioning actual bodily harm, and charging in other counts an unlawful wounding and the infliction of grievous bodily

The unlimited character of this crime makes it a convenient means of punishing a variety of crimes, which do not at first sight seem to be assaults, at least not in the popular signification of the term; for example, putting a child into a bag, hanging it on some palings, and there leaving it.<sup>1</sup> But a mere omission to do an act cannot be construed into an assault.<sup>2</sup>

The party injured may proceed against the defendant by action and indictment for the same assault; and the court in which the action is brought will not compel him to make his election to pursue either the one or the other, for the punishment upon the criminal prosecution and the damages to the party in the civil action are perfectly distinct in their natures.<sup>3</sup>

**2. Battery.**—A battery is not necessarily a forcible striking with the hand or stick or the like, but includes every touching or laying hold (however trifling) of another person, or his clothes, in an angry, revengeful, rude, insolent, or hostile manner; for example,

harm, a conviction may be had for a common assault. *R. v. Yeadon*, 1 L. & C. 85.

And this is so notwithstanding the word "assault" does not occur in the indictment. *R. v. Taylor*, L. R. 1 C. C. 194; 38 L. J. M. C. 106.

On an indictment for feloniously cutting, stabbing, or wounding, the jury may find a verdict of guilty of the misdemeanor of unlawfully wounding, under the 14 & 15 Vict. c. 19, s. 5.

1. *Harris Crim. Law* (Force's Ed.), 151; *R. v. March*, 1 C. & K. 496.

Where parish officers, by force and against her consent, cut off the hair of a young woman who was an inmate of a workhouse, it was held an assault. *Forde v. Skinner*, 4 C. & P. 449.

Exposing a child of tender years, or a person under the control and dominion of the party, to the inclemency of the weather, is an assault. *R. v. Ridley*, 2 Camp. 650; 1 Russ. Cri. 959.

An indictment against a mistress for not providing sufficient food and sustenance for a servant, whereby the servant became sick and emaciated, was ruled to be bad, because it did not allege that the servant was of tender years, and under the dominion and control of her mistress; it was suggested that the indictment also charged that the defendant exposed the servant to the inclemency of the weather; and it was holden that such exposure was an act in the nature of an assault, for which the defendant might be liable, whatever was the age of the servant. *R. v. Ridley*, 2 Camp. 650. See *Com. v. Stoddard*, 9 Allen (Mass.), 280.

Where a mother left her child, ten days old, at the bottom of a dry ditch, by which there was a path, and a lane sepa-

rated from the ditch by a hedge, Parke, B., is reported to have said that "there were no marks of violence on the child, and it does not appear in the result that the child actually experienced any inconvenience, as it was providentially found soon after it was exposed, and therefore, although it is said in some of the books that an exposure to the inclemency of the weather may amount to an assault, yet, if that be so at all, it can only be when the person suffers a hurt or injury of some kind or other from the exposure. *R. v. Renshaw*, 2 Cox C. C. 285.

But where the defendants told the mother of a child of which she had been delivered that it was to be taken to a nursery or institution to be brought up, and they put the child in a bag and hung it upon some park-pales at the side of a footpath, and it was likely that the putting a child of so tender an age into a bag and hanging the bag on the pales would cause its death, *Tindal, C. J.*, held that the defendants were guilty of an assault; for the mother gave consent on the pretext that the child was to be taken to some institution, and as that pretext was false, it was no consent at all. *R. v. March*, 1 C. & K. 496.

2. Where a man kept an idiot brother, who was bedridden, in a dark room in his house, without sufficient warmth or clothing, *held*, that these facts would not support an indictment for assault and false imprisonment; for although there had been negligence, yet mere omission, without a duty, would not create an offence indictable as an assault. *R. v. Smith*, 2 C. & P. 439.

3. 1 Russ. on Cr. (9th Am. Ed.) 1030, *State v. Frost*, 1 Brev. (S. Car.) 385; *State v. Blythe*, 1 Bay. (S. Car.) 166.



jostling another out of the way. Thus, if a man strikes at another with a cane or fist, or throws a bottle at him, if he misses, it is an assault; if he hits, it is a battery.<sup>1</sup>

**3. Contributory Negligence.**—The doctrine that contributory negligence on the part of a plaintiff will defeat his action has no application to a case of unlawful assault and battery, and no defence can be predicated thereon.<sup>2</sup>

**4. Consent.**—As a rule, consent on the part of the complainant deprives the act of the character of an assault, unless, indeed, non-resistance has been brought about by fraud.<sup>3</sup> But the fact of

1. Harris' Crim. Law (Force's Ed.), 151; Stephens' Dig. Cr. Law (Am. Ed.), 181. See *State v. Baker*, 65 N. Car. 332; *Johnson v. State*, 17 Tex. 515; *Republica v. De Longchamps*, 1 Dall. (U. S.) 111; *U. S. v. Ortega*, 4 Wash. (U. S.) 534.

Mr. Stephens gives the following as cases of assault and battery (Dig. Cr. L. Am. Ed. 182):

A cuts B's dress whilst B is wearing it, but without touching, or intending to touch, any part of B's person. *R. v. Day*, 1 Cox C. C. 207.

A sets a dog at B, which bites B. 1 Russ. Cr. 958 gives several cases of this sort.

A man, professing to act as a medical adviser, fraudulently induces a girl to allow him to undress her, by falsely alleging that it is necessary, for medical reasons, to do so. *R. v. Rosinski*, 1 Russ. Cr. 959. And see *R. v. Case*, 1 Den. 580.

A touches B, a boy of eight, in a grossly indecent manner, B acquiescing in ignorance of the nature of the act. *R. v. Lock*, L. R. 2 C. C. R. 10. And see *R. v. Barnett*, L. R. 2 C. C. R. 81.

A induces B to permit him to have connection with her, by pretending to be her husband. *R. v. Williams*, 8 C. & P. 286.

A battery is more than an attempt to do a corporal hurt to another; but any injury whatsoever, be it ever so small, being actually done to the person of a man in an angry or revengeful or rude or insolent manner, such as spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, is a battery in the eye of the law. For the law cannot draw the line between different degrees of violence, and, therefore, totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. It should be observed that every battery includes an assault. 1 Russ. on Cr. (9th Am. Ed.) 1020.

A beat a horse while being driven by B. Held, not a battery on B. *Kirland*

*v. State*, 43 Ind. 146; s. c., 13 Am. Rep. 386.

2. *Steinmetz v. Kelly*, 72 Ind. 442; s. c., 37 Am. Rep. 170.

The exclusion of evidence tending to show that the plaintiff's negligence contributed to his injuries is not erroneous. *Whitehead v. Mathaway*, 85 Ind. 85; *Ruter v. Foy*, 46 Iowa, 132.

3. *Pillow v. Bushnell*, 5 Barb. (N. Y.) 156; *People v. Dohring*, 59 N. Y. 374; *Champer v. State*, 14 Ohio St. 437; *Smith v. State*, 12 Ohio St. 466; *State v. Burgdorf*, 53 Mo. 65; *Duncan v. Com.*, 6 Dana (Ky.), 295; *State v. Murphy*, 6 Ala. 765; *Anschicks v. State*, 6 Tex. App. 524.

There may be submission by a child of tender years to an assault without legal consent. *Cliver v. State*, 45 N. J. L. 46; *Hays v. People*, 1 Hill (N. Y.), 351; *People v. Justices*, 18 Hun (N. Y.), 330.

Attempting to have connection with a girl between the ages of ten and twelve, or under ten years of age, if done with the girl's consent, is not an assault. *R. v. Meredith*, 8 C. & P. 589; *R. v. Banks*, 8 C. & P. 574; *R. v. Martin*, 9 C. & P. 213.

A person who whips another at the latter's request, and for the purpose, as they both supposed, of saving him from a greater punishment, is not guilty of assault. *State v. Beck*, 1 Hill (S. Car.), 363; s. c., 26 Am. Dec. 190.

The case of *Matthew v. Ollerton*, Comb. 218, is referred to as an authority that if one license another to beat him, such license is no defence, because it is against the peace.

Where a boy was seized, by his consent, while in the legal custody of his father, held, an assault. *Com. v. Nickerson*, 5 Allen (Mass.), 518.

Ultimate consent to sexual intercourse, though freely given, after the use of violence and threats, will not justify the violence and threats. *Dickey v. McDonnell*, 41 Ill. 62; *Desborough v. Homes*, 1 F. & F. 6.

If excessive force is used in sexual in-

consent will in general be immaterial when an actual battery or breach of the peace has been committed.

tercourse, consent is not a defence to charge of assault. *Richie v. State*, 58 Ind. 355.

An assault is within the rule that fraud vitiates consent; and therefore when a man, knowing that he had a foul disease, induced a girl of thirteen, who was ignorant of his condition, to consent to sleep with him, and he infected her, *held*, that he might be convicted of an indecent assault. *R. v. Bennett*, 4 F. & F. 1105.

If a surgeon professing to take steps to cure a girl of a complaint has carnal connection with her, and she is ignorant of the nature of his act, and makes no resistance, solely from a *bona-fide* belief that he is, as he represents, treating her medically, with a view to her cure, his conduct in point of law amounts to an assault. *People v. Bransby*, 32 N. Y. 525; *R. v. Case*, 5 Cox C. C. 222.

Where defendants told the mother of a child of which she had been delivered that it was to be taken to a nursery or institution to be brought up, and they put the child in a bag and hung it upon some park-pales at the side of a footpath, and it was likely that the putting a child of so tender an age into a bag and hanging the bag on the pales would cause its death, *Tindal, C. J.*, held that the defendants were guilty of an assault; for the mother gave consent on the pretext that the child was to be taken to some institution, and as that pretext was false, it was no consent at all. *R. v. March*, 1 C. & K. 496.

In fighting by mutual agreement, consent is no defence. *Com. v. Callberg*, 119 Mass. 350; s. c., 20 Am. Rep. 328. See *Fitzgerald v. Calvin*, 110 Mass. 153. See also *MUTUAL COMBAT*, *post*, p. 807.

Mr. Roscoe says (*Ros. Cr. Ev.* 306): "In consequence of the natural desire not to permit a flagrant act of immorality to go unpunished, an attempt has frequently been made to treat that as an assault which is consented to on the part of the person who is the subject of the act. But on examination it will be found that there is no authority for such a position. Thus in *R. v. Nichols, Russ. & Ry.* 130, which is sometimes quoted in support of such a doctrine, where a master took indecent liberties with a female scholar to which she did not resist, Mr. Baron Graham distinctly told the jury that there was some evidence to show that the acts of the prisoner were against the girl's will. And in *R. v. Day*, 9 C. & P. 722, a similar case, *Coleridge, J.*, pointed out

the distinction between consent and submission. He said: 'Every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law.' So where two boys of eight years of age were ignorant of the moral nature of the act done to them it was held that mere submission to an indecent act was not consent. *R. v. Lock*, L. R. 2 C. C. R. 10. It is otherwise if they willingly and intentionally consent. *R. v. Wollerston*, 12 Cox C. C. 180. In *R. v. Martin*, 2 Moo. C. C. 123, where the prisoner was convicted of an assault with intent to carnally know a girl above ten and under twelve years of age, the girl assenting, the judges, on a case reserved, held that the conviction could not be supported. See also *R. v. Read*, 1 Den. C. C. 377; 2 C. & K. 927; *R. v. Johnson*, 1 L. & C. 632; 34 L. J. M. C. 192. If the consent of the injured party has been obtained by fraud, then the outrage is considered as not the less an assault because it is consented to. Thus in *R. v. Saunders*, 8 C. & P. 265, where a man, pretending to be her husband, went to bed with a married woman, and she believing him to be her husband, permitted him to have connection with her, this was held by *Gurney, B.*, to be an assault. And the same was held by *Alderson, B.*, in *R. v. Williams*, 8 C. & P. 286. See also *R. v. Case*, 1 Den. C. C. 580; *R. v. Bennett*, 4 F. & F. 1105; *R. v. Flattery*, 9 Q. B. D. 410; 46 L. J. M. C. 130; *R. v. Young*, 14 Cox C. C. R. 114; *Hegarty v. Shine*, 14 Cox C. C. Ir. 124, 145. It has also been said, though the law is not so clear upon this point, that where the act is in itself unlawful, it will, though consented to, be punishable as an assault. *Colebridge, J.*, in *R. v. Lewis*, 1 C. & K. 419, said that if two parties go out to strike one another, and do so, it was an assault in both, and that it was quite immaterial who struck the first blow. And see *per Cave, J.*, in *R. v. Coney*, L. R. 8 Q. B. D. 534. It is indeed said in *Buller's N. P.* 16 that in an action for assault and battery it is no defence that the plaintiff and defendant fought by consent, for that,

**5. On Official Persons.**—Assaults are aggravated by being committed on persons in official station, particularly when in the actual discharge of official duties.<sup>1</sup>

**6. Intent.**—An intention on the part of the accused to do the other party some bodily harm is essential to constitute an assault.<sup>2</sup>

the fighting being unlawful, the plaintiff would still be entitled to a verdict for the injury done him. But in *Christopherson v. Bare*, 17 L. J. Q. B. 109, the Court of Queen's Bench held that a plea of leave and license to an action of assault amounted to a plea of not guilty." *R. v. Knock*, 14 Cox C. C. 1.

1. 1 Bish. Cr. L. § 470. Compare *Cornelison v. Commonwealth*, 2 S. W. Repr. (Ky.) 235.

**Assault on Peace Officer.**—The fact that the defendant did not know that the man whom he assaulted was a peace officer or was in the execution of his duty is no defence. *R. v. Forbes*, 10 Cox C. C. 362.

In *R. v. Prince*, L. R. 2 C. C. 154, Brett, J., in commenting on the above case of *R. v. Forbes*, said that although the policeman was in plain clothes, the prisoners certainly had strong ground to suspect, if not to believe, that he was a policeman; but *Bramwell, B.*, cited the case with approval, saying that the act of assaulting a police officer in the execution of his duty was a wrong in itself.

An indictment for assaulting an officer in the execution of his duty, under a warrant, must clearly show that he is such an officer as is authorized to execute the warrant; and if it do not, the defendant cannot be sentenced upon it for a common assault. A count for assaulting A. in the execution of his office, imprisoning him, and preventing him from arresting a person as he was commanded by a writ issued by the court of record of a town and county, merely described A. as "one of the sergeants-at-mace of the said town and county," and the judgment was arrested because it did not appear that A. was a legal officer of the court out of which the writ issued; for a sergeant-at-mace, *ex vi termini*, means no more than a person who carried a mace for somebody, and the indictment did not show for whom; and taking the whole count together, the jury, in effect, had found that there was an assault and imprisonment, but committed under circumstances which justified the defendant, and therefore there was not sufficient to sustain the judgment, as for a common assault, or for an imprisonment. 1 Russ. on Cr. (9th Am. Ed.) 1047.

Conviction for a simple assault may be had on an information charging an assault on an officer with intent to resist arrest. *People v. Warner*, 53 Mich. 78.

2. *Cowley v. State*, 10 Lea (Tenn.) 282; *Richels v. State*, 1 Sneed (Tenn.) 606; *Bloomer v. State*, 3 Sneed (Tenn.) 66; *State v. Smith*, 2 Humph. (Tenn.) 457; *Keefe v. State*, 19 Ark. 190; *State v. Sears*, 86 Mo. 169; *McKay v. State*, 44 Tex. 43; *Warren v. State*, 33 Tex. 517; *Johnson v. State*, 17 Tex. 515; *People v. Yslas*, 27 Cal. 630; *People v. Keefer*, 18 Cal. 636; *State v. Sims*, 3 Strob. (S. Car.) 137; *State v. Cherry*, 11 Ired. (N. Car.) 475; *State v. King*, 86 N. Car. 603; *State v. Morgan*, 3 Ired. (N. Car.) 186; *State v. Davis*, 1 Ired. (N. Car.) 121; s. c., 35 Am. Dec. 735; *State v. Crow*, 1 Ired. (N. Car.) 375; *Woodruff v. Woodruff*, 22 Ga. 237; *Smith v. State*, 39 Miss. 521; *Johnson v. State*, 35 Ala. 363; *Lawson v. State*, 30 Ala. 14; *State v. Blackwell*, 9 Ala. 79; *Kunkle v. State*, 32 Ind. 220; *Paxton v. Boyer*, 67 Ill. 132; s. c., 16 Am. Rep. 615; *State v. Malcolm*, 8 Iowa, 413; *Barnes v. Martin*, 15 Wis. 240; *People v. Lilley*, 43 Mich. 521; *Com. v. Adams*, 114 Mass. 323; s. c., 19 Am. Rep. 362; *State v. Benedict*, 11 Vt. 236; s. c., 34 Am. Dec. 688; *People v. Bransby*, 32 N. Y. 525; *Com. v. Eyre*, 1 S. & R. (Pa.) 347; *U. S. v. Ortega*, 4 Wash. C. C. 534. *U. S. v. Myers*, 1 Cranch C. C. 310; *U. S. v. Richardson*, 5 Cranch C. C. 348.

The intent must be carried into effect. *Yoes v. State*, 9 Ark. 42.

Intent may be inferred from the actions of the defendant. *Ware v. State*, 67 Ga. 349. See *Com. v. Shaw*, 134 Mass. 221.

Where an act is committed deliberately, and is likely to be attended with dangerous consequences to the life of another, malice may be presumed. *Conn v. People*, 116 Ill. 459.

To constitute an assault and battery, the intent to injure must concur with the use of unlawful violence upon the person of the assaulted party; but the slightest degree of force suffices to constitute the violence, and the intended injury may be to the feelings or the mind of the latter as well as to the corporeal person. If such injury would be the natural consequence of the violence used, the unlawful

intent is presumed unless the presumption is repelled by the evidence. *Donalson v. State*, 10 Tex. App. 307.

A mere intent to commit violence, accompanied by acts preparatory thereto, will not sustain conviction for an assault if it goes no farther. There must be present ability to carry out the intent, and the act done must be criminal and sufficiently proximate to the deed intended; and it is for the jury, under proper instructions, to determine whether it has proceeded far enough. *People v. Lilley*, 43 Mich. 521.

The intent to do corporal hurt is to be ascertained by the jury from the circumstances, and may be inferred from the unlawful act. *Richels v. State*, 1 Sneed (Tenn.), 606; *Com. v. Randall*, 4 Gray (Mass.), 36; *Conn. v. People*, 116 Ill. 459.

And it is not necessary in a simple assault that there should be the specific purpose to do a particular injury, but general malevolence or recklessness will be sufficient. *Tarver v. State*, 43 Ala. 354; *Anderson v. State*, 3 Head (Tenn.), 455; *Regina v. Fretwell*, 9 Cox C. C. 471.

If a person do one wrong, intending to do another, he is, as a general rule, punishable for the wrong done as a substantive offence. Thus, if he shoot intending to hit or kill one man and hit or kill another, he may be convicted for the wrong to the latter. *Bratton v. State*, 10 Humph. (Tenn.) 103; *State v. Meadows*, 18 W. Va. 658.

Taking a gun in one's hands in the execution of an intention of shooting, or doing some act besides so taking the gun to carry such intention into execution, is an assault. The offence is complete if there has been an act done indicating an intention coupled with ability. *Higginbotham v. State*, 23 Tex. 574; *State v. Epperson*, 27 Mo. 255; *State v. Myerfield*, Phil. (N. Car.) 108; *State v. Church*, 63 N. Car. 15; *Keefe v. State*, 19 Ark. 190; *Com. v. McLaughlin*, 5 Allen (Mass.), 507; *Richels v. State*, 1 Sneed (Tenn.), 606.

The intent of a person present at an assault as to complicity therein is not determined by his failing to express disapproval or opposition. *Kuney v. Dutcher*, 56 Mich. 308.

When an indictment charges an assault with intent to rob one of a watch and money, proof of intent to rob either is sufficient. *Phillips v. State*, 36 Ark. 282.

In a prosecution for an assault with a deadly weapon with intent to kill, where the question of motive was important, evidence was admitted for the State as to

what occurred between defendant and the prosecuting witness about a week before the assault, and at a distant place in another State. *Held*, no error, the facts proved having some bearing on the question of motive. *Yanke v. State*, 51 Wis. 464.

Where a person fired a pistol with no intention of hitting the person fired at, but merely to frighten him, such person may not be guilty of assault. *Com. v. Mann*, 116 Mass. 58.

A, while a passenger in a railway car filled with people, in a spirit of frolic discharged a pistol, intending to shoot the load into the floor of the car and thereby cause a temporary fright among the passengers. Without any intent on A's part, the ball from the pistol entered the foot of the prosecutor, inflicting a severe wound. At the time of the discharge the pistol was held downward, A standing in the aisle and the prosecutor and other persons standing behind him and in close proximity to him. On the trial of A for the above offence, upon an indictment alleging an assault, *held*, that under the circumstances, defendant's act being recklessly and wilfully done, the law would of itself imply malice. *Smith v. Commonwealth*, 100 Pa. St. 324.

A school-boy of such years and discretion as to be responsible for crime cannot voluntarily throw a stone at a comrade and hit him, though in sport or play, and then defend against a charge of assault and battery by urging that he acted without malice or anger and expected his playmate to dodge, as was customary, and evade the blow. *Hill v. State*, 63 Ga. 578.

Shortly before the conclusion of a performance at a theatre, M., with the intention and with the result of causing terror in the minds of persons leaving the theatre, put out the gaslights on a staircase which a large number of such persons had to descend in order to leave the theatre, and he also, with the intention and with the result of obstructing the exit, placed an iron bar across a doorway through which they had in leaving to pass. Upon the lights being thus extinguished a panic seized a large portion of the audience, and they rushed in fright down the staircase, forcing those in front against the iron bar. By reason of the pressure and struggling of the crowd thus created on the staircase, several of the audience were thrown down or otherwise severely injured, and amongst them A and B. On proof of these facts, the jury convicted M. of unlawfully and maliciously inflicting griev-

An assault with intent may exist without an actual attempt. There need not be a direct attempt at violence, but indirect prep-

ous bodily harm upon A and B. *Held*, that M. was rightly convicted. *R. v. Martin*, L. R. 8 Q. B. Div. 54.

In an action for an assault, where it appeared that the defendant and another person were fighting, when the plaintiff came up and took hold of the defendant by the collar, in order to separate the combatants, upon which the defendant beat the plaintiff, it was objected to the counsel for the plaintiff, who offered to enter into this evidence, that it ought to have been specially stated in the replication to the plea of *son assault demesne*; but the objection was overruled, on the ground that the evidence was not offered by way of justification, but for the purpose of showing that there was not any assault, and that it was the *quo animo* which constituted an assault, which was matter to be left to the jury. *Griffin v. Parsons*, Gloucester Lent Ass. 1754; *Selwin's N. P.* 26, n. 1.

So to lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants, is said to be no battery. 1 *Hawk. P. C. c.* 62, s. 2.

So if one lays his hand gently and not in a hostile manner on another, in order to attract his attention, it is not an assault. *Bac. Ab.*

If one soldier hurts another by discharging a gun in exercise, it will not be a battery. *Weaver v. Ward*, *Hob.* 134.

And it is no battery if, by a sudden fright, a horse runs away with his rider and runs against a man. *Gibbons v. Pepper*, 4 *Mod.* 405.

So where upon an indictment for throwing down skins into a man's yard, being a public way, by which a person's eye was beaten out, it appeared by the evidence that the wind blew the skin out of the way, and that the injury was caused by this circumstance, the defendants were acquitted. *R. v. Gill*, 1 *Str.* 190.

It seems also that if two, by consent, play at cudgels, and one happen to hurt the other, it would not amount to a battery, as their intent was lawful and commendable, in promoting courage and activity. *Bac. Ab.*

If one of two persons who are fighting strike at the other, and hit a third person unintentionally, this is a battery, and cannot be justified on the ground that it was accidental. *James v. Campbell*, 5 *C. & P.* 372.

As the blow if it had struck the party at whom it was aimed would have been a battery, so it was though it struck another person; just in the same way as if a blow intended for A hit and kill B, it will be murder or manslaughter, according as it would have been murder or manslaughter if the blow had hit A and killed him. *C. S. G.*

In *Hall v. Fearnley*, 3 *Q. B.* 919, it was held that inevitable accident arising from superior agency is a defence under the general issue; but that a defence which admits that the accident resulted from an act of the defendant must be pleaded. In an action for assault where the defendant had thrown a stick and hit the plaintiff, but it did not appear that he threw the stick with the intention of hitting the plaintiff, *Rolfe, B.*, is reported to have held that this was not sufficient to constitute an assault, as it did not appear for what purpose the stick was thrown; and it was therefore fair to conclude that it was thrown for a proper purpose, and that the striking of the plaintiff was merely accidental. *Alderson v. Waistell*, 1 *C. & K.* 358.

But this ruling may well be doubted, at all events as far as relates to a civil suit. 1 *Russ. on Cr.* 1023.

Words may sometimes be an important ingredient in ascertaining what is the intention of the party; thus they may qualify what would otherwise be an assault by showing that the party intends no present corporal injury, as where a person meeting another laid his hand upon his sword, saying, "If it were not assize time I would not take such language from you," for it shows that he had not a design to do the party any corporal hurt. *Tuberville v. Savage*, 1 *Mod.* 3. See *State v. Rawle*, 65 *N. Car.* 334.

When a special intent, beyond the natural consequences of the thing done, is essential to the crime charged, such special intent must be pleaded, proved, and found. *State v. Bloedow*, 45 *Wis.* 279.

An information which charges the defendant with unlawfully and feloniously making an assault upon S., "said defendant being then and there armed with a dangerous weapon, to wit, a revolver pistol, with intent then and there to kill and murder said S.," is not bad (on motion in arrest of judgment) for failing to charge that the assault was made "with malice aforethought," or "with a premeditated design to kill and murder said

arations toward it will, in certain circumstances, constitute an assault, and the intent to use force may be inferred from the circumstances.<sup>1</sup>

Where an act is done with intent to commit an assault, but the intent is voluntarily abandoned, or is prevented while the distance between the parties is too great to commit an actual assault, there can be no conviction as for an assault.<sup>2</sup>

The intent need not be addressed to the party injured, as where A shoots at B but hits C,<sup>3</sup> or without intent to injure any one in par-

S." nor for failing to allege that the pistol was "loaded with powder and a leaden bullet." *Cross v. State*, 55 Wis. 261.

**Intoxication.**—Drunkenness is no defence to an action by a woman against a man for assaulting her, but rather an aggravation of the tort. *Reese v. Barbee*, 61 Miss. 181.

1. *State v. Smith*, 80 Mo. 516; *State v. Eddings*, 71 Mo. 545; *State v. Carpenter*, 1 Houst. Cr. (Del.) 367; *State v. Neely*, 74 N. Car. 425; *Regina v. Dungey*, 4 F. & F. 102 and note; 1 Selw. N. P. 27; Bull. N. P. 15; 3 Chitty Crim. Law, 821.

Where the prisoner decoyed a female under ten years of age into a building, and was detected within a few feet of her in a state of indecent exposure, although he had not touched her, *held*, that he was properly convicted of assault with intent to commit a rape. *Hays v. People*, 1 Hill, 351.

The prosecutrix awoke; she found the defendant in bed with her, holding her by the wrist, and he escaped when she called on the family for help. It was held there was evidence sufficient to convict him of an assault with intent to ravish. *Carter v. State*, 35 Ga. 263.

In *State v. Morgan*, 3 Ired. (N. Car.) 186, one C., a constable, had, under an execution, seized a gun of the defendant's, and had it in possession in his yard when the latter came up with an uplifted axe in his hands, and, within striking distance, demanded its return or he would strike. The gun was not delivered up, but a parley ensued and an arrangement was made. This was declared to be an attack begun, and it was not the less so because not carried into complete execution, the principle being that such a use of a deadly weapon to enforce performance of some required act, when the act is done, is itself an assault.

2. *People v. Lilley*, 43 Mich. 521. Compare *Hays v. People*, 1 Hill (N. Y.), 351.

3. Wharton's Cr. L. §§ 965, 997.

**Shooting One with Intent to Kill Another.**—Where a person deliberately

shoots at A and in the direction of B, and the ball misses A and strikes B, inflicting a wound, these facts will sufficiently show the intention of the person shooting to kill and murder B, although he has no actual malice or ill-feeling toward B, and he may be convicted of an assault upon B with intent to kill and murder him. *Dunaway v. People*, 110 Ill. 333; s. c., 51 Am. Rep. 686.

A fired into a crowd intending to kill B, but, missing him, wounded C. *Held*, guilty of assault with intent to commit murder. *State v. Gilman*, 69 Me. 163; s. c., 31 Am. Rep. 257. See *State v. Butman*, 42 N. H. 490; *Walker v. State*, 8 Ind. 290. Compare *Simpson v. State*, 59 Ala. 1; s. c., 31 Am. Rep. 1.

The court said: "If the intent was to murder another, there cannot be a conviction of the aggravated offence charged, though there may be of the minor offence of assault." See *Barcus v. State*, 49 Miss. 17; *Jones v. State*, 11 Smed. & M. (Miss.) 315; *Ogletree v. State*, 28 Ala. 693; *Morgan v. State*, 33 Ala. 413; *State v. Abram*, 10 Ala. 928; *Lacefield v. State*, 34 Ark. 275; s. c., 36 Am. Rep. 8.

If A is indicted for shooting C with intent to maim, disfigure, disable, and kill him, and the proof is that he shot at B and missed him and accidentally hit C, he can be convicted on such indictment for shooting C with intent to maim, disfigure, disable, and kill him; or if A be indicted for an attempt to shoot C with intent to maim, disfigure, disable, and kill him, and C is not in fact shot, and the proof is that the attempt was to shoot B and not C, he cannot be convicted of an attempt to shoot C. *State v. Meadows*, 18 W. Va. 658.

He who, intending to kill and murder his enemy, mistakes in the dark a friend for such enemy, and assails with a deadly weapon and dangerously wounds his friend, but desists from the attack upon discovering the mistake, is guilty of an assault "with intent to kill and murder." *McGehee v. State*, 62 Miss. 772; s. c., 52 Am. Rep. 209.

When one intending to kill A shoots

ticular, as firing into a crowd.<sup>1</sup> An assault upon a house will be regarded as an assault on the person, when the purpose of the assault is injury to the person of the occupant or members of the family.<sup>2</sup>

The intent must be a present one, and not an intention to inflict an injury at some other or future time.<sup>3</sup>

The ability to do the act must concur with the intent;<sup>4</sup> the ability need only be apparent, not perfect.<sup>5</sup>

**7. Assault upon Several.**—An indiscriminate assault upon several persons is an assault upon each individual.<sup>6</sup>

and wounds B, or if it be doubtful which he shoots at, he cannot be convicted of an assault with intent to kill B. *Lacefield v. State*, 34 Ark. 275; s. c., 36 Am. Rep. 8.

A and B are fighting, and A unintentionally hits C. A is guilty of assault. *James v. Campbell*, 5 C. & P. 372.

1. *State v. Myers*, 19 Iowa, 517.

A boy about 13, in sport, but wantonly, threw a piece of mortar at another boy, which accidentally hit a third boy and injured his eye. *Held*, an assault. *Peterson v. Haffner*, 59 Ind. 130; s. c., 26 Am. Rep. 81. See *Conway v. Reed*, 66 Mo. 346; s. c., 27 Am. Rep. 354, a case of shooting by a boy.

2. *State v. Patterson*, 45 Vt. 308; *Cowley v. State*, 10 Lea (Tenn.), 282.

That an assault may be committed on one in a house who is not seen or known to be there, as if one were wantonly to fire a loaded gun, and the ball should pass through a house where persons were, it might be an assault on all of them. *Cowley v. State*, 10 Lea (Tenn.), 282; *Meador v. Stone*, 7 Metc. (Mass.) 151.

A person who shoots a ball from a loaded pistol through the door of a dwelling-house, intending to assault a particular individual as the supposed occupant, commits an assault upon the actual occupant although a different individual. *Cowley v. State*, 10 Lea (Tenn.), 282.

The besetting of a house is a constructive, not an actual, assault. *Evans v. State*, 1 Humph. (Tenn.) 399; *State v. Freels*, 3 Humph. (Tenn.) 228.

So, the shooting into a house for the purpose of injuring an inanimate object, as an obnoxious transparency in a window, with no design of personal injury, may not be an assault. *U. S. v. Hand*, 2 Wash. C. C. 435.

3. *Fondren v. State*, 16 Tex. App. 48; *Johnson v. State*, 43 Tex. 576; *People v. Lilley*, 43 Mich. 521.

4. Wharton's Cr. Law, § 1244; Bishop's Cr. Law, §§ 668-693; *State v. Blackwell*, 9 Ala. 79; *Beasley v. State*, 18 Ala. 535; *Shaw v. State*, 18 Ala. 547; *Lawson v. State*, 30 Ala. 14; *Johnson v. State*, 35

Ala. 363; *Mullen v. State*, 45 Ala. 43; s. c., 6 Am. Rep. 691; *Higginbotham v. State*, 23 Tex. 574; *McKay v. State*, 44 Tex. 43; *People v. Yslas*, 27 Cal. 630; *State v. Epperson*, 27 Mo. 255; *State v. Myerfield*, Phil. (N. Car.) 108; *State v. Church*, 63 N. Car. 15; *State v. Bryson*, 1 Wins. No. 2 (N. Car.) 86; *State v. Davis*, 1 Ired. L. (N. Car.) 125; s. c., 35 Am. Dec. 735; *State v. Crow*, 1 Ired. L. (N. Car.) 375; *State v. Morgan*, 3 Ired. (N. Car.) 186; *Woodruff v. Woodruff*, 22 Ga. 237; *Smith v. State*, 39 Miss. 521; *Com. v. Eyre*, 1 Serg. & R. (Pa.) 347; *State v. Benedict*, 11 Vt. 236; s. c., 34 Am. Dec. 688; *People v. Bransby*, 32 N. Y. 525.

Where the plaintiff was in the defendant's workshop and refused to leave it, and the defendant and his workmen surrounded him and, tucking up their sleeves and aprons, threatened to break his neck if he did not go out, and fearing that the men would strike him if he did not do so, the plaintiff went out; it was held that this was an assault; for there was a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution. *Read v. Coker*, 13 C. B. 850.

5. *Mullen v. State*, 45 Ala. 43; s. c., 6 Am. Rep. 691.

Where the accused presented a loaded gun and snapped it three times, but there was no cap on it, the court charged the jury that the absence of the cap would not avail the accused if he supposed it was on the gun, but the jury must be satisfied, beyond all reasonable doubt, that he did not know there was no cap on the gun; *Held*, correct. See *U. S. v. Kierman*, 3 Cranch. C. C. 435.

Where the defendant was not within striking distance. *People v. Yslas*, 27 Cal. 633.

Where defendant enticed a girl into a building for the purpose of committing an indecent assault, but being discovered, he desisted. *Hays v. People*, 1 Hill (N. Y.), 351. See *Keefe v. State*, 19 Ark. 190; *Richels v. State*, 1 Sneed (Tenn.), 606.

6. *State v. Nash*, 86 N. Car. 650. *Com-*

**8. Striking Distance.**—If one rushes upon another, or pursues him with intent to strike, and in a threatening attitude, but is stopped immediately before he was within reach of the person aimed at, it is an assault.<sup>1</sup>

**9. Need not be Immediate.**—It is not necessary that the assault should be immediate.<sup>2</sup>

*pare State v. Damon* 2 Tyler (Vt.), 390. This case is criticised in Bennett & Heard Lead. Cas. 534.

It appears to have been formerly holden that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence. But the case has been subsequently treated as one which was not well considered; and the court said, "Cannot the king call a man to account for a breach of the peace because he broke two heads instead of one?" 1 Russ. on Cr. (9th Am. Ed.) 1030, citing *R. v. Benfield*, 2 Burr, 984. See *Kenney v. State*, 5 R. I. 385; *State v. McClintock*, 8 Iowa, 203.

1. 3 Greenl. Ev. § 59. See *People v. Lilley*, 43 Mich. 521; *State v. Davis*, 1 Ired. (N. Car.) 125; s. c. 35 Am. Dec. 735; *State v. Rawles*, 65 N. Car. 334; *State v. Vannoy*, 65 N. Car. 632; *People v. Yslas*, 27 Cal. 630. Compare *State v. Blackwell*, 9 Ala. 79; *McKay v. State*, 44 Tex. 43; *State v. Yancey*, 74 N. Car. 244; *Cobbett v. Grey*, 4 Exch. 744.

It is not every threat, where there is no actual personal violence, that constitutes an assault; there must in all cases, be the means of carrying the threat into effect. If, therefore, a party be advancing in a threatening attitude, e.g., with his fist clenched, to strike another, so that his blow would almost immediately have reached such person, and be then stopped, it is an assault in law, if his intent was to strike such person, though he was not near enough at the time to have struck him. 1 Russ. on Cr. (9th Am. Ed.) 1020.

Picking up an axe within twenty-five yards of the prosecutor without an offer or attempt to use it is not an assault. *State v. Blackwell*, 9 Ala. 79.

The plaintiff was walking on a footpath by a roadside, and the defendant, who was on horseback, rode after him at a quick pace; the plaintiff then ran away into his own garden, and the defendant rode up to the gate, and shook his whip at the plaintiff, who was about three yards off; it was held, that if the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter to avoid being beaten, it was an assault.

*Mortin v. Shoppee*, 3 C. & P. 373; *State v. Sims*, 3 Stroob. (S. Car.) 137.

It is not an assault to fire a gun at a person if he is not within carrying distance of the weapon. *Shaw v. State*, 18 Ala. 547; *Tarver v. State*, 43 Ala. 354; *Lawson v. State*, 30 Ala. 14.

The evidence was to the effect that defendant pointed a loaded rifle at one W. and threatened to shoot him if he did not leave a certain field of which he was in possession, and in which he was at work, and that defendant and W. were then from thirty to fifty feet apart. There was no evidence as to whether one with a gun so loaded and at the distance stated from another could have killed or maimed the latter. Held, that the court rightly refused to instruct the jury, for the defendant, that, if they should believe from the evidence that on account of the distance between the parties at the time, a discharge of the rifle by defendant, loaded as charged, could not have killed or maimed W., they should acquit. *State v. Sears*, 86 Mo. 169.

A, who was beyond carrying distance, pointed a pistol at B in a threatening manner. Held, not an assault. *State v. Yancey*, 74 N. Car. 244.

A was advancing in a threatening attitude, with an intention to strike B, so that his blow would have almost immediately reached B., if he had not been stopped. Held, that it was an assault in point of law, though at the particular moment when A was stopped he was not near enough for his blow to take effect. *Stephens v. Myers*, 4 C. & P. 349.

2. As where a defendant threw a lighted squib into a market-place, which being tossed from hand to hand by different persons, at last hit the plaintiff in the face and put out his eye, it was adjudged that this was actionable as an assault and battery. *Scott v. Shepard*, 2 Black. 892.

And the same has been holden where a person pushed a drunken man against another, and thereby hurt him. *Short v. Lovejoy*, Bull. N. P. 16.

But if such person intended doing a right act, as to assist the drunken man, or to prevent him from going along the street without help, and in so doing a



**10. Lawful Force.**—In some cases force used against the person of another may be justified, and will not amount to an assault and battery.<sup>1</sup>

**11. By an Officer.**—An officer has no right to use force upon the person of a defendant on whom he is making service, for the purpose of identifying him.<sup>2</sup>

In cases where officers have authority to arrest, their laying hands upon persons in order to do so is no battery in law. (See also ARREST.)

An officer who arrests a drunken man without warrant, locks him up till sober, and then discharges him without taking him before a magistrate, is guilty of assault.<sup>3</sup>

hurt ensued, he would not be answerable. *Short v. Lovejoy*, Bull. N. P. 16.

1. Thus, if an officer having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him; or if a parent in a reasonable manner chastise his child, or a master his servant, being actually in his service at the time, or a schoolmaster his scholar, or a jailer his prisoner, or if one confine a friend who is mad, and bind and beat him, etc., in such a manner as is proper in such circumstances; or if a man force a sword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby stay him from inciting a dog against a third person, no assault or battery will be committed by such acts. So if A beat B (without wounding him, or throwing at him a dangerous weapon), who is wrongfully endeavoring, with violence, to dispossess him of his lands, or of the goods, either of himself or of any other person, which have been delivered to him to be kept, and will not desist upon A's laying his hands gently upon him, and disturbing him; or if a man beat, wound, or maim one who is making an assault upon his own person, or that of his wife, parent, child, or master; or if a man fight with, or beat one who attempts to kill any stranger; in these cases also it seems that the party may justify the assault and battery. It has been holden that a master may not justify an assault in defence of his servant, because he might have an action for the loss of his service; but a different opinion has been entertained on this point; and in one case Lord Mansfield said, "I cannot say that a master interposing, when his servant is assaulted, is not justifiable under the circumstances of the case; as well as a servant interposing for his master; it rests on the relation between master and servant. It is said that a servant may not justify beating

another in defence of his master's son, though he were commanded to do so by the master, because he is not a servant to the son; and that, for the like reason, a tenant may not beat another in defence of his landlord. A wife may justify an assault in defence of her husband. An upper servant cannot justify beating an under servant for disobedience of orders. 1 Russ. on Cr. (9th Am. Ed.) 1026.

A railway servant may use force to remove a passenger who refuses to pay his fare, or is guilty of misconduct. *State v. Gould*, 53 Me. 279; *Hilliard v. Gould*, 34 N. H. 230; s. c., 66 Am. Dec. 765; *Houston & Texas Cent. R. Co. v. Ford*, 53 Tex. 364; *Lilles v. St. Louis, etc., R. Co.*, 64 Mo. 464; *Ohio, etc., R. Co. v. Muhl-ling*, 30 Ill. 9; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Haley v. Chicago, etc., R. Co.*, 21 Iowa, 15; *Chicago, etc., R. Co. v. Boger*, 1 Bradw. (Ill.) 472; *O'Brien v. Boston, etc., R. Co.*, 15 Gray (Mass.), 20; s. c., 77 Am. Dec. 347; *People v. Gibson*, 3 Park Cr. C. (N. Y.) 234; *Chicago, etc., R. Co. v. Peacock*, 48 Ill. 253; *Ill. Cent. R. Co. v. Sutton*, 53 Ill. 397; *Fulton v. Grand Trunk R. Co.*, 17 U. Can. Q. B. 428; *Johnson v. C. R. R.*, 64 N. H. 213; *Com. v. Power*, 7 Metc. (Mass.) 596; s. c., 41 Am. Dec. 465; *Stephen v. Smith*, 29 Vt. 160; *New York, etc., R. Co.*, 36 Conn. 287; *State v. Campbell*, 32 N. J. 309. See also ASSAULTS BY RAILWAY SERVANTS, *post*, p. 809.

2. *Hull v. Bartlett*, 49 Conn. 64.

An officer attempting to execute process may defend himself against violence without being guilty of an assault. *People v. Galick, Hill & D.* (N. Y.) 229. See *Faris v. State*, 3 Ohio St. 159; *State v. Richardson*, 38 N. H. 208; *State v. Webster*, 39 N. H. 96; *Com. v. Presby*, 14 Gray (Mass.), 65; *Galvin v. State*, 6 Coldw. (Tenn.) 283.

3. *State v. Parker*, 75 N. Car. 249; s. c., 22 Am. Rep. 669; *Brock v. Stimson*, 108 Mass. 520; s. c., 11 Am. Rep. 390.

An officer having authority to execute criminal warrants may arrest a person charged with felony without a warrant upon information given by others, but he does so at his peril; for, unless he has reasonable grounds for believing the person arrested to be guilty of a felony, he will be liable for assault.<sup>1</sup> (See also ARREST.)

If an officer use excessive force in making an arrest, he is guilty of assault.<sup>2</sup> (See also ARREST.)

1. *Wakeley v. Hart*, 6 Binn. (Pa.) 316; *Com. v. Deacon*, 8 Serg. & R. (Pa.) 49.

This subject is fully treated under ARREST.

If a person resists an attempt to arrest him for a misdemeanor, which was not committed in the presence of the officer, such resistance will not be an assault. *Com. v. Bryant*, 9 Phila. (Pa.) 395.

2. The force used must be only so great as is necessary for the purpose of effecting the object in view, and if there be an excess of violence the officer will be guilty of an assault. If therefore a constable is preventing a breach of the peace, and any person stands in the way with intent to prevent him from so doing, the constable is justified in taking such person into custody, but not in striking him. *Levy v. Edwards*, 1 C. & P. 40.

So where one of the marshals of the city of London, whose duty it was on the day of a public meeting in Guildhall, to see that a passage was kept for the transit of the carriages of the members of the corporation and others, directed a person in the front of the crowd to stand back, and on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him, it was held that a more moderate degree of pressure ought to have been exercised, and some little time given to remove the party in a more peaceable way, and that consequently the marshal had been guilty of too violent an exertion of his authority. *Imason v. Cope*, 5 C. & P. 193.

An officer is entitled to the possession of the warrant under which he acts, and if he deliver it to the party against whom it is issued, and he refuse to redeliver it, the officer may use so much force as is necessary to get possession of it again. An officer having a warrant to search for an illegal still in the defendant's house, the defendant asked to see the warrant, and it was given him, and he then refused to return it, upon which the officer endeavored by force to retake it, and a scuffle ensued, it was held that the officer was justified in using so much violence as was necessary to retake the war-

rant, and no more. *R. v. Milton*, M. & M. 107.

If a justice make a warrant to J. S. to arrest J. D., and J. N. comes in aid of J. S., and gently puts his hands on the shoulders of J. D. and says, "this is the man," this is no battery. *Wilson v. Dodd*, 2 Roll. Abb. 546.

There may be cases in which a person may justify laying hands upon another in order to serve him with civil process. *Harrison v. Hodgson*, 10 B. & C. 445.

A police officer in arresting one for violating a city ordinance was indicted for an assault. The prosecutor alleged that the force used was excessive, and the judge charged the jury if such was the case the defendant was guilty, but failed to call their attention to the good faith in which the officer claims to have acted. *Held*, error. The amount of force necessary to make the arrest is left to the judgment of the officer when acting within the scope of his general powers and actuated by no ill-will or malice. *State v. McNinch*, 90 N. Car. 695.

A warrant for the arrest of the defendant in a civil action in justice's court, if issued upon an insufficient affidavit, constitutes no ground of defence in favor of the party procuring it, in an action against him for an assault and battery committed in an attempt to execute the warrant. But if such warrant was regular upon its face it is a protection to the person, not a party to the action in which it was issued, who took no part in procuring it and had no knowledge of the facts in relation to the issuance thereof except what appeared from the warrant itself, and who, having been duly empowered by the justice to execute the warrant, was not guilty of any abuse of process. *Mudrock v. Killips*, 65 Wis. 622.

A complaint in a civil action charged the defendant with assaulting and beating the plaintiff. The defendant made answer, by way of justification, that he was a constable, and did the acts in the execution of his office, using no more force than was necessary. The court found the allegations of both complaint and answer true, and rendered judgment for

**12. Lawful Chastisement.**—A parent may in a reasonable manner chastise his child, or a schoolmaster his scholar, or a jailer his prisoner.<sup>1</sup>

the plaintiff. *Held*, that this was a finding of the issue for the defendant, and that judgment should have been rendered on it for him. *Powers v. Mulvey*, 51 Conn. 432.

1. *Hawk*, P. C. b. 1, c. 90, s. 23; *State v. Neff*, 58 Ind. 516; s. c., 2 Am. Cr. R. 176; *Landus v. Seaver*, 32 Vt. 114; *Com. v. Randall*, 4 Gray, 36; *State v. Hull*, 34 Conn. 132; *State v. Mizner*, 45 Iowa, 238; s. c., 24 Am. Rep. 769; *Snowden v. State*, 12 Tex. App. 105; *Dowlin v. State*, 14 Tex. App. 63; *Anderson v. State*, 3 Head (Tenn.), 455; *Forde v. Skinner*, 4 C. & P. 494.

In all cases of chastisement it must, in order to be justifiable, appear to have been reasonable. 1 *East* P. C. 406.

And the law as above stated with respect to children is said to have reference only to such children as are capable of appreciating correction, and not to infants only two and a half years old. *R. v. Griffin*, 11 Cox C. C. 402.

**By Schoolmaster.**—In *Dowlin v. State*, 14 Tex. App. 61, where a teacher severely whipped a boy of thirteen years of age, the court said: "Violence used to person is not unlawful, and does not amount to an assault and battery in the exercise of moderate restraint or correction given by law to the parent over the child, the guardian over the ward, the master over his apprentice, the teacher over the scholar." In all such cases the law presumes, from the relation of the parties, an entire absence of any criminal or unlawful intent to injure; and in order to effect lawful purposes permits the parent, guardian, master, or teacher to restrain and correct the child, ward, apprentice, and scholar. When the teacher corrects his scholar the presumption is that it is in the exercise and within the bounds of his lawful authority, and it does not devolve on him to show accident or his intention; neither is it any criterion of his act or intention that bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind is produced. He has the right under the law to inflict moderate corporal punishment for the purpose of correcting or restraining the refractory pupil. But where violence is permitted to effect a lawful purpose only that degree of force must be used which is necessary to effect such purpose.

"If the correction was moderate, de-

fendant was not guilty of an assault and battery at all. If it was not moderate, but excessive, he was guilty of an aggravated assault and battery, by having exceeded the boundary of his legal right as teacher, and placed himself in the attitude of a stranger. It is true the law has not laid down any fixed measure of moderation in the lawful correction of a scholar, nor is it practicable to do so. Whether it is moderate or excessive must necessarily depend upon the age, sex, condition, and disposition of the scholar, with all the attending and surrounding circumstances, to be judged of by the jury, under the direction of the court as to the law of the case." *Dowlin v. State*, 14 Tex. App. 61; *Stanfield v. State*, 43 Tex. 167.

In *State v. Pendergrass*, 2 Dev. & Bat. 365, the court said: "Within the sphere of authority, the master is the judge when correction is necessary and of the degree of correction necessary; and like all others entrusted with a discretion, he cannot be made penally responsible for error of judgment, but only for wickedness of purpose. . . . But the master may be punishable when he does not transcend the powers granted if he grossly abuse them. If he use his authority as a cover for malice, and, under pretence of administering correction, gratify his own bad passions, the mask of the judge shall be taken off, and he will stand amenable to justice as an individual not invested with judicial power."

In *Lander v. Seaver*, 32 Vt. 114, the court said: "A schoolmaster has the right to inflict reasonable corporal punishment. He must exercise reasonable judgment and discretion in determining when to punish and to what extent. In determining what is a reasonable punishment various considerations must be regarded; the nature of the offence, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, age, size, and strength of the pupil to be punished. Among reasonable persons, much difference prevails as to the circumstances which will justify the infliction of punishment and the extent to which it may properly be administered. On account of this difference of opinion, and the difficulty which exists in determining what is a reasonable punishment, and the advantage which the master has by being

**By Schoolmaster—Continued.**

on the spot to know all the circumstances, the manner, look, tone, gestures, and language of the offender, which are not always easily described, and thus to form a correct opinion as to the necessity and extent of the punishment, considerable allowance should be made to the teacher by the way of protecting him in the exercise of his discretion. Especially should he have this indulgence when he appears to have acted from good motives, and not from anger and malice. Hence, the teacher is not to be held liable on the ground of the excess of punishment unless the punishment is clearly excessive, and would be held so in the general judgment of reasonable men. If the punishment be thus clearly excessive, then the master would be liable for such excess, though he acted from good motives in inflicting the punishment, and in his own judgment considered it necessary and not excessive. But if there be any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt." Approved in *Patterson v. Nutter*, 8 Eastern Repr. (Me.) 662.

A schoolmaster who on the second day of a boy's return to school wrote to his parent proposing to beat him severely, in order to subdue his alleged obstinacy, and on receiving the father's reply assenting thereto, beat the boy for two hours and a half secretly in the night, and with a thick stick, until he died, is guilty of manslaughter. *R. v. Hopley*, 2 F. & F. 202.

The defendant, who was the superintendent of a private school, whipped a boy who was a pupil in the school, and was prosecuted for an assault and battery committed in whipping the boy. On the trial of the cause the defendant was a witness in his own behalf. *Held*, that the court erred in refusing to allow the defendant, in answer to a question propounded by his counsel, to testify to the whole transaction and explain the circumstances of his punishment of the boy, and the offence for which the punishment was inflicted. *Danenhoffer v. State*, 79 Ind. 75.

A girl over twenty-one, by pretending that she was under age, obtained admission to a school. While there she was whipped for bad conduct by the master. On a prosecution for assault against the master, *held*, that the girl, having been guilty of fraud in obtaining admission to the school, could not set up her majority in answer to the schoolmaster's right of chastisement of an infant scholar. *State*

*v. Mizner*, 45 Iowa, 248; s. c., 24 Am. Rep. 769.

Though a schoolmaster has in general no right to punish a pupil for misconduct committed after the dismissal of school for the day, and the return of the pupil to his home, yet he may, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which has a direct and immediate tendency to injure the school and to subvert the master's authority. *Lander v. Seaver*, 32 Vt. 114; s. c., 76 Am. Dec. 156.

In an action for assault and battery by a pupil against his teacher, based upon corporal punishment inflicted in school, the court instructed the jury that the defendant would not be liable unless the punishment was so clearly excessive "that all hands at once say it was excessive," or that "all hands would instinctively rise up and say, 'that is excessive, that is beyond judgment.'" *Held*, error. *Patterson v. Nutter*, 8 East. Repr. (Me.) 652.

A master has the right to remove an unruly scholar from the schoolhouse, and a person doing so at the master's request will not be guilty of assault. *State v. Williams*, 27 Vt. 755.

The manager of the lessee of convicts for misdemeanors cannot, of his own authority, award and inflict corporal punishment on one of the leased convicts for a refusal to work or for a violation of duty or good order. *Cornell v. State*, 6 Lea (Tenn.), 624. Compare *Prewitt v. State*, 51 Ala. 33.

The superintendent of a county poor-house may use a proper degree of force to preserve order among the inmates. *State v. Neff*, 58 Ind. 516; s. c., 2 Am. Cr. R. 176.

Where a master of a union inflicts personal chastisement on a female pauper in an indecent manner, he is guilty of an assault, even though the extent of the correction is within the limits of moderation. *R. v. Miles*, 6 Jur. 243.

If parish officers cut off the hair of a pauper in the poor-house by force and against the will of such pauper, this is an assault; and if it be done as matter of degradation, and not with a view to cleanliness, that will be an aggravation and go to increase the damages. *Forde v. Skinner*, 4 C. & P. 437.

**By Parent.**—If a father beats his son for theft so severely with a rope that he dies, it is only manslaughter. *Anon.*, 1 East P. C. 261.

An infant two years of age is not capable of appreciating correction: a father,

**13, Defence of Person or Property.**—A blow or other violence necessary for the defence of a man's person against the violence of another will not constitute a battery. Thus, if A lift up his stick and offer to strike B, it is a sufficient assault to justify B in striking A; for he need not stay till A has actually struck him.<sup>1</sup> (See also SELF-DEFENCE.)

therefore, is not justified in correcting it, and if the infant dies owing to such correction, the father is guilty of manslaughter. *R. v. Griffin*, 11 Cox C. C. 402.

**In Loco Parentis.**—A brother who provides a sister of fifteen with lodging, clothing, and schooling may inflict moderate correction. *Snowden v. State*, 12 Tex. App. 105; s. c., 41 Am. Rep. 667.

A stepfather who supports his stepchild is *in loco parentis* and may reasonably chastise the child to enforce his authority. *Gorman v. State*, 42 Tex. 221; *State v. Alvord*, 68 N. Car. 322.

Where a person *in loco parentis* inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies, the death being of consumption, but hastened by the ill-treatment, it will not be murder, but only manslaughter, in the person inflicting the punishment, although it was cruel and excessive, and accompanied by violent and threatening language, if such person believed that the child was shamming illness and was really able to do the quantity of work required. *R. v. Cheeseman*, 7 C. & P. 454.

**Army.**—A defendant may justify even a mayhem, if done by him as an officer of the army for disobedience of orders, and he may give in evidence the sentence of a council of war, upon petition against him by the plaintiff; and if by the sentence the petition is dismissed, it will be conclusive evidence in favor of the defendant. *Lane v. Degberg*, B. N. P. 19.

**Servant.**—A master has no implied authority to whip a minor servant hired to him by the servant's father. *Cooper v. State*, 8 Baxt. (Tenn.) 324; s. c., 35 Am. Rep. 704.

**Husband and Wife.**—At the common law the husband possessed the power of chastising his wife, though the tendency of the criminal courts in the present day is to regard the marital relation as no defence to a battery. Wharton's Cr. L. (9th Ed.) § 633.

In *Bradley v. State*, 1 Walker (Miss.), 156, the court said, "Perhaps, however, the husband should still be permitted to exercise the right of moderate chastisement in cases of great emergency, and to

use salutary restraints in every case of misbehavior, without subjecting himself to vexatious prosecutions, resulting in the discredit and shame of all parties concerned." See *State v. Rhodes*, Phill. (N. Car.) 453; *Robbins v. State*, 20 Ala. 36; *Fulgham v. State*, 46 Ala. 143; *Greta v. State*, 10 Tex. App. 36.

But the better opinion is that a husband has no right to inflict corporal punishment on his wife. Wharton's Cr. L. (9th Ed.) § 633. See *Com. v. McAfee*, 108 Mass. 458; s. c., 11 Am. Rep. 383; *Gorman v. State*, 42 Tex. 221; *Owen v. State*, 7 Tex. App. 329; *People v. Winters*, 2 Park. Cr. (N. Y.) 10; *Perry v. Perry*, 2 Paige (N. Y.), 501; *Edmond's App.*, 57 Pa. St. 232; *James v. Commonwealth*, 12 S. & R. (Pa.) 220; *State v. Buckley*, 2 Harr. (Del.) 552; *State v. Oliver*, 70 N. Car. 60; *Taylor v. Taylor*, 76 N. Car. 433; *Bradley v. State*, 1 Miss. 156; *Gholston v. Gholston*, 31 Ga. 625; *Fulgham v. State*, 46 Ala. 143; *Trowbridge v. Carlin*, 12 La. Ann. 882; *Pillar v. Pillar*, 22 Wis. 656; *Knight v. Knight*, 31 Iowa, 451; *Poor v. Poor*, 8 N. H. 307; s. c., 29 Am. Dec. 664; *Shackett v. Shackett*, 40 Vt. 195.

The punishment must not be for previous misconduct. *State v. Hull*, 34 Conn. 132.

The presumption is that the punishment was proper and reasonable, and the burden is on the prosecution to prove that it was excessive. *Anderson v. State*, 3 Head (Tenn.), 455.

And if there is any reasonable doubt that the chastisement was excessive, the master should have the benefit of it. *Lander v. Seaver*, 32 Vt. 114; s. c., 76 Am. Dec. 156.

1. B. N. P. 18. See *State v. Patterson*, 45 Vt. 308; *Com. Kennard*, 8 Pick. (Mass.) 133; *Baldwin v. Hayden*, 6 Conn. 455; *Gyre v. Culver*, 47 Barb. (N. Y.) 592; *Pond v. People*, 8 Mich. 150; *Davis v. Whitridge*, 2 Strob. (S. Car.) 232. This subject will be fully treated under the title SELF-DEFENCE.

But every assault will not justify every battery, and it is matter of evidence whether the assault was proportionable to the battery; an assault may indeed be of such a nature as to justify a mayhem;

but where it appeared that A had lifted the form upon which B sat, whereby the latter fell, it was held no justification for B's biting off A's finger. *B. N. P.*, 18.

In cases of assault, as in other cases of trespass, the party ought not, in the first instance, to beat the assailant, unless the attack is made with such violence as to render the battery necessary. *Weaver v. Bush*, 8 T. R. 78; 1 Russ. 965, 5th Ed.

Where a man strikes at another within a distance capable of the latter being struck, he is justified in using such a degree of force as will prevent a repetition. *Per Parke, B., Anon.*, 2 Lewin C. C. 48.

But a blow struck after all danger is past is an assault. *R. v. Driscoll, Car. & M.* 214, *per Coleridge, J.*

If the violence used be more than necessary to repel the assault, the party may be convicted of an assault. *R. v. Mabel*, 9 C. & P. 474; *Stewart v. State*, 1 Ohio St. 66; *People v. Anderson*, 44 Cal. 65; *Blake v. State*, 3 Tex. App. 581; *State v. Jones*, 77 N. Car. 520; *Gallagher v. State*, 3 Minn. 270.

The rule on this point is well laid down by a writer on Scotch law: "Though fully justified in retaliating, the party must not carry his resentment to such a length as to become the assailant in his turn, as by continuing to beat the aggressor after he has been disabled, or has submitted, or by using a lethal or ponderous weapon, as a knife, poker, hatchet, or hammer, against a fist or cane, or in general pushing his advantage, in point of strength or weapon, to the uttermost. In such cases the defence degenerates into aggression, and the original assailant is entitled to demand punishment for the new assault committed on him, after his original attack had been duly chastised. *Alison's Princ. Cr. Law of Scot.* 177; 1 *Hume*, 335.

On a trial for murder of a wife by her husband, evidence that the wife had on other occasions tried to strangle him with his neckerchief was allowed to be given in order to show the character of the assault he had to apprehend. It appeared from the evidence that the prisoner was very sensitive about the neck from old abscesses, and that the wife on several occasions had twisted his neckerchief round his neck until he became black in the face. *R. v. Hopkins*, 10 Cox C. C. 229.

There is no doubt that *son assault demesne* is a good defence to an indictment. If, therefore, the plaintiff first lifted up his staff and offered to strike the defendant, it is a sufficient assault to justify the defendant striking the plain-

tiff, and he need not stay till the plaintiff has actually struck him. If one man strikes another a blow, that other has a right to defend himself, and to strike a blow in his defence, but he has no right to revenge himself; and if, when all danger is past, he strikes a blow not necessary for his defence he commits an assault and battery. It is not, however, every trifling assault that will justify a grievous and immediate mayhem, such as cutting off a leg or hand, or biting off a joint of a man's finger, unless it happened accidentally, without any cruel or malignant intention, or after the blood was heated in the scuffle, but it must appear that the assault was in some degree proportionable to the mayhem. If a party raise up a hand against another within a distance capable of the latter being struck, the other may strike in his own defence to prevent him, but he must not use a greater degree of force than is necessary. For if the violence used be more than was necessary to repel the assault, the party may be convicted of an assault. 1 Russ. on Cr. (9th Am. Ed.) 1027.

In an action by A against B for an assault, there was evidence that it was committed by B on his own land in self-defence, he being attacked by A and C. *Held*, that B was properly allowed to show that he had told C that day not to come upon the land; and also to show that, shortly before the assault, C (who was a witness at the trial in A's behalf) said to another person, "You wait a few minutes, and you will see some fun." *White v. Swain*, 138 Mass. 325.

A fired a pistol intending to frighten B, who assailed him. B was hit. *Held*, not an assault by B if he was in danger. *Com. v. Mann*, 116 Mass. 58.

If a person wilfully trespass upon the cultivated lands of another, and while so trespassing assault the owner thereof, and the owner while defending his person from such assault, and while being pursued by the assaulting party, inflicts an injury upon the party thus making the assault, the party thus injured cannot recover damages for the injury so received. Neither can he if, in such case, a gun in the hands of the assaulted party is accidentally discharged and he is injured thereby. *Fassbinder v. Svitak*, 16 Neb. 499.

A threatened B with a knife; B pointed a loaded gun at A, but had no intent to discharge it unless A attacked him. *Held*, no assault on part of B. *State v. Blackwell*, 9 Ala. 79.

In a trial upon an indictment charging

# 14. Trespassers.—If a person intrudes upon the premises of

the prisoner with shooting at the prosecuting witness with malicious intent to kill, where evidence has been introduced tending to show that the act charged was committed by the accused at a time when he was being actually assaulted by the prosecuting witness with a dangerous weapon, it is competent for the defence to prove that the general reputation of the prosecuting witness was that of a violent and dangerous man, and that such general reputation was known to the accused at the time of the assault, as tending to support the plea of self-defence. *Upthegrove v. State*, 37 Ohio St. 662.

**Of Property.**—The owner of land may resist a trespasser upon it who seeks without right to remove therefrom chattels that have been sold to another for whom such landowner is protecting them; and if, in so doing, he has a reasonable apprehension of danger from the intruder, resistance with a deadly weapon is justifiable. An execution purchaser went with a pistol to take possession. The judgment debtor resisted him with a pistol, and was thereupon prosecuted as for an assault with intent to murder. *Held*, that he was entitled to put in evidence the record of the proceedings in the case in which the execution issued, for the purpose of showing that the sale was illegal; and to show also that before the levy the property had been sold to a third person, for whom respondent was taking care of it. *People v. Dann*, 53 Mich. 490; s. c., 51 Am. Rep. 151.

**Retaking Property.**—If a person's property is obtained from him by fraud or force, he may use the necessary degree of force to recover it. *Anderson v. State*, 6 Baxt. (Tenn.) 608; *State v. Miller*, 12 Vt. 437; *State v. Elliott*, 11 N. H. 540; *Com. v. McCue*, 16 Gray (Mass.). 226.

So, if one come forcibly and take away another's goods, the owner may oppose him at once, for there is no time to make a request. *Green v. Goddard*, 2 Salk. 641.

And the owner of goods (or his servant, acting by his command) which are wrongfully in the possession of another, may, after requesting him to deliver them up, justify an assault in order to repossess himself of them. *Blades v. Higgs*, 10 C. B. (N. S.) 713.

Some young men made up a "bell crowd," and between eight and nine o'clock at night went around the defendant's house ringing bells and blowing horns; some of the party carried guns,

which were fired off a few times; after they were going away from the house (but still within the defendant's inclosure) the defendant came out on his porch and fired his gun at the crowd, inflicting a serious wound on one of the party. The defendant admitted that he fired the gun at the crowd, and proposed to prove that before he fired, his child, who was sleeping near a window in the house, rose up and ran to the witness with blood on her face, and under the impulse of the moment, believing that she had been shot, he got his gun and went to the door, and, seeing the flash of pistols fired, as he supposed, by the retreating crowd, fired his gun at and into the crowd. This evidence was objected to by the State and excluded by the court, and the defendant excepted. *Held*, that a person who has reason to believe, and does believe, at the time and under the circumstances that he is in immediate danger is justified in resisting his assailant, though the danger did not in fact exist; but the jury must determine the reasonableness of his belief; therefore it was error to exclude from the consideration of the jury the evidence upon which such belief is grounded. *State v. Nash*, 88 N. Car. 618.

A man entered upon land and put up a shanty, claiming the right to do so under a contract of purchase. The owner, however, aided by his wife, tore down the shanty and forcibly ejected the intruder, who seems to have used force also in defending his possession, and afterward had the woman and her husband arrested. The woman then sued him for assault and battery, malicious prosecution, and false imprisonment. Upon the trial plaintiff offered in evidence a decree refusing to defendant the specific performance of the contract, and it was excluded. It seems that it should have been admitted. But defendant's right to specific performance could not be litigated in this suit. And the woman could have no greater right as against defendant than her husband could if the assault had been upon him. *Franck v. Weigert*, 56 Mich. 472.

The plaintiff went on to the defendant's premises and loaded slabs without right or license. *Held*, in an action for assault, that the defendant, the owner of the slabs, could use sufficient force to retake them. *Johnson v. Perry*, 56 Vt. 703; s. c., 48 Am. Rep. 826.

Getting into the back kitchen of an occupied house through an open door

another, and an unnecessary amount of violence is used in removing him, it is an assault.<sup>1</sup> (See also TRESPASS.)

**15. Defence of Other Persons.**—It would seem that a person has no right to commit an assault merely in defence of other persons, unless he stand in a particular relation to the person assaulted. Such relations are, husband and wife, and *vice versa*; parent and child, and *vice versa*; and a servant in defence of his master, but not a master in defence of his servant.<sup>2</sup>

While a wife has the right to fight in the necessary defence of her husband, yet if she use excessive force she is guilty of assault.<sup>3</sup>

when no one is in the room, and boarding up the rest of the house on failing to secure an entrance thereto, does not establish such a constructive possession of the premises as will justify committing assault and battery upon the occupants if they attempt to remove obstructions. *Soule v. Hough*, 45 Mich. 418.

Statements made by a party previous to and at the time of a personal encounter, as to his physical condition, are not admissible in evidence in his behalf for the purpose of showing that he did not bring on the difficulty. *State v. Van Zant*, 71 Mo. 541.

One who commits an act of unlawful force and thereby brings on a conflict in which he assaults another, cannot excuse the assault by showing that the person assailed was reputed to be violent, and that he acted in self-defence. *People v. Miller*, 49 Mich. 23.

Defendant was indicted for assaulting M. with intent to kill. It was shown that M. and N. were returning from church when defendant and N. engaged in a quarrel. M. interfered and stopped it. Soon it was renewed, and defendant picked up a large rock, and, throwing it at N., hit M. The court instructed the jury that if it be shown that defendant and N. had a difficulty, yet, before defendant will be justified or excused in resorting to the use of any dangerous or deadly weapon on N., it must appear that defendant, at the time of using the weapon, had reasonable ground to fear or believe that N. was about to do him great bodily harm, and used said weapon for the purpose of protecting himself, and, unless so used by defendant in self-defence, he is liable in law for all the consequences of the use of said weapon. *Held*, the instruction was a proper one. *State v. Jump*, 2 S. W. Repr. 281.

1. *People v. Van Vechten*, 2 N. Y. Cr. R. 291; *Glass v. Grady*, 17 Up. Can. C. P. 223.

If a person break down the gate, or come into a close *vi et armis*, the owner

need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence. If a person enters another's house with force and violence, the owner of the house may justify turning him out (using no more force than is necessary) without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out without a previous request. For "there is a manifest distinction between endeavoring to turn a man out of a house or close, into which he has previously entered quietly, and resisting a forcible attempt to enter; in the first case a request is necessary; in the latter not." *Polkington v. Wright*, 8 Q. B. 197; 1 Russ. on Cr. (9th Am. Ed.) 1029.

If a tenant at will surrenders the premises by an express agreement with the owner, and vacates them with his family and goods, leaving behind a person who has occupied the premises with him by his permission, but without the owner's knowledge or consent, the owner is not liable to an action for an assault if he ejects such person, after request and refusal to leave the premises, using no unreasonable force. *Stone v. Lahey*, 133 Mass. 426.

What is a reasonable amount of force is a question for the jury. *Com. v. Clark*, 2 Metc. (Mass.) 23.

2. *Roscoe's Cr. Ev.* 305. See *Hathaway v. Rice*, 19 Vt. 102.

The law is so laid down in Dalton's Justice, c. 121; though he treats the last point as doubtful. He also says that neither can the farmer nor tenant justify such an act in defence of his landlord, nor a citizen in defence of the mayor of the city or town corporate where he dwelleth. *Hawkins*, bk. 2, c. 60, s. 4, follows Dalton exactly. It is true that both these writers are speaking of the forfeiture of recognizances to keep the peace, but probably what is said would be applicable to prosecutions for assaults also.

3. J. rented a tract of land to H., who



**16. Prevention of Unlawful Acts.**—There can be no doubt that any person may interfere to prevent the commission of a felony or any breach of the peace, and that he may proceed to any extremity which may be necessary to effect that object; commencing, of course, with a request to the offender to desist, then, if he refuses, gently laying hands on him to restrain him; and if he still resist, then with force compelling him to submit. Precisely the same rules apply as in cases of self-defence, it being in every case a question for the jury whether or no the degree of force actually used was necessary for the object which renders it legitimate; if there be any excess, the party using it will be guilty of an assault.<sup>1</sup>

**17. Husband and Wife.**—An indictment will not lie against a *feme covert* for an assault committed in the company and by command of her husband.<sup>2</sup>

with his wife lived in a house upon the same. In the upper story of the house it was agreed that the tobacco raised by said H and the prosecutor should be stored. H. put his tobacco there, but objected to the prosecutor's being stored there. Thereupon a dispute arose between them, in the course of which the prosecutor slapped H. in the face and seized him by the collar. While thus engaged the witness heard the defendant (the wife) say, "Shoot him, shoot him," and soon thereafter she struck the prosecutor on the head with a "bed-wrench" made of a piece of hickory wood. *Held*, that if she used excessive force she was guilty of assault; whether such force was used, and whether she acted freely or under constraint of the husband, were questions properly submitted to the jury upon the evidence in this case. *State v. Bullock*, 91 N. Car. 614. See *State v. Johnson*, 75 N. Car. 174; *State v. Jones*, 77 N. Car. 520.

A assaulted B, who knocked him down. C. (A's son) then stabbed B. *Held*, that if the father was in fault by beginning the combat, before the son could be excused for a stabbing in defence of the father, it should appear that the latter had abandoned or offered to abandon the combat, provided the fierceness of his adversary permit, or he have time to do so. Of course all this assumes that at the time the stab is given the father is in danger of death or great bodily harm, or honestly believed to be so, upon reasonable grounds. *Crowder v. State*, 8 Lea (Tenn.), 669.

A addressed insulting words to B's wife. *Held*, B was not justified in assaulting A. *Luggs v. Anderson*, 12 Ga. 46. See *Avery v. Ray*, 1 Mass. 12; *Collins v. Todd*, 17 Mo. 537; *Birchard v. Booth*, 4 Wis. 67.

1. Roscoe's Cr. Ev. (10th Ed.) 308. Mr. Roscoe says: "It has been attempted in some cases to draw a distinction between laying hands upon a person in order to restrain him, and proceeding to use force in order to attain that object. *Seward v. Barclay*, 1 Ld. Raym. 62; 1 Hawk, c. 60, s. 33. But there seems no ground for such a distinction; the slightest imposition of hands if not justified is an assault; and the necessity of a greater or less degree of violence depends on the circumstances of the case, to be judged of by the jury. Whether the assault may be carried to the extent of depriving the offending party of his life may perhaps be doubtful. There does not seem any express authority that to prevent any unlawful act other than a felony or breach of the peace an assault may be committed, and it may perhaps be doubtful whether an assault can be justified on this ground. Of course the right to apprehend persons who have committed offences stands on a different footing. A man may justify an assault in defence of his house or other property even though no felony or breach of the peace is threatened. 2 Roll. Abr. 549. And if the trespasser use force, then the owner may oppose force to force. *Green v. Goddard*, 2 Salk. 641; *Weaver v. Bush*, 8 T. R. 78." See *Spicer v. People*, 11 Bradw. (Ill.) 295; *People v. Van Vechten*, 2 N. Y. Cr. R. 291.

2. *Com. v. Neal*, 10 Mass. 152; s. c., 6 Am. Dec. 105 and note.

**Chastisement of Wife.**—See **LAWFUL CHASTISEMENT**, *ante*, p. 794.

In a prosecution against a husband for assault with intent to murder the wife, evidence that he married her under a false name, which fact, when it became known to her, was a cause of domestic trouble, is admissible. So, also,

**18. Threatening Words.**—Mere words or menaces of themselves do not constitute an assault;<sup>1</sup> but if the words are accompanied by a threatening gesture, or an offer or attempt to do violence, then the whole circumstances combine to make the assault.<sup>2</sup>

conversations between them respecting their disagreements. *Doolittle v. State*, 93 Ind. 272.

1. *State v. Davis*, 1 Ired. L. (N. Car.) 125; s. c., 35 Am. Dec. 735; *State v. Mooney*, Phil. L. (N. Car.) 434; *Smith v. State*, 39 Miss. 521; *State v. Martin*, 30 Wis. 216; *People v. Yslas*, 27 Cal. 630; *State v. Wood*, 1 Bay. (S. Car.) 351; *Lawson v. State*, 30 Ala. 14; *Chapman v. State*, 78 Ala. 463; *Warren v. State*, 33 Tex. 517; *People v. Bransby*, 32 N. Y. 525; *Keyes v. Devlin*, 3 E. D. Smith (N. Y.), 518; *People v. Lilley*, 43 Mich. 521.

Presenting and aiming an unloaded gun at a person within shooting distance, in such manner as to terrify him, he not knowing that the gun is not loaded, will not support a conviction for a criminal assault, although it may support a civil action for damages. *Chapman v. State*, 78 Ala. 463.

A. said "I am now ready for you," at the same time holding a pistol, but making no motion to use it. *Held*, not an assault. *Warren v. State*, 33 Tex. 517.

If the person who used abusive words had a knife in his hand, but did not advance towards defendant, or offer to strike, or cut, or stab with the knife, such conduct will not justify a battery. *Reid v. State*, 71 Ga. 865.

Under the Texas Code an assault may be committed by "the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object." *Held*, that the ability to commit a battery need not be shown in order to constitute or prove such an assault. *Kief v. State*, 10 Tex. App. 286.

2. *State v. Shipman*, 81 N. Car. 513; *State v. Rawley*, 65 N. Car. 334; *State v. Baker*, 65 N. Car. 332; *State v. Church*, 63 N. Car. 15; *Brown v. State*, 58 Ga. 212; *Hawkins v. State*, 13 Ga. 322; s. c., 58 Am. Dec. 517; *Cato v. State*, 4 Tex. App. 87; *Johnson v. State*, 7 Tex. App. 210; *Kief v. State*, 10 Tex. App. 286; *Crow v. State*, 41 Tex. 468; *Bloomer v. State*, 3 Sneed (Tenn.), 66; *Keefe v. State*, 19 Ark. 190; *State v. Painter*, 67 Mo. 84; *State v. Taylor*, 20 Kan. 643; *Lange v. State*, 95 Ind. 114; *Allen v. People*, 82 Ill. 610; *People v. McMakin*, 8 Cal. 547; *Close v. Cooper*, 34 Ohio St.

98; *Barnes v. Martin*, 15 Wis. 240; *State v. Benedict*, 11 Vt. 236; s. c., 34 Am. Dec. 688; *U. S. v. Ortega*, 4 Wash. (C. C.) 531; *U. S. v. Richardson*, 5 Cranch. (C. C.) 348.

The person making the threat must have the means or ability to carry his intent into execution. *State v. Malcolm*, 8 Iowa, 413; *Spiers v. State*, 2 Tex. App. 244; *Jarnigan v. State*, 6 Tex. App. 465; *Smith v. State*, 32 Tex. 593; *Richels v. State*, 1 Sneed (Tenn.), 606; *People v. Yslas*, 27 Cal. 630; *Osborn v. Veitch*, 1 F. & F. 317; *Read v. Coker*, 13 C. B. 850.

If the parties, at the time the gestures are used are so far apart from each other that immediate contact is impossible there is no assault. *Cobbett v. Grey*, 4 Exch. 744. *Compare People v. Yslas*, 27 Cal. 630; *People v. Campbell*, 30 Cal. 312.

A stopped B on the street and by threats prevented him from passing. *Held*, an assault. *Bloomer v. State*, 3 Sneed (Tenn.), 66. See *Long v. Rogers*, 17 Ala. 540.

A advanced towards B with a stick raised, as if to strike, C interfered and withheld A before he was within reach of B. *Held*, an assault. *State v. Vannoy*, 65 N. Car. 532. *Compare People v. Lilley*, 43 Mich. 521.

If a person be at a place where he has a right to be, and four other persons, with a pitchfork, gun, etc., by following him and using threatening and insulting language put him in fear, and induced him to go home sooner than, or in a different way from the one he would otherwise have gone, the four are guilty of an assault, although they do not get nearer than seventy-five yards, and do not take the weapons from their shoulders. See *State v. Hampton*, 63 N. Car. 13; *State v. Church*, 63 N. Car. 15.

Where a person is obstructed in the exercise of a legal right, or prevented from doing what he proposed to do, and may lawfully do, by a display of physical force, as in brandishing a deadly weapon with violent threats of using it, and this in such proximity as admits of an effectual execution of the menace, in consequence of which such person desists, an assault is consummated. *State v. Harne*, 92 N. Car. 805.

Where the defendant, who was utter-

Words may qualify an action, which without them would consti-

ing threatening and insulting words, picked up a stone, but did not offer to throw it. *Held*, not an assault. 82 N. Car. 549.

One who by words, acts, or gestures, incites the assailants of an officer who is endeavoring to make an arrest is guilty of an assault. *Com. v. Hurley*, 99 Mass. 433.

Defendant intruded upon the premises of prosecutor, who took hold of him to lead him off, when defendant put his hand in his pocket and partly drew out a knife, and thereupon the prosecutor desisted and went away. *Held*, an assault. *State v. Marsteller*, 84 N. Car. 726.

Defendant said, "Now, God damn you, I am ready to fight you," at the same time holding a loaded gun, with the muzzle pointing down. *Held*, not to sustain a conviction for aggravated assault. *Young v. State*, 7 Tex. App. 75.

In *State v. Hampton*, 63 N. Car. 13, the prosecutor was passing down the steps of the court-house, when he encountered the defendant, who, turning himself about within reach and with his right hand clinched, his right arm bent at his side, but not drawn back, said, "I have a great mind to hit you." He had previously threatened to cow-hide the prisoner if the crowd would go with him. In consequence, the prosecutor turned away and passed out by another doorway. This violent obstruction offered to the prosecutor's passing out, compelling him to seek other means of egress from the building, was held to be an assault.

The defendant, after using threatening language with reference to the prosecutor and in his hearing, advanced upon him with a knife, continuing the use of violent and menacing expressions. The evidence left it doubtful as to whether or not the knife was open, and when the defendant got within five or six feet of the prosecutor, the latter said, "I shall have to go away," and withdrew from the work upon which he was engaged. It was held that the defendant was properly convicted of an assault. *State v. Shipman*, 81 N. Car. 513.

As by giving a person a push, so that he fell, threatening language having been used before the act. *State v. Baker*, 65 N. Car. 332.

Defendant being about twenty steps distant, advanced towards prosecutor with knife and stick, cursing and threatening to do him bodily harm, in consequence of which the prosecutor went into a store and remained two or three

hours, during which time the defendant walked to and fro in front of the store cursing him and threatening to whip him if he came out. *Held*, an assault. *State v. Martin*, 85 N. Car. 508; s. c., 39 Am. Rep. 711.

Defendant shook his fist at another, saying, "If you do that again I will knock you down." *Held*, an assault. *United States v. Myers*, 1 Cranch. (C. C.) 310. See also *State v. Hampton*, 63 N. Car. 13.

Defendant raised a club over the head of a woman within striking distance, and threatened to strike her if she opened her mouth. *Held*, an assault. *U. S. v. Richardson*, 5 Cranch. (C. C.) 348.

A commands B to do a certain act, at the same time raising a club and threatening to strike him unless he obeys. A does the act and no blow is struck. *Held*, an assault. *State v. Morgan*, 3 Ired. (N. Car.) 186.

If the threatening words and gestures are not coupled with a present intent to commit personal violence, they will not amount to an assault. *Smith v. State*, 39 Miss. 521; *Jarnigan v. State*, 6 Tex. App. 465.

Pointing a gun, or pistol, accompanied by threats, unless it is proved that it was unloaded, is an assault. *Crow v. State*, 41 Tex. 468; *Hairston v. State*, 54 Miss. 689; s. c., 38 Am. Rep. 392. See DEADLY WEAPONS, *infra*.

The pistol need not be cocked or pointed. *People v. McMakin*, 8 Cal. 547.

The defendant aimed a gun in an excited and threatening manner at plaintiff, standing three or four rods off, and snapped it two or three times. *Held*, an assault even though the gun was unloaded, if such fact was unknown to the plaintiff. *Beach v. Hancock*, 27 N. H. 223; s. c., 59 Am. Dec. 373; *State v. Smith*, 2 Humph. (Tenn.) 457; *State v. Shepard*, 10 Iowa, 126; *Com. v. White*, 110 Mass. 407; *R. v. St. George*, 9 C. & P. 483.

The prisoner pointed a pistol at a man who unlawfully attempted to stop the team which he was driving, and threatened to shoot if he was not allowed to pass. *Held*, that he was guilty of assault. *Hairston v. State*, 54 Miss. 689.

Shooting at a person with a gun loaded only with powder, he not knowing it was only so loaded, is an assault. *Crumby v. State*, 61 Ga. 582.

In Tennessee and Iowa it is expressly held that pointing an unloaded gun at a person is an assault. *State v. Smith*, 2

tute an assault.<sup>1</sup> It is not competent to prove a custom to curse, abuse, and denounce one another in obscene, insulting, and violent language, and flourishing knives and pistols, with threatening gestures, as a matter of jest and without any intention to use them to the injury of any one.<sup>2</sup>

Words of provocation will not justify an assault.<sup>3</sup>

**19. Threatening Gestures.**—A gesture, unaccompanied with acts which would induce a reasonable belief that personal violence is to be apprehended, will not constitute an assault.<sup>4</sup> Nor will

Humph. (Tenn.) 457; *State v. Shepard*, 10 Iowa, 126.

1. The defendant raised his whip within striking distance, and said: "If you were not an old man I would knock you down." *Held*, not an assault. *State v. Crow*, 1 Ired. L. (N. Car.) 375. See *Com. v. Eyre*, 1 Serg. & R. (Pa.) 347.

Where the defendant, holding an axe behind him, says, "If you interfere I'll cut you down," it is not an assault. *Cutler v. State*, 59 Ind. 300.

A man laid his hand upon his sword, and said: "If it were not assize time, I would not take such language from you." *Held*, no assault, as the intent to injure was disavowed. *Tuberville v. Savage*, 1 Mod. 3. See *Blake v. Barnard*, 9 C. & P. 626; *State v. Davis*, 1 Ired. L. (N. Car.) 125; s. c., 35 Am. Dec. 735; *Riches v. State*, 1 Sneed (Tenn.), 606; *State v. Blackwell*, 9 Ala. 79. Compare *U. S. v. Myers*, 1 Cranch. (C. C.) 310; *U. S. v. Richardson*, 5 Cranch. (C. C.) 348; *State v. Morgan*, 3 Ired. (N. Car.) 186, *ante* note 2, also *State v. Hampton*, 63 N. Car. 13; *Cato v. State*, 4 Tex. App. 87.

2. *Hawkins v. State*, 17 Tex. App. 593; s. c., 50 Am. Rep. 129.

3. *Sorgenfrei v. Schroeder*, 75 Ill. 397; *Ogden v. Claycomb*, 52 Ill. 366; *Donnelly v. Harris*, 41 Ill. 126; *State v. Griffin*, 87 Mo. 608; *Collins v. Todd*, 17 Mo. 537; *State v. Wood*, 1 Bay (S. Car.), 351; *Winfield v. State*, 3 Greene (Iowa), 339; *Birchard v. Booth*, 4 Wis. 67; *Mitchell v. State*, 41 Ga. 527; *Suggs v. Anderson*, 12 Ga. 461; *Lee v. Woolsey*, 19 Johns. (N. Y.) 319; s. c., 10 Am. Dec. 230; *Avery v. Ray*, 1 Mass. 12; *Cushman v. Ryan*, 1 Story (U. S.), 91.

On the issue of assault and battery, abusive language, without more, will not be a valid legal defence to battery with a rock. If the person who used the opprobrious words had a knife in his hand, but did not advance towards defendant, or offer to strike or cut or stab with the knife, such conduct will not justify a battery with a rock. If one makes use of opprobrious epithets, and another replies

with other opprobrious words, the former will not be justified in striking the latter for the use of language provoked by his own similar language. The use of opprobrious words may or may not justify a battery, according to the nature and extent of it; and abusive language will not justify a battery which is excessive and disproportioned to the language used,—all of which the jury should determine. *Reid v. State*, 71 Ga. 865. See *Arnold v. State*, 46 Ga. 455.

**Admissibility as Evidence.**—The Alabama statute which allows a defendant who is prosecuted for an assault, an assault and battery, or an affray, to "give in evidence any opprobrious words or abusive language used by the person assaulted or beaten, at or near the time of the assault or affray," and declares that "such evidence shall be good in extenuation, or justification, as the jury may determine" (Code, § 4900), was "intended as a shield, and not as a sword;" and it cannot be invoked by a defendant who first used insulting words and struck the first blow. *Brown v. State*, 74 Ala. 42.

**Mitigation of Damages.**—But if the provocation is recent, it will constitute an excuse which will mitigate the damages, and they may be proved for that purpose. *Currier v. Swan*, 65 Me. 323; *Avery v. Ray*, 1 Mass. 12; *Matthews v. Terry*, 10 Conn. 455; *Lee v. Woolsey*, 19 Johns. (N. Y.) 319; s. c., 10 Am. Dec. 230; *Maynard v. Beardsley*, 7 Wend. (N. Y.) 560; s. c., 22 Am. Dec. 595; *Salters v. Kipp*, 12 How. Pr. (N. Y.) 342; *Corning v. Corning*, 6 N. Y. 97; *Bride v. McLaughlin*, 5 Watts (Pa.), 375; *McAlexander v. Harris*, 6 Munf. (Va.) 465; *Barry v. Inglis*, Taylor (N. Car.), 121; *Rochester v. Anderson*, 1 Bibb. (Ky.) 428; *Waters v. Brown*, 3 A. K. Marsh. (Ky.) 557; *Delevan v. Bates*, 1 Mich. 97; *Cushman v. Ryan*, 1 Story (U. S.), 91.

4. *Speers v. State*, 2 Tex. App. 244; *State v. Blackwell*, 9 Ala. 79; *Goodwin's Case*, 6 C. H. R. (N. Y.) 9; *Taberville v. Savage*, 1 Mod. 3. See *ante*, p. 801, n. 2.

they if unaccompanied by a present intention to do a corporal injury.<sup>1</sup>

**20. Administering of Drugs.**—The delivery to another of a deleterious drug is an assault.<sup>2</sup>

**21. Indecent Assault.**—If a teacher take indecent liberties with a pupil, without the pupil's consent, though the pupil does not resist, it is an assault;<sup>3</sup> or if a man take improper liberties with the person of a female.<sup>4</sup>

A attempted to arrest B, when B drew a knife within striking distance. *Held*, an assault. *Stockton v. State*, 25 Tex. 772. See *Higgenbotham v. State*, 23 Tex. 574; *Richels v. State*, 1 Sneed (Tenn.), 606.

1. *Smith v. State*, 39 Miss. 521; *Simpson v. State*, 59 Ala. 1; s. c., 31 Am. Rep. 1; *People v. Yslas*, 27 Cal. 630; *Yoes v. State*, 9 Ark. 42.

2. *Com. v. Stratton*, 114 Mass. 303; s. c., 19 Am. Rep. 350. Compare *People v. Quin*, 50 Barb. (N. Y.) 128.

It was formerly held that if a person put a deleterious drug (as cantharides) into coffee, in order that another may take it, if it be taken, he is guilty of an assault upon the party by whom it is taken. *R. v. Button*, 8 C. & P. 660. But in *R. v. Hanson*, 2 C. & K. 912, the contrary was held; and *R. v. Walkden*, 1 Cox C. C. 282; *R. v. Dilworth*, 2 Mood. R. 531, are to the same effect. Nevertheless if death ensued, it would be manslaughter. 2 Hale P. C. 436.

Where the defendant gave to a woman a fig containing "love-powders" (i. e., cantharides), which she ate, in ignorance of the fact, and was injured in health, the court said: "Although the defendant was ignorant of the qualities of the drug he administered and of the effects to be expected from it, and had been assured and believed that it was not deleterious to health, . . . this, in itself, was unlawful, and he must be held responsible for whatever effect it produced." *Com. v. Stratton*, 114 Mass. 303; s. c., 19 Am. Rep. 350. Compare *Bechtelheimer v. State*, 54 Ind. 128; *R. v. Hanson*, 2 C. & K. 912; *R. v. Walkden*, 1 Cox Cr. Cas. 282; *R. v. Dilworth*, 2 M. & Rob. 531; *R. v. Wilkins*, 9 Cox Cr. Cas. 20; *R. v. Button*, 8 C. & P. 660.

3. *Ridout v. State*, 6 Tex. App. 249; *R. v. Nichol*, R. & R. C. C. 130.

If a master take indecent liberties with a female scholar without her consent, he is liable to be punished for an assault, though she did not resist. A master took very indecent liberties with a female scholar of the age of thirteen, by putting her hand into his breeches, pulling up her

petticoats, and putting his private parts to hers; she did not resist, but it was against her will. The jury found him guilty of an assault with intent to commit a rape, and also of a common assault; and the judges thought the finding as to the latter clearly right. *R. v. Nichol*, R. R. C. C. 130; *R. v. McGavaron*, 3 C. & K. 320.

And making a female patient strip naked, under pretence that the defendant, a medical practitioner, cannot otherwise judge of her illness, if he himself takes off her clothes, is an assault. A girl of sixteen was taken by her parents to the defendant, a German quack, on account of fits, by which she was afflicted; he said he would cure her, and bid her come again the next morning; she went accordingly the next morning by herself, and he told her she must strip naked; she said she would not. He said she must, or he could not do any good. She began to untie her dress, and he stripped off all her clothes; she did nothing; he pulled off everything; she told him she did not like to be stripped in that manner. When she was naked, he rubbed her with a liquid. The case was left to the jury to consider whether the defendant believed that stripping the girl would assist his judgment, or whether he did not strip her wantonly, without thinking it necessary; and they were told that the making her strip and pulling off her clothes might, under the latter circumstances, justify a verdict for an assault. The jury found the defendant guilty; and, upon a case reserved, it was held that the conviction was right. *R. v. Rosinski*, R. & M. C. C. 19.

4. *Com. v. Bean*, 111 Mass. 438.

The plaintiff gave lessons to the defendant's daughters, and lodged at his house over night. On one occasion at midnight the defendant stealthily came into the room where the plaintiff was sleeping, sat down upon her bed, leaned over her person, and made repeated solicitations to her for sexual intimacy, which she repelled. *Held*, sitting on her bed, leaning over her person, etc., under the circumstances, was an assault.

Practising any fraud or deception upon a person by which his or her consent is gained to an undue liberty with his or her person is an assault.<sup>1</sup>

Or if a physician unnecessarily exposes the person of a female, or takes indecent liberties with her, under pretence that he cannot otherwise judge of her illness, or is treating her disease, she making no resistance solely from the *bona-fide* belief that such was the case, he is guilty of an assault.<sup>2</sup>

Newell v. Whitcher, 53 Vt. 589; s. c., 38 Am. Rep. 703. Compare Irving v. State, 9 Tex. App. 66; Saddler v. State, 12 Tex. App. 194; Goodrum v. State, 60 Ga. 509.

Where a man placed his arm about the neck of a married woman without her consent. Craker v. Chicago, etc., R. Co., 36 Wis. 657.

To sustain a conviction for indecent assault upon young girls under twelve years of age it is not necessary to establish positive resistance on their part: it is sufficient if their persons were indecently interfered with, without their actual consent. People v. Justices, 18 Hun (N. Y.), 330.

If in a prosecution for assault and battery the intent imputed to the accused was to injure the mind or the feelings of the assaulted party, the evidence germane to the existence of the intent may well involve the character of the assaulted party, and the surrounding circumstances:—e.g., if the battery consisted in manipulating a woman without her consent, and the intent imputed was to obtain sexual knowledge of her, proof of previous illicit intercourse between the parties, or evidence that she was a public prostitute, is legitimate for the defence as tending to disprove the imputed intent, and thus bearing directly on the issue. Donaldson v. State, 10 Tex. App. 307; Atkins v. State, 10 Tex. App. 8.

1. R. v. Case, 4 Cox Cr. Cas. 220.

The prisoner was indicted for indecently assaulting two boys, each of whom was eight years of age. It was proved that he took the boys into a field, and did acts toward them which amounted to indecent assaults unless they consented to them. The boys stated in evidence that they did not know what he was going to do to them when he did each of the acts in question. Upon this evidence the judge left to the jury the question whether the boys merely submitted to the acts, ignorant of what was going to be done to them, or of the nature of what was being done, or if they exercised a positive will about it and consented to what the prisoner did; and told the jury that, in the

former case, they would find the defendant guilty, in the latter case they would acquit him. The jury found the prisoner guilty, on the ground that the boys merely submitted to his act, not knowing its nature. *Held*, that the direction of the judge was right. R. v. Lock, L. R. 2 Cr. Cas. Res. 10. See Cliver v. State, 45 N. J. L. 46.

Mere submission to an indecent act, without any positive exercise of a dissenting will, where, owing to the circumstances, the person submitting is in ignorance of the nature of the act, is not such a consent as the law contemplates, so as to prevent the act from being an assault. R. v. Lock, 2 L. R. C. C. 10.

**Constructive Assault.**—Where a man who was affected by a venereal disease induced a female to have connection with him and infected her with the disease, *held*, an assault. R. v. Bennett, 4 F. & F. 1005; Hegarty v. Shine, 12 Ir. L. T. Rep. 100; R. v. Sinclair, 13 Cox C. C. 28.

2. Nichols v. State, 72 Ga. 191; R. v. Flattery, L. R. 2 Q. B. 410; R. v. Stanton, 1 C. & K. 415.

Where a medical practitioner had sexual connection with a female patient of the age of fourteen, who had for some time been receiving medical treatment from him, *held*, that he was guilty of an assault, the jury having found that she was ignorant of the nature of his act, and made no resistance solely from a *bona-fide* belief that he was (as he represented) treating her medically, with a view to her cure. R. v. Case, 4 Cox C. C. 220; R. v. Flattery, 2 L. R. Q. B. Div. 410.

On an indictment for an assault with intent to commit a rape, the prosecutrix stated that the defendant, her medical man, being in her bedroom, directed her to lean forward on a bed, that he might apply an injection; she did so, and the injection having been applied, she found the defendant was proceeding to have connection with her, upon which she instantly raised herself, and ran out of the room. She stated that the defendant had penetrated her person a little. *Held*, that, if it had appeared that the defend-

If a man unsuccessfully attempts by force to compel a woman to have connection with him, it is an assault.<sup>1</sup> (See also RAPE.)

ant had intended to have had a connection with the prosecutrix by force, the complete offence of rape would, upon this evidence have been proved, but that the thus getting possession of the person of the woman by surprise, was not an assault with intent to commit a rape, but was an assault. *R. v. Stanton*, 1 C. & K. 415.

1. If it appears that the consent of the woman was obtained by fraud, such consent constitutes no defence. See *R. v. Case*, 1 Den. C. C. 580; 19 L. J., M. C. 174; *R. v. Bennett*, 4 F. & F. 1105.

It is no defence to an indictment for an assault upon a child with intent to carnally know and abuse her, that the defendant, in making the assault, threw the child into such a position that it was impossible for him to accomplish his purpose of ravishing her. *Com. v. Shaw*, 134 Mass. 221.

The fact that the prosecutrix in an indictment for an assault with intent to rape is a lewd woman only goes to her credit. If the prosecutrix consented to have connection with the prisoner upon certain terms, which the defendant refused, and attempted by force to carnally know her without her consent, he is guilty of rape if he succeeds, and of an assault with intent to commit rape, if he does not succeed. It seems that this offence is complete, if the defendant attempts to force the prosecutrix against her will, although she afterwards consents. *State v. Long*, 93 N. Car. 542.

On trial of an indictment for an assault with intent to commit rape, evidence that the prosecutrix, while going alone to the house of an acquaintance, in the nighttime, was pursued by the defendant, who seized her around the neck with both hands and threw her down and put his hand over her mouth to prevent her from making outcry, was held to have been properly left to the jury upon the question of intent, and warranted a verdict of guilty.

The evidence showed that late in the evening, near dark, a girl twelve years of age was passing along a by-way going to the house of a neighbor; that the defendant, a grown man and a stranger, rushed out of the woods on the roadside, seized and squeezed her hand, clasped her in his arms, and was bearing her to the woods, saying that he was going to "take her off," and, upon her crying, that he was going to take her off and

kill her; that upon her threatening him with her father, he put her down and ran. *Held*, that the facts warranted a verdict of assault with intent to rape. The intent could be inferred from the actions of the defendant. *Ware v. State*, 67 Ga. 349.

On trial of an indictment for assault with intent to commit rape it appeared that the prosecutrix, while going from her house to her mother-in-law's, about a mile distant, was carrying with her a child in a baby-carriage and accompanied by a boy of six years of age. Soon after passing defendant's house, she heard defendant (who was about seventy-five yards off) say, "Halt, I intend to ride in the carriage. If you don't halt, I'll kill you when I get hold of you." She ran and called for her mother-in-law, defendant running after her and telling her to stop, until she got to the gate, where she met another woman to whom she related the matter. *Held*, that the evidence is not sufficient to warrant a conviction of the intent charged. At most, the circumstances only raise a suspicion of defendant's purpose, and it was error in the court to permit the jury to consider them. *State v. Neely*, 74 N. Car. 425, overruled. *State v. Massey*, 86 N. Car. 658; s. c., 41 Am. Rep. 478.

To warrant conviction upon an indictment for an assault with intent to commit a rape, the evidence must show that defendant's intention was, if it became necessary, to force compliance with his desire at all events and regardless of any resistance the woman might make. *State v. Priestly*, 74 Mo. 24. See *Com. v. Merrill*, 14 Gray (Mass.), 415; *Reynolds v. People*, 41 How. Pr. (N. Y.) 179; *Joice v. State*, 53 Ga. 50; *State v. Burgdorf*, 53 Mo. 65; *Irving v. State*, 9 Tex. App. 66.

In charges of indecent assault, the woman may be cross-examined as to connection with other men; but she need not answer. If she does answer in the negative her answer in conclusive, and no evidence can be given to contradict her. The same rule prevails in cases of rape, notwithstanding several decisions to the contrary. *R. v. Holmes*, L. R. 1 C. C. R. 334; 41 L. J., M. C. 12.

At the trial of an indictment for an assault with intent to commit a rape upon a girl, evidence that the defendant, about a month before the assault, invited the girl to walk with him to certain woods,

**22. Mutual Combat.**—If two parties go out to strike one another and do so, it is said to be an assault in both, and that it is quite immaterial which strikes the first blow, or that there is no anger or ill-will.<sup>1</sup>

and that about five weeks after the assault he followed her in a street at night, is admissible in the discretion of the presiding judge. *Com. v. Bean*, 137 Mass. 570.

In order to warrant a verdict of guilty in indictments for assaults with intent to commit rape, it is sufficient if the evidence shows that the defendant intended to gratify his lust on the person of the prosecutrix notwithstanding any resistance on her part. *State v. Long*, 93 N. Car. 542.

B. and M. were charged with an assault with intent to commit a rape on Anna B., the wife of the defendant B. On the trial the wife testified to certain shameful words and acts of the defendants committed several days subsequent to the date of the alleged offence, showing a willingness on the part of B. that the wife might be debauched by M. *Held*, irrelevant to the issue; therefore incompetent, and sufficiently prejudicial to be material error. *State v. Boyland*, 24 Kan. 186.

Dr. M. testified to having had the prosecutrix under treatment for some years for a malady which he described, and with the character and progress of which he was well acquainted. Immediately after the assault he was called in, and discovered a condition which was unexpected and for which he could not account, after a careful examination, until he was informed of the grievance, and was at once satisfied that if true it would account for her changed state. *Held*, no error. *Fay v. Swan*, 44 Mich. 544.

**Burden of Proof.**—In prosecutions for assault with intent to commit rape, the burden of proof to show the criminal intent is upon the State, and evidence showing a mere possibility of the existence of such intent will not support a verdict of guilty. *House v. State*, 9 Tex. App. 567.

An indictment for an assault with intent to commit a rape need not set forth the manner or means of the assault charged. The general averment that the assault was made with the intent to ravish is all that is requisite, and the details as to the mode and means of the act are matters of evidence. *State v. Smith*, 80 Mo. 516.

In indictments for assault with intent

to kill or commit rape, the intent must be averred. *State v. Russell*, 91 N. Car. 624.

A conviction for an assault with intent to commit a rape by force is not warranted by proof that the defendant, against the will of the female, indecently fondled her person with the intent to induce her thereby to submit to his embrace. It must appear that his intent was to accomplish his purpose by force and against her will. *Sanford v. State*, 12 Tex. App. 196; *Irving v. State*, 9 Tex. App. 66; *Saddler v. State*, 12 Tex. App. 194. *Compare Newell v. Whitcher*, 53 Vt. 589; s. c., 38 Am. Rep. 703.

The plaintiff in an action for an assault with intent to ravish showed that the outrage was attempted in an upper room of a certain hotel, and that defendant had told her that he was in the habit of going there with women; that the keeper of the house expected him, and that it would be of no use to make any noise. *Held*, that the testimony of another witness that defendant had tried to get her to go with him to the same house, and had then told her that he was in the habit of taking girls there, and that all was arranged there, was relevant and admissible as corroborating plaintiff's story, and showing that her danger was real and not feigned. The plaintiff's physician was properly allowed to testify that after the assault he found her in a condition for which he could not account until he heard of the attempted outrage, and that he was satisfied that if the fact was true, it would account for her state. *Fay v. Swan*, 44 Mich. 544.

1. *Com. v. Collberg*, 119 Mass. 350; s. c., 50 Am. Rep. 328; *Dole v. Erskine*, 35 N. H. 503; *Adams v. Waggoner*, 33 Ind. 531; s. c., 5 Am. Rep. 231; *State v. Newland*, 27 Kan. 764; *Shay v. Thompson*, 59 Wis. 540; s. c., 48 Am. Rep. 538; *Stout v. Wren*, 1 Hawks. (N. Car.) 420; s. c., 9 Am. Dec. 653; *Bell v. Hansley*, 3 Jones (N. Car.), 131; *Logan v. Austin*, 1 Stew. (Ala.) 476. See *McCue v. Klein*, 60 Tex. 168; s. c., 48 Am. Rep. 260. *Compare Champer v. State*, 14 Ohio St. 437; *State v. Beck*, 1 Hill (S. Car.), 363; s. c., 26 Am. Dec. 190.

"The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an as-



*Scuffling*.—If the parties are frolicking together and one injures the other in an unlawful and unjustifiable way, it is an assault.<sup>1</sup>

**23. Unlawful Imprisonment.**—An unlawful imprisonment is an assault.<sup>2</sup> (See also FALSE IMPRISONMENT.)

sault, but that a blow struck in sport, and not likely nor intended to cause bodily harm, is not an assault, and that an assault, being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct, a blow struck in a prize-fight is clearly an assault; but playing with single-sticks or wrestling does not involve an assault; nor does boxing with gloves in the ordinary way, and not with the ferocity and severe punishment to the boxers deposed to in *Reg. v. Orton*, 39 L. T. 293." *Per Cave, J.*, in *R. v. Coney*, 8 Q. B. D. 539.

The combatants at a prize-fight and all persons aiding and abetting therein are guilty of an assault for which an indictment will lie. But the mere voluntary presence of persons at a prize-fight does not necessarily make them guilty of an assault as aiding and abetting. *R. v. Coney*, 8 Q. B. D. 534.

Where a prize or other fight takes place and a number of persons are assembled to witness it, if they have gone thither for the purpose of seeing the combatants strike each other, and were present when they did so, they are all in point of law guilty of an assault; and there is no distinction between those who concur in the act and those who fight. *R. v. Perkins*, 4 C. & P. 537.

And it is not at all material which party struck the first blow, for if several are in concert encouraging one another and co-operating, they are all equally guilty, though one only committed the actual assault. *Anonymous*, 1 Lewin, 17; *R. v. Lewis*, 1 C. & K. 419.

A person who wrongfully and voluntarily enters into a combat armed with a deadly weapon, and is assailed by his adversary with his fist, is not justified in using such weapon, without in good faith making an effort to withdraw from the contest. *Presser v. State*, 77 Ind. 274.

Where two parties on horseback meet and have an encounter, and thereafter each party dismounts, lets his horse go, and both willingly engage in a fist fight, and no question of self-defence arises, then each party is guilty of an assault and battery, and this irrespective of the question as to who in the first instance, and while on horseback, was the aggressor. *State v. Newland*, 27 Kan. 764.

In the case of a mutual combat waged, where death does not ensue, in order to

reduce the offence from assault with intent to murder to aggravated or simple assault, it must appear that the combat was waged upon equal terms, and that no undue advantage was sought or taken by the accused. *King v. State*, 4 Tex. App. 54; s. c., 30 Am. Rep. 160; *People v. Sanchez*, 24 Cal. 17.

If two in anger fight together by consent, each is liable to the other for the actual injury inflicted. *Shay v. Thompson*, 59 Wis. 540; s. c., 48 Am. Rep. 538.

**Civil Action.**—If two persons by mutual consent, in anger, fight together, each is liable to the other for actual damages. The fighting being unlawful, the consent of either party is no bar to his action. *Shay v. Thompson*, 59 Wis. 540; s. c., 48 Am. Rep. 538.

1. *Fitzgerald v. Cavin*, 110 Mass. 153.

Where defendant squeezed plaintiff's testicles. *Ricker v. Freeman*, 50 N. H. 420; s. c., 9 Am. Rep. 267.

Where one boy swung another around violently and let him go, thereby throwing him against a third boy, who pushed him away and against a hook which injured him. *Compare Rutherford v. State*, 13 Tex. App. 92; *People v. Hale*, 1 N. Y. Cr. R. 533; *State v. Elliott*, 11 N. H. 540; *Peterson v. Haffner*, 59 Ind. 130. s. c., 26 Am. Rep. 81; *Bullock v. Babcock*, 3 Wend. (N. Y.) 391.

2. 1 Haw. c. 62, s. 1.

It has been frequently said that every imprisonment includes a battery. *B. N. P. 22*; 1 Selw. N. P. Imprisonment, 1.

But this doctrine has been denied. *Emmett v. Lyne*, 1 N. R. Bos. & P. 255.

"An unlawful imprisonment is also an assault, for it is a wrong done to the person of a man, for which, besides the private satisfaction given to the individual by action, the law also demands public vengeance, as it is a breach of the King's peace, a loss which the state sustains by the confinement of one of its members, and an infringement of the good order of society. To constitute the injury of false imprisonment, there must be an unlawful detention of the person. With respect to the detention, it may be laid down that every confinement of the person, whether it be in a common prison or in a private house, or by a forcible detaining in the public streets, will be sufficient. And such detention will be unlawful unless there be some sufficient

## 24. Corporations.—A corporation may be held responsible for an assault and battery.<sup>1</sup>

authority for it, arising either from some process from the courts of justice, or from some warrant of a legal officer having power to commit under his hand and seal, and expressing the cause of such commitment; or arising from some other special cause sanctioned, for the necessity of the thing, either by common law or by act of Parliament. And the detention will be unlawful, though the warrant or process upon which it is made be regular, in case they are executed at an unlawful time, as on a Sunday; or in a place privileged from arrests, as in the verge of the King's court." 1 Russ. on Cr. (9th Am. Ed.) 1023.

No actual force is necessary. *Smith v. State*, 7 Humph. (Tenn.) 43.

In *Bird v. Jones*, 7 Q. B. 742, the majority of the court held that where the plaintiff in attempting to go in a particular direction was prevented from going in any direction but one, not being that in which he endeavored to pass, it was not an imprisonment, and this whether the plaintiff had or had not a right to pass in the first-mentioned direction. "A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may be movable or fixed; but a boundary it must have, and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place within the ambit of which the party imprisoning him would confine him, except by prison breach." Per Coleridge, J., *Bird v. Jones*, 7 Q. B. 742.

"In general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room, and it is not necessary in order to constitute an imprisonment that a man's person should be touched. The compelling a man to go in a given direction against his will may amount to imprisonment."

"Imprisonment is a total restraint of the person for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him." Per Patterson, J., *Bird v. Jones*, 7 Q. B. 742. See also *Warner v. Riddiford*, 4 C. B. (N. S.) 180.

1. *Frost v. Domestic S. M. Co.*, 133 Mass. 563; *Ramsden v. Boston*, etc., R. Co., 104 Mass. 117; *Hewett v. Swift*, 3 Allen (Mass.), 420; *Lynch v. Metropolitan R. Co.*, 90 N. Y. 77; s. c., 12 Am. & Eng. R. R. Cas. 119; *Jackson v. 2d Ave. R. Co.*, 47 N. Y. 274; *Penna. R. Co. v.*

*Vandiver*, 42 Pa. St. 365; *Owsley v. Montgomery*, etc., R. Co., 37 Ala. 560; *Am. Express Co. v. Patterson*, 73 Ind. 430; *Chicago*, etc., R. Co. v. *Williams*, 55 Ill. 185; *St. Louis*, etc., R. Co. v. *Dalby*, 19 Ill. 593.

In an action against a corporation for an assault and battery and false imprisonment by its agents and servants, the plaintiff's evidence showed that a certain machine bought by him of the defendant was replevied upon a writ in favor of the defendant brought by one S., an attorney, who in its service committed the torts sued for, and that the replevin bond was signed by the defendant, by G., manager. The plaintiff also offered to show that, at the trial of the replevin writ, G. testified that he was the manager and agent of the defendant, and further offered to prove that before that writ was sued out G., as such manager and agent, employed an attorney to sue out the writ; that the writ was placed in the hands of a person for service, and that, upon the refusal of this person and the attorney to serve the writ by committing a breach of the peace, G. said "he would find some one to obtain the machine," and then followed the employment of and service by S. Held, that this evidence should have been submitted to the jury upon the question of S.'s agency. *Frost v. Domestic S. M. Co.*, 133 Mass. 563.

**Assaults by Railway Servants.**—In many cases a railroad company has been held liable for violent or malicious assaults by servants upon passengers, independent of the question whether or not the servant was at the time acting within the scope of his employment. This is upon the ground that the company is bound to protect its passengers from such assaults as part of the contract of carriage. See also **RAILROADS.** *Craker v. Chicago*, etc., R. Co., 36 Wis. 657; *Pittsburgh*, etc., R. Co. v. *Hinds*, 53 Pa. St. 212; *Weed v. Panama R. Co.*, 17 N. Y. 362; *Milwaukee*, etc., R. Co. v. *Finney*, 10 Wis. 388; *Chamberlin v. Chandler*, 3 Mason (U. S.), 242; *Nieto v. Clark*, 1 Cliff (U. S.) 145; *Quigley v. Central Pacific R. Co.*, 11 Nev. 350; *Sherley v. Billings*, 8 Bush (Ky.), 147; *Maleeck v. Tower Grove*, etc., R. Co., 57 Mo. 18; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Hanson v. European*, etc., R. Co., 62 Me. 84; *Pendleton v. Kinsley*, 3 Cliff (U. S.), 416; *Bryant v. Rich*, 106 Mass. 189; *Rounds v. Delaware*, etc., R. Co., 64 N. Y. 129; *Shea v. Sixth Avenue R. Co.*, 62 N.

**25. Assault without Actual Violence applied to the Person.**—The mere taking hold of the coat, or laying the hand gently on the person of another, if done in anger, or in a rude and insolent manner, or with a view to hostility; striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist at him, if done in anger, or in a menacing manner,—are considered by the law as assaults.<sup>1</sup> So is pointing a loaded fire-arm at a per-

Y. 180; *Cohen v. Dry Dock, etc., R. Co.*, 69 N. Y. 170; *Stewart v. Brooklyn & C. R. Co.*, 90 N. Y. 588; *Ramsden v. Boston, etc., R. Co.*, 104 Mass. 117; *Terre Haute, etc., R. Co. v. Jackson*, 6 Am. & Eng. R. R. Cas. 178; *Chicago & E. R. Co. v. Flexman*, 8 Am. & Eng. R. R. Cas. 354; *Wabash, etc., R. Co. v. Rector*, 9 Am. & Eng. R. R. Cas. 264; *Lynch v. Metropolitan Elevated R. Co.*, 12 Am. & Eng. R. R. Cas. 119; *Stewart v. Brooklyn, etc., R. Co.*, 12 Am. & Eng. R. R. Cas. 127; *Louisville & Nashville R. Co. v. Kelly*, 13 Am. & Eng. R. R. Cas. 1; *Bryan v. Chicago, R. I. & P. R. Co.*, 16 Am. & Eng. R. R. Cas. 335; *International & Great Northern R. Co. v. Kenle*, 16 Am. & Eng. R. R. Cas. 337.

**Company not Liable for Assaults of Servants upon Passengers Outside Scope of Employment.**—In other cases the company has not been held liable unless the servant making the assault appears to have been acting within the scope of his authority. *Isaacs v. Third Avenue R. Co.*, 47 N. Y. 122; *Parker v. Erie R. Co.*, 5 Hun (N. Y.), 57; *McKean v. Citizens' R. Co.*, 42 Mo. 88; *Little Miami, etc., R. Co. v. Wetmore*, 19 Ohio St. 110; *Ward v. General Omnibus Co.*, 42 L. J. (C. P.) 265; *Johnson v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. R. Cas. 206. The cases are, however, opposed to the current of modern authority.

**Company Liable for Assaults of Servants upon Passengers Within Scope of their Employment.**—It is unquestionably admitted by all the authorities that where the servant is acting within the scope of his employment the company is liable for the assault, although the same is, of course, committed without instruction of the company. *Hewett v. Swift*, 3 Allen (Mass.), 420; *McKinley v. Chicago, etc., R. Co.*, 44 Iowa, 314; *Atlantic, etc., R. Co. v. Dunn*, 19 Ohio St. 162; *Passenger R. Co. v. Young*, 21 Ohio St. 518; *Indianapolis, etc., R. Co. v. Anthony*, 43 Ind. 183; *Jeffersonville, etc., R. Co. v. Rogers*, 38 Ind. 116; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660; *Pittsburgh, etc., R. Co. v. Theobald*, 51 Ind. 246; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350; *Travers v. Kansas, etc., R. Co.*, 63 Mo.

421; *Baltimore, etc., R. Co. v. Blacher*, 27 Md. 277; *Brown v. Hannibal & St. Joe. R. Co.*, 66 Mo. 588, *Northwestern, R. Co. v. Hack*, 66 Ill. 238; *Galveston, etc., R. Co. v. Donahue*, 9 Am. & Eng. R. R. Cas. 287.

In *Ramsden v. Boston, etc., Co.*, 104 Mass. 117, it was held that the corporation was liable to an action for an assault and battery, for the act of its conductor in wrongfully and unlawfully attempting to seize the parasol of a passenger for her fare.

Plaintiff purchased a ticket for a passage upon defendant's railway, and entered one of its cars; before reaching his destination he lost his ticket, and when he attempted to pass through the gate, from the station platform, he was stopped by the gatekeeper and told that he could not pass until he produced a ticket or paid his fare. He stated the facts of his purchase of a ticket and its loss, and insisted on passing out, but was pushed back by the gatekeeper, who sent for a police officer and ordered his arrest; he was arrested, taken to the police station, where the gatekeeper made a complaint against him, and he was locked up over night. In the morning plaintiff was examined before a police magistrate, the gatekeeper appearing against him, and he was discharged. Defendant had given orders to its gatekeepers not to let passengers pass out until they either paid their fares or showed tickets. In an action for false imprisonment, *held*, that the detention was unlawful; that defendant was responsible for the acts of the gatekeeper, and the plaintiff was entitled to recover. *Lynch v. Metro. R. Co.*, 90 N. Y. 77; s. c., 12 Am. & Eng. R. R. Cas. 119.

Where a car conductor, instead of arresting a passenger who refuses to pay his fare at once, and taking him into custody in his capacity as a railroad police officer, causes him to be arrested by officers at the next station, the arrest, if unlawful, was an assault and a false imprisonment by such conductor. *Krulevitz v. Eastern R. Co.*, 3 New Eng. Repr. (Mass.) 310.

1. *U. S. v. Ortega*, 4 Wash. (C. C.)

son and threatening to shoot,<sup>1</sup> or an unloaded fire-arm, if the person assaulted does not know that the weapon is not loaded.<sup>2</sup> Stopping and preventing a person by threats from passing in the street.<sup>3</sup>

**26. Assault with Violence, but not directly applied to the Person.**—It is not necessary to constitute an assault with violence that any actual violence be done to the person, as by striking a horse attached to wagon in which another person is sitting.<sup>4</sup>

**27. Assault with Violence Applied to the Person.**—Whenever unlawful violence is inflicted upon the person of another without his consent, it constitutes a battery.<sup>5</sup> (See also BATTERY, *ante*, p. 783.)

531; *Kirland v. State*, 43 Ind. 146; s. c., 13 Am. Rep. 390; *State v. Wright*, 52 Ind. 307; *State v. Philley*, 67 Ind. 304; *Howard v. State*, 67 Ind. 401; *Buntin v. State*, 68 Ind. 38; *U. S. v. Myers*, 1 Cranch (C. C.), 310; *U. S. v. Richardson*, 5 Cranch (C. C.), 348; *People v. Powers*, 1 Wheeler's Cr. Cas. (N. Y.) 405; *Johnson v. State*, 17 Tex. 515; *Coward v. Baddeley*, 4 H. & N. 478.

Approaching another threateningly, brandishing a knife or other weapon. *Barnes v. Martin*, 15 Wis. 240.

1. *Keefe v. State*, 19 Ark. 190; *Com. v. McLaughlin*, 5 Allen (Mass.), 507; *Richels v. State*, 1 Sneed (Tenn.), 606; *U. S. v. Kierman*, 3 Cranch (C. C.), 435.

An instruction to the effect that if defendant assaulted W. by pointing a loaded gun at him in a threatening manner and cocking it within shooting distance of him, they should find defendant guilty of common assault, *held* erroneous. *The State v. Sears*, 86 Mo. 169.

2. *State v. Smith*, 2 Humph. (Tenn.) 457; *Morgan v. State*, 33 Ala. 413; *State v. Shepard*, 10 Iowa, 126. See *Beach v. Hancock*, 27 N. H. 223; s. c., 59 Am. Dec. 373; *State v. Cherry*, 11 Ired. (N. Car.) 475.

3. *Bloomer v. State*, 3 Sneed (Tenn.), 66.

4. *Clark v. Downing*, 55 Vt. 259; s. c., 51 Am. Rep. 612; *State v. Davis*, 1 Hill (S. Car.), 46; *Bull v. Colton*, 22 Barb. (N. Y.) 94; *De Marentille v. Oliver*, 2 N. J. L. 379. Compare *Kirland v. State*, 43 Ind. 146; s. c., 13 Am. Rep. 386; *People v. Keefer*, 18 Cal. 636.

If the horse's running against the man were occasioned by a third person whipping him, such third person would be the trespasser. *Bac. Ab.*, tit. "Assault and Battery" (B).

The upsetting of a chair or carriage in which a person is sitting. *Hopper v. Reeve*, 7 Taunt. 698.

Riding after a person at a quick pace

and compelling him to run into his garden to avoid being beaten. *Martin v. Shoppee*, 3 C. & P. 373.

Overturning of a ladder on which the plaintiff was standing. *Gregory v. Hill*, 8 Term. 299.

Striking a cane a person is carrying. *Respublica v. De Longchamps*, 1 Dall. (U. S.) 114.

Riding a horse so close as to endanger a person, and give him the idea that the rider intends to run him down. *State v. Sims*, 3 Strobl. (S. Car.) 137.

Stopping a person on the street, and by threats or menaces preventing him from passing. *Johnson v. State*, 17 Tex. 515; *Long v. Rogers*, 17 Ala. 540; *Bloomer v. State*, 3 Sneed (Tenn.), 66; *Bird v. Jones*, 7 Q. B. 742.

Doubling one's fist and approaching another with a threat to strike if certain things are done. *U. S. v. Myers*, 1 Cranch (C. C.), 310; *U. S. v. Richardson*, 5 Cranch (C. C.), 348.

Stopping the carriage in which a person was riding, *held* not an assault. *State v. Edge*, 1 Strobl. (S. Car.) 91.

5. Pushing a person aside in order to enter a house which the defendant had a right to enter. *Drury v. Hervey*, 126 Mass. 519; *Churchill v. Hulburt*, 110 Mass. 42; s. c., 14 Am. Rep. 578.

Pushing a person aside while defendant held a knife in his hand and used threatening language. *Johnson v. State*, 7 Tex. App. 210.

Pouring "a mixture of spirits of turpentine and pepper" upon the person of the prosecutrix. *Murdock v. State*, 65 Ala. 520.

Throwing a person from a wagon on the frozen ground. *Nixon v. People*, 2 Scam. (Ill.) 267; s. c., 35 Am. Dec. 107.

Throwing a person from a window. *People v. Emmons*, 61 Cal. 487.

Throwing water upon a person. *Purcell v. Horne*, 3 N. & P. 564.

**28. Actual and Grievous Bodily Harm.**—Actual bodily harm would include any hurt or injury calculated to interfere with the health or comfort of the prosecutor; it need not be an injury of a permanent character. Nor is it necessary that there should be an intention to injure particular persons.<sup>1</sup>

**Wounding.**—In order to constitute a wound the continuity of

Cutting off the hair of a pauper in the poor-house by force, and against the will of such pauper. *Forde v. Skinner*, 4 C. & P. 239.

An aggravated assault may be committed with one's fists. *Keley v. State*, 12 Tex. App. 245.

A parent to whom the custody of his child has been awarded upon the termination of a divorce suit may be convicted of an assault and battery if, in endeavoring to effect an entrance into a house in which the child has been placed, for the purpose of obtaining possession of the child he uses intentional force upon the person of the occupant of the house in order to overcome resistance by the latter to his entrance. *Com. v. Beals*, 133 Mass. 396.

A railway employé was sent with a party of men to repair a side-track. A man who claimed that they were coming upon his land disputed the company's right to do what was proposed, threatened to undo whatever should be done, and in the course of an excited altercation drew a line on the ground where he said his boundary was, pushed the leader of the working party so that he staggered, and then struck him a single blow with a heavy stick and knocked him down. There was some testimony that the person assailed had raised a shovel as if to strike the assailant, but this was denied. The assailant acted in hot blood, but apparently supposed that in trying to prevent what was proposed he was defending his rights. *Held*, that although the blow was unjustifiable, the evidence would not sustain a charge of assault with intent to kill. *People v. Comstock*, 49 Mich. 330.

**By Intermediate Means.**—The injury need not be effected directly by the hand of the party. Thus there may be an assault by encouraging a dog to bite; by riding over a person with a horse; or by wilfully and violently driving a cart, etc., against the carriage of another person, and thereby causing bodily injury to the persons travelling in it. 1 Russ. on Cr. (9th Am. Ed.) 1021.

1. Harris Cr. L. 190.

Where the prisoner shortly before the conclusion of a performance at a theatre,

with the intention and with the result of causing terror in the minds of persons leaving the theatre, put out the gas-lights on a staircase which a large number of such persons had to descend in order to leave the theatre, and also placed an iron bar across a doorway through which they had in leaving to pass, and thereupon a panic seized a large portion of the audience, and they rushed in fright down the staircase, forcing those in front across the iron bar, and thus several of the audience were thrown down or otherwise severely injured, it was held that the prisoner was rightly convicted of unlawfully and maliciously inflicting grievous bodily harm. *R. v. Martin*, L. R. 8 Q. B. D. 54.

**Wound.**—To constitute a wounding the continuity of the skin must be broken. The nature of the instrument is immaterial, whether it be a stab by a knife, a kick, or a gunshot wound, etc. *R. v. Wood*, 1 Mood. C. C. 278; *R. v. Briggs*, 1 Mood. C. C. 318.

**Mayhem.**—To maim is to injure any part of a man's body, which may render him less capable of fighting. The injury is termed "mayhem." A premeditated design to do the act is essential to mayhem, and therefore where the act is done in the heat of a sudden affray without any evidence of premeditation, the crime is not committed. *Godfrey v. People*, 63 N. Y. 207. See also MAYHEM.

**Disfigure.—Disable.**—The term "disfigure" explains itself. To disable refers to the causing of a permanent and not merely a temporary disablement. *R. v. Boyce*, 1 Mood. C. C. 29.

An indictment for aggravated assault and battery should not simply characterize the offence as aggravated, but should state the matter which makes the aggravation. *State v. Beadon*, 17 S. Car. 55; *Marshall v. State*, 13 Tex. App. 492.

On the trial of an indictment for maliciously or unlawfully shooting a person "with intent to disfigure, disable, and kill" him, it is error to instruct the jury that if they believe the shooting was done "with intent to maim, disfigure, disable, or kill him, or to cause him bodily injury," they must find a verdict of guilty. *State v. Meadows*, 18 W. Va. 658.

the skin must be broken, and it is not sufficient that bones are broken, the skin not being broken.<sup>1</sup> (See also WOUNDS.)

**29. Assault with Deadly Weapon.**—Where the statute provides greater punishment for assaults with a dangerous or deadly weapon, the gravamen of the offence is the use of the weapon with intent to hurt. Where the statute specifies danger to life, such danger must be proved. The indictment under a statute prohibiting assaults with dangerous or deadly weapons should not only aver the weapon to be dangerous or deadly, but should specify it.<sup>2</sup>

1. 1 Russ. on Cr. (9th Am. Ed.) 982.

2. Malone's Cr. Briefs, 178.

There is no punishment provided for an assault with a dangerous weapon committed within the exclusive jurisdiction of the United States if committed on land, even if it should involve an attempt to commit murder. *U. S. v. Williams*, 2 Fed. Repr. 61 (1880).

Where an assault is charged to have been committed with a deadly weapon, the character of the weapon must be averred. *State v. Russell*, 91 N. Car. 624; *Slusser v. State*, 71 Ind. 280.

Where an indictment charges an assault and battery "with a weapon, to wit, a gun," and the evidence shows that the offence was committed without a weapon, as with the hand or fist, this is a fatal variance. *Walker v. State*, 73 Ala. 17.

A man who is stricken with the fist may enter willingly into the combat, supposing that it is to be prosecuted without deadly weapons; but if in its progress his adversary resorts to such weapons, he may lawfully do the same, if it be necessary to protect his own life, and the fact that he had such weapon concealed on his person will not deprive him of this right, unless the jury believe from the evidence that he went into the fight intending from the first to resort to his weapon if it became necessary thereby to overcome his adversary. *Aldrige v. State*, 59 Miss. 250.

Where, during an angry and violent altercation between the prisoner and the prosecuting witness, the former threatened to shoot the latter, and immediately thereafter procured a gun and discharged it at the latter, it is error for the court to charge the jury that from this threat alone they might infer that the gun was loaded. *Fastbinder v. State*, 42 Ohio St. 341.

It is no defence to an indictment for assault with intent to kill and murder that the defendant learned on the night before the day of assault that the man assaulted had been on that night and

previously criminally intimate with defendant's wife or had solicited sexual intercourse with her; and evidence of such information or of the facts to which it related is inadmissible. *Reed v. State*, 62 Miss. 405.

In order to convict of shooting at with intent to kill, it must be averred and proved that the gun was loaded with powder and a bullet or some other destructive substance, which, when discharged from the gun, is calculated to produce death. The fact that the gun was so loaded may be proved by either direct or circumstantial evidence. *Fastbinder v. State*, 42 Ohio St. 341.

An indictment charging that defendant assaulted another by pointing a gun at the latter with the intent to maim and kill him is not defective in only alleging that the gun was loaded with gunpowder. Serious injury can be inflicted with a gun so loaded. *State v. Sears*, 86 Mo. 169.

Where in an indictment the word "feloniously" is used in characterizing the assault in the first part of the indictment and is joined by the copulative and the words "then and there" to the subsequent clause which charges the shooting or giving the wound, it is sufficient; and it is not essential that the word "feloniously" shall be again repeated before the allegation of the shooting or wounding in order to make it a good indictment for a felony. *State v. Yates*, 21 W. Va. 761.

The Code of 1880 makes it a felony for "any person to assault and beat another with a cowhide, whip, or stick, having at the time in his possession a pistol or other deadly weapon, with intent to intimidate the person assaulted and prevent him from defending himself." Where a person assaults and beats another with a cowhide, having in his possession a pistol with the intent to intimidate the assaulted person and prevent him from defending himself, the statute is violated, even though the pistol be not exhibited and the assaulted person does

**30. Assault with Fire-arms.**—It is well settled that it is an assault to point a loaded weapon at a person,<sup>1</sup> but whether it is an assault

not know that his assailant has a pistol. *Lawson v. State*, 62 Miss. 556.

**Procedure.**—On an indictment for assault to murder, the verdict, "We, the jury, find defendant guilty of an assault to murder," is not limited to the assault merely, and is a sufficient verdict. *People v. McFadden*, 65 Cal. 445.

At the trial of an indictment in one count for an assault with a knife, with intent to kill and murder, the jury, upon retiring, were instructed, if they did not agree upon a verdict before the court adjourned for the day, to reduce it to writing, seal it up, and return it into court the next morning. The jury agreed upon their verdict after the court had adjourned, and, on the coming in of the court on the next day, a sealed verdict in the following form was handed to the clerk: "In the above entitled case the jury say the defendant is guilty on the first count of an assault, not guilty on the second count." The clerk read this paper in open court, and then inquired of the jury in the usual form whether they found the defendant guilty or not guilty. The foreman replied as follows, to which all the jury assented: "Guilty of an assault with a knife, without the intent to kill and murder." The verdict in this form was affirmed, received, and recorded. *Held*, that it did not conclusively appear that the jury before separating found the defendant guilty of the same crime of which they declared him to be guilty by their oral verdict; and that the verdict must be set aside. *Com. v. Walsh*, 132 Mass. 8.

So if one shoots a loaded pistol or other firearm in the direction of another under such circumstances as to show a reckless indifference as to the consequences, and the act is likely to result in the death of the person toward whom the shot is fired, the law will imply malice, and the party so shooting may be convicted of an assault with intent to murder. *Conn v. People*, 116 Ill. 459.

To convict one of an assault with a loaded revolver, with intent to kill and murder, the criminal intent must be shown; but direct and positive testimony is not required to prove such intent. It may be presumed from facts and circumstances shown by the evidence. *Conn v. People*, 116 Ill. 459.

In a civil action for an assault and battery alleged to have been made by defendant by the discharge of a loaded

pistol at plaintiff, the court charged that if defendant did not assault the plaintiff, but the pistol, being in his hand for a lawful purpose, was discharged by careless handling or by accident, there could be no recovery in this action; and again, that if plaintiff assaulted defendant, the latter having the pistol in his hands, and its discharge was caused by plaintiff's act without design on defendant's part, defendant was not liable. *Held*, that there was then no error in refusing a further instruction, asked by defendant, that there could be no recovery "unless the shooting was wilful and intentional." *Krall v. Lull*, 49 Wis. 403.

Under an indictment for an assault with a deadly weapon, with intent to inflict upon the person of another a bodily injury, etc., the accused may be convicted of a simple assault. *Bryant v. State*, 41 Ark. 359.

1. *Morgan v. State*, 33 Ala. 413; *State v. Shepard*, 10 Iowa, 126; *State v. Taylor*, 20 Kan. 643; *Burton v. State*, 3 Tex. App. 408; *Crow v. State*, 41 Tex. 468; *U. S. v. Kiernan*, 3 Cranch (U. S.), 435.

In *State v. Montgomery*, 65 Iowa, 483, where defendant, in seeking to prevent the prosecuting witness from crossing his farm, pointed a cocked revolver at him more than once, it was held, that the several acts were but parts of the same transaction, and constituted but one assault, and that, while one act was sufficient to constitute an offence, all were properly shown to establish the *animus* of the defendant.

One charged with committing an assault with a revolver should not be permitted to testify as to his purpose in taking the revolver with him, for, however innocent his purpose, it would not justify an assault with the weapon.

An assault with a revolver cannot be justified for the purpose of removing a mere trespasser from the premises of the assailant.

Pointing a loaded gun at half-cock at a person is an assault; for there is a present ability of doing the act threatened as the gun can be cocked in an instant. *Osborn v. Veitch*, 1 F. & F. 317.

But if it is not presented or cocked it is not an assault. *Lawson v. State*, 30 Ala. 14.

In *State v. Church*, 63 N. Car. 15, the facts were these: The defendant and some others, on a day of public worship, were sitting outside the church some six

to threaten a party with a gun or pistol which is not loaded is a question upon which the cases differ.<sup>1</sup>

or seven steps distant, when the prosecutor appeared. The defendant spoke to him thus: "We have no use for you in this company—go back, you shall not come here." The prosecutor stopped, when defendant rose to his feet and said, addressing the prosecutor, "I have a pistol," at the same time placing his hand on it, where belted around his body. The prosecutor retired slowly, followed by the defendant, not over ten steps apart, who urged him to go or he would shoot him, and drew the pistol from its scabbard, but did not cock it nor present it towards the prosecutor. The court said: "An offer of violence is an assault, even if it be accompanied with a declaration that violence will be forbore upon a condition which the actor had no right to impose."

So if a person fires a revolver at or toward another, either with malice premeditation or with a total disregard of human life, he may be convicted of an assault with intent to kill and murder the person so attacked; and in such case it makes no difference whether such person was struck by the shot or not. *Conn v. People*, 116 Ill. 459.

1. **Unloaded Fire-arms.**—In *Chapman v. State*, 78 Ala. 463, the court said: "The present conviction, however, can be sustained only on the theory, that it was an assault for the defendant to present or aim an unloaded gun at the person charged to be assaulted, in such a menacing manner as to terrify him, and within such distance as to have been dangerous had the weapon been loaded and discharged. On this question, the adjudged cases, both in this country and in England, are not agreed, and a like difference of opinion prevails among the most learned commentators on the law. We have had occasion to examine these authorities with some care, on more occasions than the present; and we are of the opinion that the better view is, that presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not, without more, such an assault as can be punished criminally, although it may sustain a civil suit for damages. The conflict of authorities on the subject is greatly attributable to a failure to observe the distinction between these two classes of cases."

"It seems that a very reasonable distinction might be made in cases of this

kind. If a person presents a gun at another, knowing it not to be loaded, there can be no intent to injure in any event, and therefore he ought not to be criminally responsible; but if the person at whom such an unloaded gun was presented did anything in self-defence, his justification, whether in a civil or criminal proceeding, ought to be just the same as if the gun were loaded; for the act of the party presenting the gun led to the natural consequences that the party at whom it was presented should defend himself, and the party presenting the gun ought not to be permitted to show the facts to be otherwise than he had himself held them out to be." 1 Russ. on Cr. (9th Am. Ed.) 1019.

In *R. v. St. George*, 9 C. & P. 483, Parke, B., said: "My idea is, that it is an assault to present a pistol at all, whether loaded or not. If you threw the powder out of the pan, or took the percussion-cap off, and said to the party this is an empty pistol, then that would be no assault, for there the party must see that it was not possible that he should be injured; but if a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent." Compare *R. v. Brown*, L. R. 10 Q. B. Div. 381.

If the person assaulted had reasonable cause to believe that the weapon was loaded, it is an assault though it proved to be unloaded. *Com. v. White*, 110 Mass. 407.

A gun is not loaded if the touch-hole is so plugged that the gun cannot possibly be fired, or if, from not being primed or otherwise it does not contain a charge capable of doing the mischief intended. 1 Bish. Cr. L. (7th Ed.) § 758.

**Under a Statute.**—The Indiana statute provides that "It shall be unlawful for any person over the age of ten years, with or without malice, purposely to point or aim any pistol, gun, revolver, or other fire-arm, either loaded or empty, at or toward any other person."

One who angrily seeks another, who is sheltered in his dwelling, and purposely points a gun at the dwelling-house door, daring him to come out, and threatening to shoot him, is amenable under such statute. *Lange v. State*, 95 Ind. 114.

**Cases holding Not Assault.**—But where in an action for an assault and presenting a loaded pistol at the plaintiff, it appeared



**31. Dangerous or Deadly Weapon.**—The term “deadly weapon” occurs in the common law of homicide and in various statutes. It is a weapon likely to produce death or great bodily injury. In a case of doubt, the manner in which it was used may be taken into account in determining whether or not it was deadly. And when the facts are all established, the question whether a particular weapon was deadly or not is one of law for the court; yet practically, as in most instances the establishment of the fact awaits the rendition of the verdict, the jury must pass upon this question under instructions from the court.<sup>1</sup> A dangerous weapon is one likely to produce death or great bodily harm.<sup>2</sup> The words

that the defendant cocked a pistol, and presented it at the plaintiff's head, and said if he was not quiet he would blow his brains out; but there was no evidence that the pistol was loaded, *Lord Abinger, C. B.*, held that if the pistol was not loaded it would be no assault. *Blake v. Barnard*, 9 C. & P. 626.

And *Tindal, C. J.*, has ruled in the same way. *R. v. James*, 1 C. & K. 530.

In order to convict of shooting at with intent to kill, it must be averred and proved that the gun was loaded with powder and ball or some other destructive substance, which when discharged is calculated to produce death. *Fasbinder v. State*, 42 Ohio St. 341; *Robinson v. State*, 31 Tex. 170; *Porter v. State*, 57 Miss. 300; *R. v. James*, 1 C. & K. 530. See *Crow v. State*, 41 Tex. 468; *McKay v. State*, 44 Tex. 43; *Burton v. State*, 3 Tex. App. 408; *Allen v. People*, 82 Ill. 610.

1. *Bishop Stat. Cr.* (2d Ed.) § 320.

2. *State v. Dineen*, 10 Minn. 407. See *McReynolds v. State*, 4 Tex. App. 327; *Hunt v. State*, 6 Tex. App. 663; *Wilson v. State*, 4 Tex. App. 637; *State v. McDonald*, 67 Mo. 13; *Doering v. State*, 49 Ind. 56; s. c., 19 Am. Rep. 669; *Berry v. Com.*, 10 Bush (Ky.). 15.

In *State v. Huntley*, 91 N. Car. 617, the court said: “Then what is a deadly weapon? It must be an instrument used, or that may be used, for the purpose of offence or defence capable of producing death. Some weapons are *per se* deadly; others, owing to the manner in which they are used, become deadly. A gun, a pistol, or a dirk-knife is of itself deadly; a small pocket-knife, a walking-cane, a switch of the size of a woman's finger, if strong and tough, may be made a deadly weapon if the aggressor shall use such instrument with great or furious violence, and especially if the party assailed should have comparatively less power than the assailant, or be helpless and feeble.”

Such weapons or instruments as are

made and designated for offensive and defensive purposes, or for the destruction of life, or for the infliction of injury. *Com. v. Branham*, 8 Bush (Ky.). 387.

The act of assembly making it indictable for one to carry concealed about his person any “pistol, bowie-knife, razor, or other deadly weapon of like kind” embraces a butcher's knife. The words “other deadly weapons of like kind” imply similarity in the deadly character of weapons, such as can be conveniently concealed about one's person to be used as a weapon of offence and defence. *State v. Erwin*, 91 N. Car. 545.

A weapon may be a deadly weapon although not especially designated for offensive or defensive purposes, or for the destruction of life or the infliction of injury. *Blige v. State*, 20 Fla. 742; s. c., 51 Am. Rep. 628.

A stone may or may not be a dangerous weapon, depending upon its size and other circumstances. A large, heavy stone in the hands of a man intending to do great bodily harm is likely to produce that result. *State v. Dineen*, 10 Minn. 407.

When a gun or pistol is used simply as an instrument to strike with, it is not necessarily a deadly weapon, but would be such or not according to its size and the manner of using it; and these facts should be determined by a jury. *Shadle v. State*, 34 Tex. 572.

“Whether a pistol is a deadly weapon, when used to strike with as a club or stick, must depend upon its size or weight in connection with the manner of its use and the part of the person that is stricken with it. A pistol used to strike with is nothing more than a piece of iron of the same size, weight, and shape. There may be five or six shooting pistols so small that they would not, when so used, be likely to produce death or serious bodily injury.” *Skidman v. State*, 43 Tex. 93. See *Chambers v. State*, 42 Tex. 254.

In *Kruger v. State*, 1 Neb. 365, the

"dangerous" and "deadly" are practically synonymous when

court said: "The indictment fails to charge that the weapons with which the defendants made the assault were deadly weapons, or that the names given to them import that they were such. They were described as being 'weapons, to wit, wooden clubs.' They say that to warrant a conviction under the section of the criminal code of that State under which the indictment was found, it is necessary that the assault be made with a deadly weapon, or with 'some other instrument or thing fitted to occasion death, in the use to which it is put. If it be a weapon, the ordinary name of which, *ex vi termini*, imports its deadly character, e.g., a sword, gun, or pistol, it would be sufficient to describe it by such name; but in other cases the instrument or thing used should be described and charged to be deadly."

In *State v. Napper*, 6 Nev. 113, the indictment was for an assault with a deadly weapon, with intent to commit murder. The court said: "To constitute, then, the crime of which defendant was convicted, he must have made an unlawful attempt with a weapon deadly, either in its nature, or capable of being used in a deadly manner, intending to inflict a bodily injury and with the present ability so to do."

As to whether or not the weapon is, in fact, a deadly weapon is matter of proof, and depends in some cases upon the mode and manner of its use. *Hunt v. State*, 6 Tex. App. 663.

A chair is not necessarily a deadly weapon; whether it is such must depend upon its size or weight, in connection with the manner of its use and the part of the person that is stricken with it. *Kouns v. State*, 3 Tex. App. 13.

An indictment for an assault with intent to commit murder charged that the defendants assaulted the prosecutor with a loaded pistol and a hoe, without alleging the hoe and the pistol were deadly weapons, and there was no direct proof that they were deadly weapons. *Held*, that the indictment was sufficient, and that if it was necessary to show the weapons used were deadly ones, that was shown by proof of an assault with the pistol and hoe, and that a hoe, in legal signification, is a deadly weapon, as much so as a loaded pistol or an axe, and that proof of their deadly character was not necessary. *Hamilton v. People*, 113 Ill. 34.

**What Weapons are Deadly.**—A stone or an iron weight. *State v. Dineen*, 10 Minn. 407; *Regan v. State*, 46 Wis. 256;

*Coleman v. State*, 28 Ga. 79; *Blige v. State*, 20 Fla. 742; s. c., 51 Am. Rep. 628; *Milner v. State*, 30 Ga. 138; *Brown v. State*, 58 Ga. 212.

A bottle. *Wilson v. State*, 33 Ga. 217.  
A chisel. *Com. v. Branham*, 8 Bush (Ky.), 387.

A gun or pistol if it is loaded. *Com. v. White*, 110 Mass. 407; *Com. v. Fenno*, 125 Mass. 387; *State v. Painter*, 67 Mo. 84; *Agee v. State*, 64 Ind. 340; *Prior v. State*, 41 Ga. 155; *State v. Swann*, 65 N. Car. 330.

A pistol or gun may be used as bludgeon. *State v. Franklin*, 36 Tex. 155; *Allen v. People*, 82 Ill. 610.

And may be a deadly weapon according to its size and the manner of using it. *Shadle v. State*, 34 Tex. 572.

A knife. *Ferguson v. State*, 6 Tex. App. 504.

The knife must be shown to have been a deadly weapon. *Hilliard v. State*, 17 Tex. App. 210.

A bowie-knife is. *Buchanan v. State*, 24 Ga. 286.

A pocket-knife may be. *Sylvester v. State*, 71 Ala. 17.

A knife with a blade three inches long is. *Briggs v. State*, 6 Tex. App. 144.

An iron bolt, rod, or pin used by thrusting, whether the point be sharp or not, under a statute making it an offence to "shoot, stab, or thrust any person with a dangerous weapon." *State v. Lowry*, 33 La. Ann. 1224.

A horseshoe is not under the N. Y. statute 1854. *People v. Cavanagh*, 62 How. Pr. (N. Y.) 187.

A handspike. *R. v. Shea*, 3 Allen (N. Brunswick), 129.

Brass knuckles. *Wilks v. State*, 3 Tex. App. 34.

A pitchfork. *McReynolds v. State*, 4 Tex. App. 327; *State v. Beverlin*, 30 Kans. 611.

An axe. *Dollarhide v. U. S.*, 1 Morris (Iowa), 233; s. c., 39 Am. Dec. 460; *State v. Ostrander*, 18 Iowa, 435.

A hatchet. *State v. Sebastian*, 81 Mo. 514.

A shovel. *State v. Beadon*, 17 S. Car. 55.

A pick-handle. *Smith v. State*, 73 Ga. 31.

**What are not Deadly Weapons.**—The handle of a shovel when only one blow is struck. *People v. Comstock*, 49 Mich. 330. *Compare Smith v. State*, 73 Ga. 31.

Nor necessarily a black-jack fence-pole. *Wilson v. State*, 15 Tex. App. 150.

Nor, under the N. Y. statute, which re-

used in this connection. What is a dangerous or deadly weapon is a question of fact and not of law, and is for the jury.<sup>1</sup>

**32. Assault with Intent to Kill.**—To sustain an indictment for an assault with intent to murder, the evidence must be such as to warrant a conviction for murder had death ensued from the assault.<sup>2</sup> (See also HOMICIDE.)

**33. Accessories.**—In an assault and battery, not only he who is the actor or actual perpetrator of the offence, but he also who, being present when the act is done, aids and abets therein, is a principal and liable as such.<sup>3</sup>

quires the weapon to be sharp as well as dangerous, the handle of a pitchfork. *Filkins v. People*, 69 N. Y. 101; *People v. Hickey*, 11 Hun (N. Y.), 631. See *People v. Casey*, 72 N. Y. 393.

Whether a horseshoe is, is a question for the jury. *People v. Cavanagh*, 62 How. Pr. (N. Y.) 187.

1. *Doering v. State*, 49 Ind. 60; s. c., 19 Am. Rep. 669; *People v. Rodrigo*, 11 Pac. Repr. (Cal.) 481.

Courts judicially know some weapons to be deadly without any distinct averment in the indictment to that effect. *Dollarhide v. U.S.*, 1 Morris (Iowa), 233; s. c., 39 Am. Dec. 460.

In *U. S. v. Small*, 2 Curt. (C. C.) 241, the court said: "In many cases it is practicable for the court to declare that a particular weapon was or was not a dangerous weapon within the meaning of the law. And when it is practicable it is a matter of law, and the court must take the responsibility of so declaring. But when the question is whether an assault with a dangerous weapon has been proved, and the weapon might be dangerous to life or not, according to the manner in which it was used, or according to the part of the body attempted to be struck, I think a more general direction must be given to the jury; and it must be left for them to decide whether the assault, if committed, was with a dangerous weapon." See *State v. Rigg*, 10 Nev. 284.

2. *McCoy v. The State*, 8 Ark. 451; *Cole v. The State*, 10 Ark. 318; 1 Russ. on Crimes, 719; *Whar. Crim. Law*, 467; *Stark. on Ev.* 53; *Lacefield v. State*, 34 Ark. 275; s. c., 36 Am. Rep. 8.

3. *Cooney v. Burke*, 11 Neb. 258; *Dunman v. State*, 1 Tex. App. 593; *State v. McClintock*, 8 Iowa, 203; *Com v. Hurley*, 99 Mass. 432; *State v. Rawles*, 65 N. Car. 334.

Two men fought with each other in a ring, formed by ropes supported by posts, in the presence of a large crowd. Amongst that crowd were the prisoners.

It did not appear that the prisoners took any active part in the management of the fight, or that they said or did anything. They were tried and convicted of assault, as being principals in the second degree. The jury were directed that prize-fights are illegal, and that all persons who go to a prize-fight to see the combatants strike each other and who are present when they do so are guilty in law of an assault, and that if the persons charged were not casually passing by, but stayed at the place, they encouraged the fight by their presence, although they did not do or say anything. Upon this direction the jury found the prisoners guilty; but added that they did so in consequence of such direction of law, as they found that the prisoners did not aid or abet. *Held*, that the above direction was not correct, that mere voluntary presence at a fight does not as a matter of law necessarily render persons so present guilty of an assault as aiding and abetting in such fight, and that the conviction could not be sustained. *Held*, that the conviction could be sustained, that the legal inference to be drawn from mere presence, as a voluntary spectator, at a prize-fight is, in the absence of other evidence to rebut such inference, that the person so present is encouraging, aiding, and abetting such fight, and consequently guilty of assault. *Held*, that a prize-fight is illegal, and that all persons aiding and abetting therein are guilty of assault, and that the consent of the persons actually engaged in fighting to the interchange of blows does not afford any answer to the criminal charge of assault. *Seemle*, that mere presence of a person, unexplained, at a prize-fight affords some evidence for the consideration of a jury of an aiding or abetting in such fight. *The Queen v. Coney*, L. R. 8 Q. B. Div. 534.

Where three persons entered the premises of another with intent to steal, and on being detected by the owner assaulted him, and during the difficulty ensuing

**34. Evidence** that threats have been made by the defendant at a time previous to the alleged assault is admissible.<sup>1</sup>

**35. Damages.**—In an action for an assault and battery, damages should be given as nearly as possible in conformity to the conse-

one of them struck the owner and another shot at him with a pistol, it was held, that whatever act was done by any one of the defendants so entering the premises was in law the act of all, and that all were guilty of an assault with intent to murder. *Hamilton v. People*, 113 Ill. 34.

1. *State v. Fry*, 25 N. W. Repr. (Iowa), 738; *Sharp v. People*, 29 Ill. 464; *McMahon v. State*, 16 Tex. App. 357; *Henderson v. State*, 70 Ala. 29.

On the trial of a civil action for damages for an assault and battery, where the defendant is a witness in his own behalf, it is not competent to ask him what threats had been communicated to him immediately before the fight of personal violence to him by the plaintiff, unless it is shown that such threats were in fact made by the plaintiff. *Hutts v. Shoaf*, 88 Ind. 395.

It is not competent as an excuse for a battery to prove that several days before it was committed plaintiff had used insulting language to defendant's wife, or had threatened the defendant. The court in such a case, having properly excluded evidence of previous threats by the plaintiff, permitted the plaintiff to prove the negative—that at the time in question the plaintiff made no threats. *Held* to be error, and well calculated to prejudice the defence with the jury. *Heiser v. Loomis*, 47 Mich. 16.

Where there were two assaults, threats made at the first affray—within reasonable proximity of the last assault—were admissible, the court confining the consideration of the jury to the threats. *Howland v. Day*, 56 Vt. 318.

Under an indictment for an assault with intent to murder, the defendant's declarations to the person assaulted, made "about six minutes after the difficulty," threatening to kill him if he did not "keep his distance," cursing him, and forbidding him to stop at a house in the neighborhood where he wished to stop for the purpose of having his wounds dressed, and where the defendant had already stopped, are competent evidence for the prosecution, being relevant to the question of malice and hostile feeling. Threats made by the defendant against the person assaulted, "about two weeks before the difficulty between them," are admissible as showing malice, and as de-

claratory of his criminal intention. *Henderson v. State*, 70 Ala. 29.

In a criminal prosecution for an alleged assault with intent to kill, where the defendant claims that he acted solely in self-defence and to prevent a felony from being committed upon him, and evidence is introduced tending to show that such were the nature and character of his acts, it is then competent for the defendant, in corroboration of such evidence, to introduce other evidence tending to show that the person on whom the alleged assault is alleged to have been committed had, some time previously to such alleged assault, assaulted the defendant with a deadly weapon, and had also threatened to kill him, which threats had been communicated to the defendant previously to such alleged assault. *State v. Scott*, 24 Kan. 68.

Under a prosecution for an assault with intent to murder, any evidence is admissible which tends to show malice, ill-will, or other motive for the act of the accused; and for this purpose the fact of a former altercation or difficulty between the parties, but not the merits or details thereof, may be given in evidence. *Gray v. State*, 63 Ala. 66.

The bad character of a woman on whose premises a person was arrested charged with an assault committed elsewhere cannot be shown upon the prosecution of such person for such offence, in the absence of any showing implicating the woman. *People v. Sweeney*, 55 Mich. 586.

**Threats by the Prosecutor.**—Evidence of previous threats of personal violence against the defendant by the prosecutor is inadmissible. *State v. Skidmore*, 87 N. Car. 509.

**Violent Character of Person Assaulted.**—In a prosecution for an assault and battery, where the defendant was himself the aggressor, he cannot be permitted to adduce evidence of the bad character of the person assaulted, as a violent, dangerous, or turbulent man. *Brown v. State*, 74 Ala. 42.

Testimony that a person is quarrelsome is inadmissible for the purpose of showing that he probably began a rumpus in which he was hurt; it may be given, perhaps, for the purpose of showing that one who knew it feared an assault from him. *Keney v. Dutcher*, 56 Mich. 308.

quences which have ensued, and those likely to ensue, therefrom; and, in estimating them, the jury is not to be restricted to the actual loss, but may consider the pain and suffering, the wounded feelings of the plaintiff, and, if the act was wanton, may give vindictive damages.<sup>1</sup>

1. *Shelter v. York, Crabbe* (U. S.), 449; *Slater v. Rink*, 18 Ill. 527; *Shereden v. Furber*, 1 Bl. & H. (U. S.) 423; *Gurthor v. Blowers*, 11 Md. 536.

Wounded feelings. *West v. Forrest*, 22 Mo. 344.

Vindictive damages. *Wilson v. Middleton*, 2 Cal. 54; *Causee v. Anders*, 4 Dev. & B. (N. C.) 246; *Cook v. Ellis*, 6 Hill (N. Y.), 466; *Day v. Woodworth*, 13 How. (U. S.) 363.

In all cases, unless the provocation is such as to amount to a legal justification, the damages should be compensatory. *Birchard v. Booth*, 4 Wis. 67.

A verdict of not guilty in a criminal prosecution for an assault is not admissible in defence to an action for damages caused by the assault. But a conviction and payment of fine might be shown in mitigation of exemplary damages, if pleaded. *Shook v. Peters*, 59 Tex. 393.

A wrong-doer is liable for the natural results of his trespass, and the jury may take into account the disgrace as well as the physical suffering caused by it. *Fay v. Swan*, 44 Mich. 544.

In an action for assault and battery the jury may consider the malice of the defendant, the insulting character of his conduct, the rank and position in life of the several parties, and all the circumstances of the wrong, and thereupon award such damages as the circumstances of the case require. Where mental pain or suffering is connected with, and follows as a natural consequence of, a material wrong or injury, it is a legitimate element of damage. *Sloan v. Edwards*, 61 Md. 89.

In an action for damages for a trespass *vi et armis*, brought in the district court, evidence of the payment of a fine imposed in the county court for the same trespass in a criminal prosecution is admissible as evidence in mitigation of damages. *Flanagan v. Womack*, 54 Tex. 45.

As mental pain is the natural and inevitable result of personal injuries, damages therefor need not be specially claimed. *Gronan v. Kukkuck*, 59 Iowa, 18.

Although the jury may, in an action to recover damages for a malicious personal injury, allow a reasonable fee to plaintiff for the services of her attorney in the ac-

tion, yet such allowance, and the amount thereof, rest in the discretion of the jury, to be determined under all the circumstances of the case, but neither party can call witnesses to prove the value of such services. *Stevenson v. Morris*, 36 Ohio St. 10; s. c., 41 Am. Rep. 481.

Where the assault is of grievous or wanton nature, manifesting wilful disregard of the rights of others, actual malice need not be shown to entitle the aggrieved party to exemplary or vindictive damages. *Borland v. Barrett*, 76 Va. 128; s. c., 44 Am. Rep. 152.

Whatever injurious consequences result naturally from the wrongful act done become elements of damage; and it is not necessary that the particular form or nature of the results should have been contemplated or foreseen by the wrong-doer. *Sloan v. Edwards*, 61 Md. 89.

The fact that an assault and battery were induced by personal abuse of the assailant by the party assaulted may be considered in mitigation of punitive, but not of actual, damages, which include those allowed for mental and bodily suffering. *Corcoran v. Harran*, 55 Wis. 120.

An injured trespasser who caused the assault by his own acts cannot recover damages. *Fossbinder v. Svitak*, 16 Neb. 499.

An employer who in a fit of passion assaults his servant for neglect of duty thereby commits a breach of the peace and an actionable wrong; but if, making a reasonable allowance for the infirmities of human temper, the defendant has a reasonable excuse arising from the provocation or fault of the servant, but not sufficient to justify entirely the act done, then damages ought not to be assessed by way of punishment, but the circumstances of mitigation should be considered. *Ward v. Blackwood*, 41 Ark. 295; s. c., 48 Am. Rep. 41.

In an action for assault it is proper to inquire of an unprofessional witness how the assaulted party appeared after the affray; and the answer, "She seemed to be in great pain in her head and back," was also admissible. *Knight v. Smythe*, 57 Vt. 529.

In an action in damages for an assault and battery, it is competent for the plain-

tiff to offer in evidence, and for the jury to consider the fact, that as a result of the battery alleged the plaintiff had become subject to convulsions or fits, although such fact was not specially alleged in the declaration as a ground of special damage. *Sloan v. Edwards*, 61 Md. 89.

In an action for assault and battery the plaintiff averred that by reason of the battery he was greatly hindered and prevented from doing and performing his work and business, and looking after and attending his necessary affairs and avocations. *Held*, that this allegation did not justify the reception of evidence that plaintiff, being a farmer, and having hay ungathered at the time of the injury, was troubled in getting help to save it, and in consequence it was seriously injured. *Heiser v. Loomis*, 47 Mich. 16.

In a suit for personal injury, on account of an assault and battery, alleging suffering and a permanent impairment of health as the result, testimony by the plaintiff as to wounds, pain and suffering, loss of sleep and poor health afterwards, is not matter of opinion, but a statement of facts, and is admissible. *Hamm v. Romine*, 98 Ind. 77.

An instruction, in an action for an assault and battery, permitting the jury in assessing compensatory damages to take into consideration the means and public position of the defendant, is erroneous. *Hare v. Marsh*, 61 Wis. 435; s. c., 50 Am. Rep. 141.

In action for assault and battery and false imprisonment, there was no error in charging the jury that the wealth of defendant was a proper matter for the jury to consider in making up their verdict. *Rowe v. Moses* 9 Rich. (S. Car.) 426; *Harris v. Marco*, 16 S. Car. 575.

In an action for assault and battery where punitive damages are recoverable, the financial condition of the defendant may be shown by evidence of his reputed wealth. *Draper v. Baker*, 61 Wis. 450; s. c., 50 Am. Rep. 143. See *Brown v. Evans*, 17 Fed. Repr. 912.

It appears from the evidence in this case that plaintiff was a woman of ill repute, and had on prior occasions conducted herself about the defendant's passenger-station in a lewd and indecent manner, and that, in the evening of a certain day, at a time when, by the defendant's rules, the ladies' waiting-room was closed, and several hours prior to the departure of the train on which she said she was about to travel, she, by some artifice, had gained admission to the waiting-room, and that, for misconduct therein, she was removed by the

police at the request of defendant's agent, but without any force whatever; and it was *held* that, if plaintiff was entitled to a verdict at all, it was only for nominal damages, and a verdict for \$175 should be set aside. *Beeson v. Chicago, etc., R. Co.*, 13 Am. & Eng. R. R. Cas. 45; s. c., 62 Iowa, 173.

In an action brought by a father to recover for injuries to his minor son, caused by an assault and battery, which, it was alleged, resulted in the death of the son, whereby the father was deprived of his services, etc., the defendants requested the court to charge that no recovery could be had for pecuniary injury resulting to the plaintiff by the death of his son, though caused by the wrongful act of the defendants; but the court refused the request, and charged that the plaintiff might recover for loss of services of his son until he would have been of age. *Held*, error; and that at common law the death of a human being affords no grounds for an action for damages. In such case the father is not entitled to exemplary damages. *Sherman v. Johnson*, 58 Vt. 40.

Provocation given at the time of the assault or within a prior time so recent as to justify the presumption that the offence was committed under the influence of passion, excited thereby, may be shown in mitigation of damages. But if time for reflection intervened after the provocation, it will not extenuate the violence. *Gronan v. Kukkuck*, 59 Iowa, 18; *Thrall v. Knap*, 17 Iowa, 468; *Ireland v. Elliott*, 5 Iowa, 478.

**Pregnant Women.**—While B., a married woman, far advanced in pregnancy, R. in a state of intoxication approached her, cursing and threatening to shoot her, and entered her house. She became frightened and fled from her home. In her flight she climbed, and jumped or fell from, a fence. Three days afterwards she was delivered of a dead child. Subsequently she brought an action against B. to recover damages for the injuries alleged to have been produced by his conduct. The evidence showed, almost beyond doubt, that the premature delivery and death of the foetus were the results of B.'s demonstrations against the plaintiff. *Held*, the plaintiff is entitled to recover much more than nominal damages. *Barbee v. Reese*, 60 Miss. 906.

In an action for assault and battery, the plaintiff, a married woman, having, while testifying in her own behalf, stated that at the time of the battery she was *enccinte*, and that the battery caused her to miscarry, upon her cross-examination

**ASSEMBLE.** (See also AFFRAY; RIOT; ROUT.)—To meet or come together; to convene, whether for an unlawful or a lawful purpose.<sup>1</sup>

she was asked by defendant's counsel whether her husband was not in the habit of beating her. To which question the plaintiff by her counsel objected; which objection was sustained by the court. *Held*, no error. *Goracke v. Hintz*, 13 Neb. 390.

A verdict of \$250 for assaulting and beating a woman who is *enccinte* so as to produce a miscarriage *held* not excessive. *Goracke v. Hintz*, 13 Neb. 390.

**Whipping Another's Child.**—An infant about five years of age committed a violent and brutal assault and battery upon a child eighteen months old. The father of the latter then caught the former and whipped him severely. The older child then, by his next friend, brought an action to recover damages for the assault and battery, or whipping, inflicted upon him by the man, who was not his father nor guardian. The jury rendered a verdict in favor of the plaintiff for \$100, and the court refused to set it aside. *Held*, that the verdict was well warranted by the evidence. The provocation, though great, did not justify the whipping; and the right to protect his own child did not authorize the defendant to punish the plaintiff for having maltreated it. *Sowell v. McDonald*, 58 Miss. 251.

**Where not Excessive.**—Where a mob seizes a prisoner, under arrest upon a criminal accusation, and hangs him by the neck till he is senseless, to extort a confession, \$1500 are not excessive damages. *Elliott v. Russell*, 92 Ind. 526.

\$8150 damages *held* not excessive. *Brown v. Evans*, 17 Fed. Repr. 912.

\$1000 not excessive. *Borland v. Barrett*, 76 Va. 137; s. c., 44 Am. Rep. 152.

1. "If any number of persons meet together on a lawful occasion, and on a sudden quarrel engage in a fight, they are not guilty of a riot, but of a sudden affray only (1 Hawk. P. C. 541; 1 Russ. on Cr. 268); and to constitute a riot, the common intent of at least three persons to do any unlawful act must exist, either at the time of their 'assembling' or be formed with the agreement of mutual assistance after they have 'assembled.' It is of course not necessary to prove any formal or express agreement or intent; but it may be inferred from circumstances, and is a question of fact for the jury. But the bare fact that three or more persons in a violent manner beat another does not raise the presumption

of law that they 'assembled' with that intent, or after being 'assembled' agreed mutually to assist one another in executing such a purpose; for if the law, from such conduct, deduced the inference, either as a conclusive or disputable presumption, that the intent existed which is a necessary ingredient to a riot, there would be no distinction between riots and affrays." *State v. Kempf*, 26 Mo. 429.

By 32 & 33 Vict. c. 99, s. 10, a penalty is imposed on "every person who occupies or keeps any place where exciseable liquors are sold, and knowingly lodges or harbors thieves or reputed thieves, or knowingly permits or suffers them to meet or assemble therein." One Marshall, who occupied a place where exciseable liquors were sold, allowed a meeting to be held there for the purpose of getting up a subscription in aid of the wife and children of a man charged with an offence, or for procuring means for his defence. At the meeting were several thieves, or reputed thieves, who were known by the appellant, Marshall, to be such; but no disorderly conduct occurred, and the meeting was not held pursuant to any unlawful design. *Held*, that such an "assemblage" is forbidden by the section; for, said Millor, J., "In this case, the occasion of the 'assembling' was that some man having got into trouble through a criminal offence, cards were sent out to his friends inviting them to meet, that funds might be procured for his defence; and consequently a number of persons 'assembled,' and were found in this house sitting round a table singing songs and drinking. Clearly therefore, they being reputed thieves, did 'assemble' there; in the terms of the section, 'they did meet and assemble in his house.' It appears that a number of the persons were thieves, and reputed thieves, and it is found as a fact that the landlord knew they were thieves or reputed thieves. Now, it is not every casual meeting of thieves, or reputed thieves, who might accidentally come together, which constitutes an offence for which the landlord is made liable—it would be hard upon him if it were so; but we think that the intention of the legislature was to prohibit the meeting of thieves together in a public-house, though they might have no improper object in meeting, and for this reason, viz., that when thieves get

**ASSEMBLY.**—The meeting of a number of persons in the same place.<sup>1</sup> Any political meeting required to be held by law.<sup>2</sup>

**ASSENT.** (See also **CONTRACT.**)—Approval; consent; acceptance. Assent may be either expressed or implied. This word is

together it affords opportunity and inducement to devise crimes and offences." *Marshall v. Fox*, L. R. 6 Q. B. 370.

Where a charter directed that out of certain persons to be nominated in a particular mode "the mayor, aldermen, bailiff, principal burgesses, and other burgesses and inhabitants of the borough for the time being (they being for that purpose congregated and assembled together) or the greater part of them as should be so congregated, might by the greater part of the voices of them, so assembled, choose one to be mayor;" congregated and "assembled" mean so "assembled" as the law requires, viz., by a majority of each definite body; and a majority of each definite body must be present in order to make a valid election. *King v. Bower*, 1 B. & C. 492, 500.

In order to be duly "assembled" the persons who are to make the election must have notice of the meeting. *King v. Ashwell*, 12 East, 22, 31.

The statutes forbidding the disturbance of congregations "assembled" for religious worship are applicable not only to disturbances which are made whilst the religious services are progressing, but to disturbances made whilst the congregation is "assembled" for religious worship, though it be at night, after the religious services are closed for the day, and the congregation has retired to rest. *Com. v. Jennings*, 3 Gratt. (Va.) 624. See *Kinney v. State*, 38 Ala. 224; *Williams v. State*, 3 Sneed (Tenn.), 313.

Under these cases it is not necessary that the assemblage should have been actually engaged in worship at the moment of the discourse or of the conduct complained of. The statute applies to assemblages when in the act of gathering together; until there has been a dispersion of the persons met for worship, and they cease to be an "assemblage" or congregation; but not to cases where the congregation, though disturbed, was "assembled" exclusively for business purposes, even though the proceedings were opened with religious exercises. *Wood v. State*, 11 Tex. App. 318.

A different rule obtains in Tennessee, where it has been held that the protection afforded religious bodies extended to their business meetings as duties connected with their interests as a church. *Hollingsworth v. State*, 5 Sneed (Tenn.), 518.

Where an act made it a criminal offence to interrupt and disturb any public, private, or select school while the same is in session, a complaint charging a wilful disturbance of "a school met and assembled for culture and improvement in sacred and church music" was held fatally defective in not alleging that the school was in session; and it was also held that a meeting of persons "assembled" for the purpose of singing together, for their common improvement in the art of singing, but without a teacher, is not a school within the statute. *State v. Gager*, 28 Conn. 232.

1. **Unlawful Assembly.**—In criminal law the assembling together of three or more persons together to do an unlawful act, who separate without actually doing it, or making any motion towards it. *Burrill's Law Dict.* (2d Edit.), *sub voce*.

It is distinguished from riot or rout, because in each of these there is some act done besides the simple meeting. If parties assemble together for a purpose which if executed would make them rioters, but having assembled they do nothing, and separate without carrying their purpose into effect, this is an "unlawful assembly." *Rex v. Birt*, 5 C. & P. 154.

Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighborhood, is an "unlawful assembly." *Regina v. Vincent et al.*, 9 C. & P. 91.

Any assembly of persons attended with circumstances calculated to excite alarm is an "unlawful assembly." *Regina v. Neale*, 9 C. & P. 431.

Defendant was indicted for a riot and assault, and the jury found him guilty of a riot, but not of the assault charged. *Held*, that a conviction for riot could not be sustained, the assault, the object of the riotous assembly, not having been executed; although the defendant might have been guilty of joining in an unlawful assembly. *Queen v. Kelly*, 6 U. C. C. P. 372.

**Popular Assembly.**—A mass meeting, where the people meet to deliberate on their rights guaranteed by the constitution. U. S. Const. Amend. Art. 1.

2. Such as the "General Assembly," which includes the Senate and House of Representatives.



chiefly used in contracts—which see.<sup>1</sup> Also used in England, where a devise in trust is made to an executor, of his willingness to take under the will as legatee in trust, and not as executor.<sup>2</sup> In many instances where a transaction is manifestly for any one's benefit or advantage, his assent thereto will be assumed.<sup>3</sup>

#### ASSESSMENTS.

Assessments for Streets, Improvements. See STREETS (ASSESSMENTS FOR).

Assessments upon Stock. See STOCK (ASSESSMENTS OF).

Assessments in Insurance. See INSURANCE.

Assessments of Taxes. See TAXATION.

**ASSETS.** (See also BANKRUPTCY; CORPORATION; PARTNERSHIP.) 1. **Definition** (from *assez*, enough).—Property, whether real or personal, available for the payment of debts of a person, estate, or corporation.<sup>4</sup>

2. **At Common Law.**—At the common law the property of a deceased person liable to his debts consisted of both personal and real assets, viz.: (1) all his personal property;<sup>5</sup> (2) his real estate descending to his heir, where the debt was a specialty and the heir especially named in the obligation,<sup>6</sup> otherwise the latter was not bound, until by later statutes, principally the 3 & 4 Wm. IV. c. 104, and similar ones in the different States, lands descending to the heir or devisee were made liable to simple contract debts also. The two kinds of assets were also known as "assets by descent," which originally meant the land descended to the heir of equal value to that as to which the ancestor had entered into a warranty, but afterwards became equivalent to "real assets;"<sup>7</sup> and "assets *inter manes* (in the hands)," i.e., "where a man indebted makes executors and leaves them sufficient to pay his debts and legacies; or where some commodity or profit ariseth to executors in right of the testator."<sup>8</sup>

1. Every contract consists of a request on one side and an assent on the other. *Jackson v. Galloway*, 5 Bingham New Cas. 71, 75.

2. See *Young v. Holmes*, 1 Strange, 70; *Doe v. Sturges*, 1 Taunton, 217; *Doe v. Tatchell*, 3 B. & Ad. 675.

3. As of a grantee. *Wilt v. Franklin*, 1 Binn. (Pa.) 502.

Or an assignee for the benefit of creditors. *Skipwith v. Cunningham*, 8 Leigh (Va.), 271. But see *Crosby v. Hillyer*, 24 Wend. (N. Y.) 280; *Welch v. Sackett*, 12 Wis. 243.

Assent, as used in the Mississippi constitution, art. 12, § 14, relative to elections, means agreeing to or consenting to, and this can be shown only by affirmative action—by actually voting. *Hawkins v. Carroll County*, 50 Miss. 735. See *State v. Brassfield*, 67 Mo. 331.

**Assents in Writing.**—By signing as

guarantor, the wife's promissory note, expressed on its face to be secured by a mortgage, a husband "assents in writing," within the Mass. Gen. Stat. ch. 106, § 3; *Cormerais v. Wesselhoeft*, 114 Mass. 550.

The royal "assent" in England is the approval by the sovereign of an act which has passed both houses of Parliament. 1 Bl. Com. 184.

The assent of the President of the United States is expressed in similar cases by the word "approved." *Burrill's Law Dict.*

"Assent" is an agreement to or approval of an act or thing done. "Consent" is agreement to a thing to be done or about to be done. *Burrill's Law Dict.*

4. Abb. Law Dict.

5. Wms. Exrs. 1530.

6. Wms. R. Prop. 75.

7. Co. Litt. 365, a; 374, b.

8. Jac. Law Dict.

**3. Legal and Equitable Assets.**—Legal assets are those which an executor takes *virtute officii*, and which in an action at law against him would be liable, even though it may be necessary for the executor himself to seek the aid of equity in recovering them.<sup>1</sup> These are administered according to the legal rules of priority of debts, *i.e.*, debts of record, and by specialty are preferred in the order of payment to simple contract debts.<sup>2</sup>

Equitable assets are such as are administered by a court of equity *pari passu* among the creditors, irrespective of legal priority, as where land is devised for or charged with payment of debts, or where the nature of the property is such that it cannot be reached by the creditor except through the aid of equity.<sup>3</sup>

**4. What are Assets.**—The following kinds of property have been held to be assets, *viz.*: the general personal estate, including chattels real, of a deceased person;<sup>4</sup> a debt owing by the executor or administrator;<sup>5</sup> debts generally, when they are recoverable with due diligence;<sup>6</sup> negotiable notes;<sup>7</sup> legacies and distributive shares;<sup>8</sup> money due on mortgage;<sup>9</sup> emblements;<sup>10</sup> rent accruing previous to the death of the intestate or testator;<sup>11</sup> choses in action founded on contract, debt, covenant, or other duty,<sup>12</sup> and on tort, under stat. 4 Edw. III. c. 7;<sup>13</sup> real estate generally, including reversions<sup>14</sup> and equitable interests.<sup>15</sup>

1. Cook v. Gregson, 3 Drew, 547; Att.-Gen. v. Brunning, 8 H. L. C. 256.

2. In the case of a person dying on or after January 1, 1870, the rule has been altered by 32 & 33 Vict. c. 46, enacting that all creditors, whether by specialty or simple contract, are to be paid *pari passu*. As to the law in the States, see *infra*.

3. Silk v. Prime, 1 Dick. 384; Lowe v. Peskett, 16 C. B. 500.

4. Luce v. Treasurer, Wright (Ohio), 654; Gray v. Swain, 2 Hawks (N. Car.) 15.

5. Hall v. Hall, 2 McCord (S. Car.), Ch. 269; Leland v. Felton, 1 Allen (Mass.), 531; Marvin v. Stone, 7 Cow. (N. Y.) 781; Wood v. Exrs. of Tallman, Coxe (N. J.), 153.

6. Kohler v. Knapp, 1 Bradf. (N. Y.) 241; Harrington v. Keteltas, 92 N. Y. 40; Bullock v. Rogers, 16 Vt. 294; Wilson v. Lineberger, 88 N. Car. 416; Tompkins v. Tompkins, 18 S. Car. 1; Anderson v. Piercy, 20 W. Va. 282; Sanderson v. Sanderson, 20 Fla. 292. See Ruggles v. Sherman, 14 Johns. (N. Y.) 446.

But a joint debt inures to the surviving creditor. Cote v. Dequindre, Walk. (Mich.) 64.

7. Slocum v. Sanford, 2 Conn. 533.

8. Storer v. Blake, 31 Me. 289; Hanenkamp v. Borgnier, 32 Mo. 569; Pease v. Walker, 20 Wis. 573.

9. Smith v. Dyer, 16 Mass. 18; Chase

v. Lockerman, 11 Gil. & J. (Md.) 185; Burton v. Hintrager, 18 Iowa, 348.

10. Wadsworth v. Allcott, 6 N. Y. 64; Waring v. Purcell, 1 Hill Ch. (S. Car.) 193; Laurin v. McColl, 3 Strobb. (S. Car.) 21; Singleton v. Singleton, 5 Dana (Ky.), 92.

11. Foltz v. Prouse, 17 Ill. 487; King v. Anderson, 20 Ind. 385; Sohler v. Eldredge, 103 Mass. 350; Smith v. Bland, 7 B. Mon. (Ky.) 21; Ball v. Covington Bank, 80 Ky. 501; Mills v. Merryman, 49 Me. 65; Fay v. Holloran, 35 Barb. (N. Y.) 295; Haslage v. Krugh, 25 Pa. St. 97.

But that accruing after his death goes to the heir or devisee. Burnell's Estate, 13 Phila. (Pa.) 387; Kidwell v. Kidwell, 84 Ind. 224.

12. Holbrook v. White, 13 Wend. (N. Y.) 591; Tobey v. Manufrs. Nat. Bank, 9 R. I. 239.

Unless the claim is barred by the statute of limitations. Patterson v. Wadsworth, 89 N. Car. 407.

13. Enbanks v. Dobbs, 4 Ark. 173; Mannell v. Briggs, 17 Vt. 176; Towle v. Lovet, 6 Mass. 394; Kennerly v. Wilson, 1 Md. 102; Coleman v. Woodworth, 28 Cal. 567; Elrod v. Alexander, 4 Heisk. (Tenn.) 342.

The amount recovered for the killing of an intestate is assets. Little Rock, etc., R. Co. v. Townsend, 41 Ark. 382.

14. Ram. on Assets, 152 *et seq.*

15. Atkison v. Henry, 80 Mo. 670.

**5. Order of Liability of Assets.**—The property of a decedent, in the absence of special directions in his will, is liable to his debts in the following order:

1. The general personal estate, not expressly or by implication exempted.

2. Land expressly devised for the payment of debts.

3. Estates descending to the heir.

4. Real or personal estate devised or bequeathed charged with debts, and disposed of subject to such charge.

5. General pecuniary legacies.

6. Specific legacies and real estate devised, whether specific or residuary; these contributing *pro rata*.

7. Real and personal property over which the testator has a power of appointment, which power he has exercised.<sup>1</sup>

**6. Order of Priority of Debts.**—The rule as to the legal priority of debts of record, and by specialty over those by simple contract, has been altered in England (see n. 7) and in most of the States. In the majority of them it is provided by statute that debts shall be paid in the following order: (1) funeral, medical, and administration expenses; (2) debts due the United States and other public debts; (3) all other debts *pari passu*.<sup>2</sup>

**7. Marrelling Assets.**—The marrelling of assets is such an arrangement of the different funds under administration as shall enable all parties having equities thereon to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of those funds, as where A and B are creditors and there are two funds available for A's claim and but one of them for B's, in which case either A will be compelled to have recourse to the fund not available to B, or if he has been paid from the other, B will be subrogated to A's claim against the former fund.<sup>3</sup>

**ASSIGNMENTS.** (See also ASSIGNMENTS FOR BENEFIT OF CREDITORS; BONDS; CHOSSES IN ACTION; DEEDS; FRAUDULENT CONVEYANCES; JUDGMENTS; MORTGAGES.)

1. Definition.

2. What is Assignable.

Future Earnings.

1. In General.

2. By Public Officers.

Expectancies and Future Inter-

Causes of Action.

Partial Assignment of a Claim.

3. What constitutes an Assignment.

4. Notice of Assignment.

5. Effect of Assignment.

**1. Definition.**—An assignment is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.<sup>4</sup> The term

1. 2 Jarm. Wills, 622.

2. Mass. Gen. Stat. c. 99, § 1; 2 R. S. (N. Y.) 87, § 27; Bason v. Hughart, 2 Tex. 476; Bank v. Gibbs, 3 McCord (S. Car.), 377; Fields v. Wheatley, 1 Sneed (Tenn.), 351; Pa. Act Feb. 24, 1838.

3. Story's Eq. Jur. § 558; Wats. Comp. Eq. 36.

4. Bouvier's Law Dict.

The common-law definition of an assignment is "the transferring and setting over to another of some right, title, or interest in things in which a third party, not a party to the assignment, has a concern and interest." 1 Bac. Abr. 329.

denotes not only the act of transfer, but also the instrument by which it is effected.<sup>1</sup>

2. **What is Assignable.**—At common law the transfer of a chose in action or right to a thing not in possession was forbidden, as violating the rules against maintenance and champerty, and because the vendor could not sell a thing he did not have. Such an assignment was considered as passing to another a mere right to recover in a suit at law, and as the ancient law abhorred litigation, it prevented the sale of possibilities or rights in action, and refused to recognize the title of the assignee when he sought to recover in a suit at law.<sup>2</sup>

But courts of equity have long since disregarded this rule, and assignments of choses in action, possibilities, expectancies, and things not *in esse*, will be protected and enforced in equity. The assignee is regarded as the true owner of the chose in action, and is entitled to use it for his own purposes.<sup>3</sup>

If the debtor assents to the transfer, the assignee may then maintain a direct action against him upon the implied promise to pay which results from the assent,<sup>4</sup> and if relief is necessary to

1. Burrill on Assignments.

2. "It is to be observed that by the ancient maxim of the common law a right of entry or a chose in action cannot be granted or transferred to a stranger, and thereby is avoided great oppression, injury and injustice." Co. Lit. 266, a.

So in *Lampet's Case*, 10 Rep. 48, Lord Coke says: "The great wisdom and policy of the sages and founders of our law have provided that no possibility, right, title, nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of tenants, and the subversion of the due and equal execution of justice."

3. In *Thalheimer v. Brinckerhoff*, 20 Johnson (N. Y.), 380, the chancellor said: "It was a principle of the common law that a right of action could not be transferred by him who had the right to another. When we seek the reason of this rule, we find it in the motive already mentioned, an apprehension that justice would fail and oppression would follow if rights of action might be assigned. . . . Feeble, partial, and corrupt must have been the administration of justice where such a reason could have force. In early times this rule concerning rights of action was rigorously enforced. As the entire right of action could not be assigned, so no part of it could be transferred, and no man could purchase another's right to a suit, either in whole or in part. Hence the doctrine of maintenance, which prohibits contracts for a part of the thing in

demand, was adopted as an auxiliary regulation, to enforce the general principle which prohibited the transfer of all rights of action. But the rule of the common law that rights of action cannot be assigned has in modern times been reversed; the apprehension that justice would be trodden down if property in action should be transferred is no longer entertained; and the ancient rule now serves only to give form to some legal proceedings. In the courts of equity this rule was never followed, and those courts have always considered and treated the rule as unjust, and have supported assignments of rights of action. Experience has fully shown, not only that no evil results from the assignments of rights of action, but that the public good is greatly promoted by the free commerce and circulation of property in action, as well as of property in possession." See also *Warmstrey v. Tanfield*, 1 Ch. Rep. 29; *Wright v. Wright*, 1 Ves. R. 411; *Mandeville v. Welch*, 5 Wheat. (U. S.) 283; *Bacon v. Bonham*, 33 N. J. Eq. 614; *Manufacturing Co. v. Marsh*, 91 Pa. St. 96; *Kountz v. Kirkpatrick*, 72 Pa. St. 376; *Trull v. Eastman*, 3 Metc. (Mass.) 121; *Bispham's Eq.* 214.

4. *Tieman v. Jackson*, 5 Peters (U. S.), 597; *Williams v. Everett*, 14 East, 582; *Baron v. Husband*, 4 B. & Ad. 611; *Skinner v. Somes*, 14 Mass. 107; *Crocker v. Whitney*, 10 Mass. 316; *Mowry v. Todd*, 12 Mass. 281; *Bucklin v. Ward*, 7 Vt. 195; *Currier v. Hodgdon*, 3 N. H. 82; *Barger v. Collins*, 7 H. & J. (Md.) 213; *Clark v. Thompson*, 2 R. I. 146.

protect or enforce his title, the assignee can have relief in a court of chancery.<sup>1</sup>

*Future Earnings.*—1. *In General.*—An assignment of wages to be earned under an existing employment, made in good faith and for a valuable consideration, is valid. Such an assignment is good not only for the security and payment of a present indebtedness, but for such advances as the assignor may find it necessary to obtain, and although the workman works by the piece and his wages per month vary.<sup>2</sup> And if there is a subsisting engagement an assignment of future earnings will be sustained, although the assignor is liable to removal at any time.<sup>3</sup>

Where, however, a person is not engaged in or under contract for any employment, the mere possibility of being employed and earning wages under that employment at a future time is not assignable.<sup>4</sup>

1. *Hammond v. Messenger*, 9 Sim. 327; *Ontario Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596; *Adair v. Winchester*, 7 G. & J. (Md.) 114; *Hagar v. Buck*, 44 Vt. 290.

2. *Hartley v. Tapley*, 2 Gray (Mass.), 565; *Boylan v. Leonard*, 2 Allen (Mass.), 407; *Weed v. Jewett*, 2 Metc. (Mass.) 608; *Brackett v. Blake*, 7 Metc. (Mass.) 335; *Emery v. Lawrence*, 8 Cush. (Mass.) 151; *Thayer v. Kelley*, 28 Vt. 19; *Field v. Mayor of New York*, 6 N. Y. 179; *Augur v. N. Y. Belting Co.*, 39 Conn. 536; *Garland v. Harrington*, 51 N. H. 409.

In *Taylor v. Lynch*, 5 Gray (Mass.), 49, an order drawn by a working-man in consideration of necessities, and accepted by his employer, was accordingly held to be valid against a subsequent attaching creditor, although he was working by the piece and might have withdrawn at any time.

In *Ruple v. Bindley*, 91 Pa. St. 296, Ruple was under contract to put up the stairs in a building in process of erection by Bindley, and not having the means to fulfil his contract, one Lewis agreed to advance the same, receiving as security an order from Ruple on Bindley for the amount advanced, to be paid out of his wages when the stairs were finished. Held, that the order was a valid, equitable assignment of the amount advanced.

And a written order to pay certain sums out of wages to be earned under a subsisting engagement, and accepted by the assignor's employer, applies to wages earned under a new engagement entered into by the workman immediately after the expiration of the first, with the same employer for lower wages. *Wallace v. Heywood Chair Co.*, 16 Gray (Mass.), 209.

In *Gardner v. Hoeg*, 18 Pick. (Mass.)

168, it was held that the share in the profits of the voyage which a seaman in a whaling-ship receives, according to custom, in lieu of wages, is assignable before the commencement of such voyage. The court said: "There is a sufficient subject to which the contract was to attach. The assignor had, by the shipping articles, an inchoate right to a distributive share of the oil upon the making up the account at the end of the voyage."

3. *Payne v. Mayor of Mobile*, 4 Ala. 333; *Greene v. Bartholomew*, 34 Ind. 235; *Billings v. O'Brien*, 14 Abb. Pr. (N. S.) (N. Y.) 246.

4. *Mulhall v. Quinn*, 1 Gray (Mass.), 105. In this case there was an assignment of all claims and demands which the assignor had or might have against the city of Boston for money due or to become due for services rendered to the city in laying sewers, and the assignment was accompanied by an irrevocable power of attorney authorizing the assignee to draw the money assigned. Notice of the assignment was given to the city and a trustee attachment issued. The assignor at the time of the attachment was not employed by the city, but had previously been employed and after the assignment was again employed. Held, that the earnings between the assignment and the attachment did not vest in the assignee. "The future earnings," said Shaw, C. J., "constitute a mere possibility coupled with no interest. There was no subsisting engagement under which wages were earned, and it is dependent altogether upon a future engagement whether anything would ever become due."

So, in a recent case in Northampton County, Pennsylvania, the court held that an assignment of unearned wages,

2. *By Public Officers.*—It is well settled in England that the salary of a public officer which is paid to him for the purpose of keeping up the dignity of his office and assuring a due discharge of its duties cannot be assigned by anticipation. Such assignments impair the efficiency of the public service, and are void as against public policy. Thus the pay of an officer in the army,<sup>1</sup> the salary of an assistant parliamentary counsel for the treasury,<sup>2</sup> and of a clerk of the peace<sup>3</sup> have been held not assignable.<sup>4</sup>

And the weight of authority in the United States is in accord with the rule which prevails in England.<sup>5</sup>

executed when the assignor was not in the employment of the party from whom payment of the wages is demanded, is void as against public policy. *Woodring v. Lehigh Valley R. Co.*, 2 Pa. Co. C. Rep. 465. *Schuyler, P. J.*, said: "We think all assignments such as the one in controversy here should be declared void as being against the principles of public policy. The present assignment is by a day-laborer in consideration of groceries and provisions furnished him and his family, and it covers all wages, past and future, due and to become due, to the assignor from any person, firm, or corporation whatever, so long as the assignee's claim remains unpaid. . . . Should the law be declared to be that such an assignment is valid, it is not difficult to see that it would open the door to improvidence and profusion on the part of the assignor, and in the end to utter and hopeless poverty." See also *Trumbower v. Ivey*, 2 Pa. Co. C. Rep. 470.

In *Jermyn v. Moffitt*, 75 Pa. St. 399, Leslie assigned to Moffitt "five dollars a month of my earnings in the employment of the Delaware & Hudson Canal Co., or with whomsoever I may be employed, until the amount due said Moffitt is paid." Notice of the assignment was given to the defendant, but at the date thereof the assignor was not in the defendant's employ. *Held*, that the assignment was insufficient to make a valid transfer of the debt against the employer without his acceptance.

A sale of fish hereafter to be caught in the sea does not pass title to the fish when caught. *Law v. Pew*, 108 Mass. 350.

1. *Stone v. Lidderdale*, 2 Anst. 233; *McCarthy v. Goad*, 1 Ball. & B. 389.

2. *Cooper v. Reilly*, 2 Sim. 560.

3. *Palmer v. Bate*, 6 Moore, 28.

4. In *Arbuthnot v. Norton*, 5 Moore P. C. C. 219, it was taken for granted that the salary of a judge given to him for the support of the dignity of his office would not be assignable.

In *Flarty v. Odiam*, 3 T. R. 681, the half-pay of an army officer, being in part in view of future service, was held not to be assignable, and Lord Kenyon said: "It might as well be contended that the salaries of the judges which are granted to support the dignity of the State and the administration of justice may be assigned."

And in *Arbuckle v. Cowhan*, 3 Bos. & Pul. 328, the general principle was laid down that such profits as a man receives in respect of the performance of a public duty are, from their very nature, exempt from attachment and incapable of assignment, and that he who has not been employed to do the duty should not receive the emolument and reward. See also *Lidderdale v. Montrose*, 4 T. R. 248; *Barwick v. Read*, 1 H. Bl. 627; *Hill v. Paul*, 8 Cl. & Fin. 307.

**Pensions.**—A pension for past services, however, has been held to be assignable. The pension of a retired officer of the Indian navy, or of a county-court judge, is liable to sequestration. *Dent v. Dent*, 1 L. R. P. & D. 366; *Willcock v. Terrell*, 3 Ex. D. 323.

Lord Eldon observed in *Davis v. Marlborough*, 1 Swanst. 79, "A pension for past services may be aliened; but a pension for supporting the grantee in the performance of future duties is inalienable."

5. *Emerson v. Hall*, 13 Peters (U. S.), 409.

In *Bliss v. Lawrence*, 58 N. Y. 442, it was held that although a public officer may have an assignable interest in his salary not yet due, he cannot make a valid assignment of it in advance, because public policy forbids such transactions. An assignment by a United States treasury official of a month's salary in advance at a discount of ten per cent was, on this ground, declared invalid.

And in *Billings v. O'Brien*, 14 Abb. Pr. N. S. (N. Y.) 246, an assignment of a similar character was declared invalid on the ground "that it tends to impair

*Expectancies and Future Interests.*—To support an assignment at law, the subject-matter thereof must have actual or potential existence at the time of the assignment.<sup>1</sup> But courts of equity will uphold assignments not only of choses in action, but of contingent interests and expectancies, and things having no present actual existence but resting in mere possibility, if fairly made and not against public policy; not as a transfer operative *in presenti*, for that can only be of a thing *in esse*, but as a present contract, to take effect and attach as soon as the thing comes *in esse*.<sup>2</sup> Such

the efficiency of the officer by diminishing his interest in the performance of his duties, and rendering him to a great extent the mere slave or servant of his creditor or assignee in working out a past-debtor obligation."

There are cases, however, in this country which assert a different doctrine. In *Brackett v. Blake*, 7 Metc. (Mass.) 335, an assignment of a quarter's salary before the expiration of the quarter, made by the city marshal, was declared to be a possibility coupled with an interest, and as such capable of being assigned. See also *Macomber v. Doane*, 2 Allen (Mass.), 541.

So in *The State Bank v. Hastings*, 15 Wis. 75, an order drawn by the judge of a circuit court on the State treasurer directing the "said bank on the first of October next to pay the amount of my quarterly salary commencing on that day," was held to vest the right irrevocably in the payee; and the court criticised the English cases invalidating such assignments as being against public policy, as not applicable to the condition of society or the principles of public policy in this country.

In *People v. Dayton*, 50 How. Pr. 143, a distinction is made between the unearned fees and the unearned salary of a public officer, and it is held that an assignment of the unearned fees of a justice or other public officer is valid.

A provision in copartnership articles that all salaries and earnings received by either partner from any office or employment shall be accounted for and paid into the funds of the firm as though received from debtors, is not forbidden by any principle of public policy. *Thurston v. Fairman*, 9 Hun (N. Y.), 585.

An assignment of his earnings by a public officer, appointed for a definite period of time, cannot extend beyond his existing term of office, and does not pass to the assignee any sums earned subsequently to his reappointment. *Twiss v. Cheever*, 2 Allen (Mass.), 40.

1. *Petch v. Tutin*, 15 Mees. & W. 110; *Moody v. Wright*, 13 Metc. (Mass.) 17;

*Hope v. Hayley*, 5 El. & B. 830, 845; *Skipper v. Stokes*, 42 Ala. 255.

2. *Hobson v. Trevor*, 2 P. Wms. 191; *Douglass v. Russell*, 4 Sim. 524; *Taylor v. Palmer*, 31 Cal. 240; *Wells v. Foster*, 8 Mees. & W. 149; *Pierce v. Robinson*, 13 Mees. & W. 123; *Jenkins v. Stetson*, 9 Allen (Mass.), 128; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Dunham v. The Railroad*, 1 Wall. (U. S.) 268; *Groot v. Story*, 41 Vermont, 533; *Manufacturing Co. v. Marsh*, 91 Penn. St. 96; *Lansden v. McCarthy*, 45 Mo. 106.

The expectancy of an heir to his ancestor's estate may be assigned, and will be enforced in equity after the death of the ancestor, if made *bona fide* for a valuable consideration. *Wethered v. Wethered*, 2 Sim. 183; *Stover v. Eyclesheimer*, 3 Keyes (N. Y.), 622; *Powers' Appeal*, 63 Penn. St. 443; *Curtis v. Curtis*, 40 Maine, 24; *Fitzgerald v. Vestal*, 4 Sneed (Tenn.), 258; *Trull v. Eastman*, 3 Metc. (Mass.) 121; *Wright v. Bircher*, 72 Mo. 179.

In *McDonald v. McDonald*, 5 Jones Eq. (N. Car.) 211, plaintiff sold to his nephew, the defendant, all claim in expectancy to the estate of his aunt that he might acquire as her heir-at-law or legatee, and executed a deed to him therefor. Held, that the assignment was operative and binding, and, as the expectancy had fallen into possession, would be enforced.

In *Powers' Appeal*, 63 Penn. St. 443, the sons received advancements from their father and executed receipts to him for the sums with releases in full of their shares of his estate. Held, on his death intestate, that they were estopped from claiming any part of his estate. *Read, J.*, said: "An heir or an expectant devisee or legatee may, in the lifetime of the intestate or testate, in equity, sell or assign his expectant or contingent interest, whatever it may turn out to be, upon the death of the person from whom it may come, which contract, if made upon a valuable consideration, a court of equity will enforce. If so, there can be no reason why a father should not make such a

assignments are enforced on the ground that the assignee is entitled to have immediate specific performance of the contract to assign, as soon as the property comes into existence in the hands of the assignor, who holds it then in trust for the assignee, whose title cannot be disturbed by an execution creditor of the assignor.<sup>1</sup> But

contract with a son, which should entirely bar all his claim as an heir to any part of his parent's estate." See also *Quarles v. Quarles*, 4 Mass. 680; *Kenney v. Tucker*, 8 Mass. 143.

So an antenuptial contract, by which a woman agrees to relinquish her distributive share of her intended husband's estate, will be enforced in equity, if entered into understandingly, for an adequate consideration, and without fraud or misrepresentation on his part. *Sullings v. Richmond*, 5 Allen (Mass.), 187; *Tarbell v. Tarbell*, 10 Allen (Mass.), 278.

In *Meriweather v. Herran*, 8 B. Monroe (Ky.), 162, a deed assigning every interest of the assignor in the estate of his father "due or to become due" to him as one of the heirs, was held to pass an interest of the assignor in a claim against the State of Virginia for his father's Revolutionary services, although not known to be in existence at the time of the assignment.

But in *Needles' Executor v. Needles*, 7 Ohio, 432; s. c., 70 Am. Dec. 85, a release by a married daughter, in which her husband joined, given to her father, of all her expectation or hope of inheritance of his estate, was not sustained, the court holding that the intestate laws cannot be set aside by such an agreement, and the parties thereto did not stand upon an equal footing.

1. *Bispham's Eq.* 215.

**Future Acquisitions.**—In *Holroyd v. Marshall*, 10 H. L. Cas. 209, Lord Chancellor Campbell held that where there had been an agreement, by which the machinery and implements thereafter to be brought into a mill should be subject to the trusts of a mortgage, and such machinery was afterwards brought in and had been taken in execution by creditors of the assignor before the assignees had done anything to perfect their title, the assignment was invalid as against the execution creditors. But on appeal the House of Lords reversed the decree.

The principle that mortgages of personal property to be acquired in the future are valid in equity, is well established in this country. Where the lease of a farm gave the lessor a lien upon "personal property which may be put on said premises," it was held that the equitable title attached immediately upon the acquisition

of the property. *McCaffrey v. Woodin*, 65 N. Y. 459.

So also an assignment of the future freight, earnings, and profit of a ship will be upheld in equity. *In re Ship Warre*, 8 Price, 269, n.

And mortgages by railroad companies of rolling-stock and other personal property (*Jones on Mortgages*, §§ 152, 153), and of future crops (*Butt v. Ellett*, 19 Wall. (U. S.) 544; *Apperson v. Moore*, 20 Ark. 56; *Everman v. Robb*, 52 Miss. 653), and of future stock of goods (*Brett v. Carter*, 2 Lowell's Dec. 458), are valid in equity.

**Money to become Due.**—So an assignment of money to become due upon performance of an existing contract is valid in equity. *Hassie v. The Congregation*, 35 Cal. 388; *Hall v. Buffalo*, 2 Abb. App. 307; *Devlin v. Mayor of N. Y.*, 63 N. Y. 15; *First Nat. Bk. v. Kimberlands*, 16 W. Va. 592; *Ruple v. Bindley*, 91 Penn. St. 299.

In *Field v. Mayor of N. Y.*, 6 N. Y. 179, the plaintiff held an assignment made by Bell to Garread of all bills that might become due to Bell for printing, paper, and stationery done for or furnished the city, to the amount of \$1500. The bills appeared to have accrued and the services to have been rendered after the date of the assignment, notice of which had been given to the city controller. Held, that the assignment was valid as an agreement, by force of which an equitable title to the benefit of the bills as they became due vested in Field as assignee of Garread. As to the objection that the assignment did not pass any interest, as there was no contract at the time between Bell and the city, the court say: "There was indeed no present, actual, potential existence of the thing to which the assignment or grant related, and therefore it could not and did not operate *eo instanti* to pass the claim which was expected thereafter to accrue to Bell against the corporation; but it did nevertheless create an equity, which would seize upon those claims as they should arise, and would continue so to operate until the object of the agreement was accomplished."

So also an assignment of the proceeds of future expected sales of goods is valid in equity. *Manufacturing Co. v. Marsh*,



an assignment of an expectancy to be enforced in equity must be founded upon a valuable consideration.<sup>1</sup>

**Causes of Action.**—The right of action for mere personal torts, such as assault and battery, false imprisonment, malicious prosecution, defamation, and deceit, which die with the party and do not survive to his personal representatives, cannot be assigned.<sup>2</sup>

91 Penn. St. 96. And an assignment of a patent not yet issued. *Goodyear v. Day*, 6 Duer (N. Y.), 161. And of costs not yet accrued in a pending suit. *Ely v. Cooke*, 9 Abb. Pr. (N. Y.) 377. And of a right to insurance money under a policy before a loss has happened. *Bibend v. Liverpool Ins. Co.*, 30 Cal. 86; *Bergson v. Builders' Ins. Co.*, 38 Cal. 541.

1. *Bayler v. The Commonwealth*, 40 Penn. St. 37; *Powers' App.*, 63 Penn. St. 443; *Wright v. Wright*, 1 Ves. 412; *Jones v. Roe*, 3 T. R. 63, 94.

**Personal Services.**—A contract for the performances of personal duties or services is unassignable, so as to vest in the assignee the right to compel its execution. *Hayes v. Willio*, 4 Daly (N. Y.), 259; *Davenport v. Gentry*, 9 B. Mon. (Ky.) 427.

Nor can one who has covenanted to do an act requiring skill and proficiency, put another in his place without the consent of the opposite party. *Flanders v. Lamphear*, 9 N. H. 201; *Bethlehem v. Annis*, 40 N. H. 34, 40; *Burger v. Rice*, 3 Ind. 125.

Nor can the right to the services of a laborer or servant be assigned. *Bethleman v. Annis*, 40 N. H. 34; *Davenport v. Gentry*, 9 B. Mon. (Ky.) 427.

In *Lansden v. McCarthy*, 45 Mo. 106, defendant entered into a written contract with the assignors of the plaintiff, by which he agreed to furnish meat to them at a certain hotel for the ensuing year at a certain price. The plaintiffs afterwards became the proprietors of said hotel and took an assignment of the meat contract, and notified defendant to continue his deliveries of meat to plaintiffs, which he refused to do. *Held*, that the contract was not assignable without the defendant's consent. So, a note or bond, payable wholly or partly in personal services, is not assignable. *Henry v. Hughes*, 1 J. J. Marsh. (Ky.) 454.

And a license to shoot, fish, or exercise any other right in the land of another, which is not in the nature of property, is a personal trust or confidence which cannot be delegated. *Cowles v. Kidder*, 24 N. Y. 564.

2. *Comegys v. Vasse*, 1 Peters (U. S.), 213; *Borst v. Baldwin*, 30 Barb. (N. Y.)

182; *Seizer v. Mali*, 32 Barb. (N. Y.) 79; *Pulver v. Harris*, 52 N. Y. 75.

In *Rice v. Stone*, 1 Allen (Mass.), 566, the question was whether a claim for injuries to the person was assignable after verdict and before final judgment thereon. *Held* that it was not. *Chapman, J.*, said: "In respect to all claims for personal injuries, the questions put by Lord Abinger in *Howard v. Crowther*, 8 M. & W. 603, are applicable: 'Has it ever been contended that the assignees of a bankrupt can recover for his wife's adultery, or for an assault? How can they represent his aggravated feelings?' And we may add the broader inquiry—Has any court of law or equity ever sanctioned a claim by an assignee to compensation for wounded feelings, injured reputation, or bodily pain suffered by an assignor?"

A right of action for debauching a step-daughter is not assignable. *The People v. Tioga Common Pleas*, 19 Wend. (N. Y.) 73.

In New York everything that can be transmitted to the personal representatives of a person is assignable. *Smith v. Smith*, 9 Abb. Pr. N. S. (N. Y.) 422; *Mackey v. Mackey*, 43 Barb. (N. Y.) 61; *Gould v. Gould*, 36 Barb. (N. Y.) 275.

Whether a cause of action is assignable or not, depends mainly on whether or not it would survive to the executor or administrator of the assignor, in case of his death. *Dinenny v. Fay*, 38 Barb. (N. Y.) 20; *Devlin v. Mayor*, 63 N. Y. 15.

The maxim that personal actions die with the person is now confined in New York to claims for naked deceits, and for injuries to the person, reputation, and feelings. *Wade v. Kalbfleisch*, 15 Abb. Pr. N. S. (N. Y.) 17; *Meech v. Stoner*, 19 N. Y. 29; *Cox v. R. Co.*, 11 Hun (N. Y.), 623.

In *Wade v. Kalbfleisch*, 15 Abb. Pr. N. S. (N. Y.) 17, an action was brought to recover damages for the breach of an alleged promise of marriage. After the case was put down for trial the defendant died. *Held*, that the cause of action did not survive. "The promise of marriage," said the court, "is merely personal; the action for the breach of it seeks redress for disappointed hopes, wounded pride, humiliation, for the loss of coveted society

So the assignment of a bare right to file a bill in equity for a fraud committed on the assignor will be held void, as being against public policy and savoring of maintenance.<sup>1</sup>

A right of action to recover damages for an injury to property, real or personal, may, however, be assigned.<sup>2</sup>

*Partial Assignment of a Claim.*—It was said in *Mandeville v. Welch*,<sup>3</sup> that an order drawn on a fund for only a part thereof

and protection; it may be for the loss of happiness." See also *Stebbins v. Palmer*, 18 Mass. 71; *Smith v. Sherman*, 58 Mass. 408; *Lattimore v. Simmons*, 13 S. & R. (Pa.) 184.

The principle favoring the liability or reparation is the same, whether the action be by or against the personal representatives. *Wade v. Kalbfleisch*, 15 Abb. Pr. N. S. (N. Y.) 17.

Neither a cause of action for breach of promise of marriage, nor for seduction, passes to an assignee in bankruptcy before judgment. *Ex parte Charles*, 14 East, 197; *Buss v. Gilbert*, 2 M. & S. 70.

A right of action for damages for deceit, in falsely recommending the credit of a person, is not assignable. *Zabriskie v. Smith*, 13 N. Y. 322; *Smith v. R. Co.*, 28 Barb. (N. Y.) 606; *Graves v. Spier*, 58 Barb. (N. Y.) 384; *Sheldon v. Wood*, 2 Bosw. (N. Y.) 277.

But in *Johnston v. Bennett*, 5 Abb. Pr. N. S. (N. Y.) 331, it was held that a cause of action for procuring a sale of goods by false representations is assignable, and *Zabriskie v. Smith*, 13 N. Y. 322 was criticised. The same case was also criticised in *Jackson v. Daggett*, 24 Hun (N. Y.), 205, as being in conflict with *Haight v. Hayt*, 19 N. Y. 464.

The court held in *Jackson v. Daggett*, 24 Hun (N. Y.), 205, that a cause of action against a sheriff for his failure to return an execution against property within the time required by law, and for making a false return, is assignable; citing *Paine v. Ulmer*, 7 Mass. 317, where an action against a sheriff for the default of his deputy in not returning an execution was held to survive to the administrator of the judgment creditor.

An action for the malicious abuse of legal process, being a personal tort, is not the subject of assignment under an insolvent law. *Sommer v. Wilt*, 4 S. & R. (Pa.) 19, 28.

In *Iowa* a claim based upon a personal tort which dies with the party may be assigned. *Gray v. McCallister*, 50 Ia. 497. And a judgment not in being may be assigned pending the litigation. *Weire v. City of Davenport*, 11 Ia. 49. The liability assigned in this case was for a

tort, but the court said, "Such a liability may be sold or transferred *bona fide*, so as to give the holder a priority over an attaching creditor of the transferrer. It may be sold just as a horse or any other property may be, and the title pass just as completely." See also *Vimont v. Railway Co.*, 64 Ia. 520. The Iowa code provides that "all causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to the same."

1. *Milwaukee & Minnesota R. v. Milwaukee & Minn. R.*, 20 Wis. 183; *Gardner v. Adams*, 12 Wend. (N. Y.) 297; *Marshall v. Means*, 12 Georgia, 61; *Dayton v. Fargo*, 45 Mich. 153; *De Hoghton v. Money*, L. R. 2 Ch. 169.

Lord Chief Baron Lyndhurst remarked in *Prosser v. Edmunds*, 1 Younge & Coll. Exch. R. 481, that courts of equity had relaxed the ancient rule as to assignments of choses in action, "but only in the cases where something more than a mere right to litigate has been assigned." The lien of a vendor for purchase-money has been held not to be assignable. *Richards v. Leaming*, 27 Ill. 431.

2. *Gillet v. Fairchild*, 4 Denio (N. Y.), 80; *Byxhie v. Wood*, 24 N. Y. 612; *Hudson v. Plitt*, 11 Paige (N. Y.), 180; *McBride v. Farmers' Bank*, 26 N. Y. 456; *Butler v. The Railroad*, 22 Barb. (N. Y.) 110; *North v. Turner*, 9 Serg. & R. (Pa.) 244; *Lazard v. Wheeler*, 22 Cal. 142.

A right of action for the conversion of personal property is assignable. *McKee v. Judd*, 12 N. Y. 622; *Graves v. Spier*, 58 Barb. (N. Y.) 386; *Sheldon v. Wood*, 2 Bosw. (N. Y.) 277; *Jordan v. Gillen*, 44 N. H. 424.

All demands arising from injuries to property are assignable in New York. *Foy v. The Railroad*, 24 Barb. (N. Y.) 383; *Smith v. The Railroad*, 28 Barb. (N. Y.) 606.

Where property is lost or injured through the negligence of an agent, bailee, or common carrier the transfer of such a cause of action will confer an equitable right on the assignee. *Grant v. Ludlow*, 8 Ohio (N. S.), 37; *Smith v. The Railroad*, 28 Barb. (N. Y.) 605.

3. 5 Wheat. (U. S.) 286.

does not constitute an assignment of that part, on the ground that a creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor. Although this rule has been approved in several cases,<sup>1</sup> as a doctrine of equity its soundness may well be questioned, and the weight of authority seems to be that the assignment of a part only of an entire demand will be upheld in equity.<sup>2</sup>

### 3. What Constitutes an Assignment.—In order to constitute a valid

1. *Tierman v. Jackson*, 5 Peters (U.S.), 580; *Palmer v. Merrill*, 6 Cush. (Mass.) 282; *Tripp v. Brownell*, 12 Cush. (Mass.) 376; *Beardslee v. Morgener*, 73 Mo. 22; *Nat. Bk. v. Noonan*, 88 Mo. 372; *McWilliams v. Webb*, 32 Iowa, 577; *Fairgrievs v. Navigation Co.*, 2 Phila. Rep. 182. See also *Jermyn v. Moffitt*, 75 Penn. St. 399; *Chicago R. Co. v. Nichols*, 57 Ill. 467.

In *Gibson v. Cooke*, 20 Pick. (Mass.) 15, it was held that a draft for a part only of the debt due from the drawee to the drawer does not, against the consent of the drawee, amount to an assignment, for the debtor is not to be subjected to distinct demands on the part of several persons when his contract was one and entire.

2. *Fitzgerald v. Stewart*, 2 Sim. 333; *Lett v. Morris*, 4 Sim. 607; *Stanberry v. Smythe*, 13 Ohio St. (N.S.) 495; *Lapping v. Duffy*, 47 Ind. 51; *Whitney v. Cowan*, 55 Miss. 626; *Claffin v. Kimball*, 52 Vt. 7; *Public Schools v. Heath*, 15 N. J. Eq. 22; *Caldwell v. Hartupce*, 70 Penn. St. 74, 79; *Phoenix Iron Co. v. Phila.*, 2 Weekly Notes Cases (Phila.) N. 596; *Canty v. Lattner*, 31 Minn. 239.

In *Risley v. Phoenix Bank*, 83 N. Y. 318, the court say: "The claim that there can be no valid assignment of a part of an entire debt or obligation is opposed to the well-settled rule in this State."

In *Daniels v. Meinhard*, 53 Georgia, 359, it was held that a holder of a fire-insurance policy, after a loss, might assign in writing an interest in the same to a creditor to the extent of the creditor's debt.

In *Exchange Bank v. McLoon*, 73 Maine, 498, the cases are reviewed in an exhaustive opinion, and it is there held that a partial assignment of an entire demand is valid in equity against the consent of the debtor.

Peters, J., says: "In a court of equity, however, the objections to a partial assignment of a demand which are formidable in a court of law disappear. In equity the interests of all parties can be determined in a single suit. The debtor

can bring the entire fund into court and run no risks as to its proper distribution. If he be in no fault, no costs need be imposed upon him, or they may be awarded in his favor. The debtor is not the only party whose interests should be considered. There is as much natural equity, in many cases, in protecting an assignment of a part of a claim as an assignment of the whole of it. Equitable assignments are the outgrowth of the requirements and refinements of the present business era. In many ways, directly and indirectly, do circumstances create assignments of parts of funds, in dealings through servants, tenants, consignees, bankers, and other agencies. Disastrous results will often be experienced by deserting and innocent persons if this boon be not granted by courts of equity."

In *Oakes v. Oram*, 43 Leg. Int. (Pa.) 520, it was held by the lower court that an order issued by A. upon B. to pay to C. a sum "out of moneys which may become due me for coal sold and delivered" in a month subsequent to the date of the order, unaccepted by B., but left in his possession, is an equitable assignment of so much of the fund in B's hands as is specified in the order. And upon appeal, the supreme court being equally divided in opinion as to the correctness of this decision, the decision below was affirmed.

In Pennsylvania a partial assignment of a claim upon a municipal corporation is held not binding upon the corporation, and to amount merely to an agreement to pay out of a particular fund. *Geist's App.* 104 Penn. St. 351; *Appeals of the City of Phila.*, 86 Penn. St. 179; *Buckley v. Eckel*, 3 Penn. St. 368; *City of Erie, v. Knapp*, 29 Penn. St. 173.

These decisions rest upon the ground that the policy of the law is against permitting individuals by their private contracts to embarrass the financial officers of a municipality, and subject them to the responsibilities and costs of adjudicating contracts to which the municipality is not a party. But see *Field v. Mayor of N. Y.*, 6 N. Y. 179; *Parker v. City of Syracuse*, 31 N. Y. 376.

assignment of a debt or other chose in action in equity, no particular form of words is necessary. Any words are sufficient which show an intention of transferring or appropriating the chose in action to the assignee for valuable consideration.<sup>1</sup> Nor is any written instrument required. Any order, writing, or act which makes an appropriation of a fund amounts to an equitable assignment of the fund.

An oral or written declaration may consequently be as effectual as the most formal instrument, and pass the right to an obligation under seal or of record.<sup>2</sup>

So an order payable out of a particular fund operates as an equitable assignment of the fund, not only as between the drawer

1. *Thompson v. Spies*, 13 Sim. 469; *Burn v. Carvalho*, 4 My. & Cr. 690; *Cook v. Black*, 1 Hare, 390; *Chowne v. Baylis*, 31 Beav. 351.

In *Row v. Dawson*, 1 Vesey, 331, Lord Hardwicke observed that "no particular words are necessary."

Whenever it appears that it was the intention and understanding of the parties to an agreement that the transaction shall be an assignment, it will have that effect, and the interest of the assignee will be protected. *Pass v. McCrea*, 36 Miss. 143; *Kimball v. Donald*, 20 Mo. 577.

The intention need not be expressed in terms, and may be implied from any act or instrument which admits of such interpretation, and is not inconsistent with any other. *Garnsey v. Gardner*, 49 Maine, 167.

An order for the amount due or the delivery of the instrument by which the debt is secured is an equitable assignment, if so intended. *Laimon v. Smith*, 7 Gray (Mass.), 150; *McEwen v. Johnson*, 7 Cal. 258; *Jones v. Witter*, 13 Mass. 304; *Grover v. Grover*, 24 Pick. (Mass.) 261.

Nor is it necessary that the party receiving the order should, in some way, enter into a contract to hold the funds for the assignee. *Burn v. Carvalho*, 4 My. & Cr. 690.

The intention, however, to create a charge must be shown. Thus a mere letter of instruction to a banker, not written with any intent to create a charge on a fund in his hands, will not amount to an equitable assignment. *Hopkinson v. Foster*, 19 L. R. Eq. 74.

2. *Clemson v. Davidson*, 5 Binn. (Pa.) 392, 398; *Wiggins v. McDonald*, 18 Cal. 126; *McWilliams v. Webb*, 32 Iowa, 577; *Garnsey v. Gardner*, 49 Maine, 167; *Spiker v. Nydegger*, 30 Md. 315; *Jordan v. Gillen*, 44 N. H. 424; *Noyes v. Brown*, 33 Vt. 431; *Shannon v. Hoboken*, 37 N.

J. Eq. 123; *Thompson v. Emery*, 7 Foster (Mass.), 269.

In *Dunn v. Snell*, 15 Mass. 481, a parol assignment of a judgment for a valuable consideration was sustained. See also *Ford v. Stuart*, 19 Johns. Rep. (N.Y.) 342.

In *Kessel v. Albetis*, 56 Barb. (N.Y.) 362, a parol assignment of a claim for the price of goods sold and delivered was held to be valid.

An agreement between attorney and client that the former should have \$100 for his services "out of the verdict," in an action for unliquidated damages, operates as an equitable assignment to that extent of the sum recovered, and is good against an attaching creditor of the client. *Patten v. Wilson*, 34 Penn. St. 299.

So in England a valid equitable assignment, if it be clearly proved, may be made verbally. See *Gurnell v. Gardner*, 9 Jurist (N. S.), 1220; *Riccard v. Prichard*, 1 K. & J. 277, 279; *Field v. Megaw*, 4 L. R. (C. P.) 660.

In *Gurnell v. Gardner*, 9 Jurist (N. S.) 1220, J. G., being indebted to the plaintiff, and having purchased some wool of B., in consideration of the debt due to the plaintiff, and to secure payment thereof and with the intention of assigning the wool over to plaintiff, in an interview with the plaintiff said, "There is the wool which has gone to Doncaster; go and sell that wool; pay B. the balance due to him on such wool, and keep the remainder yourself." J. G., died a few hours afterwards, and his administrators claimed the proceeds of the wool which had been sold by the plaintiff. But the court held that the plaintiff had established an equitable lien and his right to retain the proceeds. *Stuart, V. C.*, said: "It seems to me to be impossible to resist the plaintiff's claim on the ground that there was no valid equitable assignment in writing. I find no law which says a valid equitable lien cannot be created by parol."

and payee, but as regards the drawee, though not accepted by him.<sup>1</sup> But an unaccepted bill or draft payable generally, and not drawn upon a particular fund, is not a valid assignment of the fund, and creates no liability upon the drawee and no lien in favor of the payee.<sup>2</sup> Where, however, a bill or draft is drawn upon a par-

1. *East Lewisburg L. & M. Co. v. Marsh*, 91 Penn. St. 96; *Clark v. Mauran*, 3 Paige Ch. R. (N. Y.) 373; *McLellan v. Walker*, 26 Maine, 114; *Newby v. Hill*, 2 Met. (Ky.) 530; *Ex parte Butt*, L. R. 4 Ch. D. 419; *Hunt v. Mortimer*, 10 B. & C. 44; *Richardson v. Rust*, 9 Paige (N. Y.), 243; *Caldwell v. Hartupee*, 70 Penn. St. 74; *Conway v. Cutting*, 51 N. H. 407; *McWilliams v. Webb*, 32 Iowa, 517; *Walker v. Mauro*, 18 Missouri, 564; *Spain v. Hamilton*, 1 Wallace (U.S.), 604; *Blin v. Pierce*, 20 Vermont, 25.

**Draft upon a Particular Fund.**—In *Nesmith v. Drum*, 8 W. & S. (Penn.) 9, it was held that a draft upon a particular fund in the hands of an attorney for collection is an equitable assignment of it, and although not accepted by the attorney, yet it is not afterwards subject to be attached for the debt of the drawer.

So an order for part of the proceeds of a note, though not accepted by the trustee for collecting the note, operates as an equitable assignment. *Caldwell v. Hartupee*, 70 Penn. St. 74.

In *Cutts v. Perkins*, 12 Mass. 206, a draft was made by Abbott, the owner and master of a ship, payable out of certain freight money due him from the defendant. Afterwards the administrator of the drawer brought an action for the freight. *Held*, that the draft was an assignment of Abbott's claim for the freight. See also *Chase v. Petroleum Bank*, 66 Penn. St. 169; *Phoenix Iron Co. v. Philadelphia*, 2 Weekly Notes Cases (Phila.) 596; *Cabada v. DeJongh*, 1 Weekly Notes Cases (Phila.), 342.

In *Burn v. Carvalho*, 4 Myl. & Cr. 690, the plaintiffs were merchants in London. Fortunato, a merchant in Liverpool, being under pecuniary obligations to them, and having property in the hands of his agent Rigo in a foreign port, promised and agreed with the plaintiffs to apply such property to the discharge of his liability to the plaintiffs, and sent directions to Rigo for that purpose, but became bankrupt before they reached him. The Lord Chancellor held that the plaintiffs had a good title in equity to the goods, laying down the rule to be that "in equity an order given by a debtor to his creditor upon a third person having funds of the debtor to pay the creditor out of such funds is a binding equi-

table assignment of so much of the funds."

In *Ex parte South*, 3 Swanst. 392, Lord Eldon says, "If a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him."

2. *Harris v. Clark*, 3 Comstock (N. Y.), 93; *Cowperthwaite v. Sheffield*, 3 Comstock (N. Y.), 243; *Mandeville v. Welch*, 5 Wheat. (U. S.) 283; *Sands v. Matthews*, 27 Alabama, 399; *Hoyt v. Story*, 3 Barb. (N. Y.) 262; *Ford v. Angelrodt*, 37 Mo. 57.

In *Kimball v. Donald*, 20 Missouri, 577, the drawee promised to apply any balance in his hands belonging to the drawer in payment of the bill, and subsequently refused to accept it. *Held*, that it could not take effect as an equitable assignment. The court said: "No one supposes that it was the intention of the parties, at the time this bill was drawn, that, if it could not take effect as a bill, on account of the refusal of the drawee to accept, that then it should operate as an equitable assignment of whatever funds the drawee might have in his hands belonging to the drawer. That event was already provided for by the drawer's undertaking to pay himself upon such refusal."

In *Hopkins v. Beebe*, 26 Penn. St. 86, Black, J., said: "The proposition that a bill of exchange does, *propria vigore*, vest in the payee a title to the effects sent to meet it, or give the payee a lien upon such effects, so that he can demand them or their proceeds from a person to whom the drawee has transferred or passed them away is altogether unsupported by any authority or custom that we know of. Such a rule would certainly not promote the convenience or the safety of commercial business. The contrary doctrine, that 'the bill has no such operation, but that the holder must look to the parties whose names are on it, and not to any particular fund, has cases in its favor quite numerous enough to sustain a principle so simple and just—more indeed than could have been expected on a point so little likely to be raised.'"

In *Harris v. Clark*, 3 Comstock (N. Y.), 93, the court say: "The principle appears to be firmly established that a bill of exchange does not of itself give to the holder

ticular fund specified, it is a good equitable assignment after notice, even without acceptance. Upon notice the drawee is bound to keep the fund as a special deposit to meet the draft.<sup>1</sup> And the better opinion is that an unaccepted check does not operate as an equitable assignment of a deposit standing to the drawer's credit, nor does it confer any lien.<sup>2</sup> A mere promise or agreement to

either at law or in equity a lien upon the funds of the creditor in the hands of the debtor, until after acceptance by the latter." See also *Cowperthwaite v. Sheffield*, 3 Comst. (N. Y.) 243; *Winter v. Dray*, 5 N. Y. 530; *Greenfield's Estate*, 24 Penn. St. 232.

1. *Munger v. Shannon*, 61 N. Y. 251; *Hall v. City of Buffalo*, 1 Keyes (N. Y.), 193.

In *Shuttleworth v. Bruce*, 7 Robt. (N. Y.) 162, there was an order or draft upon factors to pay "all moneys," the entire proceeds of a single consignment of goods, pointed out and designated as the goods shipped to Havana and consigned to a person named. *Held*, that this was not only a draft upon a particular fund but also a clear appropriation of the fund, itself for the payment of the draft. "The result of all the cases is," said the court, "that an order or draft drawn upon a particular or specified fund, or which in terms, or by necessary implication, appropriates a particular fund to its payment, operates as an equitable assignment of such fund, after notice. In such case an acceptance is not necessary, and the drawee, upon notice of the draft, is bound to keep the fund, as a special deposit to meet the draft."

In *Lowery v. Steward*, 25 N. Y. 239, a draft was drawn by the consignor upon the consignee of cotton, to pay the plaintiffs five hundred dollars "on account of twenty-four bales cotton shipped to you as per bill of lading, by steamer Colorado, inclosed to you in letter." The bill of lading was accompanied by a letter advising the consignees of the draft. *Held*, that this was a clear and specific appropriation of five hundred dollars of the proceeds of the cotton, when sold, to the use of the payees of the draft, payable on presentation of the draft.

In *Parker v. City of Syracuse*, 31 N. Y. 376, a street contractor drew upon the comptroller of the city a draft to pay \$1420 "on plank-road and sidewalk accounts," which on the same day was left by the payee with the comptroller. Such order was held to be a valid equitable assignment of the demand which the drawer had against the city, and the delivery of the order to the comptroller

was held to be sufficient notice of the assignment to charge the city.

In *Vreeland v. Blunt*, 6 Barb. (N. Y.) 182, the order was, "Please pay N. W. S. or order \$7000 out of the money you received from F. G. for me," and it was accepted by the drawee when in funds. *Held*, that it was an equitable appropriation.

2. *Rosenthal v. The Mastin Bank*, 17 Blatchf. (C. C.) 318; *Bank of Republic v. Millard*, 10 Wallace (U. S.) 152; *Chapman v. White*, 6 N. Y. 412; *Butterworth v. Peck*, 5 Bosw. (N. Y.) 343; *Lunt v. The Bank of North America*, 49 Barb. (N. Y.) 221; *Parker v. Baxter*, 19 Hun (N. Y.), 415; *Duncan v. Berlin*, 60 N. Y. 153; *Bullard v. Randall*, 1 Gray (Mass.), 605; *Atty.-Gen. v. Life Ins. Co.*, 71 N. Y. 325; *Dykens v. Leather Man. Bank*, 11 Paige, (N. Y.) 612; *Tyler v. Gould*, 48 N. Y. 682; *Ætna Nat. Bk. v. Fourth Nat. Bk.*, 46 N. Y. 82; *Hopkinson v. Forster*, 19 L. R. Eq. 74.

In *Chapman v. White*, 6 N. Y. 412, the Bank of Geneva, having a large deposit in the Canal Bank, on which the latter paid interest, sold to the plaintiffs on July 7th a draft for \$500 on the Canal Bank, payable on demand to the order of its cashier, which was mailed to him with instructions that it was sent to pay plaintiff's note of \$500 payable at that bank on July 12th. The draft was received by the cashier on the 8th and was neither indorsed by him nor accepted by the bank. On the 10th the bank failed, and on the 12th the plaintiff's note was presented and payment refused. *Held*, that the plaintiff had acquired no right to be paid the amount of his draft from the assets of the bank in preference to its general creditors. "Money deposited generally with a banker," said the court, "becomes the property of the depositary. The right of the depositor is a chose in action. It is immaterial whether the implied engagement upon the part of the banker is to pay the sum in gross, or in parcels, as it shall be required by the depositor. In either case the draft or check of the latter would not of itself transfer the debt, or give a lien upon it, to a third person without the assent of the depositary."

pay out of a particular fund would seem not to constitute an assignment, for the assignor must not retain any control over the fund or power to collect it; if he does, it is fatal to the claim of the assignee.<sup>1</sup>

Where an insurance company gave its check upon a trust company in payment of a loss, but before being presented for payment a receiver of the company was appointed, who withdrew the funds deposited, and when the check was presented for payment it was refused for want of funds; *held*, that the check, not having been drawn on a particular fund, did not operate as an equitable assignment *pro tanto* of the deposit. *Church, C. J.*, said: "Banks are debtors to their customers for the amount of deposits. A check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer, or to the order of the payee. Until presented and accepted, it is inchoate; it vests no title or interest, legal or equitable, in the payee to the fund. Before acceptance, the drawer may withdraw his deposit; the bank owes no duty to the holder of a check until it is presented for payment. Knowledge that checks have been drawn does not render it obligatory upon the bank to retain the deposit to meet them. These rules are indispensable to the safe transaction of commercial business." *Atty.-Gen. v. Continental Life Ins. Co.*, 71 N. Y. 325.

So in *Lunt v. Bank of North America*, 49 Barb. (N. Y.) 221, the rule was stated to be that checks drawn in the ordinary form, not describing any particular fund, or using any words of transfer of the whole or any part of the account standing to the credit of the drawer, are of the same legal effect as inland bills of exchange, and will not operate as an equitable assignment.

Where the balance due a depositor in a bank was levied on by virtue of an attachment against the depositor, *held*, that the bank was not authorized to deduct any outstanding check given by the depositor to a third person which had not, prior to the levy, been presented and accepted. *Duncan v. Berlin*, 15 Sickels (N. Y.), 151.

In *Dykens v. The Leather Manufacturer's Bank*, 11 Paige (N. Y.), 613, a depositor had given checks to different persons for a much larger amount than his funds in the bank, and finding he could not make them all good during banking hours, directed the paying teller not to pay any of his checks until further orders from him, and finally drew out his funds

in the bank to make a ratable distribution thereof among the holders of all the checks. *Held*, that the holder of one of the checks who had demanded payment thereof from the bank after the direction not to pay it and before the fund was drawn out, was not entitled to claim the amount thereof against the bank.

Some cases, however, hold that as a check on a bank is ordinarily drawn against an actual deposit, and will not be paid unless the amount is standing to the credit of the drawer on the books, it is virtually an order on a particular fund, and confers a specific interest on the drawee. See *Bromley v. Brunton*, 6 L. R. Eq. 275; *Munn v. Burch*, 25 Ill. 35; *The Chicago M. Ins. Co. v. Stanford*, 28 Ill. 168; *Fogarties v. The State Bank*, 12 Richardson (S. Car.), 518; *Morrison v. Bailey*, 5 Ohio St. 13; *Hoyt v. Seely*, 18 Conn. 353; *Robinson v. Hawksford*, 9 A. & E. (N. S.) 52.

In *Bromley v. Brunton*, 6 L. R. Eq. 275, a check was given by A to B, and presented without delay. The bankers had sufficient assets of A, but refused payment because they doubted the signature. The next day A died, the check not having been paid. *Held*, that the check was an appropriation of so much of the donor's money and must be paid out of the funds in the hands of the executors.

In *Kingman v. Perkins*, 105 Mass. 111, a depositor in a savings bank gave to a creditor the following check or order: "October 1, 1868. The Holyoke Savings Bank will please pay B. F. Perkins, or his order, the amount due me in book No. 312." Afterwards the depositor's funds there were attached, and the bank subsequently accepted the order "except the amount trusted." *Held*, that the order was an assignment, which took effect when delivered, of all the depositor's funds then held by the bank, and prevailed against the trustee process.

1. *Ex parte Tremont Nail Company*, 16 N. B. R. 448; *Rogers v. Hosack*, 18 Wend. (N. Y.) 319; *Hoyt v. Story*, 3 Barb. (N. Y.) 262; *Christmas v. Russell*, 14 Wall. (U. S.) 69; *Christmas v. Griswold*, 8 Ohio St. 558; *Ford v. Garner*, 15 Ind. 298; *Pearce v. Roberts*, 27 Mo. 179.

In *Ex parte Tremont Nail Company*, 16 N. B. R. 448, a loan was made and a note for thirty days given therefor, upon an agreement to repay the lenders out of the

A mere mandate from a principal to his agent to collect money and hand it over to a third party will not amount to an assignment, and may be revoked at any time before it is executed.<sup>1</sup> An order to operate as a valid assignment must purport to pass a present interest in the *chose* to the alleged transferee. If it merely makes the party to whom it is given an agent to transfer

first money received from a certain person named, for whom the borrowers were filling a large order. *Held*, that being a mere promise to pay out of a particular fund, when received, the promiser retaining control over the fund and no notice being given to the person who is to pay, it created no lien or charge upon such fund.

Where there was a covenant to pay certain debts out of a designated fund, when the same should be received by the debtor, *held*, that it did not give the creditors a specific lien on the fund, but was a mere personal covenant. The court said: "Here is no assignment, no mortgage or pledge, no order, or any other specific appropriation of the French funds, but a mere covenant to pay them over on their being obtained by the covenantor." *Rogers v. Hosack*, 18 Wend. (N. Y.) 319.

It was said by Mr. Justice Swayne, in *Christmas v. Russell*, 14 Wall. (U. S.) 70: "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. . . . The assignor must not retain any control over the fund, any authority to collect it, or any power of revocation. If he does, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund-holder can safely pay, and is compelled to do so though forbidden by the assignor."

In *Bradley's Case*, *Ridgway*, 194, there was a promise to pay a debt out of a sum due by a third person, and Lord Hardwicke refused a prayer for an injunction to stay the money in the debtor's hands, saying that "he would not lay such embargoes upon persons to prevent their paying their debts."

But in *Rodick v. Gandell*, 1 De G., M. & G. 763, there is a dictum by Lord Truro to the effect that "an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor," will create a valid equitable charge upon such fund, and this was followed in *Riccard v. Prichard*, 1 K. & J. 277, where it was held that an agreement that a certain judgment debt, and interest thereon, should be paid to the plaintiff out of any

moneys which might be recovered by the defendant in respect of certain claims which he had against third parties, created a valid equitable charge upon these moneys when recovered.

Vice-Chancellor Wood said: "I apprehend that if A tells B that he expects that £10,000 are coming to him by a given day, and agrees out of that to pay B £5,000, that is a good agreement to constitute a charge upon the fund. That is substantially the agreement in this case. In *Rodick v. Gandell*, Lord Truro collects the result of numerous authorities, summing them up by saying that two things were established: 'The extent of the principle to be deduced,' he says, 'is that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers.' This case is brought exactly within the former of those rules."

The weight of authority in this country, however, appears to be decidedly the other way.

1. Where a railway contractor, being indebted to his bankers, wrote to the solicitors of the company authorizing them to receive the money due to him from the company and pay it over to his bankers, and the solicitors then wrote to the bankers promising to pay them the money upon receiving it, *held*, that this did not operate as an equitable assignment. *Rodick v. Gandell*, 1 De G., M. & G. 763. See also *Morrell v. Wooten*, 16 Beav. 197.

Bankruptcy or any disposition of the property inconsistent with the execution of the order will revoke it. *Ex parte Hall*, 10 Ch. D. 615; *Scott v. Porcher*, 3 Mer. 652, 664.

A promise to pay money when the debtor receives a debt due to him from a third person, does not constitute an equitable assignment so as to charge the



the *chose* on behalf of the principal, until the transfer is actually made it confers no title.<sup>1</sup>

**4. Notice of Assignment.**—To complete the assignment of a demand or chose in action as against the debtor or custodian of the fund he must be informed that the obligation has been transferred; until informed of the assignment, he is entitled to regard the assignor as the owner, and may accept a release from him or purchase a debt which he owes and use it as a set-off.<sup>2</sup> But when notified of the transfer, the debtor can thenceforth do no act to prejudice the title of the assignee.<sup>3</sup>

If the assignee does not perfect his title by giving notice, a subsequent *bona-fide* purchaser for value from the assignor of the same obligation, giving notice of his assignment, will thereby acquire priority. Between different assignees, the one who first gives notice to the debtor will, as a general rule, have the prior right.<sup>4</sup>

debt in the hands of such third person. *Field v. Megaw*, 4 L. R. (C. P.) 660; *Malcolm v. Scott*, 3 Hare, 39; *Jones v. Starkey*, 16 Jur. 510.

1. *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Beers v. Spooner*, 9 Leigh (Va.), 153; *Tieman v. Jackson*, 5 Peters (U. S.), 580; *Beans v. Bullitt*, 57 Pa. St. 221; *Watson v. Bagaley*, 12 Pa. St. 164; *Ins. Co. of Pa. v. Phoenix Ins. Co.*, 71 Pa. St. 34; *Wright v. Ellison*, 1 Wall. (U. S.) 22; *Bispham's Eq.* 221.

The mere delivery of the written evidence of the debt, with intent to transfer it, is, in general, a valid assignment. *Runyan v. Mersereau*, 11 Johns. 534; *Mowry v. Todd*, 12 Mass. 281; *Clark v. Rogers*, 2 Me. 147; *Tutt v. Couzins*, 50 Mo. 152; *Noyes v. Brown*, 33 Vt. 431.

2. *Bishop v. Garcia*, 14 Abb. Pr. (N. S.) 69; *Campbell v. Day*, 16 Vt. 358; *Loomis v. Loomis*, 26 Vt. 201; *Noble v. Thompson Oil Co.* 79 Pa. St. 354; *Heemans v. Ellsworth*, 64 N. Y. 159; *Norrish v. Marshall*, 5 Madd. 475; *Stocks v. Dobson*, 4 DeG. Mac. & G. 11.

A debtor who in good faith pays a debt before notice of assignment thereof, is not liable to pay it a second time to his creditor's assignee. *Dodd v. Brott*, 1 Minn. 270.

In *Louden v. Tiffany*, 5 W. & S. (Pa.) 367, cross-demands were purchased by the debtor after the assignment, but before notice thereof. *Held*, that the demands so acquired could be set off, the court declaring it to be the duty of the assignee "to inquire of the defendant whether he had any defence, and to give him notice of the assignment."

So, in *Rider v. Johnson*, 20 Pa. St. 190, the maker of a note under seal was held to be entitled to set-off in a suit against him by the equitable assignee, a claim ac-

quired against the payee of the note before notice of its assignment.

3. *Brashear v. West*, 7 Peters (U. S.), 608; *Laughlin v. Fairbanks*, 8 Mo. 367; *Cummings v. Fullam*, 13 Vt. 434; *Stewart v. Kirkland*, 19 Ala. 162.

A release given subsequently to the assignment is fraudulent on the part of the assignor and will not avail the debtor if accepted after notice of the assignment. *Phillips v. Claggett*, 11 M. & W. 84; *Reservoir Co. v. Chase*, 14 Conn. 123; *Bartlett v. Pearson*, 29 Me. 9; *Webb v. Steele*, 13 N. H. 230; *Blake v. Buchanan*, 22 Vt. 548.

Nor can the debtor set-off any demand against the assignor which accrues to him after notice of the assignment. *Goodwin v. Cunningham*, 12 Mass. 193; *Conant v. The Bank*, 1 Ohio St. 298; *Phillips v. The Bank*, 18 Pa. St. 394.

4. *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, 3 Russ. 90; *Barron v. Porter*, 44 Vt. 587; *Spain v. Hamilton*, 1 Wall. (U. S.) 604, 623.

The question which of the successive assignees of the same obligation is entitled to priority, depends not upon the date of the respective transfers, but upon when they were communicated to the debtor. *Spain v. Hamilton*, 1 Wall. (U. S.) 623; *Campbell v. Day*, 16 Vt. 558; *Barney v. Douglass*, 19 Vt. 98; *Loomis v. Loomis*, 26 Vt. 201; *Hobson v. Stevenson*, 1 Tenn. Ch. 203; *McWilliams v. Webb*, 32 Iowa, 507; *Murdoch v. Finney*, 2 Mo. 138; *Woodbridge v. Perkins*, 3 Day (Conn.), 364; *Bishop v. Halcomb*, 10 Conn. 444.

In *Dearle v. Hall*, Sir Thomas Plumer, M. R., said: "In *Ryall v. Rowles* (1 Ves. 348), the judges held that, in the case of a chose in action, you must do everything towards having possession which the sub-

But as against one claiming under the assignor as a creditor or mere volunteer, the failure to give notice of an assignment is immaterial, for the right of a creditor does not rise higher than that of the debtor and is subject to all equities that could have been enforced against him.<sup>1</sup>

ject admits; you must do that which is tantamount to obtaining possession by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person."

Where a bond, bill, note, or like evidence of debt is assigned and is transferred by actual manual delivery to the assignee, no notice to the debtor of the assignment is necessary. *Savings Institute v. Fellows*, 6 Caldwell (Tenn.), 467.

Where notices of assignments are simultaneous, the assignments will take priority according to their dates. *Calisher v. Forbes*, 7 L. R. Ch. App. 109.

A subsequent assignee giving notice of the assignment will not gain priority over a prior assignee who has not given notice, if at the time of giving such notice he has notice, express or implied, of the former assignment. *Spencer v. Clarke*, 9 Ch. D. 137.

Although notice should be given as early as possible, it is sufficient if it be given before another notice. *Menx v. Bell*, 1 Hare, 86; *Stocks v. Dobson*, 4 DeG. M. & G. 17.

1. *Justice v. Wynne*, 12 Ir. Ch. R. 289; *Scott v. Lord Hastings*, 4 K. & J. 633; *Beavan v. Lord Oxford*, 6 DeG. Mac. & G. 492; *Eyre v. McDowell*, 9 H. L. Cas. 618, 652; *The People v. Elmore*, 35 Cal. 653; *Kortright v. Buffalo*, 20 Wend. (N. Y.) 91; *McNeil v. The Bank*, 46 N. Y. 328; *Grymes v. Hone*, 49 N. Y. 17, 22; *The Mt. Holly Co. v. Ferree*, 2 C. E. Green (N. J.), 117; *United States v. Vaughan*, 3 Bin. (Pa.) 394.

But it was held in *Clodfelter v. Cox*, 1 Sneed (Tenn.), that an assignment of a judgment was incomplete and invalid, as against a subsequent attaching creditor, unless notice of the assignment were given to the judgment debtor. *McKinney, J.*, said: "To perfect the assignment not merely as against the debtor, but also

as against creditors and subsequent *bona fide* purchasers, notice must be given." See also *VanBuskirk v. Ins. Co.* 14 Conn. 145. This doctrine, however, is not in accord with the weight of authority.

In *Pellman v. Hart*, 1 Pa. St. 266, the court say: "Immediately on the assignment, as between the assignor who is the original promisor to the assignee, and the latter, the equitable title vests in the assignee, which, of course, cannot be taken to pay the debt of the assignor. . . . A general creditor, unless a purchaser without notice, is in no better situation than the debtor, and cannot sell a greater interest than the debtor has." It was accordingly held that where a note has been assigned by a debtor *bona fide* in payment of a debt, before the service of an execution attachment, although the garnishee had no notice of such assignment previous to the service of the attachment, the assignee is entitled to the money due by the garnishee, and not the attaching creditor.

A chose in action equitably assigned is not subject to attachment as the property of the assignor. *Canal Co. v. Ins. Co.*, 2 Phila. Rep. 354; *Noble v. Thompson Oil Co.* 79 Pa. St. 354; *Wakefield v. Marvin*, 3 Mass. 558; *Thayer v. Daniels*, 113 Mass. 129; *Dix v. Cobb*, 4 Mass. 512; *Van Buskirk v. Warren*, 24 Barb. (N. Y.) 457; *Stevens v. Stevens*, 1 Ash. (Pa.) 190.

In *Walters v. Washington Ins. Co.*, 1 Iowa, 404, it was held that where the assignee of an unnegotiable instrument fails to give notice of the assignment to the debtor until judgment of garnishment has been rendered against him for the debt, as a debtor of the assignor, the creditors by garnishment have the prior claim to the money in the garnishee's hands, and his liability to the assignee is destroyed.

The court say: "The assignee of the debt should give notice to the garnishee of the assignment in time to enable him to show such assignment in his answer, or, at least, before judgment against him." See also *Seever v. Wood*, 12 Iowa, 300; *Wigwall v. Union Coal Co.*, 37 Iowa, 130.

So an attachment by an assignor's creditor of the debt in the debtor's hands will not entitle him to a priority of right if the debtor receives notice of the

And notice to the assignor of non-payment of the debt is not obligatory upon the assignee.<sup>1</sup>

Notice to one of several trustees or joint debtors is, in general, notice to all,<sup>2</sup> and, although it is obviously better to give a written notice, parol notice is sufficient.<sup>3</sup>

**5. Effect of Assignment.**—The assignee of a chose in action, except in the case of negotiable paper, takes it subject to every defence that would be valid between the original parties.<sup>4</sup> But the defence to be valid, must be one subsisting at the time the debtor receives notice of the assignment; for the assignment with notice

assignment *pendente lite* and in time to avail himself of it in discharge of the suit against him. *Smith v. Blatchford*, 2 Ind. 184; s. c., 52 Am. Dec. 504.

Bank stock which has been sold *bona fide* and the certificate delivered to the purchaser, with a power of attorney to transfer it on the books of the bank, is not liable to attachment as the property of the vendor, although still standing in his name on the books of the bank at the time of the attachment. *United States v. Vaughan*, 3 Bin. (Pa.) 394; *Com. v. Watmough*, 6 Whart. (Pa.) 117, 138.

In *Mount Holly Co. v. Ferree*, 1 C. E. Green (N. J.), 117, the chancellor said: "The certificate of stock, accompanied by the power of attorney authorizing the transfer of the stock to any person, is *prima-facie* evidence of equitable ownership in the holder, and renders the stock transferable by the delivery of the certificate; and when the party in whose hands the certificate is found is shown to be a holder for value and without notice of any intervening equity, his title as such owner cannot be impeached."

But, on the other hand, it was held in *Pinkerton v. Railroad Co.*, 42 N. H. 424, that the delivery of stock is not complete until it is transferred on the stock record or a notice sent to the office for that purpose.

So, it is held in like manner in Connecticut that the failure to complete the title to stock by a formal transfer is a badge of fraud, which renders the sale invalid as against the creditors of the vendor. *Shipman v. The Aetna Ins. Co.*, 29 Conn. 245; *Culb v. Ives*, 31 Conn. 251.

As between two purchasers of stock for value, the better opinion would seem to be that the purchaser who perfects his right by obtaining a transfer on the books of a corporation will be preferred to a prior purchaser who has been less diligent. See *New Haven, N. Y. R. R. v. Schuyler*, 34 N. Y. 30; *The People v. Ellison*, 35 Cal. 653; *Bayard v. The Bank*, 52 Penn. St. 232, 235. See also,

*Fisher v. The Bank*, 5 Gray (Mass.). 373; *Blanchard v. The Gas Light Co.*, 12 Gray (Mass.), 213; *Sabin v. The Bank of Woodstock*, 21 Vt. 353.

1. *Glyn v. Hood*, 1 DeG. F. & J. 334.

2. *Smith v. Smith*, 2 Cr. & M. 231; *Nolan v. O'Brien*, 7 L. R. Ir. 180; *Ex parte Rogers*, 8 De G. M. & G. 271.

3. *Re Tichener*, 35 Beav. 317; *Smith v. Smith*, 2 Cr. & M. 231; *Barron v. Porter*, 44 Vt. 587; *Phillips v. Lewistown Bank*, 18 Penn. St. 394.

The notice need not be formal or express. It is enough that the debtor has such knowledge or information as will put him on his guard and enable him to warn subsequent purchasers. *Dale v. Kempton*, 46 Vt. 76.

In *Barron v. Porter*, 44 Vt. 587, the court say: "It is not necessary to the validity of the notice that the assignee should personally give the notice or that the agent of the assignee for giving notice directly employed by him for that purpose should himself personally give the notice; if given by his procurement, it is sufficient."

In *Phillips v. Lewistown Bank*, 18 Penn. St. 394, it was held that the notice need not be in writing and "it was immaterial in what manner the knowledge of the transfer was acquired, so that it existed at the time of the purchase" of the notes offered to be set off.

4. *Bebee v. The Bank of N. Y.* 1 Johns. (N. Y.) 529; *Kamena v. Huelbig*, 8 C. E. Green (N. J.), 78; *Martin v. Richardson*, 68 North Carolina, 225; *Boardman v. Payne*, 29 Iowa, 339; *Jeffries v. Evans*, 6 B. Mon. (Ky.) 119; *Barney v. Grover*, 28 Vermont, 391; *Willis v. Twambly*, 13 Mass. 204; *Bush v. Lathrop*, 22 N. Y. 535; *Wheeler v. Hughes*, 1 Dall. (Pa.) 23; *Weaver v. McCorkle*, 14 S. & R. (Pa.) 304; *Keagy v. The Commonwealth*, 43 Pa. St. 70; *Faulk v. Tinsman*, 36 Pa. St. 108; *Andrews v. McCoy*, 8 Alabama, 920; *Kleman v. Frisbie*, 63 Illinois, 482; *Timms v. Shannon*, 19 Md. 296; *Marshall v. Cooper*, 43 Md. 61.

imposes upon the debtor an equitable and moral obligation to pay the money to the assignee.<sup>1</sup>

And if the debtor actively misleads the assignee as to the existence of any defence or set-off, or remains silent when it is his duty to speak, he may be estopped by such conduct from setting up such defence against the assignee.<sup>2</sup>

The assignee cannot be affected by secret trusts or acts unconnected with the subject of the contract.<sup>3</sup>

1. *Crocker v. Whitney*, 10 Mass. 316; *Mowry v. Todd*, 12 Mass. 281; *Fay v. Jones*, 18 Barb. (N. Y.) 340; *Small v. Browder*, 11 B. Mon. (Ky.) 212; *Miller v. Kreiter*, 76 Pa. St. 78.

In *Northampton Bank v. Balliet*, 8 W. & S. (Pa.) 311, the court say: "The important period to determine the rights of the assignee and the defendants is not the time of the assignment, but the time the defendants had notice of it, and this principle applies as well in the case of set-off as payment. The time the contract begins between the assignee and the obligor is when the latter has notice of the assignment. It is the duty of the assignee or the obligee to inform the obligor that he has parted with the bond, and if this is omitted they are in default, and not the obligor, who, until he is informed otherwise, has a right to suppose that the bond is still the property of the obligee, and to act and contract with the obligee or others under that reasonable supposition."

2. *In re General Estates Company*, L. R. 3 Ch. 758; *Kemp v. McPherson*, 7 H. & J. (Md.) 320; *Jones v. Hardesty*, 10 G. & Johns. (Md.) 404; *Decker v. Eisenhauer*, 1 Penna. R. 476; *Sargeant v. Sargeant*, 18 Verm. 371; *Foot v. Ketchum*, 15 Verm. 258; *Bank v. Jerome*, 18 Conn. 443; *Watson's Exrs. v. McLaren*, 19 Wend. (N. Y.) 557; *Buckner v. Smith*, 1 Wash. 296; *McLellan v. Walker*, 26 Maine, 114; *King v. Fowler*, 16 Mass. 397.

In *McMullen v. Wenner*, 16 S. & R. (Pa.) 18, the assignee was induced to purchase a bond under the representations made by the obligor and communicated to the purchaser that he had no defence and was willing that the bond should be sold. Held, that the obligor could not set up an equity of which he might have availed himself against the obligee. "Although *prima facie*," say the court, "the obligor may make every defence against the assignee, which at the time of the assignment, or notice of it, he could have made against the obligee, yet he may by his own conduct, preclude himself from the benefit of that right. Thus it has been held that if the assignee calls

on the obligor and informs him he is about to take an assignment of his bond, and the obligor acknowledges that it is due, without any allegation of defence, he shall not be permitted to take defence against the assignee, and this whether his silence proceeds from ignorance or design. It would be most inequitable and unjust that he should; because if any loss afterwards occur it arises from the negligence or folly of the obligor, and not the default of the assignee, who has taken every pains to inform himself of the real situation of the parties."

3. *Davis v. Barr*, 9 S. & R. (Pa.) 137; *Beckley v. Eckert*, 3 Penn. St. 292; *Mott v. Clark*, 9 Penn. St. 399; *Taylor v. Gitt*, 10 Penn. St. 428; *Corsen v. Craig*, 1 Wash. C. C. 424.

Upon the question whether the assignee of a chose in action will take it not only subject to the equities between the original parties, but also to equities residing in third persons, the decisions are not in harmony. It is held, on the one hand, that the assignee is subject only to the equities of the original debtor and not to latent equities of third persons. *Taylor v. Gitt*, 10 Penn. St. 428; *Mullison's Est.* 68 Penn. St. 212; *Metzgar v. Metzgar*, 1 Rawle (Pa.), 227; *Livingston v. Dean*, 2 Johns. Ch. 479; *Moore v. Holcombe*, 3 Leigh (Va.), 597.

In *Mott v. Clark*, 9 Penn. St. 399, the court say: "The assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action, which he is about purchasing from the obligee; but he may not be able with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries, and for this reason the claim of the assignee, without notice, of a chose in action, in the late case of *Redfearn v. Ferrier*, 1 Dow. 50, was preferred to that of a party setting up a secret equity against the assignor. Lord Eldon observed, in that case, that if it were not to be so, no assignment could ever be taken with safety."

But, on the other hand, it is held that

By the assignment of a demand the assignee becomes entitled to every remedy, lien or security that could have been used or made available by the assignor as a means of indemnity or payment.<sup>1</sup> Thus the assignee of a debt secured by a mortgage will be held entitled, in equity, to the benefit of the mortgage.<sup>2</sup>

Another effect of the assignment is that the assignee thereby acquires the right to use the name of the assignor in an action at law to recover the demand assigned, and courts of common law now entertain such an action, which must be brought in the name of the original assignor to the use of the assignee.<sup>3</sup> And in many of the States of the Union, the assignee of a chose in action may sue in his own name.<sup>4</sup>

As the remedy of the assignee is generally complete at law by a suit in the name of the assignor, a court of equity will not, as a general rule, entertain a bill filed by the assignee simply for the purpose of recovering a debt. It is only when his legal remedy is in some manner obstructed or rendered insufficient that a court of equity will interpose. In cases in which the assignee may proceed against the debtor in equity, he can file a bill in his own name.<sup>5</sup>

the assignee takes the exact position of his assignor, and that the equities existing between the assignor and assignee of a chose in action, attend the title transferred to a subsequent assignee for value and without notice. See *Bush v. Lathrop*, 22 N. Y. 535, and cases cited; *Schafer v. Reilly*, 50 N. Y. 67.

1. *Mehaffey v. Share*, 2 P. & W. (Pa.) 296; *Donley v. Hayes*, 17 S. & R. (Pa.) 400; *Foster v. Fox*, 4 W. & S. (Pa.) 92; *Philips v. The Bank*, 18 Penn. St. 394; *Wilson v. Bowden*, 26 Ark. 451; *Coffing v. Taylor*, 16 Ill. 457, 472; *Perry v. Roberts*, 30 Ind. 244; *Craig v. Parkis*, 40 N. Y. 181; *Hunt v. Wilson*, 38 Cal. 263.

2. *Lindsay v. Bates*, 42 Miss. 397; *Cathcart's App.*, 13 Penn. St. 416; *Ryan v. Dunlap*, 17 Ill. 40; *Burdett v. Clay*, 8 B. Mon. (Ky.) 287; *Bolen v. Crosby*, 49 N. Y. 183.

3. *Bispham's Equity*, 226; *Skinner v. Somes*, 14 Mass. 107; *Jessel v. Ins. Co.*, 3 Hill (N. Y.), 88.

4. *Long v. Heinrich*, 46 Mo. 603; *Cook v. Bell*, 18 Mich. 387; *Smith v. Chicago R. R.*, 23 Wis. 267; *Hook v. Eagle Bank*, 30 N. Y. 83; *Carpenter v. Johnson*, 1 Nev. 331; *Mills v. Murry*, 1 Neb. 327; *Allen v. Miller*, 11 Ohio, 374; *McDonald v. Kneeland*, 5 Minn. 352; *Russell v. Petree*, 10 B. Mon. (Ky.) 184; *White v. Tucker*, 9 Iowa, 100; *Stewart v. Balder-*

*ston*, 10 Kan. 131; *Fletcher v. Piatt*, 7 Blackf. (Ind.) 522.

But the equities in defence are not thereby excluded, and the rights of the parties are not altered. *Purple v. The Railroad*, 4 Duer (N. Y.), 74; *Myers v. Davis*, 22 N. Y. 489; *Cox v. Sprigg*, 6 Md. 274.

5. *Hammond v. Messenger*, 9 Sim. 327, 332; *Carter v. Ins. Co.*, 1 Johns. Ch. (N. Y.) 463; *Adair v. Winchester*, 7 Gill & Johns. (Md.) 114; *Walker v. Brooks*, 125 Mass. 241; *Chicago R. R. v. Nichols*, 57 Ill. 466; 1 *Parsons on Contracts*, 224, note (d).

In *Ontario Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596, Chancellor Walworth says: "As a general rule this court will not entertain a suit brought by the assignee of a debt or of a chose in action which is a mere legal demand; but will leave him to his remedy at law by a suit in the name of the assignor. When, however, special circumstances render it necessary for the assignee to come into a court of equity, for relief, to prevent a failure of justice, he will be allowed to bring a suit here upon a mere legal demand."

**Authorities for Assignments.**—*Bispham's Equity*, *Story's Equity Jur.*, *Parsons on Contracts*, 2 *Lead. Cas. Eq. Notes to Ryall v. Rowles*.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

**ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.**<sup>1</sup> (See also ASSIGNMENTS; ATTACHMENT; CONTRACTS; CORPORATIONS; DEBTOR AND CREDITOR; DEED; FRAUDULENT CONVEYANCES; INSOLVENCY; LIEN; MORTGAGE; PARTNERSHIP; PRACTICE; TRUSTS; TRUSTEES.)

1. *Definition*, 845.
2. *Who may Assign*, 846.
3. *Who may be Assignee*, 850.
4. *What Passes by the Assignment*, 852.
5. *Formal Requisites of an Assignment*, 855.
6. *Preferences*, 860.
7. *Reservations and Stipulations*, 863.
8. *Other Features of the Deed*, 864.
9. *Fraudulent Assignments*, 869.
10. *Effect*, 871.
11. *Rights, Duties, Powers, and Responsibilities of the Assignee*, 874.
12. *Rights and Powers of Creditors*, 878.

**1. Definition.**—An assignment for the benefit of creditors is a voluntary<sup>2</sup> transfer<sup>3</sup> by a debtor of all,<sup>4</sup> or a part<sup>5</sup> of his prop-

1. While the origin of this species of assignment is to be found in the old common law, its extensive use in this country, owing to the frequent non-existence of a bankrupt law, has led not only to new applications of the original principles, but also to many important changes in the statute law. The following article, therefore, attempts only to show the main features of the law on this point in this country to-day, and not the rise and development of this law. Reference to ancient and English authorities is therefore omitted.

2. Such assignments "come into being not by operation of law, or by force of any previous proceedings either by or against the debtor. They are purely the voluntary act of the debtor. They are contracts, and rest, like all contracts, upon the consent of parties. It is true, that the manner of executing such instruments is now regulated by statute, and to a certain extent a method for administering the trust created by them, apart from the ordinary processes of a court of equity, has been created; but the right to make an assignment for creditors is derived in no sense from the statute, nor does the statute restrict or limit the operation or effect of such instruments when made." Bishop on Insolvent Debtors, § 104. The last sentence must be understood with the proviso that such instruments must be validly made in accordance with the statute.

The statute "recognizes the existence of the power in the citizen to make an assignment of his property to trustees for the benefit of creditors, and does no more than prescribe the mode in which the power shall be used, and furnish some safeguards against abuse." Thrasher v. Bentley, 1 Abb. N. C. (N. Y.) 39, 44. See

also *People v. Chalmers*, 1 Hun (N. Y.) 683; s. c., on appeal, 60 N. Y. 154; *Ludington's Petition*, 5 Abb. N. C. (N. Y.) 307.

3. The title to the property must be actually transferred, so as to divest the debtor of all control over it. A mere power of attorney to collect debts, and apply the proceeds to the payment of the claims of creditors, is not an assignment. *Henderson's App.*, 31 Pa. 502; *Griffin v. Rogers*, 38 Pa. 382; *Beans v. Bullitt*, 57 Pa. 221; *Banning v. Sibley*, 3 Minn. 389. See *post*, 5, p. 855.

4. **General Assignments.**—These are effected by a transfer of all the property. *U. S. v. Clark*, 1 Paine (U. S.), 620, 640; *Mussey v. Noyes*, 26 Vt. 462, 473; *Bishop v. Hart*, 28 Vt. 71.

This is the most usual species of assignment, and it has even been held to be necessarily implied in the term "voluntary assignment." *U. S. v. Mott*, 1 Paine (U. S.), 188, 195.

An assignment stipulating for the release of the debtor must be general. *Seaving v. Brinkerhoff*, 5 Johns. Ch. (N. Y.) 329; *Skipwith v. Cunningham*, 8 Leigh (Va.), 271; *Green v. Trieber*, 3 Md. 11; *Sangston v. Gaither*, 3 Md. 40; *Johns v. Bolton*, 12 Pa. 339; *Boker v. Crookshank*, 1 Phila. (Pa.) 193. So sometimes when preferences are given. 1 Kentucky Rev. Sts. p. 553.

An assignment which is general on its face must be so in point of fact. *Price v. Haynes*, 37 Mich. 487; *Stanford v. Williston*, 90 N. Y. 582; *Pierce v. Jackson*, 2 R. I. 35.

5. **Partial Assignments.**—A transfer of a portion of the debtor's property is a partial assignment on its face. *Mussey v. Noyes*, 26 Vt. 462.

"An assignment of partnership effects

erty, to an assignee or assignees,<sup>1</sup> in trust to apply the same, or the proceeds thereof, to the payment of some or all of the assignor's debts, and to return the surplus, if any, to him.<sup>2</sup>

**2. Who may Assign.**—Any person<sup>3</sup> of sound mind, not under a legal disability,<sup>4</sup> may make an assignment for the benefit of creditors.

*A Corporation* can make such an assignment<sup>5</sup> unless it is

is a partial one whenever the debtor has separate property." *Thomas v. Jenks*, 5 Raw. (Pa.) 221.

So an assignment, general in form, but with an express exception of a part of the debtor's property, is partial. *Ingraham v. Grigg*, 12 Sm. & M. (Miss.) 22. See *post*, 4.

Such assignments are comparatively rare in practice, and usually cannot contain the stipulations and preferences sometime admissible in general assignments. These restrictions will be noted in their proper places.

As to matters of practice, *e.g.*, the filing of an inventory by the assignee, etc., there is no difference between general and partial assignments in Pennsylvania. *Reigart's App.* 4 Pa. 477.

In some States no partial assignments are allowed, *e.g.*:—Connecticut, Gen. Sts. (Rev. 1875) p. 378; Indiana, 1 Sts. (Rev. 1876) p. 142. But a trifling and unintentional omission does not invalidate. *Krug v. McGilliard*, 76 Ind. 28; Maine, Rev. Sts. (Ed. 1871) p. 543, § 1. But a partnership assignment need not include private property of partners. *Simmons v. Curtis*, 41 Me. 373.

1. The assignee is also a trustee, but as the former term is the more distinctive, it will be exclusively used here.

**Special Assignments, or Assignments Direct to Creditors.**—These are to be distinguished from assignments for the benefit of creditors, which are, strictly speaking, always made through the intervention of an assignee trustee. Special assignments take the form or legal effect either of mortgages (see *Leitch v. Hollister*, 4 N.Y. 411) or absolute conveyances, and are therefore not considered in this article.

An absolute, unconditional sale and conveyance of his property by a debtor, free from all reservation, in payment and satisfaction of antecedent debts, cannot be declared a general assignment, enuring to the benefit of all his creditors equally, although it may embrace all his property, and he be insolvent. *Otis v. Maguire*, 76 Ala. 295.

"An assignment involves the transfer by a debtor of property by mortgage,

deed of trust, or other conveyance intended as a security for, and not in payment or satisfaction of a debt due his creditor. It therefore implies the idea of a trust, under the operation of which there is the possibility of a reversion to the debtor of some interest in the proceeds of sale of the property assigned. When the debts intended to be secured are paid, the surplus, after deducting lawful expenses, goes back to the debtor. Such an assignment does not, *ipso facto*, like a sale, satisfy the claims of the creditors to any extent, but only provides a method for raising the means with which to pay them." *Otis v. Maguire*, 76 Ala. 295. See also *Bebb v. Preston*, 1 Iowa, 460; *Blank v. German*, 5 W. & S. (Pa.) 36; *Shirley v. Teal*, 67 Ala. 449; *Com. Bank v. Brewer*, 71 Ala. 574; *Danner v. Brewer*, 69 Ala. 191; *Dunham v. Whitehead*, 21 N.Y. 131; *Hendrickson v. Robinson*, 2 John. Ch. (N.Y.) 283; *Tompkins v. Wheeler*, 16 Pet. 106; *Smith v. Woodruff*, 1 Hilt. (N.Y.) 462.

2. For the definition in general, see *Burrill on Assignments*, § 2; *Bishop on Insolvent Debtors*, § 104; *Bartlett v. Teah*, 1 McCr. (U.S.) 176.

3. "Every debtor has a legal right to assign property for the security of the debts due by him, and so far from such an act being reprehended by the law, it is justified and approved." *Story, J.*, in *Brown v. Minturn*, 2 Gall. (U.S.) 557.

"The right to make a general assignment of all a man's property results from that absolute ownership which every man claims over that which is his own." *Marshall, C. J.*, in *Brashear v. West*, 7 Pet. (U.S.) 608, 614.

4. The competency to make an assignment results from the competency to incur debts. An assignment by an infant is voidable, not void. The defence of infancy can only be made by the infant or some one in his right. *Soper v. Fry*, 37 Mich. 237; *Yates v. Lyon*, 61 N.Y. 344. Overruling *Fox v. Heath*, 21 How. Pr. (N.Y.) 384.

5. *De Ruyter v. Trustees*, 3 N.Y. 238, affirming 3 Barb. Ch. 119, 124; 2 Kent's Com. (10th Ed.) 398, and note; *Shockley v. Fisher*, 75 Mo. 498; *Catlin v. Bank*, 6

restricted by its charter<sup>1</sup> or by some statutory provision.<sup>2</sup>

*The Personal Property of a Partnership* may be assigned either by the joint act of all the partners, or by one or more, under the authority and with the consent of the rest;<sup>3</sup> but not, as a general rule, without this authority and consent, except under peculiar circumstances.<sup>4</sup>

Conn. 233; *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13.

Corporations have the same right to confer preferences that individuals have. *Catlin v. Bank*, 6 Conn. 233; *Ringo v. Biscoe*, 13 Ark. 563.

It has been held that a general assignment of corporate property cannot be made, since by destroying the object for which the corporation exists, it would work a surrender of its charter, an act both beyond the powers of the officers, unless specially authorized, and contrary to the provisions of the law as to the winding up of corporations. *Smith v. Stage Co.*, 18 Abb. Pr. (N. Y.) 419; *Com'rs v. Bank, Har.* (Mich.) 106; Dissenting op. of Story, J., in *Beaston v. Bank*, 12 Pet. (U. S.) 102, 138.

The prevailing opinion, however, is that such assignment does not affect the franchises, and hence does not work a dissolution. *Hurlburt v. Carter*, 21 Barb. (N. Y.) 221; *State v. Bank*, 6 G. & J. (Md.) 205; 3 South. L. Rev. N. S. 553.

A provision in the charter, making stockholders individually liable for corporate debts, does not affect the right to assign. *Pope v. Brandon*, 2 Stew. (Ala.) 401.

A general assignment may, however, not transfer the capital stock. *Ohio Life Co. v. Ins. Co.*, 11 Humph. (Tenn.) 1.

A quorum of the board of directors may make the assignment. *Buell v. Buckingham*, 16 Iowa, 284.

1. *Ringo v. Biscoe*, 13 Ark. 563.

2. *Bowen v. Lease*, 5 Hill (N. Y.), 221; *Harris v. Thompson*, 15 Barb. (N. Y.) 62; *Loring v. Gutta Percha Co.*, 36 Barb. (N. Y.) 329; *Sibell v. Remsen*, 33 N. Y. 95; *Robinson v. Bank*, 21 N. Y. 406; *Relfe v. Ins. Co.*, 5 Mo. App. 173.

In New York, the assignment must have been authorized by a previous resolution of the board of directors. *Curtis v. Leavitt*, 15 N. Y. 9.

3. *Ely v. Hair*, 16 B. Mon. (Ky.) 230; *Weiles v. March*, 30 N. Y. 344; *Baldwin v. Lyons*, 19 Abb. Pr. (N. Y.) 32.

An assignment made by "M., H., C., and R., co-partners doing business under the style and firm name of H., M. & Co., party of the first part," and granting to the assignee all the property "belong-

ing to said partnership, party of the first part, or in which they as such co-partners have any right or interest, or which is held by any person or persons for such partnership," is an assignment by the partnership of the partnership property and not by the individual partners executing it. *Bank v. Hackett*, 61 Wis. 335.

4. This subject has been frequently considered by courts and text-writers. The cases may be grouped in three classes:—

(1.) Where it was possible to consult the other partner or partners.

Assignments made against the known wishes of co-partners are undoubtedly invalid. *Deckert v. Filbert*, 3 W. & S. (Pa.) 454; *Wilcox v. Jackson*, 7 Col. 521. *McGregor v. Ellis*, 2 Disn. (O.) 286, is not an authority against this, as the court held that the co-partner had not openly expressed his dissent in time, so that he was estopped by laches.

Even where the wishes of co-partners are not known and disregarded, but simply not consulted, the rule seems to be the same.

*Egberts v. Wood*, 3 Paige (N. Y.), 517, is usually cited as an authority. In fact, however, the decision was that as the partnership had been dissolved by the death of one of the partners before the assignment, the assignor's individual interest in the partnership property was all that passed. The allegation that the assignment was made without the consent of the other surviving partner was explicitly denied by the defendants, and while the chancellor did, at the request of counsel, pass on the validity of an assignment by one partner alone, he restricted this dictum (as he explicitly states in *Havens v. Hussey*, 5 Paige (N. Y.), 30) to the case of a conveyance directly to creditors, which was not a feature of the case before him, nor is it considered in this present article.

*Havens v. Hussey*, 5 Paige (N. Y.), 30, is more directly in point, though there was the additional fact that the assignment was against the known wishes of the co-partner's son and agent, so that it was held to be in fraud of the co-partner's rights. On the general question, the chancellor said, "The principle upon



which an assignment by one partner in payment of a partnership debt rests, is that there is an implied authority for that purpose from his co-partner, from the very nature of the contract of partnership, the payment of the company debts being always a part of the necessary business of the firm. But it is no part of the ordinary business of a partnership to appoint a trustee of all the partnership effects for the purpose of selling and distributing the proceeds among the creditors in unequal proportions, and no such authority as that can be implied. On the contrary, such an exercise of power by one of the firm, without the consent of the other, is in most cases a virtual dissolution of the partnership; as it renders it impossible for the firm to continue its business." Nothing is said about such an assignment made in equal proportions, without preferences.

In *Robinson v. McIntosh*, 3 E. D. Smith (N. Y.), 221, the assignment was upheld as being "in all respects equitable and just to all parties, made in a condition of hopeless insolvency by all of those who by the terms of the actual arrangement between the members are the active, managing partners."

In *Deming v. Colt*, 3 Sand. S. C. (N. Y.) 284, it was held that "one partner cannot, of his own exclusive authority, make a trustee to dispose of the partnership effects in behalf of all the co-partners;" also that the circumstance of insolvency did not make any difference. This case preceded *Robinson v. McIntosh*, however.

*Hayes v. Heyer*, 3 Sand. S. C. (N. Y.) 284, 293, is to the same effect. The report of this case in 4 Sand. Ch. (N. Y.) 485 is on another point, and this question is only referred to as difficult.

In *Kirby v. Ingersoll*, 1 Doug. (Mich.) 477, affirming s. c., 1 Harr. (Mich.) 172, it was said (p. 491): "It is not within the ordinary powers arising from the partnership relation, while the business of the firm is proceeding in the usual manner, and both partners are present and attending to the affairs of the firm in the ordinary manner contemplated by their partnership agreement, for one partner to make an assignment to a trustee for the benefit of preferred creditors, with the design of putting an end to the partnership, and closing up its concerns." The resulting dissolution of the partnership, rather than the preferences, seems to be the controlling reason, though *Daly, J.*, in referring to the case in *Fisher v. Murray*, 1 E. D. Smith (N. Y.) 341, thinks it was decided on the ground of the

preferences. In this last case it was held that, even without preferences, an assignment made without consulting all the partners, unless that is impossible, is invalid.

In *Hughes v. Ellison*, 5 Mo. 463, and *Drake v. Rogers*, 6 Mo. 317, the assignments were for the benefit of such creditors as should accept within a specified time, but the decisions seem to uphold the simple proposition that no assignment without consent of all the partners is valid.

*Loeb v. Pierpoint*, 58 Iowa, 469, is more flat-footed. The assignment was without preferences, but without the knowledge or assent of the co-partner, who was, at the time, in the town where the firm transacted business, and where the deed was executed, and where both of the parties lived. It was held that a partner has not "power to execute a general assignment of all the property of the firm for the benefit of its creditors without the assent, expressed or implied, of his co-partner, when he may be consulted upon the subject and is capable of expressing assent or dissent." *Ex parte Daniels*, 14 R. I. 500, is to the same effect.

*McGregor v. Ellis*, 2 Disn. (Ohio) 286, and *Graves v. Hull*, 32 Tex. 665, appear to hold the contrary; but in the former case the decision was that an assignment by one partner is presumed to be acquiesced in by the other, unless they express their dissent promptly and unequivocally, which had not been done. The latter case is too meagrely reported to be a certain authority.

(2) **Where it was not practically possible to consult them.**—In the earlier reports such cases constitute a numerous class, but in these days of easy communication by telegraph with all parts of the world they are not likely to arise from the mere absence of a co-partner. Such assignments have been held invalid in many cases, among which are the following:

*Dickinson v. Legare*, 1 Dess. (S. Car.) 537 (1797). Here the assignment seems to have been directly to creditors, and was probably void by the laws of war, being made in an enemy's country to an alien enemy.

*Pearpoint v. Graham*, 4 Wash. C. C. 232 (1818). *Washington, J.*, held that the assignment had been ratified, but that otherwise it could not have been sustained, as its effect would be to terminate the partnership.

*Hitchcock v. St. John*, 1 Hoff. Ch. (N. Y.) 511 (1840). The assignment was held void because of the preferences which required the consent of all the partners

the vice-chancellor holding it well established that otherwise it would have been valid.

*Dana v. Lull*, 17 Vt. 390 (1845). Here the partners resided in different parts of the State, and the assignor was the managing partner; but it was held, on the authority of *Pearpoint v. Graham*, that there was no implied power to make such assignment.

*Pettee v. Orser*, 6 Bosw. (N. Y.) 123 (1850), affirmed in Court of Appeals. See *Palmer v. Meyers*, 43 Barb. (N. Y.) 509. The assignment was by two of four partners, the others being temporarily absent on business. It made preferences.

*Robinson v. Gregory*, 29 Barb. (N. Y.) 560 (1859), reversed in Court of Appeals. See *Welles v. March*, 30 N. Y. 344. One of the partners resided abroad, and the assignment was sustained on the ground of necessity, but this was disapproved on appeal.

*Coope v. Bowles*, 42 Barb. (N. Y.) 87; s. c., 18 Abb. Pr. (N. Y.) 442; 28 How. (N. Y.) 10 (1864). It was held that only previous authority or subsequent ratification could uphold such an assignment, made without the joinder of all the partners.

*Stein v. La Dow*, 13 Minn. 412 (1868). It was held that as the absent partner's return was daily expected, and he had given no authority, even his subsequent ratification did not validate the assignment as against creditors who attached before the ratification. But in *Adee v. Cornell*, 93 N. Y. 572 (1883), the court was of opinion that a subsequent ratification was effectual.

*Wooldridge v. Irving*, 23 Fed. R. 676 (1884). Here the other partner was insane.

They have been sustained in other cases, among which are:

*Harrison v. Sterry*, 5 Cranch, 289 (1809). The assignment was by the New York partner of a London house, and Marshall, C. J., held that "the whole commercial business of the company in the United States was necessarily committed to the only partner residing in this country . . . The assignment . . . is within the power usually exercised by a managing partner." It was held void on other grounds, however.

*Anderson v. Tompkins*, 1 Brock. (U.S.) 456 (1820). The same judge decided the case, expressing the same views. He said: "Had this, then, been a sale for money, or on credit, no person, I think, could have doubted its obligation. I can perceive no distinction in law, in reason, or in justice between such a sale and the transaction that has taken place."

He denied that it effected a dissolution of the partnership, but also expressly based his conclusions on the fact that the other partner, being in Europe, could not have been consulted, saying: "It is true Murray had a right to be consulted. Had he been present, he ought to have been consulted. The act ought to have been, and probably would have been, a joint act. But Murray was not present. He had left the country and could not be consulted."

*Robinson v. Crowder*, 4 McCord (S. Car.), 519 (1828). The decision was on the authority of *Harrison v. Sterry*, 5 Cranch. 289, where the court said, "It was held on very sound principles that an assignment of funds for the payment of debts was in the course of trade. Indeed every partial application of funds to the payment of debts, whether it consists of cash, or goods, or anything else, is in effect an assignment for that purpose and binds the firm. And if, in the course of things, a general assignment becomes necessary, there can be no reason why it should not be equally binding. The principle is the same whether it be partial or total, and it follows that in either case one may bind the whole."

*McCullough v. Somerville*, 8 Leigh (Va.), 415 (1836). Here the other partner resided in another State. The decision followed those just cited, and it was held that preferences did not invalidate the assignment.

*Lasell v. Tucker*, 5 Sneed (Tenn.), 33. Here one partner was absent, but it would seem from the opinion that, even irrespective of this, an assignment was held to be within a partner's authority.

*Forbes v. Scannell*, 13 Cal. 242, 288 (1859). Here the assignor was at Canton, one partner at Shanghai, and another at Calcutta.

*Ex parte Daniels*, 14 R. I. 500 (1884). *Durfee, C. J.*, said: "If the other partners be not present or where they can be consulted, we think it is well established that an assignment of the partnership effects to a trustee for the partnership creditors is valid without their consent, if made by the partner in charge in good faith to meet a crisis or exigency of the business."

*Williams v. Frost*, 27 Minn. 255 (1880). The assignor was in Minnesota, the other partner in Holland. It was held that sufficient authority had been given.

(3) *Where a Partner has, by Absconding, relinquished all Control over the Partnership Property.*—Here the cases all agree that an assignment is valid, consent being implied. *Kemp v. Carnley*, 3 Duer

An assignment of the real estate of the firm requires the consent of all the partners.<sup>1</sup>

A partner can assign his own interest in the firm property for the benefit of his own creditors, subject to the rights of his co-partners.<sup>2</sup>

In some States it has been held that surviving partners can make a valid assignment.<sup>3</sup>

*The Debtor's Actual or Contemplated Insolvency*, is not essential to a valid assignment, unless made so by statute.<sup>4</sup> The fact of his own belief in his solvency has, however, been held evidence of an intent to protect himself at the cost of delay and hindrance to his creditors, a fact which, if established, would invalidate the assignment.<sup>5</sup>

**3. Who may be Assignee.**—There is no restriction on the number of assignees, but only those who accept can act,<sup>6</sup> and all those who accept must act, unless the assignment be conditioned on its acceptance by all.<sup>7</sup>

The assignee must be named in the deed of assignment.<sup>8</sup>

(N. Y.), 1; *Deckard v. Case*, 5 Watts (Pa.), 22; *Kelly v. Baker*, 2 Hilt. (N. Y.) 536; *Palmer v. Myers*, 43 Barb. (N. Y.) 509; *Welles v. March*, 30 N. Y. 344; *Bank v. Sackett*, 2 Daly (N. Y.), 395; *Sullivan v. Smith*, 15 Neb. 476.

A partner who has in fact withdrawn from the firm so that as between himself and the other partners he has no authority or control over the property or business of the firm (although as between himself and the creditors he may still be liable for its debts), need not join in an assignment by such firm for the benefit of its creditors. *Bank v. Hackett*, 61 Wis. 335.

On the whole question, see Story on Part. (7th Ed.) § 101; Parsons on Part. (3d Ed.) \*165.

1. *Anderson v. Tompkins*, 1 Brock. (U. S.) 456; *Lafley v. Butterfield*, 1 Met. (Mass.) 515; *McCullough v. Sommerville*, 8 Leigh (Va.), 415, 433; *Thompson v. Bowman*, 6 Wall. (U. S.) 316; *Collumb v. Coldwell*, 16 N. Y. 484; s. c., 24 N. Y. 505; *Tiemann v. Molliter*, 71 Mo. 512; Story on Part. (7th Ed.) § 101; Collyer on Partnership, § 394.

Where, however, one partner has absconded, the law implies his consent to an assignment of real estate by his co-partner. *Sullivan v. Smith*, 15 Neb. 476.

2. The interest conveyed is only a surplus after the company's debts are paid. *Fellows v. Greenleaf*, 43 N. H. 421; *Schiele v. Healy*, 61 How. (N. Y.) 73; *Platt v. Hunter*, 11 N. Y. Weekly Dig. 300.

In *Haggerty v. Granger*, 15 How. (N. Y.) 243, the assignment was, first, to pay partnership debts, and seems to have

been held void on that account. See also *Kirby v. Schoonmaker*, 3 Barb. Ch. (N. Y.) 46.

Such an assignment works a dissolution of the firm, unless the articles of co-partnership provide otherwise. *Horton's App.*, 13 Pa. 67; *Clark v. Wilson*, 19 Pa. St. 44.

Separate assignments by all the partners to the same assignee have the same effect as one assignment by all. *Boughton v. Crosby*, 47 Conn. 577.

3. *White v. Ins. Co.*, 1 N. & McC. (S. Car.) 556; *Galt v. Calland*, 7 Leigh (Va.), 594; *Tiemann v. Molliter*, 71 Mo. 512.

It cannot be done in Tennessee. *Barcroft v. Snodgrass*, 1 Cold. (Tenn.) 430.

In New York such an assignment, even with preferences, can only be set aside by the representatives of the deceased partner. *Williams v. Whedon*, 46 N. Y. S. C. (39 Hun) 98. See also *Haynes v. Brooks*, 17 Abb. N. C. (N. Y.) 162.

4. *Ogden v. Peters*, 21 N. Y. 23; *Ely v. Cook*, 18 Barb. 612; *Angell v. Rosenberg*, 12 Mich. 241; *Bank v. Brewster*, 30 Conn. 539; *Morgenthau v. Harris*, 12 Cal. 245.

5. *Bates v. Ableman*, 13 Wis. 644.

6. *Moir v. Brown*, 14 Barb. (N. Y.) 39; *Scully v. Reeves*, 3 N. J. Eq. 84.

In an assignment to partners, one of whom is absent, his assent will be presumed, unless on notice he refuses to accept, especially if he acts in any way. *Gordon v. Coolidge*, 1 Sumn. (U. S.) 537.

7. *Brennan v. Wilson*, 4 Abb. N. C. (N. Y.) 297; s. c., 71 N. Y. 502; *Gordon v. Coolidge*, 1 Sumn. (U. S.) 537.

8. Hence an assignment with the as-

**Who may be Assignee. BENEFIT OF CREDITORS. Who may be Assignee.**

Unless prevented by statute, every debtor can select his own assignees without consulting his creditors,<sup>1</sup> but the power to appoint substitutes in case of non-acceptance cannot be reserved in the deed.<sup>2</sup>

The assignee should be physically and mentally qualified to perform his duties, and of such character and financial standing as to assure the confidence of the creditors.<sup>3</sup>

The assignee may be a creditor of the assignor.<sup>4</sup>

An assignment may be made to partners.<sup>5</sup>

A corporation can usually appoint one of its own officers assignees.<sup>6</sup>

signee's name in blank will be postponed to an execution issued before the blank is filled. *Reamer v. Lamberton*, 59 Pa. St. 462; *Park v. Glover*, 23 Tex. 469.

If there be a transferee, but no trustee named, the court will either treat the transferee as trustee, or appoint one. *Burrows v. Lehndorff*, 8 Ia. 96; *Ohio Rev. Sts. § 6344* (Ed. 1880); *Ky. Gen. Sts. 491* (Ed. 1881).

1. *Wilt v. Franklin*, 1 Binn. (Pa.) 502, 516; *Cram v. Mitchell*, 1 Sand. Ch. (N. Y.) 251, 253; *Webb v. Daggett*, 2 Barb. (N. Y.) 9, 11. In the latter case it was held that the selection could even be made against the will of the creditors, but in *Cram v. Mitchell* it was said that it must be made with a proper reference to their interests.

In *Kansas* (Comp. Laws 1881, p. 102), *Maine* (Rev. Sts. (ed. 1882) c. 70, § 16, 24), and *Ohio* (Rev. Sts. 1881, § 6338) the creditors must be convened and select the assignee.

In *South Carolina* they can appoint one or more agents to act with the assignee. *Rev. Sts.*, c. 97, p. 477 (Ed. 1873).

2. *Planck v. Schermerhorn*, 3 Barb. Ch. (N. Y.) 644.

3. *Wilt v. Franklin*, 1 Binn. (Pa.) 502, 516; *Angell v. Rosenbury*, 12 Mich. 241; *Jennings v. Prentice*, 39 Mich. 421; *Guerin v. Hunt*, 6 Minn. 375.

The selection of an incompetent assignee is evidence of a fraudulent intent. *Cram v. Mitchell*, 1 Sand. Ch. (N. Y.) 251; *Currie v. Hart*, 2 Sand. Ch. (N. Y.) 353.

Even without proof of fraudulent intent, an incompetent assignee may be removed on the application of a creditor. *Guerin v. Hunt*, 6 Minn. 375.

An assignee's insolvency was formerly thought to make the assignment fraudulent. *Reed v. Emery*, 8 Paige (N. Y.), 417; *Browning v. Hart*, 6 Barb. (N. Y.) 91.

But where the more recent statutes re-

quire him to give bond, the contrary view prevails. *In re Paddock*, 6 How. (N. Y.) 215; *Pearce v. Beach*, 12 How. (N. Y.) 404; *Holmberg v. Dean*, 21 Kans. 73; *Covert v. Rogers*, 38 Mich. 363.

The creditors' consent is a conclusive indorsement of the assignee's fitness (*Reed v. Emery*, 8 Paige (N. Y.), 417), and they may even agree that the assignor shall act, where the right to appoint a trustee is left to them. *Tompkins v. Wheeler*, 16 Pet. (U. S.) 106.

The selection of the assignor's relatives is not evidence of fraud (*Shultze v. Hoagland*, 85 N. Y. 464; *Bumpas v. Dotson*, 7 Humph. (Tenn.) 310; *Nesbitt v. Digby*, 13 Ill. 33), unless they are preferred creditors (*Cram v. Mitchell*, 1 Sand. Ch. (N. Y.) 251, 255), or of doubtful competency. *Caldwell v. Rose*, *Smith* (Ind.), 190; *Caldwell v. Williams*, 1 Ind. 405; *Montgomery v. Kirksey*, 26 Ala. 172; *Dunlap v. Bournonville*, 26 Pa. St. 72.

4. *Wilt v. Franklin*, 1 Binn. (Pa.) 502, 520; *Johnston v. Zane's Trustees*, 11 Gratt. (Va.) 552, 564; *Gordon v. Cannon*, 18 Gratt. (Va.) 388; *Bank v. Huth*, 4 B. Mon. (Ky.) 423; *Wooster v. Stanfield*, 11 Ia. 128; *Frink v. Buss*, 45 N. H. 325; *Layson v. Rowan*, 7 Rob. (La.) 1.

5. As long as the assignees are clearly designated, it is immaterial whether they are mentioned by their firm-name or as individuals. *Forbes v. Scannell*, 13 Cal. 242.

6. *Pope v. Brandon*, 2 Stew. (Ala.) 401. In *Michigan* this has been held evidence to go to the jury on the question of good faith. *Covert v. Rogers*, 38 Mich. 363.

In *New York* no company that has suspended payments can assign to one of its own officers. 2 *Rev. Sts.* (7th Ed.) p. 1534.

A religious corporation may assign to a person ineligible as a trustee of the society under its charter. *De Ruyter v. Church*, 3 N. Y. 238.

Residence in the State is sometimes required.<sup>1</sup>

**4. What passes by the Assignment.**—A general assignment of all the debtor's property will pass to the assignee everything<sup>2</sup> which is by its nature assignable,<sup>3</sup> except property specially exempted

1. In Wisconsin. Rev. Sts. (1878) c. 80, p. 497.

In Minnesota an assignee must also be both a resident and a freeholder. Gen. Sts. (Ed. 1878) c. 41, § 23, p. 544.

2. "Creditors have an equitable claim on all the property of their debtor, and it is his duty as well as his right to devote the whole of it to the satisfaction of their claims." Marshall, C. J., in *Brashear v. West*, 7 Pet. (U.S.) 608.

In *Bank v. Roche*, 93 N. Y. 374, it was held that a general assignment passed a judgment not mentioned therein, nor included in the inventory, nor in a transfer by the assignee to third parties. For how the description is made, see *post*, 8, p. 864.

3. For what property is legally assignable see ASSIGNMENTS. The following are instances taken from decisions in regard to the present subject:

**Real Estate.**—A purchaser's right to a conveyance of land is assignable. *Halbert v. Deering*, 4 Litt. (Ky.) 9; *Brown v. Chambers*, 12 Ala. 697; *Ensign v. Kellogg*, 4 Pick. (Mass.) 1; *Coverdale v. Aldrich*, 19 Pick. (Mass.) 391.

So is land bound by liens or judgments. *Graves v. McFarlane*, 2 Cold. (Tenn.) 167; *Birdwell v. Cain*, 1 Cold. (Tenn.) 301.

So a lessor's interest. *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Willard v. Tillman*, 2 Hill (N. Y.) 274.

So a husband's rights in his wife's property. *Outcalt v. Van Winkle*, 1 Green Ch. (N. J.) 513.

So the income of a *cestui que trust*. *Knefler v. Shreve*, 78 Ky. 297.

So growing crops. *Robinson v. Mauldin*, 11 Ala. 977; *Bellamy v. Bellamy's Admr.*, 6 Fla. 52; *Cochran v. Paris*, 11 Gratt. (Va.) 348; *Dance v. Seaman*, 11 Gratt. (Va.) 778; *Montgomery v. Kirksey*, 26 Ala. 172.

A wife's dower is not divested by an assignment of her husband's real estate unless she join. *Helfrich v. Obermyer*, 15 Pa. St. 113.

**Personal Property.**—A voluntary assignment for the benefit of creditors, which is valid by the law of the assignor's domicile, is sufficient of itself to pass title to the insolvent's personal estate, wheresoever situate, and the deed, without recording, is effective as against the assignor. *Smith's App.* 104 Pa. St. 381.

Goods under an attachment are assign-

able. *Vernon v. Morton*, 8 Dana (Ky.), 247, 252.

Chattels subject to a mortgage are assignable whether after condition broken or not. *Lindemann v. Ingham*, 36 Ohio St. 1; *Gimble v. Ferguson*, 58 Iowa, 414.

A part of an entire debt cannot be assigned without the debtor's consent. *Gibson v. Cooke*, 20 Pick. (Mass.) 15.

A contingent debt is assignable. *Crocker v. Whitney*, 10 Mass. 316.

A debt of the assignor's partner to the partnership passes under the words 'all debts due the grantor.' *Griffin v. Macaulay*, 7 Gratt. (Va.) 476.

An assignment of debts due is subject to the debtor's claim of set-off of a debt not yet due. *Fry v. Boyd*, 3 Gratt. (Va.) 73.

A debt discharged in fraud of creditors cannot be revived and assigned. *Brownell v. Curtis*, 10 Paige (N. Y.), 210; *Browning v. Hart*, 6 Barb. (N. Y.) 91.

Claims for damages to land and incorporeal hereditaments are assignable. *Mayo v. Snead*, 78 Ky. 634.

A right of action for fraudulent representations passes by a general assignment. *Moore v. McKinstry*, 37 Hun (N. Y.), 194.

In some States claims for torts to personality do not pass unless specifically mentioned. *Whitaker v. Gavit*, 18 Conn. 522.

A chattel held by the vendor as security for the purchase-money is assignable. *Watson v. Dobbin*, 89 N. Car. 107; *Miller v. Hoyle*, 6 Ired. Eq. (N. Car.) 269; *Williams v. Leachey*, 85 N. Car. 402.

Even before the laws putting a married woman's personality in her own control, an assignment of all the debtor's estate did not pass a chose in action of his wife, unless specially mentioned. *Eshleman v. Shuman*, 13 Pa. St. 561; *Skinner's App.*, 5 Pa. St. 262.

After an assignment of the property described in a schedule, the assignor delivered to the assignee a chattel not included in the schedule, intending, whether it was included or not, that it should be appropriated for the benefit of his creditors. *Held*, that it passed, and he could not reclaim it. *Faxon v. Durant*, 9 Metc. (Mass.) 339.

It has been held that a trade-mark is not assignable. *Bradley v. Norton*, 33 Conn. 158.

by law,<sup>1</sup> or excepted by the terms of the deed or the schedules annexed,<sup>2</sup> where the law allows an exception.

But the weight of authority is the other way. *In re Knox*, 1 Monthly L. Bulletin, 47; *Milliken v. Dart*, 26 Hun (N. Y.), 24; *Hegeman v. Hegeman*, 8 Daly (N. Y.), 1; *Morgan v. Rogers*, 19 Fed. R. 596.

A trade-name is not assignable, and a purchaser of all the assigned stock, etc., who continues the business at the old stand, cannot prevent the assignor from forming a company and carrying on the business under the old name. *Iowa Seed Co. v. Dow*, 30 N. W. Rep. 864.

Partnership property does not pass unless an intent to that effect be shown. *Merrill v. Wilson*, 29 Me. 58.

An assignment in Virginia preferred certain creditors mentioned in a schedule in which the amounts due them were also stated. Some of these debts being fictitious, it was held that the assets intended to be applied to them did not pass under the provisions of the deed, but remained in the assignor as to attaching creditors, and were subject to their claim. *Bank v. Hofheimer*, 23 Fed. R. 13.

1. This is usually the property exempt from execution, and an assignment is not void for reserving this property. *Mulford v. Shirk*, 26 Pa. St. 473; *Heckman v. Messenger*, 49 Pa. St. 465; *Peterman's App.*, 76 Pa. 279; *Dow v. Platner*, 16 N. Y. 562; *Dolson v. Kerr*, 5 Hun (N. Y.), 643; *Baldwin v. Peet*, 22 Tex. 708; *Garner v. Frederick*, 18 Ind. 507; *Perry v. Vezina*, 63 Ia. 25; *Hollister v. Loud*, 2 Mich. 309; *Smith v. Mitchell*, 12 Mich. 180; *Brooks v. Nichols*, 17 Mich. 38; *Rosenthal v. Scott*, 41 Mich. 632; *Farquharson v. McDonald*, 2 Heisk. (Tenn.) 404; *Sugg v. Tillman*, 2 Swan (Tenn.), 208; *Simpson v. Roberts*, 35 Ga. 180.

In Connecticut real estate outside the State, and, in the case of sole assignors, one hundred dollars in cash, are also exempt. Gen. Sts. (Rev. 1875) p. 378, § 1. But the cash is not exempt unless so claimed in the instrument. *Raymond's App.*, 28 Conn. 47.

In California insurance on the debtor's life is also exempt. Civ. Code Cal. § 2470.

In Indiana resident householders have an additional exemption of six hundred dollars' worth. *O'Neil v. Beck*, 69 Ind. 239; *Garner v. Frederick*, 18 Ind. 407.

In Michigan an assignment is subject to the assignor's right of selection of property exempt from execution, which need not be specified in the instrument. *Hollister v. Loud*, 2 Mich. 309; *Smith v. Mitchell*, 12 Mich. 180; *Brooks v. Nich-*

*ols*, 17 Mich. 38; *Rosenthal v. Scott*, 41 Mich. 632.

In Pennsylvania the exemption on household furniture and things of domestic use can be claimed subsequently, though no claim was made in the assignment. 1 *Purd. Dig.* (1885) 123, pl. 23.

In New Jersey it has been held that an assignment covering exempt property subjects it to an execution which is prior to the assignment. *Moses v. Thomas*, 26 N. J. L. 124; *Van Waggoner v. Moses*, 26 N. J. L. 570.

It has been held that a homestead allowance does not pass by a general assignment. *Hoge v. Hollister*, 8 Bax. (Tenn.) 533. And that where the homestead burned down the debtor's wife could claim an allowance from the assignee. *Kelly v. Duffy*, 31 Ohio St. 437.

An assignor who has judgments against him with waiver of exemption can claim none in his assignment. *Shaeffer's App.*, 101 Pa. St. 45.

When only real estate passes, the exemption, though reserved, should be claimed before the appraisers, and if the assignor neglects to apply for an appraisal of property to be reserved, his administrator can claim nothing. *Shaeffer's App.*, 101 Pa. St. 45.

A reservation of \$300 worth of exempt property, to be selected after the assignment, is valid. *Rainwater v. Stevens*, 15 Mo. App. 544.

If an assignment by a firm excepts exempt property without designating it, the presumption is that an exemption out of the individual property of each partner was intended, and the assignment is valid. *Wooldridge v. Iving*, 23 Fed. R. 676.

2. Such an exception, making the assignment partial in fact, if not in terms, is allowed in some States. Mississippi: *Ingraham v. Grigg*, 13 Sm. & M. (Miss.) 22. Pennsylvania: *Knight v. Waterman*, 36 Pa. St. 258; *Heckman v. Messenger*, 49 Pa. St. 465. Wisconsin: *Bates v. Ableman*, 13 Wis. 644. Texas: *Baldwin v. Peet*, 22 Tex. 708; *New York: Carpenter v. Underwood*, 19 N. Y. 520.

An exception of property as exempt by law, when in fact the law exempts none, does not invalidate an assignment. *Dodd v. Hills*, 21 Kans. 707; *Goll v. Hubbell*, 61 Wis. 293; *Bank v. Hackett*, 61 Wis. 335.

Neither does the fact that some of the property is real estate within the jurisdiction of a foreign court, and which there-

Only such property will pass, however, as is embraced in the terms of the instrument, and the effects of an assignment purporting to be general will be modified by descriptive clauses, or a schedule, which operate to limit the property assigned to that described in them.<sup>1</sup>

The assignee takes only such rights in the property as the assignor had at the time of the assignment.<sup>2</sup> It follows from this well-known principle that an assignment does not pass title to property previously transferred by the assignor, even if in fraud of his creditors.<sup>3</sup> In some States this has been altered by statute.<sup>4</sup>

fore cannot pass. *Frink v. Buss*, 45 N. H. 325.

1. *Burrill on Assignments*, § 98. And see cases cited in last note.

2. Hence real estate already levied on does not pass. *Kingman v. Loyer*, 40 Ohio St. 109.

In Rhode Island a mortgage of personality is invalid against third parties without recording and delivery of possession, but even without these a *bona-fide* mortgagee, who did not design to give the mortgagor a fictitious credit, is entitled to the proceeds after sale under a subsequent general assignment. *Wilson v. Esten*, 14 R. I. 621.

An assignee for the benefit of creditors can take no exception to the validity of a chattel mortgage given by his assignor, on the ground that it was not filed in the county where the mortgagor actually resided. He is bound by the equity to which the property was subject when it came to his hands from the assignor. *Shaw v. Glen*, 37 N. J. Eq. 32.

A mortgage was executed in June, 1884, to secure a debt, by the debtor, who, in September, 1884, made an assignment for the benefit of such creditors as would consent to take under it. There was nothing to show that the assignment was contemplated when the mortgage was given, or that the mortgagor intended by executing it to delay or defraud other creditors, or to give a preference over other creditors, or that the mortgagee believed that such was the purpose of the mortgagor. *Held*, construing in this connection the ninth section of the Texas act relating to assignments, that the assignee did not have the same right to attack the mortgage, which was unrecorded, as creditors of the assignor holding liens would have. *Keller v. Smalley*, 63 Tex. 512.

A parol transfer of goods to arrive, as security for a pre-existing debt and prospective advances, is valid against the assignee though the pledgee do not take possession till after the assignment. *Gammons v. Holman*, 11 Or. 284.

An assignment by one partner gives

only a limited right to the assignee. *Moddewell v. Keever*, 8 W. & S. (Pa.) 63; *Fellows v. Greenleaf*, 43 N. H. 421.

A general assignment does not pass the debtor's interest in money borrowed by him, then in course of transmission to the lender. *Sheldon v. Dodge*, 4 Den. (N. Y.) 217.

Nor a note transferred to the assignor for collection. *Worthington v. Greer*, 17 B. Mon. (Ky.) 741.

An assignment of "all the rum and other liquors, . . . casks, etc., and other personal property whatever, being on the premises of or belonging to" the debtor, does not pass barrels of rum previously consigned to a commission-merchant elsewhere for sale, though still unsold. *Tucker v. Clesby*, 12 Pick. (Mass.) 22. See also *Shaw v. Lowry*, *Wright (O.)*, 190.

Subsequently acquired property does not pass. *McCabe's App.*, 22 Pa. St. 427; *Lorenz v. Orlady*, 87 Pa. St. 228; *Haskins v. Alcott*, 13 Ohio St. 210; *Shipman v. Graves*, 41 Mich. 675.

Nor do goods in transit not mentioned in the assignment, and not intended either by vendor or vendee to become the vendee's property in case of an assignment by him, even if they come into his possession. *Clark v. Bartlett*, 50 Wis. 543. See *Lacker v. Rhoads*, 51 N. Y. 641.

3. *Brownell v. Curtis*, 10 Paige (N. Y.), 210; *Leach v. Kelsey*, 7 Barb. (N. Y.) 466; *Van Heusen v. Radcliffe*, 17 N. Y. 580; *Van Dyke v. Christ*, 7 W. & S. (Pa.) 373; *Estabrooke v. Messersmith*, 18 Wis. 545; *Hawks v. Pritzlaff*, 51 Wis. 160; *Flower v. Cornish*, 25 Minn. 473; *Heinrichs v. Woods*, 7 Mo. App. 236; *Hanes v. Tiffany*, 25 Ohio St. 549.

In Iowa, as at common law, the right of a creditor to set aside a fraudulent conveyance of his debtor does not pass to the assignee. *Rumsey v. Town*, 20 Fed. R. 558; *Sandwich Co. v. Wright*, 22 Fed. R. 631. But in the latter case it was held that an assignee may defeat the effect of a fraudulent mortgage on realty assigned.

4. In New York such transfers and

In an assignment for particular creditors, the property assigned must not exceed the indebtedness provided for.<sup>1</sup>

**5. Formal Requisites of an Assignment.**—General assignments should always be in writing;<sup>2</sup> and partial assignments are usually so.<sup>3</sup>

The instrument is best drawn in the form of a deed conveying the property, with a declaration of trust<sup>4</sup> directing the disposition

other like acts may be resisted and the property recovered by the assignees. 3 Rev. Sts. (7 Ed.) p. 2330; Southard v. Benner, 72 N. Y. 424; Ball v. Slaffter, 32 Hun (N. Y.), 353; Leonard v. Claflin, 26 Hun (N. Y.), 288; Miller v. Halsey, 4 Abb. N. C. (N. Y.), 218; McMahon v. Allen, 35 N. Y. 403; s. c., 32 How. (N. Y.) 313.

So in Maine. Rev. Sts. (Ed. 1883) c. 70, § 52.

An assignee may maintain a bill in equity against the assignor and his grantee to recover property fraudulently conveyed and transferred by the assignor, previously to the assignment, however defective the description, or inapplicable to the property the terms of the assignment may be. Simpson v. Warren, 55 Me. 18.

So in Michigan. How. Sts. § 8741; Heineman v. Hart, 55 Mich. 64.

So in Wisconsin. Batten v. Smith, 62 Wis. 92.

In Connecticut proceedings in insolvency must be begun within sixty days after the transfer in order to affect it. Palmer v. Thayer, 28 Conn. 257; Shipman v. Aetna Ins. Co., 29 Conn. 245; Sisson v. Roath, 30 Conn. 15; Robertson v. Todd, 31 Conn. 555; Thomas v. Beck, 39 Conn. 241.

A mortgage void as to creditors is void as against an assignee for the benefit of creditors. Hanes v. Tiffany, 25 Ohio St. 549; Lindemann v. Ingham, 36 Ohio St. 1.

A deed of assignment for the benefit of creditors, which excepts from the operation of the assignment "all existing liens," does not give priority to a mortgage lien which is void as against creditors although valid as against the assignor. Blandy v. Benedict, 42 Ohio St. 295.

1. In such a case, an excess is evidence of fraud. Beck v. Burdett, 1 Paige (N. Y.), 305; Butler v. Stoddard, 7 Paige (N. Y.), 163; Stetson v. Miller, 36 Ala. 642; Longmire v. Goode, 38 Ala. 577; Du Bose v. Carlisle, 51 Ala. 590; Watkins v. Jenkins, 24 Ga. 431.

But an excess more apparent than real will not invalidate. Beck v. Burdett, 1 Paige (N. Y.), 305.

In Massachusetts the excess can be at-

tached by other creditors. Foster v. Manf. Co., 12 Pick. (Mass.) 451; Russell v. Woodward, 10 Pick. (Mass.) 408; Adams v. Blodgett, 2 Wood. & M. (Mass.) 233; Hastings v. Baldwin, 17 Mass. 552.

2. Hertle v. McDonald, 2 Md. Ch. Dec. 128.

This is usually required by statute. *Eg.*, in Connecticut: Gen. Sts. (Rev. 1875) p. 378; Whitaker v. Gart, 18 Conn. 522. Indiana: Rev. Sts. (ed. 1876) § 2663. Minnesota: Sts. (1878) p. 544. New York: 3 Rev. Sts. (7th Ed.) p. 2276; Hardman v. Bowen, 39 N. Y. 196; Britton v. Lorenz, 45 N. Y. 51; s. c., 3 Daly, 23; Kercheis v. Schloss, 49 How. (N. Y.) 284. Oregon: Laws of 1878, p. 37.

Assignments of real estate come within the statutes of frauds, and must be in writing. Lill v. Brant, 6 Brad. (Ill.) 366.

3. Partial assignments of personalty have sometimes been sustained, though verbal. Loftin v. Lyon, 22 Ala. 540; Higginbottom v. Peyton, 3 Rich. Eq. (S. Car.) 398; Brown v. Chamberlain, 9 Fla. 464; Gordon v. Green, 10 Ga. 534; Lockwood v. Canfield, 20 Ill. 126; Newby v. Hill, 2 Metc. (Ky.) 530; Boyden v. Moore, 11 Pick. (Mass.) 362; *sed contra*, Foster v. Lowell, 4 Mass. 308.

4. Burrill on Assignments, § 127; Bishop on Insolvent Debtors, § 126.

No particular form of words is necessary to create a trust. Gordon v. Green, 10 Ga. 534; Wallace v. Wainwright, 87 Pa. St. 263; Bank v. Trust Co., 11 Phila. (Pa.) 510.

Hence no particular form of words is necessary to constitute an assignment in trust for creditors. But the transaction must be in substance an absolute transfer of property in trust for the benefit of creditors. Therefore, where A and B, residing in Montgomery County, being financially embarrassed, obtained an extension of time from their creditors, and in consideration thereof gave a mortgage on their real estate to C, who resided in Philadelphia County, to secure their liabilities thus extended, and C sold the property under the mortgage, and subsequently, regarding the mortgage as an assignment for the benefit of creditors under the act of 1836, filed his account



to be made of it. Informal writings, however, have often been held valid.<sup>1</sup>

An assignment may be made by several instruments.<sup>2</sup> The

in the Common Pleas of Montgomery County, as provided in that act, *held*, that the mortgage was not an assignment for creditors within the act, and that the jurisdiction over the account was in the Common Pleas of Philadelphia County, the domicile of the trustee. *Johnson's App.*, 103 Pa. St. 373.

So a pledge or mortgage to secure future advances to be made by the pledgee to pay the debts of the pledgor, not exceeding an amount specified, with power to pledge or mortgage the property to others to secure any money he might borrow to make the advances, is no assignment for the benefit of creditors. It transfers no ownership except so far as needed to secure the pledgee for the advances he might make. *Beans v. Bullitt*, 57 Pa. St. 221; *Kalkman v. McElderry*, 16 Md. 57; *Brown v. Holcomb*, 1 Stock. (N. J.) 297. See also *Britton v. Lorenz*, 45 N. Y. 51.

A judgment given to prefer a particular creditor is not an assignment in a State where preferences are forbidden. *Blakey's App.*, 7 Pa. St. 449.

Neither is a judgment confessed to a trustee for the payment of certain specified creditors. *Guy v. McIlree*, 26 Pa. St. 92.

An assignment made to the assignee, "his heirs, executors, administrators, and assigns," is in proper form. It describes the quality of the estate conveyed, not a class of persons to whom it is conveyed. *Flagler v. Schoeffel*, 40 Hun (N. Y.), 178.

An assignment to the assignee, "his heirs, executors, administrators, and assigns," instead of to "his successors and assigns," is usual and proper where the assignment includes real estate. *Bates v. Simmons*, 62 Wis. 69.

Where there is more than one assignee, words of survivorship should be used. *Burrill on Assignments*, § 140.

In Pennsylvania the wife must join in an assignment of real estate to bar her dower. *Hennessy v. Western Bk.*, 6 W. & S. (Pa.) 300; *Helfrich v. Obermyer*, 15 Pa. St. 113. So in Maryland (*Schumann v. Peddicord*, 50 Md. 560; *Reiff v. Eshleman*, 52 Md. 582; *Reiff v. Horst*, 55 Md. 42) and Virginia. *Reynolds v. Bank*, 6 Gratt. (Va.) 174. In New York the wife must join in a separate deed of the land of even date. *Darling v. Rogers*, 22 Wend. (N. Y.) 483.

1. *E.g.*, a letter inclosing notes, with directions for their appropriation in payment of debts. *Shilbar v. Winding*, 1 Chev. L. (S. Car.) 218; *Hall v. Marston*, 17 Mass. 575.

A power of attorney to collect certain moneys and pay certain creditors in a specified order has been held an assignment. *Watson v. Bagaley*, 12 Pa. St. 164. See also *Stimpson v. Fries*, 2 Jones Eq. (N. Car.) 156.

A lease reserving a portion of the rent for the payment of the lessor's debts has been held an assignment. *Lucas v. S. & E. R.*, 32 Pa. St. 458; *Bittenger v. Railroad*, 40 Pa. St. 269.

In the former case it was said in the court below: "The means employed in each particular instance would have seemed immaterial if the result were a transfer in trust or a trust bottomed on a transfer; if, in short, the property ceased to be the debtor's without vesting directly and absolutely in his creditors, and remained outstanding in the hands of a third person who could not be compelled to render an account or to fulfil the duties imposed upon him without a recourse to the aid of equity."

A declaration made before an American consul in foreign parts, signed and acknowledged by the assignor, has been held valid. *Forbes v. Scammell*, 13 Cal. 242.

2. A deed of absolute conveyance and a declaration of trust in a separate instrument have been sustained as one assignment. *Bank v. Reigart*, 4 Pa. 477; *Johnson v. Whitwell*, 7 Pick. (Mass.) 71.

So three deeds of trust, executed at intervals of some years. *Stimpson v. Fries*, 2 Jones Eq. (N. Car.) 156.

So partial assignments in the form of distinct deeds, which were intended to evade the priority of the United States. *Downing v. Kintzing*, 2 S. & R. (Pa.) 326.

Where the defendant executed chattel mortgages for the benefit of certain creditors, and on the same day a general assignment, they were held one transaction and invalidated by the preference. *Van Patten v. Burr*, 52 Iowa, 518.

Where the deed of assignment made for the benefit of creditors conveyed designated property, without specifying in terms that it mentioned all the property owned by the assignor, but there was attached to and made part of the assign-

schedules, or inventories, of assets and liabilities are essential features of an assignment.<sup>1</sup> The general rule is that these should be prepared and annexed to the assignment before its execution;<sup>2</sup> but if the omission is promptly supplied, an assignment is usually allowed to take effect even before they are annexed.<sup>3</sup>

ment an inventory which contained a declaration that the property therein named was all the estate of the assignor of every description, except such as was exempt from forced sale, the two papers were construed as one, and as a compliance with the second section of the act of March 24, 1879, which required a conveyance of all the debtor's property except that which was exempt. *Keating v. Vaughn*, 61 Tex. 518.

But it has been held that where an insolvent person executed two chattel mortgages in good faith for a valuable consideration for the benefit of certain creditors, and such mortgages were duly filed, and thereafter and upon the next day a deed of voluntary assignment for the benefit of all his creditors was executed by him, the execution of such instruments does not constitute a single transaction, nor do such chattel mortgages and the assignment defeat each other, as each is valid. *Bailey v. Mfg. Co.*, 32 Kan. 73. See also *Norton v. Kearney*, 10 Wis. 443; *Barrows v. Lehdorff*, 8 Iowa, 96; *Van Vleet v. Slauson*, 45 Barb. (N. Y.) 317; *Bridges v. Hindes*, 16 Md. 101; *Berry v. Cutts*, 42 Me. 445; *Schoolfield v. Johnson*, 11 Fed. Rep. 297; *Blank v. German*, 5 W. & S. (Pa.) 36; *Mussey v. Noyes*, 26 Vt. 468; *Peck v. Merrill*, 26 Vt. 680; *French v. Townes*, 10 Gratt. (Va.) 513; *U. S. v. Bank of U. S.*, 8 Rob. (La.) 262; *Holt v. Bancroft*, 30 Ala. 195; *Kruse v. Prindle*, 8 Or. 158; *Lill v. Brant*, 6 Brad. (Ill.) 366; *Moody v. Paschal*, 60 Tex. 483.

1. *Terry v. Butler*, 43 Barb. (N. Y.) 395; *Talcott v. Hess*, 31 Hun (N. Y.) 282.

This is true when they are required by statute, as is usually the case. For the assignee's inventory see *post*, 11, p. 874.

2. *Burrill on Assignments*, §§ 139, 151.

In New Jersey a sworn inventory or schedule must be annexed to the assignment. *Rev. Sts. (Ed. 1878) p. 37, § 2.*

So in Vermont. *Code of 1880, tit. 14, c. 7, §§ 2117, 2124.*

In *Coggin v. Stephens*, 73 Ga. 414, no inventory was taken until after the instrument was executed, and it was never sworn to or annexed to the conveyance. A judgment obtained after the making of this instrument was levied on the property. *Held*, that the assignment was

void because there was no complete inventory and schedule of the assets of the assignor made out and sworn to by him and attached to the deed.

3. *Clark v. Mix*, 15 Conn. 152; *Woodward v. Marshall*, 22 Pick. (Mass.) 468; *Stevens v. Bell*, 6 Mass. 339; *Emerson v. Knower*, 8 Pick. (Mass.) 63; *Stamp v. Case*, 41 Mich. 267; *Keyes v. Brush*, 2 Paige (N. Y.), 311; *Hotop v. Neidig*, 17 Abb. Pr. (N. Y.) 332; *Turner v. Jaycox*, 40 N. Y. 470 (but see *Moir v. Brown*, 14 Barb. (N. Y.) 39); *Rundlett v. Dole*, 10 N. H. 438; *Hardcastle v. Fisher*, 24 Mo. 70; *Robins v. Embry*, 1 Sm. & M. Ch. (Miss.) 207; *Shackelford v. Bank*, 22 Ala. 238; *Gordon v. Cannon*, 18 Gratt. (Va.) 388; *Ely v. Blair*, 16 B. Mon. (Ky.) 230; *Poehlmann v. Kennedy*, 48 Cal. 201; *Meeker v. Saunders*, 6 Iowa, 61; *Linn v. Wright*, 18 Tex. 317; *Steinlein v. Halstead*, 52 Wis. 289; *Pearpoint v. Graham*, 4 Wash. C. C. 232.

The omission of the schedule, taken with other circumstances, may be evidence of fraud. *Van Nest v. Yoe*, 1 Sand. Ch. (N. Y.) 4; *Kellogg v. Slauson*, 15 Barb. (N. Y.) 56; s. c., 11 N. Y. 302; *Stevens v. Bell*, 6 Mass. 339; *Wilt v. Franklin*, 1 Binn. (Pa.) 502, 514.

In Wisconsin a failure to make and file an inventory within ten days after the assignment is executed renders the assignment void, even if this happen through mistake. *Mather v. McMillan*, 60 Wis. 546.

**Sufficiency of the Schedules.**—The provision of the New York act in relation to assignments for the benefit of creditors (subd. 3, § 3, chap. 466, Laws of 1877), requiring that the inventory of a debtor making an assignment shall state the sum owing to each creditor "with the true cause and consideration therefor" does not require, where the indebtedness consists of promissory notes, that the inventory should state what they were given for. A statement, as to each note, of its date, time of payment, payee, to whom belonging, and the amount due thereon, is sufficient. *Pratt v. Stevens*, 94 N. Y. 387.

The schedules filed with an assignment by a partnership need not show the state of the accounts between the firm and the individual partners or between such partners. *Smith v. Bowen*, 61 Wis. 258.

The assignee is sometimes a party to the instrument.<sup>1</sup>

When the assignment is manifestly for the advantage of the creditors, with no provisions prejudicial to them, their consent will be presumed unless the contrary appears, though they do not join in the deed.<sup>2</sup>

If the assignment requires some act to be done which is not presumptively for the benefit of the creditors, it cannot bind them without their consent, and they would be proper parties to the instrument.<sup>3</sup>

If the assignment be drawn with the express design that it should be executed by the creditors, or expressly requires their

Omissions from the list of creditors, or a failure to state the true amount of a certain debt, if caused by an innocent mistake, do not invalidate an assignment. *Smith v. Bowen*, 61 Wis. 258.

In *Barroilhet v. Fisch*, 63 Cal. 462, it was said: "Conceding that the assignor in some instances inventoried his indebtedness to some of the creditors, for whose benefit said the assignment was made, too high, we think, in the absence of any evidence that it was designedly done, the assignment should not be held void for that reason. A mere mistake of computation ought not to vitiate such an assignment, and we are not prepared to say from an inspection of the record that there is anything more than that apparent in this case. The court below found that there was not, and we must presume that the evidence justified that finding unless the contrary appears."

The Wisconsin statute (sec. 1697 R. S.) providing that no mistake in the inventory and list of creditors shall invalidate a voluntary assignment applies to mistakes of omission. *Batten v. Smith*, 62 Wis. 92.

In an assignment of individual and firm assets the inventory filed comprised, apparently, a merchant's stock of goods only. The affidavit annexed thereto stated that it was "true and correct of all the assets of the firm of B. & Co., of which B. is the sole member." *Held*, that, presumptively and in the absence of evidence to show a mistake in the affidavit, the inventory was not "a correct inventory" of all the assets of B. within the meaning of sec. 1697 R. S.; and, by the failure to file such a correct inventory within ten days after the execution of the assignment, the title of the assignee was divested. *Haben v. Harshaw*, 59 Wis. 508.

1. This is usual when the instrument contains an express provision for its execution by the assignee, or a covenant to

be performed by him. *Burrill on Assignment*, § 124.

Acceptance by the assignee is necessary, but not his signature. *State v. Benoit*, 37 Mo. 500.

2. *Nichol v. Mumford*, 4 Johns. Ch. (N. Y.) 522; *Ludington's Petition*, 5 Abb. N. C. (N. Y.) 307; *Brown v. Minturn*, 2 Gall. (U. S.) 557; *Lawrence v. Davis*, 3 McL. (U. S.) 177; *Ward v. Lewis*, 4 Pick. (Mass.) 518; *Pingree v. Comstock*, 18 Pick. (Mass.) 46; *Weir v. Tannehill*, 2 Yerg. (Tenn.) 57; *Robertson v. Sublett*, 6 Humph. (Tenn.) 313; *Ingram v. Kirkpatrick*, 6 Ired. Eq. (N. Car.) 462; *Stimpson v. Fries*, 2 Jones Eq. (N. Car.) 156; *Jones v. Dougherty*, 10 Ga. 273; *Bellamy v. Bellamy*, 6 Fla. 62; *Brown v. Chamberlain*, 9 Fla. 464; *Forbes v. Scannell*, 13 Cal. (Va.) 242; *Hall v. Dennison*, 17 Vt. 310; *Fellows v. Greenleaf*, 43 N. H. 421.

Where the creditors are not required to be parties to the instrument, they may take the benefit of the trust by notice to the trustee within the time named, if any, and if none, then within a reasonable time and before a distribution of the property. *McFerran v. Davis*, 70 Ga. 661.

Where a deed of trust was executed to secure creditors (naming them), and authorized the trustee to divide the proceeds of the sale of property conveyed *pro rata* "amongst the said subscribing creditors, parties of the third part," but it was signed only by the grantor and trustee, and the trust accepted by the latter, *held*, that the deed was binding on those who executed it, although it appeared that when it was drawn the secured creditors should also sign, and the same was properly admitted to probate and registration. *Moore v. Hinnant*, 89 N. Car. 455.

3. *E.g.*, if a release is stipulated for. *Wakeman v. Grover*, 4 Paige (N. Y.) 23; s. c., 11 Wend. (N. Y.) 187; *Drake v. Rogers*, 6 Mo. 317. But see *Gale v. Mensing*, 20 Mo. 461.

assent, they must execute it or express their assent as required, to make it binding as to them.<sup>1</sup>

An assignment may be made by attorney under a proper power.<sup>2</sup>

An assignment must be attested, sworn to, or acknowledged,<sup>3</sup>

1. *Lawrence v. Davis*, 3 McL. (U. S.) 177; *Brown v. Lyon*, 17 Ala. 659; *Shearer v. Loftus*, 26 Ala. 603.

But in *Windham v. Patty*, 62 Tex. 490, the assignment on its face contemplated three parties to it, viz., the makers, the assignee, and the creditors, "who have executed or may hereafter execute or accede to its terms." The deed closed with these words: "And the parties of the third part (the creditors) express their consent to this arrangement and accept the provisions made for them." It was only signed by the makers and the assignee. *Held*, the creditors accepting the provisions of the deed might do so without signing it.

In *Hewlett v. Cutler*, 137 Mass. 285, an assignment was made in consideration of the covenants and agreements therein expressed to be performed by "their creditors" and the trustees, and of one dollar and other good and valuable considerations paid to the assignors by "said creditors" and the trustees. The assignment recited that it was the purpose of the assignors to have the instrument executed by all their creditors whose claims should equal or exceed a certain sum, and to secure their own release from all personal responsibility for their debts, except those which were trifling in amount; provided that, when they should express their satisfaction with the due execution of the instrument in writing and upon the instrument, it should be a perfected conveyance and agreement, and not before; and the assignors covenanted with the trustees and their creditors to execute further conveyances if required. The instrument also recited that the creditors had appointed an advisory committee, who were to advise the trustees; and provided for filling vacancies by a vote of the creditors. The trustees were constituted the attorneys of the assignors and of the creditors; and covenanted with them, "parties hereto," to execute the trust faithfully; and the respective creditors of the assignors, each for himself, ratified the conveyance, and agreed to accept from the trustees their dividend or proportionate part of the estate in full payment, satisfaction, and discharge of their respective debts, "and an acceptance of this conveyance for our benefit,

evidenced by our signature hereto, shall constitute such discharge." *Held*, that only such creditors as became parties to the assignment were entitled to share in the dividends.

Creditors may become parties by filing their claims under the assignment, without having signed the instrument. *Bodley v. Goodrich*, 7 How. (U. S.) 276.

2. *Lowenstein v. Maurand*, 82 N. Y. 494.

3. In New York both acknowledgment and recording have been held essential to the validity of an assignment, and due acknowledgment is necessary to make the recording effectual.

The New York Common Pleas held, in 1884, that any defect in the officer's certificate of acknowledgment (*e.g.*, referring to the assignee as the party "described in and who executed the same," instead of "the within instrument") made the assignment absolutely void. *Smith v. Tim*, 14 Abb. N. C. (N. Y.) 447; practically reversing *Tim v. Smith*, 13 Abb. N. C. (N. Y.) 31.

The Supreme Court, however, in 1885 held that the words "the same" were not meaningless, and that the officer should have been allowed to testify that the acknowledgment was in fact made in due form at the time stated. *Clafin v. Smith*, 35 Hun (N. Y.), 372.

So a notary's certificate of acknowledgment, if defective, can be corrected by him so as to validate the assignment, even after the assignor's death. *Camp v. Buxton*, 34 Hun (N. Y.), 511.

In New Jersey acknowledgment is not necessary to the vesting of the estate assigned. *Scully v. Reeves*, 3 N. J. Eq. 84.

In Illinois an assignment is not required by the statute to be acknowledged in the county where the grantor resides, but must be there recorded. The words in the first section of the act of 1877, that "every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside," do not require the deed to be acknowledged at the county of the grantor's residence. There should be a comma after the word "acknowledged." *Zimmerman v. Willard*, 114 Ill. 364. See also *Rendleman v. Willard*, 15 Mo. App. 375.

A certificate of the acknowledgment of

and recorded<sup>1</sup> in the manner provided by statute. It must also be delivered to<sup>2</sup> and accepted by<sup>3</sup> the assignee.

6. **Preferences.**—In most of the States, assignments preferring certain creditors are now forbidden by statute.<sup>4</sup> Even in those

a deed by a debtor, of his lands, etc., for the benefit of creditors, which stated that the grantor was personally known to the officer, and that he appeared before such officer and made the acknowledgment of the deed, is substantially good, as sufficiently showing that the grantor did appear in person before the officer, at least under the act relating to voluntary assignments. *Zimmerman v. Willard*, 114 Ill. 364.

1. In New York it has recently (in 1885) been held that the title to the property assigned vests in the assignee on the execution, acknowledgment, and delivery of the assignment, and an attachment procured after the delivery, even with levy before the recording, effects nothing. *McBlain v. Spelman*, 35 Hun (N. Y.), 263; overruling *Rennie v. Gaige*, 24 Hun (N. Y.), 123.

In Minnesota indorsement and record (of the assignment, inventory, and bond) provided for in section 31 of the assignment law (Gen. St. 1878, c. 41) are not essential to the validity of the assignment. *Perkins v. Zarracher*, 32 Minn. 75.

In Virginia an assignment is void until recorded, and all interference with the insolvent's goods may be enjoined on the ground of fraud in an unrecorded assignment, and a marshal put in immediate possession. *Shufeldt v. Jenkins*, 22 Fed. R. 359.

In Pennsylvania the assignment of a non-resident may be recorded within any county of the State where the assignor has any real or personal estate, and will then take effect from its date, saving the rights of "bona-fide purchasers, mortgagees, or creditors having a lien thereon before the recording, in the same county, and not having had previous actual notice thereof." Those having actual knowledge of the assignment are not within this saving clause, and can take no title by deed from the assignor. 1 *Purd. Dig.* (ed. 1885) 122, pl. 14; *Smith's App.*, 104 Pa. 381.

In Missouri taking possession by the assignee has been held equivalent to recording, at least until a reasonable time for the recording has elapsed. *Wise v. Wimer*, 23 Mo. 507.

2. Delivery to the assignee is essential to make the deed effectual. An attachment after execution, before delivery, is

good against the assignee. *Marston v. Coburn*, 17 Mass. 454.

Delivery may be proved by parol evidence, as also that the delivery was conditional, to take effect when the instrument should be signed by the greater part of the creditors. *Ward v. Lewis*, 4 Pick. (Mass.) 518.

3. In New York the assignee's assent may be either by a recital embodied in the assignment, and he may sign and acknowledge the instrument, or it may be by a separate writing duly acknowledged either at the end of or indorsed upon the instrument, but apparently not by an independent document physically separate from the instrument. *Noyes v. Wernberg*, 15 Abb. N. C. (N. Y.) 164.

Where, under the old law in force in New York, a deed was put into the hands of the assignee, and he hesitated and delayed to accept it, but subsequently, after an execution had been levied, claimed the property under it, it was held that the deed did not operate against the execution, for there was a clear non-acceptance in fact during the period of delay. *Crosby v. Hillyer*, 24 Wend. (N. Y.) 280.

In Missouri the beneficial interest of the creditors vests as soon as the assignment is recorded, irrespective of the assignee's acceptance. *Rendleman v. Willard*, 15 Mo. App. 375.

But his acceptance is necessary to bind him. *State v. Benoist*, 37 Mo. 500.

4. Whatever may be thought of the justice of allowing a debtor to make an assignment with preferences, its legality, under the common law, is indisputable. In *Thomas v. Jenks*, 5 Rawle (Pa.), 221; 1 *Am. Lead. Cas.* \*56, *Gibson, C. J.*, said (in 1835) of preferential assignments stipulating for a release: "The basis of it is the admitted right which every debtor in failing circumstances has, to prefer one creditor to another; for as an assignment on valuable consideration and for a lawful purpose, as payment of debts is, necessarily passes the property out of the debtor, the consequence indicated as apparently objectionable is unavoidable, though there be even an express reservation of a trust for the debtor in the unconsumed surplus, which is no more than the law would imply without it. The difficulty is to understand how he may lawfully manage his right to give a pref-

erence in such a way as to secure an advantage to himself in the release of his person and future earnings. And the solution of it is found in the arbitrary control over the order of payment allowed him by the common law, and not restrained by the 13 Elizabeth; which, suffering him to postpone any creditor to the rest, makes participation of the fund before those he may choose to prefer are served, not so much matter of right as of favor. To let a creditor in among the first, therefore, though on condition that he release the unpaid residue of his debt, may be to do him a favor instead of a wrong, which may consequently be extended to him on terms, or not at all. Having an unquestionable power of preference, of which he is the absolute master, it follows that he may set his price upon it, provided it is not a reservation of part of the effects for himself, or anything that would carry his power beyond mere preference. Such is the unavoidable if not the just effect of suffering a debtor to distribute the wreck of his fortune among his creditors according to his pleasure, and it is the repugnance of the mind to inequality of satisfaction which has induced legislators to extirpate the root of it in bankruptcy and insolvency by substituting a process of distribution paramount to the will of the debtor."

The "unavoidable effect" of allowing preferences, as described in the above quotation, has induced a radical change in the law, and in the greater number of the States preferences are now either wholly forbidden by statute, or allowed only as to claims for wages of labor (usually limited to fifty dollars), or a few other exceptional matters.

This change has taken place in Alabama, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Wisconsin. See the statutes of those States.

In some of these States the statutes do not make preferential assignments absolutely void, but simply nullify that provision.

In *Henderson v. Pierce*, 9 N. East. R. 449, it was held that while creditors cannot be preferred in a deed of assignment made in pursuance of the statute governing voluntary assignments for the benefit of creditors, yet a mere direction that the assignee shall first pay certain creditors in full, and then all others ratably, followed by the statement, "in accordance

with an act of the legislature of the State of Indiana, entitled 'An act providing for voluntary assignments,' etc., "approved March 5, 1859," does not render the entire assignment invalid, especially where the whole scope and tenor of the deed show that the assignment was made in good faith, and intended to be governed by the statute.

In Missouri, no matter by what form of instrument preferences are attempted, only a *pro rata* distribution is allowed. *Kerbs v. Ewing*, 22 Fed. Rep. 693.

In Nebraska, if any preferences are made, that part of the assignment will be held void. *Nelson v. Garey*, 15 Neb. 531.

In *Smith v. Bowen*, 61 Wis. 258, a voluntary assignment which upon its face was for the benefit of all creditors alike required the assignee to pay the debts "to and in the order and manner following," etc., the words quoted being those of the old form of assignment when preferences were allowed. *Held*, that such words did not render the assignment uncertain, but might be rejected as surplusage.

In *Bates v. Simmons*, 62 Wis. 69, it was held that an assignment with preferences, made before the enactment of ch. 349, Laws of 1883, prohibiting such preferences, is not illegal merely because made in anticipation of the passage of that act.

Where wages are preferred by statute, an omission to prefer them in the assignment does not invalidate it, as the statute will control. *Richardson v. Herron*, 39 Hun (N. Y.), 537; *Burley v. Hartson*, 40 Hun (N. Y.), 121.

Partial assignments giving preferences have been sometimes held void, irrespective of any statute. *Goodrich v. Downs*, 6 Hill (N. Y.), 438; *Barney v. Griffin*, 2 N. Y. 365; *Rathbun v. Platner*, 18 Barb. (N. Y.) 272; *Sangston v. Gaither*, 3 Md. 40; *Rankin v. Loder*, 21 Ala. 380; *Shackelford v. Bank*, 22 Ala. 238.

**What are not Preferences.**—Where one executed chattel mortgages upon all his property to three of his creditors, and afterwards, on the same day, made an assignment for the benefit of his creditors, subject to the chattel mortgages, but it appeared from the evidence that at the time he made the mortgages he did not contemplate making an assignment, the assignment was not held to be void as including the mortgages, and thus preferring creditors. *Farwell v. Jones*, 63 Iowa, 316. See also *Perry v. Vezina*, 63 Iowa, 25.

In *Gallagher's App.*, 7 Atl. R. 237, it was held that the Pennsylvania statute

States which allow them they are regarded with disfavor,<sup>1</sup> and must be distinctly declared in the deed, and the order of payment fixed<sup>2</sup> at the time the assignment is made.<sup>3</sup>

did not preclude a debtor from preferring a creditor prior to the assignment, while he still retained dominion of his property, so long as he violated no law and committed no fraud.

In *Nelson v. Garey*, 15 Neb. 531, it was held that the Nebraska act forbidding preferences does not prevent a debtor, though in failing circumstances, from preferring a creditor by a separate and independent conveyance unconnected with the transaction of making the assignment, even though the preferred creditor be the assignee named in the assignment subsequently made. Hence the fact that a mortgage was made to a creditor the same day of the assignment, if made *bona fide* and without fraudulent intent, will not render it a part of the assignment so as to convey the mortgaged property in trust for creditors.

In *Evans v. Winston*, 74 Ala. 349, an assignment of individual and partnership property, devoting the former primarily to the payment of individual debts, was held not to be a preference in the true sense of the term.

1. The view adopted seems to be that (as was held in *Uhler v. Mulfair*, 23 Pa. 481), since the claims of creditors may be meritorious in unequal degrees, and since particular creditors have it in their power to obtain a priority by legal proceedings, the preference of creditors is an allowed object or result of a debtor's assignment, but that it is not to be used as a means of accomplishing ends which are not the legitimate objects of a debtor's efforts.

Hence, while in Georgia a debtor may prefer one creditor to another by any legal means, he cannot reserve the surplus for his own benefit or that of any other favored creditor, to the exclusion of other creditors. *McFerran v. Davis*, 70 Ga. 661.

In *Barney v. Griffin*, 2 N. Y. 365, it was said, "The courts have very reluctantly upheld general assignments by an insolvent debtor, which give a preference among creditors; and they can only be supported when they make a full and unconditional surrender of the property to the payment of debts." See also *Nicholson v. Leavitt*, 6 N. Y. 510; *Dunham v. Waterman*, 17 N. Y. 9; *Haydock v. Coope*, 53 N. Y. 68; *Hafner v. Irwin*, 1 Ired. L. (N. Car.) 490; *Smith v. Henry*, 1 Hill (S. Car.), 16.

A debtor will not be permitted, at or before the time the debt is created, by a secret agreement with any of his creditors to engage to prefer their debts in any event in case of emergency, and by such arrangement, in effect, place a secret mortgage upon the assets. *Bank v. Whitmore*, 40 Hun (N. Y.), 499.

Corporations, when assigning because of or in contemplation of insolvency, cannot prefer creditors in New York. 2 Rev. Sts. (7th Ed.) p. 1366, § 9; *Curtis v. Leavitt*, 15 N. Y. 9.

The giving of preferences prevents a discharge under the "Two-thirds" act in New York. Code C. P. § 2173, 2; *Bishop on Insolvent Debtors*, § 34.

Assignments giving preferences are to be construed strictly, and courts of equity will not interpolate phrases to carry out a possible intent to give preferences otherwise than as expressed. *Bank v. Hofheimer*, 23 Fed. R. 13.

An assignment by a firm giving preferences to individual creditors out of the firm assets is fraudulent. *Vernon v. Upson*, 60 Wis. 418; *Willis v. Bremner*, 60 Wis. 622. (Cases arising before the act of 1883.)

A preference given to a creditor as surety on certain debts, does not make him a preferred creditor as to other claims. *Gilchrist v. Gilmer*, 9 Ala. 985, a case arising before the passage of the present act.

2. Merely placing debts at the head of the list gives them no preference. *Winslow v. Assignees*, 1 McCord Ch. (S. Car.) 100.

So where the debts are grouped into classes with a view to preferences. *Colgin v. Redman*, 20 Ala. 650.

3. An assignment which substantially reserves to the assignors the right to give future preferences is fraudulent and void as against creditors who have not assented thereto. *Averill v. Loucks*, 6 Barb. (N. Y.) 470; *Kercheis v. Schloss*, 49 How. (N. Y.) 284; *Hyslop v. Clarke*, 14 John. (N. Y.) 458; *Keiley v. Dusenbury*, 19 Alb. L. J. (N. Y.) 498; *Frazier v. Truax*, 27 Hun (N. Y.), 587.

So an assignment which attempts to confer on the assignee power to declare future preferences, as to non-preferred creditors, in his discretion, is void. *Moody v. Paschal*, 60 Tex. 483; *Boardman v. Halliday*, 10 Paige (N. Y.), 223; *Barnum v. Hempstead*, 7 Paige (N. Y.), 568.

An assignment in which the right to a preference is conditioned on giving a release is usually held void.<sup>1</sup>

**7. Reservations and Stipulations.**—The circumstance which most usually renders assignments fraudulent is the reservation of a use or benefit to the assignor or his family, or to any one not a creditor.<sup>2</sup>

Stipulations for the release of the debtor, as a condition of participation in the benefits of the assignment, are forbidden in many States, and the weight of authority is against their validity.<sup>3</sup>

1. *Goodrich v. Downs*, 6 Hill (N. Y.), 438; *Spaulding v. Strong*, 32 Barb. (N. Y.) 240; *Hafner v. Irwin*, 1 Ired. L. (N. Car.) 490; *Robins v. Embry*, 1 Sm. & M. Ch. (Miss.) 208.

2. It is well settled that such a reservation of any trust, benefit, or profit out of the property assigned is fraudulent in law. *Jackson v. Parker*, 9 Cow. (N. Y.) 73, 86; *Mead v. Phillips*, 1 Sand. Ch. (N. Y.) 83; *Goodrich v. Downs*, 6 Hill (N. Y.), 438; *Kissam v. Edmundson*, 1 Ired. Eq. (N. Car.) 180; *McAllister v. Marshall*, 6 Binn. (Pa.) 338; *Faunce v. Lesley*, 6 Pa. St. 121; *Byrd v. Bradley*, 2 B. Mon. (Ky.) 239; *Whallon v. Scott*, 10 Watts (Pa.), 237; *Cannon v. Peebles*, 2 Ired. Law (S. Car.), 449; *Litchfield v. White*, 3 Sand. S. C. (N. Y.) 554.

Conditions for the payment of money for the support of the assignor or his family invalidate the deed. *Mackie v. Cairns*, Hopk. Ch. (N. Y.) 373; s. c., 5 Cow. (N. Y.) 547; *Harris v. Sumner*, 2 Pick. (Mass.) 129; *Johnston v. Harvey*, 2 P. & W. (Pa.) 82.

Even if in the shape of salary for nominal services. *Currie v. Hart*, 2 Sand. Ch. (N. Y.) 353.

Where the assignor reserved a small sum for purpose of paying small unliquidated claims, such reservation was sustained. *Skipwith v. Cunningham*, 8 Leigh. (Va.) 271.

A condition for the employment of the debtor as agent, if the assignee think proper, has also been sustained. *Bank v. Clarke*, 7 Ala. 765.

Stipulations for the retention of possession and use of the property by the assignor are ordinarily invalid. *Lockhart v. Wyatt*, 10 Ala. 231; *Brooks v. Wimer*, 20 Mo. 503; *Hatcher v. Winters*, 71 Mo. 30; *Klapp v. Shirk*, 13 Pa. St. 579; *Knight v. Packer*, 12 N. J. Eq. 214.

But they have been sustained in some cases. *Baxter v. Wheeler*, 9 Pick. (Mass.) 21; *Kevan v. Branch*, 1 Gratt. (Va.) 274.

Where the contents of stores and factories and the like are assigned, stipulations that the assets should not be immediately sold, but that the assignees should

continue the business until all the stock was worked up and disposed of have often been sustained. *Kendall v. Carpet Co.*, 11 Conn. 383; *Foster v. Saco Co.*, 12 Pick. (Mass.) 451. *Ravisies v. Alston*, 5 Ala. 297; *Jones v. Syer*, 52 Md. 211.

But it has been said in New York that the debtor can prescribe no conditions whatever as to this matter. *Dunham v. Waterman*, 17 N. Y. 9; *Schlusell v. Willett*, 34 Barb. (N. Y.) 615.

3. *Burrill on Assignments*, §§ 184-197. Such stipulations are in the nature of preferences. They are forbidden by statute in Pennsylvania, California, and Vermont.

They are invalid in New York: *Wakeman v. Grover*, 4 Paige (N. Y.), 23; *Austin v. Bell*, 20 John. (N. Y.) 442; *Armstrong v. Byrne*, 1 Ed. Ch. (N. Y.) 79; *Mills v. Levy*, 2 Ed. Ch. (N. Y.) 183. So in Ohio: *Atkinson v. Jordan*, 5 Ohio, 178. Georgia: *Miller v. Conklin*, 17 Ga. 430; *Johnson v. Farnam*, 56 Ga. 144. North Carolina: *Hafner v. Irwin*, 1 Ired. Law (N. Car.), 490. Mississippi: *Robins v. Embry*, 1 Sm. & M. (Miss.), 208. Missouri: *Brown v. Knox*, 6 Mo. 302. Tennessee: *Wilde v. Rawlings*, 1 Head (Tenn.), 34.

They have been held valid in Massachusetts: *Hewlett v. Cutler*, 137 Mass. 285. In Rhode Island: *Dockray v. Dockray*, 2 R. I. 547; *Allen v. Gardner*, 7 R. I. 22. In South Carolina: *Pfeifer v. Dargan*, 14 S. Car. 44. In Virginia: *Skipwith v. Cunningham*, 8 Leigh. (Va.) 271; *Gordon v. Cannon*, 18 Gratt. (Va.) 387. In Alabama: *Robinson v. Rapelye*, 2 Stew. (Ala.) 86. But the assignment must be complete, with no stipulation for a return of part of the proceeds to the debtor. *Grimshaw v. Walker*, 12 Ala. 101; *West v. Snodgrass*, 17 Ala. 549; *Rankin v. Lodor*, 21 Ala. 380. In Maryland on the same conditions. *McCall v. Hinckley*, 4 Gill (Md.), 128; *Whedbee v. Stewart*, 40 Md. 414; *Maughlin v. Tyler*, 47 Md. 545. So in Arkansas: *Clayton v. Johnson*, 36 Ark. 406.

In *Keating v. Vaughn*, 61 Tex. 518, it was held that a State statute which, in providing for the administration of the



A provision that the surplus shall be returned to the assignor after all the debts are paid is valid, and would be implied by law if not expressed.<sup>1</sup>

**8. Other Features of the Deed.**—A reference to the assignor's losses in business or to other reasons for the assignment is not advisable.<sup>2</sup>

The trust to pay the debts is regarded as a sufficient consideration.<sup>3</sup>

estates of insolvents, under assignments voluntarily made, permits such assignments for the benefit only of such creditors as may consent to receive their proportionate share of the debtor's estate and execute a release of the debtor, cannot be construed as being a law impairing the obligation of contracts; and an assignment made under such a law cannot be held void because some of the creditors are citizens of other States.

1. *Halsey v. Whitney*, 4 Mason (U. S.), 206, 222; *Hall v. Dennison*, 17 Vt. 310; *Van Rossum v. Walker*, 11 Barb. (N. Y.) 237; *Curtis v. Leavitt*, 15 N. Y. 120; *Potter v. Paige*, 54 Pa. 465; *In re Mann*, 32 Minn. 60.

So where partnership property is assigned for the payment of all partnership debts. *Bogert v. Haight*, 9 Paige (N. Y.), 297.

But unless all debts are provided for it is fraudulent and void, as tending to hinder and delay creditors, and that whether the surplus be in fact large or small, or even if there turn out to be no surplus at all. *Barney v. Griffin*, 2 N. Y. 365; *Leitch v. Hollister*, 4 N. Y. 211.

And therefore where both individual and partnership property is assigned for the benefit of partnership creditors, a reservation of the surplus without providing for the individual creditors will avoid the assignment. *Bogert v. Caldwell*, 16 N. Y. 484.

It has usually been held that a reservation of the surplus is valid in assignments for the benefit of a part of the creditors, that there also the law would imply it, and that it does not affect the rights of the other creditors. *Ely v. Hair*, 16 B. Mon. (Ky.) 230; *Burgin v. Burgin*, 1 Ired. L. (N. Car.) 453; *Miller v. Stetson*, 32 Ala. 161; *N. A. & S. R. v. Huff*, 19 Ind. 444; *Bank v. Gorman*, 8 W. & S. (Pa.) 304.

It has even been held that it must be provided in such a case that the surplus is to go to the rest of the creditors. *Dana v. Lull*, 17 Vt. 390; *Palmer v. Mason*, 42 Mich. 150.

In *Keating v. Vaughn*, 61 Tex. 518, it was held that under the first and ninth

sections of the act of March 24, 1879, every conceivable interest of the assignor in the property which he owned had passed by the deed to the assignee, and it was unimportant whether the assignment reserved a surplus that might remain after satisfying consenting creditors, as they might attach it in the assignee's hands.

2. *Kellogg v. Slauson*, 15 Barb. (N. Y.) 56; s. c., 11 N. Y. 302; *Van Nest v. Yoe*, 1 Sand. Ch. (N. Y.) 4.

Recitals of losses are usually immaterial at best. *Graham v. Lockhart*, 8 Ala. 9; *Shackelford v. Bank*, 22 Ala. 238; *Reinhard v. Bank*, 6 B. Mon. (Ky.) 252; *Griffin v. Macaulay*, 7 Gratt. (Va.) 476; *Ward v. Trotter*, 3 Mon. (Ky.) 1; *Vernon v. Morton*, 8 Dana (Ky.), 247; *Brigham v. Tillinghast*, 15 Barb. (N. Y.) 618; s. c., 13 N. Y. 215.

3. A general assignment for the benefit of creditors, *bona fide* made by the debtor and assented to by the assignee, will be deemed a valid conveyance founded upon a valuable consideration, and good against creditors proceeding adversely to it, at least unless all the creditors for whose benefit it is made repudiate it. *McFarran v. Davis*, 70 Ga. 661. See also *Halsey v. Whitney*, 4 Mason (U. S.), 206, 214; *U. S. v. Bank of U. S.*, 8 Rob. (La.) 405; *Hall v. Dennison*, 17 Vt. 310; *Hudson v. Maze*, 4 Ill. 678; *Meeker v. Saunders*, 6 Iowa, 61; *Nutter v. Harris*, 9 Ind. 88; *Feimster v. McRorie*, 12 Ind. 287; *Bank v. Huth*, 4 B. Mon. (Ky.) 423; *Bank v. Knox*, 19 Gratt. (Va.) 739; *Haven v. Richardson*, 5 N. H. 113; *Thomas v. Clark*, 65 Me. 296; *Dey v. Dunham*, 2 John. Ch. (N. Y.) 182; *Lawrence v. Davis*, 3 McL. (U. S.) 177; *Burd v. Smith*, 4 Dall. (Pa.) 76; *Wilt v. Franklin*, 1 Binn. (Pa.) 502; *Gates v. Labeaume*, 19 Mo. 17; *Hollister v. Loud*, 2 Mich. 309; *Brown v. Barte*, 10 Sm. & M. (Miss.) 268; Code of Georgia, § 2744.

A nominal consideration is usual in some States. *Cunningham v. Freeborn*, 11 Wend. (N. Y.) 240.

In Massachusetts assignments where the only consideration is the acceptance of the trust are of no effect against non-

The description of the property intended to be assigned may be contained either in the deed or in the schedule of assets annexed,<sup>1</sup> but it must be sufficiently explicit to enable the assignee to distinguish the property with certainty.<sup>2</sup>

The trusts are for the conversion<sup>3</sup> and distribution<sup>4</sup> of the property,

assenting creditors. *Swan v. Crafts*, 124 Mass. 453.

1. The latter is the more usual way. *Burrill on Assignments*, § 134.

2. An assignment of property described as "one bundle of orders, one bundle of fee-bills, two bundles of notes, two bundles of accounts, and one of receipts," was held void for uncertainty. *Crow v. Ruby*, 5 Mo. 484. See also *Ryerson v. Eldred*, 18 Mich. 12; *Bellamy v. Bellamy*, 6 Fla. 62.

Property may be assigned by general terms, provided their application can be made definite by parol evidence. An assignment providing that all property omitted by mistake or otherwise intended to be assigned is valid. *Clark v. Few*, 62 Ala. 243. See also *Tarver v. Rolfe*, 7 Ala. 873; *Brown v. Lyon*, 17 Ala. 638; *Coots v. Chamberlain*, 39 Mich. 565; *Knefler v. Shreve*, 78 Ky. 297; *Coffin v. Douglass*, 61 Tex. 406; *Nave v. Britton*, 61 Tex. 572; *Walker v. Newlin*, 22 Kan. 106; *State v. Keeler*, 40 Mo. 548.

An assignment for the benefit of creditors recited that the grantor, being "desirous that all his property be applied to the payment of his debts," and then that he "bargains, sells, aliens, conveys, and assigns" to the assignee "his goods, wares, etc., and assets of every description, it being intended to assign all his property, both real and personal," except legal exemptions, the real estate not being referred to in terms anywhere in the deed except as above. *Held*, that both real and personal property passed by the deed, and the same arrangements *mutatis mutandis* as to the sale of both are made. *Wickham v. Green*, 61 Miss. 463.

An assignment of cargoes of certain vessels named, and real estate in Boston, Charlestown, and Maine, was held sufficient as furnishing the means of certainty. *Hatch v. Smith*, 5 Mass. 42.

A description of "all the stock, fixtures, goods, and chattels of every name and kind," in a designated store, is specific enough to identify the property intended to be covered. *Shaw v. Glen*, 37 N. J. Eq. 32.

Where the assignment referred to a schedule which was not in fact annexed till the day after delivery, it was held valid, as the parties consented. *Clap v.*

*Smith*, 16 Pick. (Mass.) 247. See also *Clark v. Mix*, 15 Conn. 152; *Emerson v. Knowler*, 8 Pick. (Mass.) 63; *Pingree v. Comstock*, 18 Pick. (Mass.) 46; *Raynor v. Raynor*, 21 Hun (N. Y.), 36; *Kellogg v. Slauson*, 15 Barb. (N. Y.) 56; s. c., 11 N. Y. 302; *Passmore v. Eldridge*, 12 S. & R. (Pa.) 198; *Kevan v. Branch*, 1 Gratt. (Va.) 274; *Tarver v. Rolfe*, 7 Ala. 873; *Brown v. Lyon*, 17 Ala. 659; *Robins v. Embry*, 1 Sm. & M. Ch. (Miss.) 207; *Brashear v. West*, 7 Pet. (U. S.) 608; *Bates v. Simmons*, 62 Wis. 69.

An erroneous description will not prevent property from passing. *Sandford v. Conant*, 2 Sand. S. C. (N. Y.) 143.

A description of real estate has been held essential. *Bellamy v. Bellamy*, 6 Fla. 62; *Ryerson v. Eldrid*, 18 Mich. 12.

An omission of assets does not make the assignment void. *Hayes v. Doane*, 11 N. J. Eq. 84; *Schultz v. Hoagland*, 85 N. Y. 464.

It has been held that the effect of an assignment of "all the property contained in the schedule" is to pass nothing not mentioned therein. *U. S. v. Howland*, 4 Wheat. 108; *U. S. v. Langton*, 5 Mason (U. S.), 280; *Mims v. Armstrong*, 31 Md. 87; *Rundlett v. Dole*, 10 N. H. 458; *Beard v. Kimball*, 11 N. H. 471; *Driscoll v. Fiske*, 21 Pick. (Mass.) 503.

But it has been held that an assignment clearly purporting to be general, but referring to a schedule for more particular description, is not controlled by the schedule if defective. *Turner v. Jaycox*, 40 N. Y. 470.

3. A power to sell and convey is necessarily implied by a conveyance of property for the payment of debts. *Williams v. Otey*, 8 Humph. (Tenn.) 653; *Forbes v. Scannell*, 13 Cal. 326.

But an assignment of personality "and all other estate and effects" does not give a power to sell real estate without express words. *Boker v. Crookshank*, 1 Phila. (Pa.) 193; *In re Gallagher*, 5 Phila. (Pa.) 83.

4. The property is to be applied: (1) To pay the expenses, with a proper compensation to the assignee. *Bank v. Cox*, 6 Greenl. (Me.) 395; *Andrews v. Lunlow*, 5 Pick. (Mass.) 28; *Butt v. Peck*, 1 Daly (N. Y.), 83; *Iselin v. Dalrymple*, 27 How. (N. Y.) 137; *Vernon v. Morton*, 8 Dana (Ky.), 247.

Liabilities and contingent debts may be provided for,<sup>1</sup> but not liabilities to be incurred in the future.<sup>2</sup>

These expenses must be paid even if the deed does not provide for them. *Blow v. Gage*, 44 Ill. 208; *Sherrill v. Shuford*, 6 Ired. Eq. (N. Car.) 228.

The compensation should not exceed that of executors, etc., for similar services. *Bodley v. Goodrich*, 7 How. (U. S.) 276; *Keteltas v. Wilson*, 6 Barb. (N. Y.) 298; *Barney v. Griffin*, 2 N. Y. 365; *Meacham v. Stevens*, 9 Paige (N. Y.), 398; *Wynkoop v. Shardlow*, 44 Barb. (N. Y.) 84; *Campbell v. Woodworth*, 24 N. Y. 204; *Eyre v. Beebe*, 28 How. (N. Y.) 333.

(2) To pay the debts. When the debts are few they may be stated in the declaration of trust; otherwise in the schedule. *Burrill on Assignments*, § 146.

An assignment may be invalid for uncertainty in this respect. *Caton v. Moseley*, 25 Tex. 374.

Parol evidence is admissible to identify the debts referred to. *Posey v. Bank*, 12 Ala. 802; *Platt v. Hodge*, 8 Iowa, 386.

If a debt is incorrectly described, the creditor can identify and recover it unless the fund is already exhausted. *Allemand v. Russell*, 5 Ired. Eq. (N. Car.) 183.

If a debt is described as "about" a certain sum, the creditor may prove a greater amount. *Brown v. Wier*, 5 S. & R. (Pa.) 40; *Bank v. Richards*, 2 Metc. (Mass.) 105; *Canaday v. Paschall*, 3 Ired. Eq. (N. Car.) 178.

So if there be other error in the description. *Miller v. Cherry*, 3 Jones Eq. (N. Car.) 24; *Gardner v. Pike*, 3 Jones Eq. (N. Car.) 306.

But not to the prejudice of other creditors. *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 458.

Sometimes the creditors may be described as a class, e.g., laborers. *Bank v. Talcott*, 22 Barb. (N. Y.) 550.

Or the assignment may direct a notice to creditors, and a payment to those who present their claims at a certain time and place. *Ward v. Tingley*, 1 Sand Ch. (N. Y.) 476.

Secured debts may be provided for in an assignment, in which case the security will be first applied in discharge, and then the unpaid balance, if any, will come in for its share. *Perry Ins. Co. v. Foster*, 58 Ala. 502; *Dimon v. Delmonico*, 35 Barb. (N. Y.) 554; *Grant v. Chapman*, 38 N. Y. 293.

The insertion of a fictitious debt, or one in which the assignor is interested, has been held to make the assignment fraudulent and void. *Terry v. Butler*, 43 Barb. (N. Y.) 395; *Jacobs v. Remsen*, 36

N. Y. 668; *Lockhart v. Brodie*, 1 Tenn. Ch. 384; *Kayser v. Heavenrich*, 5 Kan. 324.

But some courts have held such an assignment good as to the *bona fide* debts. *Tatum v. Hunter*, 14 Ala. 57; *Hempstead v. Johnston*, 18 Ark. 137; *Mackintosh v. Corner*, 33 Md. 607; *Hardcastle v. Fisher*, 24 Mo. 75; *Sewall v. Henry*, 5 Gratt. (Va.) 31; *Harris v. De Graffenried*, 11 Ired. L. (N. Car.) 89.

(3) To pay over the residue to the assignor, though this is unnecessary as such a trust results by operation of law. See *ante*, 7, p. 863.

To carry out these trusts a full power of attorney should be given to the assignee. *Burrill on Assignments*, § 148.

The assignee's covenant accepting the trust, and undertaking to execute it faithfully, is often inserted. *Burrill on Assignments*, § 149.

But taking possession of the property is sufficient to bind the assignee. *Cunningham v. Freeborn*, 11 Wend. (N. Y.) 240.

1. "The assignment is just as valid a security for liabilities to indorsers, etc., as for debts." *Story*, J., in *Halsey v. Whitney*, 4 Mason (C. C.), 206, 231.

Where the assignee was directed to pay the indorsers the amount of certain notes not yet due, this was held as of the same effect as a direction in favor of the holders of the notes. *Griffin v. Marquardt*, 21 N. Y. 121. See also *Keteltas v. Wilson*, 36 Barb. (N. Y.), 298; s. c., 23 How. (N. Y.), 69; *Hendricks v. Robinson*, 2 Johns. Ch. (N. Y.), 283; *Stoddard v. Tomlinson*, 10 Ala. 824; *Copeland v. Weld*, 8 Me. 411; *Duvall v. Ralsin*, 7 Mo. 449.

Sureties, bail, and all persons who have incurred responsibilities on the assignor's behalf can also be protected by the assignment. *Stevens v. Bell*, 6 Mass. 339; *Ingram v. Kirkpatrick*, 6 Ired. Eq. (N. Car.) 463; *Loeschigk v. Jacobson*, 26 How. (N. Y.) 526; *Dickson v. Rawson*, 5 Ohio St. 218; *U. S. v. Hoyt*, 1 Blatchf. (U. S.) 332; *Cushing v. Gore*, 15 Mass. 69.

An assignment in favor of the sureties for the assignor's faithful performance of his duties as guardian has been held valid. *Hopkins v. Scott*, 20 Ala. 179.

So with the sureties of a court clerk and master in chancery. *Dewey v. Little John*, 2 Ired. Eq. (N. Car.) 495.

Contra as to the sureties of a sheriff. *Currie v. Hart*, 2 Sand. Ch. (N. Y.), 353.

2. *Barnard v. Hempstead*, 7 Paige

The time within which creditors may assent is sometimes limited in the assignment.<sup>1</sup>

The time within which the trust is to be administered may also be so limited,<sup>2</sup> but is usually left to the assignee's discretion.<sup>3</sup>

The mode and terms of sale are usually left to the assignee to determine unless the statute requires a public sale.<sup>4</sup> The decisions in regard to the assignor's right to authorize or direct sales *on credit* have reached no uniform conclusion.<sup>5</sup>

(N. Y.) 568; *Brainerd v. Dunning*, 10 N. Y. 211; *Neuffer v. Pardue*, 3 Sneed (Tenn.), 191.

The assignor's liability, at the time of the assignment, must be ascertained and fixed at a sum certain, whether payable before or after the assignment, to entitle the creditor to a dividend. Hence a claim for damages for breach of a contract by the assignor, whereby claimant lost possible profits accruing after the assignment, is not provable as a debt against the assigned estate. *Matter of Adams*, 15 Abb. N. C. (N. Y.) 61.

1. If the creditors are limited to a certain time within which to become parties to the assignment or assent to it, the limit must be reasonable. *Green v. Trieber*, 3 Md. 11.

Whether it is so or not has to be determined in each individual case. *Halsey v. Whitney*, 4 Mas. (U. S.), 206, 225; *Pearpoint v. Graham*, 4 Wash. C. C. 232; *Fox v. Adams*, 5 Greenl. (Me.) 245; *Hardin v. Osborne*, 60 Ill. 93.

A debtor made an assignment in writing to trustees for the benefit of such creditors as should execute the instrument of assignment within sixty days from the date thereof, or within such further time as the trustees should allow "in and by a writing" indorsed on the instrument of assignment. *Held*, that the term "a writing" did not limit the trustees to the allowance of only one extension of the time in which creditors could become parties to the extension. *Held, also*, that if the trustees, through inadvertence, did not indorse a renewal of time before one extension had expired, this did not render the granting of a subsequent extension illegal, if it were reasonable, under all the circumstances of the case, that such extension should be made. *Bank v. Copeland*, 141 Mass. 257.

In New Jersey creditors are limited to three months by statute, but full three months must be given them. An order made on April 28, 1881, requiring creditors to present their claims before July 28, 1881, was held defective in that it did not allow three months for the presentation of creditors' claims.—

*Held, also*, that a creditor who did not put in his claim within that time, but did so afterwards and before distribution, was not barred, but was entitled to receive the same dividends as all the other creditors who had come in. *Bank v. Morehead*, 39 N. J. Eq. 493.

2. In *Rundlett v. Dole*, 10 N. H. 458, it was said: "The provision that the trustee shall execute the trust within the term of two years . . . does not seem to be unreasonable, and . . . was probably intended to secure a benefit to the creditors, instead of delaying and hindering them."

In *Christopher v. Covington*, 2 B. Mon. (Ky.) 375, three months' delay of payment for the purpose of maturing a crop and fattening stock, was held not to be unreasonable.

In *Adlum v. Yard*, 1 Raw. (Pa.) 163, an interval of three years before the sale of real estate assigned was held unreasonably long.

In *Stevens v. Bell*, 6 Mass. 339, it was said: "When no time is fixed for the grantees to apply the proceeds and render an account, the law requires them to execute the trust in a reasonable time."

3. *Sackett v. Mansfield*, 26 Ill. 21.

4. *Sackett v. Mansfield*, 26 Ill. 21; *Shackelford v. Bank*, 22 Ala. 238.

Sales under an assignment need not always be made immediately and for cash, whether well or ill for the creditors, but this may be left to the discretion of the trustee, and the assignment must not confine him by unreasonable provision. *Inloes v. Bank*, 11 Md. 173.

An authority to the trustees "to sell gradually, in the manner or on the terms in which in the course of their business the assignors had sold and disposed of their merchandise," was held to be an indefinite postponement of the trust, and void. *Am. Exch. Bank*, 7 Md. 390; s. c., 11 Md. 184.

The obvious objection is the tendency of such sales to hinder and delay creditors. In New York it is now settled that such a power, given to the assignee, invalidates the assignment.

5. In *Barney v. Griffin*, 2 N. Y. 365, it

The assignee is sometimes directed as to his mode of paying claims.<sup>1</sup>

Some special powers may be granted to the assignee.<sup>2</sup>

- was said that the creditors "have the right to determine for themselves whether the property shall be sold on credit, and a conveyance which takes away that right, and places it in the hands of the debtor, or in trustees of his own selection . . . is a conveyance to hinder and delay creditors and cannot stand."

In *Nicholson v. Leavitt*, 4 Sand. S. C. (N. Y.) 252, it was held that a debtor cannot, by the creation of a trust, avoid the obligation of immediate payment, or extend the period of credit, without the assent of the creditor, and that a creditor has no right to increase the surplus, or the chance of a surplus, by resorting to a sale on credit, thereby delaying his creditors. See also *Burdick v. Post*, 6 N. Y. 522; *Rapalee v. Stewart*, 27 N. Y. 310; *Gates v. Andrews*, 37 N. Y. 657.

The same principle has been held elsewhere. *Gardner v. Bank*, 95 Ill. 298; *Sutton v. Hanford*, 14 Mich. 19; *Bennett v. Ellison*, 23 Minn. 242; *Paige v. Olcott*, 28 Vt. 469; *Keep v. Saunderson*, 12 Wis. 352.

But the contrary has been held in some States. *Abercrombie v. Bradford*, 16 Ala. 560; *Wright v. Thomas*, 1 Fed. R. 716 (under the Indiana statute); *Hopkins v. Ray*, 1 Met. (Ky.) 79; *Farquharson v. Eichelberger*, 15 Md. 63; *In re Walker*, 18 Nat. Bankr. Reg. 56 (a Mississippi case where credit was limited to thirty days); *Nealy v. Ambrose*, 21 Pick. (Mass.) 185; *Johnson v. McAllister*, 30 Mo. 327; *Conkling v. Conrad*, 6 O. St. 611; *Gunnell v. Adams*, 11 Humph. (Tenn.) 85; *Eicks v. Copeland*, 53 Tex. 581; *Dance v. Seaman*, 11 Gratt. (Va.) 778; *Kyle v. Harveys*, 25 W. Va. 716; s. c., 52 Am. Rep. 235.

In *Billings v. Billings*, 2 Cal. 107, such a power was held presumptive, though not conclusive, evidence of fraud.

Where no power to sell on credit is expressly given, but it can be reasonably implied from the words used, this also has been held to invalidate the deed.

In *Schufeldt v. Abernethy*, 2 Duer (N. Y.) 533, the words, "upon such terms and conditions as in his judgment may appear best and most for the interest of the parties concerned," were held to have this effect.

In *Brigham v. Tillinghast*, 15 Barb. (N. Y.) 618; s. c., 13 N. Y. 215, a conversion of the assets "into money or available means" was directed. The

Court of Appeals, reversing the Supreme Court, held that a power to sell on credit was necessarily implied, and that this could not be allowed. See also *Hutchinson v. Lord*, 1 Wis. 286; *McCleery v. Allen*, 7 Neb. 21.

The same and similar phrases have, however, been held not to involve a power to sell on credit. *Whitney v. Krows*, 11 Barb. (N. Y.) 198; *Kellogg v. Slauson*, 15 Barb. (N. Y.) 56; *Bellows v. Patridge*, 19 Barb. (N. Y.) 176; *Mann v. Whitbeck*, 17 Barb. (N. Y.) 388; *Townsend v. Stearns*, 32 N. Y. 209; *Paige v. Olcott*, 28 Vt. 465; *Sackett v. Mansfield*, 26 Ill. 21; *Berry v. Hayden*, 7 Ia. 469; *Booth v. McNair*, 14 Mich. 19; *Nye v. Van Husan*, 6 Mich. 329.

1. The Wisconsin statute (ch. 80, R. S.) contemplates that all claims shall be verified or proved before the assignee shall pay them; and an assignment which restricts the assignee to the payment of claims proved as provided in said ch. 80, is not, therefore, invalid. Also a direction to the assignee to "make such payment or payments to the creditors of the party of the first part as shall from time to time be directed to be made by the circuit court or the judge thereof, as provided by law," does not prohibit him from making other payments when not so ordered, if, under the law, he may make such other payments; and such direction does not, therefore, invalidate the assignment. *Bank v. Hackett*, 61 Wis. 335.

2. A power to mortgage is void in New York under the statute of uses and trusts, but does not invalidate the assignment. *Darling v. Rogers*, 22 Wend. (N. Y.) 483; *Planck v. Schermerhorn*, 3 Barb. Ch. (N. Y.) 646.

Such a power has been upheld by some courts. *Montgomery v. Galbraith*, 11 Sm. & M. (Miss.) 555; *Beatty v. Davis*, 9 Gill (Md.), 211.

The assignee may be authorized to insure the property, and to pay interest on incumbrances. *Whitney v. Krows*, 11 Barb. 198.

Also to pay rents and taxes. *Van Dine v. Willett*, 3 Barb. 319; *Eyre v. Beebe*, 28 How. (N. Y.) 333.

Also to employ agents. *Hennessey v. Bank*, 6 W. & S. (Pa.) 300; *Casey v. Jones*, 37 N. Y. 608; *Langdon v. Thompson*, 25 Minn. 509.

If the deed of assignment gives a power to compromise with creditors, limited only

**9. Fraudulent Assignments.**—If one or more provisions in an assignment indicate an intent to delay, hinder, or defraud creditors, the whole instrument,<sup>1</sup> and not merely the obnoxious part, is void as to those creditors who do not consent to it.<sup>2</sup> It remains valid, however, as against the assignor and his representatives.<sup>3</sup>

The fraud must have entered into the assignment at the time it was made. No subsequent acts of the parties can invalidate an assignment made *bona fide*.<sup>4</sup>

by the assignee's judgment, this usually renders the assignment void. *Grover v. Wakeman*, 11 Wend. (N. Y.) 187; *Hudson v. Maze*, 4 Ill. 578; *Keevil v. Donaldson*, 20 Kan. 165.

But authority to compromise with debtors has been sustained. *Bellows v. Patridge*, 19 Barb. (N. Y.) 176; *Carlton v. Baldwin*, 22 Tex. 724.

Such a power, to be exercised under authority of the court, is given to assignees by statute in some States.

A provision that the assignee may, as part of the expenses, pay necessary attorney's fees, does not invalidate the assignment; but it is otherwise if the fees are directed to be paid for defeating an attachment, as that is the debt of the assignor. *Wooldridge v. Irving*, 23 Fed. R. 676.

A permission to the assignee to complete unfinished buildings, if advisable, and pay "all necessary charges and expenses for such completion, prior to the payment of all debts and liabilities hereinafter mentioned," gives no additional right beyond what the law gives in all cases of trusts. *Watson v. Butcher*, 37 Hun (N. Y.), 391.

1. *Wakeman v. Grover*, 4 Paige (N. Y.), 22; s. c., 11 Wend. (N. Y.) 187; *Hyslop v. Clarke*, 14 Johns. (N. Y.) 458; *Fiedler v. Day*, 2 Sand. (N. Y.) 594; *Mackey v. Cairns*, 5 Cow. (N. Y.) 547; *O'Neil v. Salmon*, 25 How. (N. Y.) 240; *Cook v. Rindskopf*, 34 Hun (N. Y.), 457.

"If the assignor annex an improper condition, the court must pronounce the assignment itself void. It cannot hold the transfer good and disregard the condition, because that would be to take the property from the assignor against his will. He having consented to part with his title only on certain conditions, the transfer and the condition must stand or fall together." *Selden, J.*, in *Jessup v. Hulse*, 21 N. Y. 168.

2. *Smith v. Howard*, 20 How. (N. Y.) 121.

If the assignment by a debtor for the benefit of certain of his creditors is made for the purpose of defrauding certain other of his creditors, it will be void as

to the latter; and the fact that the county court has assumed jurisdiction of the subject-matter of the assignment, and appointed new assignees, will not prevent creditors so attempted to be defrauded from attacking the deed for fraud, in a collateral proceeding, when it is sought by it to withdraw property attached by them, and place the same in the hands of the assignees appointed by the court. *Zimmerman v. Willard*, 114 Ill. 364.

A deed of assignment may be valid as to *bona fide* debts which it secures, and void as to fictitious debts attempted to be secured. *Bank v. Hofsheimmer*, 23 Fed. R. 13 (Virginia); *Billups v. Sears*, 5 Gratt. (Va.) 31; *Harris v. De Graffenreid*, 11 Ired. L. (N. Car.) 89; *Anderson v. Hooks*, 9 Ala. 704; *Troustine v. Lask*, 4 Baxt. (Tenn.) 162.

3. *Osborne v. Moss*, 7 Johns. (N. Y.) 161; *Storms v. Davenport*, 1 Sand. Ch. (N. Y.) 135; *Morrison v. Brand*, 5 Daly (N. Y.), 40; *Ogden v. Prentice*, 33 Barb. (N. Y.) 160; *Sweet v. Tinslar*, 52 Barb. (N. Y.) 271; *Stewart v. Ackley*, 52 Barb. (N. Y.) 283; *Waterbury v. Westervelt*, 9 N. Y. 605.

4. *Browning v. Hart*, 6 Barb. (N. Y.) 91.

Where a valid assignment is made for the benefit of creditors, no fraudulent act of the assignor after the taking effect of such assignment will vitiate it. Nor will a failure on the part of the assignee to account for money or property of the assigned estate have that effect. *Sullivan v. Smith*, 15 Neb. 476.

An assignment for benefit of creditors, free from fraud in its inception, duly executed, acknowledged and recorded, is not invalidated by a subsequent agreement between the assignor and assignee to disregard it; or by subsequent fraudulent acts on their part with respect to the assigned property. But the conduct of the assignor and assignee subsequent to the assignment, is a matter for the consideration of the jury in determining whether the assignment was fraudulent in its inception. *Goodwin v. Kew*, 80 Mo. 276.

In like manner no subsequent act cau

The fraud may be evidenced by the instrument itself. If it is clearly calculated to hinder, delay, or defraud creditors, the inference that it was so intended is irresistible.<sup>1</sup>

The fraud may also be evidenced by false statements in the assignment or schedules,<sup>2</sup> or by the acts of the parties.<sup>3</sup>

validate a void assignment. *Averill v. Loucks*, 6 Barb. (N. Y.) 470.

1. The chief features of an assignment which render it fraudulent, *e.g.*, preferences, stipulations for releases, preferences conditioned on releases, reservations of right to declare future preferences, of trusts for the assignor, of benefits out of the property, directions as to time or mode of sale, have already been noticed.

See *ante*, 6, 7, 8, pp. 860, 863, 864. A few examples may be added:

The statute of Arkansas regulating assignments for the benefit of creditors prohibits the assignee from taking possession of the assigned property until he gives bond and files an inventory of the property; and a deed of assignment that stipulates that the assignee shall take possession of the property before he gives the bond and files the inventory, as required by the statute, is void. No inquiry is permissible to show that no fraud was intended, or that the statute was violated for an honest purpose. The statute also provides that the assignee "shall give at least thirty days' notice" of the sale of assigned property, and a deed that provides for a sale upon "twenty days' notice" is void. *Rice v. Frayser*, 24 Fed. R. 460.

It is well settled that a conveyance professedly to indemnify creditors, but expressly or impliedly reserving to the grantor powers inconsistent with and adequate to defeat such purpose, is void as to creditors and purchasers. Where conveyance is made of stock and fixtures of a store, in trust to secure debt payable *in futuro*, without right to trustee to possess or control the property, except in event of default of payment, then, on request of *c. g. t.*, trustee to sell the same, such conveyance impliedly reserves to grantor the power to possess and sell the property; and if he sells, then, as to the purchaser, and creditors of that purchaser, that conveyance is void although it may have been recorded, its record being only notice of a void thing. *McCormick v. Atkinson*, 78 Va. 8.

An assignment providing for "a reasonable counsel-fee" to the assignee, a lawyer, besides his expenses and commissions, is fraudulent. *Nichols v. McEwen*, 17 N. Y. 22.

The provision in an assignment that the assignee "shall first pay the costs of executing this trust, including two hundred and fifty dollars to M., my attorney, and two hundred dollars to W. & W., attorneys," is of doubtful meaning, but, as such doubt must be construed in favor of the validity of the assignment, it does not render the same fraudulent upon its face. *Armitage v. Rector*, 62 Miss. 600.

An assignment for the benefit of creditors which provides for the sale of choses in action is not fraudulent and void on that account if adequate time is allowed for the collection by ordinary process of law. *Wickham v. Green*, 61 Miss. 463.

An assignment by an insolvent debtor for the benefit of his creditors, which directs that the assignee shall collect the choses in action as fast as practicable, and, after the expiration of twelve months shall sell all remaining uncollected and being uncollectable at public auction, is not *per se* fraudulent, on the ground that it illegally impresses the will of the debtor upon the trust created. *Armitage v. Rector*, 62 Miss. 600.

The failure in such a deed to give a full statement of the property conveyed, a list of the creditors of the assignor, and the amount of their demands, would only invalidate the assignment when done with a fraudulent intent. *Nave v. Britton*, 61 Tex. 572.

A provision authorizing the assignee to employ suitable agents at a reasonable compensation, to be paid out of the effects assigned, and to do whatever his judgment dictates for the benefit of the estate, is not fraudulent. *Mann v. Whitbeck*, 17 Barb. (N. Y.) 388; *Jacobs v. Remsen*, 36 N. Y. 668; *Casey v. Jones*, 37 N. Y. 608.

2. The recitals in the assignment are only *prima-facie* evidence.

In a contest between an attaching creditor and the trustee in an assignment for the benefit of creditors, there being no proof of actual fraud in the execution of the assignment, and the debt of the attaching creditor not then being in existence, the recitals of the assignment, as to the existence of debts, are sufficient to sustain it; but, if the debt of the attaching creditor was antecedent and existing, the existence of debts must be shown by the assignee by evidence other than the recitals of the assignment, and the exist-

Effect.

## BENEFIT OF CREDITORS.

Effect.

**10. Effect.**—The effect of a valid assignment is to vest the assigned estate in the assignee, so as to put it out of the reach of creditors<sup>4</sup> not secured by liens,<sup>5</sup> and even of the assignor himself.<sup>6</sup>

ence of other debts than that of the attaching creditor must be proved. *Reynolds v. Collins*, 78 Ala. 94.

In *Batten v. Smith*, 62 Wis. 92, it was held that the omission from the schedule of property fraudulently transferred does not invalidate the assignment under sec. 1697, R. S. As against the assignor (though not as against the assignee) the title would pass by the transfer and he would have no power to assign such property and hence no right to include it in the inventory.

8. Under the Arkansas statute, if the parties to a deed of assignment for the benefit of creditors agree at the time of the execution of the deed, that the possession of the property assigned shall be delivered to the assignee before he has given the bond and filed the inventory required by law, and that agreement is carried into effect, it avoids the deed, and is good ground for an attachment against the debtor. *Aaronson v. Deutsch*, 20 Fed. R. 465.

Where a debtor sold all his property to his brother, a young man without experience or resources, on a year's credit, and afterwards made an assignment with preferences, the sale and assignment were held one transaction, and fraudulent. *Lichfield v. Pelton*, 6 Barb. (N. Y.) 187.

In *Browning v. Hart*, 6 Barb. (N. Y.) 91, a somewhat similar case, the sale was declared void, but the assignment sustained.

In *Batten v. Smith*, 62 Wis. 92, it was held that fraudulent transfers of property by a debtor just previous to a general assignment do not avoid such an assignment, but are themselves avoidable under it.

Declarations of the assignor, before or after the assignment was made and the assignee had taken possession, are inadmissible to show intent to defraud. *Flagler v. Schaeffer*, 40 Hun (N. Y.), 179; *Bullis v. Montgomery*, 50 N. Y. 352.

The mere fact that some of the debts preferred had previously been secured by mortgage on the real estate of the assignor's wife, does not conclusively show fraudulent intent in such preference. *Bates v. Simmons*, 62 Wis. 69.

Where one mortgaged certain of his property, and three hours afterwards made an assignment for the benefit of his creditors, but it was conceded that the assignor, at the time he made the mort-

gage, did not contemplate making an assignment, the assignment was not held to be void as including the mortgage, and thus preferring creditors. *Perry v. Vezina*, 63 Iowa, 25.

Retention of possession of personal property by the assignor after assignment for benefit of creditors, is not *per se* fraudulent, and does not render the assignment void. *Goodwin v. Kerr*, 80 Mo. 276.

The mere fact that after the assignment the assignor remained in the store as an employee under the supervision of the assignee, is not conclusive evidence of fraud in making the assignment. *Bates v. Simmons*, 62 Wis. 69.

If an assignee delay unreasonably to sell the property assigned, this may be evidence of fraud, and the property may be attached or taken in execution as the debtor's. *Gore v. Clisby*, 8 Pick. (Mass.) 559.

4. Delivery and record of the instrument render actual delivery of possession unnecessary to the validity of the instrument. *State v. Benoist*, 37 Mo. 500.

The legal title to all the property of the debtor, and its proceeds, remains in the assignee, where the deed of assignment vested it, until it be judicially disposed of, and cannot during that time be seized as the property of the assignor. *Garretson v. Brown*, 26, N. J. L. 425.

When the property passes under the statute by the assignment, no provision inserted in the deed regarding consenting creditors can interfere with the distribution of the estate, nor can the rights of creditors protected by it be destroyed by attachments or other process in a suit by dissatisfied creditors. *Keating v. Vaughn*, 61 Tex. 518.

A technical informality in the assignment is not necessarily an obstacle to the grantee's appropriating the property as directed in the deed. *Harvey v. Mix*, 24 Conn. 406.

5. An assignee is not a purchaser for value who will be protected against an execution not levied of which he had no notice. *Moses v. Thomas*, 26 N. J. L. 124; *Van Wagoner v. Moses*, 26 N. J. L. 570.

6. After the execution and delivery of the instrument the assignor has no power to alter or amend its terms or provisions. *Messonnier v. Kauman*, 3 John. Ch. (N. Y.) 3; *Bell v. Holford*, 1 Duer



It also places the property under the jurisdiction of the court to which the statute gives such jurisdiction.<sup>1</sup>

(N. Y.). 58; *Metcalf v. Van Brunt*, 37 Barb. (N. Y.) 621.

Where a note made after the assignment was antedated in order to be embraced in the schedule of preferred debts, it was held that the effect of the assignment could not be varied by any such means. *Sheldon v. Smith*, 28 Barb. (N. Y.) 593.

An assignment which is wholly invalid passes no title to the property, so that a subsequent conveyance by the assignor is good. *Juliand v. Rathbone*, 39 N. Y. 369.

It has, however, been held that where an assignment required the assignee to return the surplus after paying certain creditors named, without providing for the others, the lien of the plaintiff's judgment could not be effected by a subsequent assignment providing for the general creditors, as the first assignment being valid against the assignor, he could not alter it nor show that it was made under a mistake. *Sutherland v. Bradner*, 39 Hun (N. Y.), 134.

Similarly, where the assignment was void on account of a direction to sell on credit, a new one directing sales for cash could not be substituted after liens had attached. *Porter v. Williams*, 9 N. Y. 142.

But where the assignment is voidable, not void, and no liens have attached, it has been held that the property may be released and a new assignment executed. *Howe v. Woolsey*, 2 Edw. Ch. (N. Y.) 289; *Mills v. Argall*, 6 Paige (N. Y.), 577; *Whitcomb v. Fowle*, 7 Abb. N. C. (N. Y.) 295.

An assignment does not lose its legal validity simply because the parties choose to treat it as a nullity. *In re Becker*, 2 Abb. N. C. (N. Y.) 379.

A cancellation of the instrument does not re-vest the title in the assignor. *Metcalf v. Van Brunt*, 37 Barb. (N. Y.) 621.

Where an assignment is accepted by the assignee he cannot, by surrendering or cancelling the deed, destroy the trust or effect the rights of the creditors interested therein, nor can the assignee revoke it. *Scull v. Reeves*, 3 N. J. Eq. 84.

An assignment preferring debts enumerated in a schedule which was never filed, was void under the statute as lacking the assignee's assent. Subsequently an assignment with preferences was made and recorded. *Held*, that assuming the first to be valid at common law as to all

parties, because no creditor had, by attachment or levy before the second, acquired the right to raise the question of statutory irregularity, still the first could not operate as a general assignment without preferences as claimed, but the distribution must be by the second, for it contained the designation of the *cestuis que trustent* which the assignor had a right to make by reason of the power reserved in the first instrument. *Noyes v. Wernberg*, 15 Abb. N. C. (N. Y.) 164.

1. Under the Minnesota statute, upon the perfecting of such assignment, its entire subject-matter and everything involved in it, including the assigned property, come under the jurisdiction of the district court, *ipso facto*, and without the institution of any suit or proceeding. By consequence the assigned property is then *in custodia legis*. *In re Mann*, 32 Minn. 60.

Under the several provisions of the Illinois act of May 22, 1877, a new and special jurisdiction is conferred upon county courts over the subject-matter of such assignments, the exercise of which cannot be interfered with or embarrassed by process from other courts. Such jurisdiction attaches by the making, filing, and recording of the assignment in the mode prescribed in the act.

Under that act the county court, when exercising the powers therein conferred, is in effect an insolvency court, and the same general principles applicable to such courts must be applied.

After the county court has once acquired jurisdiction of the estate of an assigning debtor, he and the assignee, and all other persons having an interest in or upon the estate, are subject alike to the judgment of that court; and a claimant of any property assigned for the benefit of creditors will not be allowed to take the same from the assignee by writ of replevin from another court, but he may present his claims to the county court, which is authorized to call a jury to try the right of property. *Hanchett v. Waterbury*, 115 Ill. 220.

Under the New York General Assignment Act of 1877, the county courts act as courts of general jurisdiction in respect of the assigned estate and any matter involved therein. They have the powers of a court of equity. *In re Bonner*, 8 Daly (N. Y.) 75; *In re Nicholas*, 15 Hun (N. Y.), 317.

By the same act the jurisdiction in the city of New York is vested in the Court

A voluntary assignment passes personality in another State as effectually as if made in that State.<sup>1</sup>

An assignment does not in any way exempt the property from taxation.<sup>2</sup>

of Common Pleas. See Bishop on Insolvent Debtors, § 249.

A court of equity can reform an assignment upon proof of mistake, and petitions for a reformation and an account may be united. *Garner v. Wright*, 28 How. (N. Y.) 92.

1. "A voluntary assignment by a party, made according to the laws of his domicile, will pass the personal estate, whatever may be its locality, abroad as well as at home. The law distinguishes that which results from the exercise of power under the law from that which comes by the free will of the party; the former is limited in its effect to the country where the law is in force, whilst the latter is given universal and general operation under the comity of nations." *Smith's App.*, 104 Pa. St. 381. It was also there said that "if the owner of personal estate in Pennsylvania may, at the place of his domicile in a foreign State, *bona fide* and for a valuable consideration dispose of the same, receiving and placing the consideration within his own control, and this he may undoubtedly do, he may certainly with like effect convey his estate to the benefit of his creditors here and elsewhere," and it was held that an assignment made in Maryland withdrew personality in Pennsylvania from liability to seizure for debts existing there, and that claims on the property were barred after the statute of limitations had run in Maryland, though it had not run in Pennsylvania. See also *Speed v. May*, 97 Pa. St. 91; *Dundas v. Bowler*, 3 McL. (U. S.) 397; *Livermore v. Jenckes*, 21 (U. S.) How. 126.

But in *Faulkner v. Hyman*, 142 Mass. 53, it was held that an assignment of property, executed in another State, by a debtor domiciled there, for the benefit of his creditors, which is valid by the law of that State, but is invalid by the law of Massachusetts, because not executed or assented to by the creditors, will not be upheld there, as against attaching creditors of the assignor constituting a partnership, although some of such creditors are domiciled in the State where the assignment was executed, and where the firm has a place of business, and some in another State, the others being domiciled and the firm having its usual place of business in Massachusetts.

By the Pennsylvania statute such an assignment does not affect liens acquired before the assignment was recorded in the State, unless the creditor had notice. 1 *Purd. Dig.* 122, pl. 14; *Smith's App.*, 104 Pa. St. 381.

2. In *Jack v. Weiennett*, 115 Ill. 105, it was said that if the insolvent laws could be held to have the effect of releasing either persons or property from taxation, to that extent they would be unconstitutional, as the constitution denies the power of the legislature to release any person or property from his or its share of taxes levied for State purposes.

It was therefore held that if an insolvent debtor makes an assignment of his property for the benefit of his creditors, even before the tax books are placed in the hands of the collector, the State will still have the right to subject the property assigned for the payment of any taxes due from the assignor; and when the property assigned consists of notes and choses in action, the collector, on proper petition to the county court, will be entitled to an order of that court directing the assignee to first pay the taxes of the assignor out of the trust fund.

If, however, property assigned for the benefit of creditors is sold in good faith to a purchaser before the tax books come to the hands of the collector, so that no lien has as yet attached, the purchaser will take free of any lien for taxes. But tangible property in the hands of the assignee after the collector receives his warrant is subject to distress and sale by the collector as if in the hands of the assignor.

In *Huiscamp v. Albert*, 60 Iowa, 421, an assignment was made for the benefit of creditors, and the assignee was afterwards appointed a receiver to convert the property into money and hold the same subject to the order of the court. It was held proper for the court in ordering a distribution of the money, upon the intervention of the county, to order the receiver, after providing, possibly, for the expenses of the trial, to pay the taxes levied under the laws of this State against the insolvent debtor, in preference to other claims, notwithstanding no levy of the taxes had been made on the goods, and no claim had been filed for the taxes against the assignee.

The resignation, removal, or death of the assignee will not affect the assignment.<sup>1</sup>

A successful attack by creditors upon an assignment does not enlarge its operation as to those who claim under it.<sup>2</sup>

The effect of a general assignment by partners is that firm property is to be used first to pay firm debts, and individual property first to pay individual debts.<sup>3</sup>

Distribution of the assigned estate under a decree of the court, and absolute discharge of the assignee after accounting, is a complete defence to a subsequent action by a judgment creditor to set aside the assignment as fraudulent.<sup>4</sup>

#### 11. Rights, Duties, Powers, and Responsibilities of the Assignee.—

A valid assignment accepted by the assignee,<sup>5</sup> vests the property in him, but before he can proceed to carry out the trust he must give a bond,<sup>6</sup> with sufficient surety, approved by a judge of a court having jurisdiction of the assignment, for the faithful performance

1. In *McFerran v. Davis*, 70 Ga. 661, it was held that the resignation of the assignee was not a revocation of the deed of assignment. The title having passed into him, the trust should not be allowed to fail for the want of a trustee.

2. *Bank v. Hofheimer*, 23 Fed. Rep. 13.

3. *Friend v. Michaelis*, 15 Abb. N. C. (N. Y.) 354; *Peckham v. Mattison*, 15 Abb. N. C. (N. Y.) 367.

A general recital in the assignment, that it is the purpose and intention of the grantor to appropriate the property assigned to the payment of partnership and individual debts as a court of equity would marshal the assets, does not authorize the court, at the instance of a secured creditor, to change or subvert the uses expressly declared, and to appropriate property to the payment of partnership debts, on the ground that it is in fact partnership property, when the deed treats it as individual property, and directs its appropriation first to the payment of individual debts. *Hatchett v. Blanton*, 72 Ala. 423.

4. *McLean v. Prentice*, 34 Hun (N. Y.) 504.

5. See *ante*, 5, p. 855.

6. Before giving the required bond, the assignee has only an inchoate right to the property, but cannot dispose of it. *Van Hein v. Elkers*, 8 Hun (N. Y.), 516; *Woodworth v. Seymour*, 22 Hun (N. Y.), 376; *Brennan v. Wilson*, 4 Abb. N. C. (N. Y.) 279; *Rendleman v. Willard*, 15 Mo. App. 375.

A bond with a single surety is not void in Pennsylvania. *Mears v. Commonwealth*, 8 Watts (Pa.) 223.

If the assignee fail to give a bond, he cannot resign and be discharged on his own motion. The court should remove

him and hold him to account for the estate. *In re Parker*, 10 Daly (N. Y.), 16.

In Wisconsin the failure of the assignees to give bond in an amount not less than the nominal value of the assets ascertained in the manner provided by sec. 1694, R. S., before taking possession of the property and before assuming any trust conferred by the assignment, renders the assignment absolutely void. The statute is mandatory, and must be strictly pursued. *Goll v. Hubbell*, 61 Wis. 293.

The bond of an assignee running to "A. E. R., clerk of the circuit court," etc., is in substantial compliance with sec. 1694, R. S. of Wisconsin, requiring it to be "executed to the clerk of the circuit court of the county, by his name of office, as obligee." The omission of the word "as" before "clerk" is immaterial. *Bates v. Simmons*, 62 Wis. 69.

Under the Minnesota statute, where no inventory has been filed, and there has been no formal and express acceptance by the assignee before and independent of the filing of his bond, and before the expiration of fifteen days from the date of the assignment, of the trust thereby created, the assignee must file his bond within said period of fifteen days. *Perkins v. Zarracher*, 32 Minn. 71.

The failure of the assignee to give bond will not invalidate a deed of assignment properly made, or justify an attachment of the property transferred. The remedy of the creditors is to apply for the appointment of another to discharge the trust. *Windham v. Patty*, 62 Tex. 490.

An action on the bond, on account of non-payment of money in the assignee's hands, sounds in damages, the measure being the demand allowed, with interest. *State v. Hart*, 38 Mo. 44.

of the trust. In some States he must take an oath to perform his duties to the best of his ability.<sup>1</sup> He must also file a sworn inventory of all the property that has come into his hands.<sup>2</sup>

The assignee has power to take into his hands all the estate of the assignor, whether delivered to him or afterwards discovered,<sup>3</sup> and to that end to sue in his own name, or otherwise, and recover all property, claims, and things in action to the same effect as if sued for by the assignor if no assignment had been made.<sup>4</sup>

1. This is the law in New York. 3 Rev. Stats. (7th Ed.) 2266, § 5.

Taking the oath is a prerequisite to the complete vesting of title in the assignee. If he has entered upon the discharge of his duties, but not otherwise, the presumption is that he took the oath. *Hoag v. Hoag*, 35 N. Y. 469; *Rockwell v. Brown*, 42 How. Pr. (N. Y.) 226.

2. By the New York statute the inventory, both of assets and liabilities, should be made by the assignor within twenty days after the assignment. If he fail to do this, the assignee shall make it within thirty days from the date of the assignment. *Bishop on Insolvent Debtors*, §§ 252-262.

By the Pennsylvania statute the assignee must, within thirty days after the execution of the assignment, file a sworn inventory in the office of the prothonotary of the court of common pleas of the county of the assignor's residence. 1 *Purd. Dig.* 122, pl. 15; *Reigart's App.* 4 Pa. 479.

If an assignee files a bond as required by law, but the inventory and appraisal are sworn to by the appraisers and not by the assignee, the inventory is defective, but this is no ground for his removal. *Drain v. Mickle*, 8 Iowa, 438.

3. It is necessary for the assignee to take possession of the assigned estate, but so far as the formal act of taking possession is concerned, no stricter rule applies than in case of ordinary purchase. A formal delivery of the keys to storehouses, safe, and shops, accompanied by a pointing out and surrender of possession of stock in pens, horses, harness, wagon, etc., in barns, is sufficient. *Sullivan v. Smith*, 15 Neb. 476.

The right which an assignor for the benefit of creditors has to discharge the trusts, by payment of the debts before sale by the assignee, and to declare to whom the lands held in trust shall belong upon its termination, and his right to grant or devise the land subject to the execution of the trust, are merely equitable, and do not impair or diminish the estate of the assignee, which remains perfect and exclusive until the purposes

of the trust have in fact been accomplished. *People v. Bacon*, 99 N. Y. 275.

4. An assignee cannot sue in the federal courts if his assignor could not have sued in those courts. *Sere v. Pitot*, 6 Cranch, 332.

In a suit by an assignee in a voluntary assignment for the benefit of creditors, for the recovery of a part of the trust estate, he must allege that the deed of assignment to him has been duly recorded in the recorder's office of the proper county, and must file a copy of such deed as an exhibit; otherwise his complaint must be held bad on demurrer for the want of sufficient facts. *Wheeler v. Hawkins*, 101 Ind. 486.

An assignee can enforce payment of promissory notes, by a bill in equity, without indorsement or special assignment to him. *Lenox v. Roberts*, 2 *Wheat.* (U. S.) 373.

Where an assignee recovers judgment, a judgment recovered by the debtor on a debt contracted after he had notice of the assignment cannot be set off; but otherwise if the claim had been acquired before notice of the assignment. *Brashear v. West*, 7 *Pet.* (U. S.) 608.

Where in a partial assignment, covering only a judgment for \$2500, the assignor covenanted to make up the deficiency between the amount realized by the judgment and \$2500, and the judgment yielded nothing, the assignee recovered damages to the full amount in an action of covenant against the assignor. *Paschall v. Scott*, 22 *Ark.* 255.

When an assignee takes possession of the goods, he is taken to have accepted the trust, and may bring suit in replevin without filing an inventory or bond. *Price v. Parker*, 11 *Iowa*, 144.

If an interest in an action is assigned *pendente lite*, the fact of the assignment must be established before the assignee can proceed in the action. Moreover, if the assignor has taken any proceedings since the assignment, without the assignee's consent, they may be set aside. *Chisholm v. Clitherall*, 12 *Minn.* 375.

Security for costs cannot be demanded of an assignee who prosecutes a suit in

He can also defend, when necessary, any suits brought against the estate.<sup>1</sup>

But he cannot, without leave of court, take the place of his assignor as a defendant.<sup>2</sup>

Joint assignees constitute but one person in law, and must all unite in bringing an action.<sup>3</sup>

An assignee cannot be compelled to fulfil the unperformed contract of his assignor to deliver goods.<sup>4</sup>

An assignee is bound to convert the assigned property into money and distribute it among the creditors without any unreasonable delay.<sup>5</sup> He has in general a discretion to sell at public or private sale as he may deem best for the interests of the creditors.<sup>6</sup> If he sell at public auction he should give the creditors notice, so that they may attend and see that the property is not sacrificed.<sup>7</sup> He should also give public notice.<sup>8</sup> He cannot purchase at his own sale.<sup>9</sup> Pending an opportunity to sell, it is his duty to keep down incumbrances on real estate.<sup>10</sup>

the name of the assignor. *Ferris v. Ins. Co.*, 22 Wend. (N. Y.) 586.

An assignee for the benefit of creditors cannot, as a general rule, appeal from a decree distributing the funds in his hands. He is protected by the decree in paying out money in accordance therewith. Where, however, two separate firms, named B. & C. and B. & D. respectively, by one deed of assignment conveyed the property belonging to said firms and to the individual members thereof to A., for the benefit of their creditors, and on the audit of A.'s account as assignee of B. & D., A., as assignee of B. & C., claimed a portion of the fund for distribution, which claim was disallowed. *Held*, that A., as assignee of B. & C., had the same power as an ordinary creditor to except to said disallowance, and on the dismissal of his exception to appeal. *Jordan's App.*, 107 Pa. St. 75.

1. In a suit by a preferred creditor in a deed of assignment against the assignee for a debt due him from the assignor, it is not error to refuse to allow the assignee credit for fees of an attorney employed by him as assignee, when he offers no proof that the amount charged by said attorney was a fair and reasonable charge for the services performed, or that the services of said attorney were necessary for the protection of the trust property, and not caused by his own failure to perform the trusts in the assignment. *Greeley v. Percival*, 21 Fla. 535.

2. When an action has been properly commenced against a debtor, and his property seized on attachment therein, and the debtor afterwards, before the time to answer has expired, makes an assignment for the benefit of all his

creditors in the manner provided by ch. 80, R. S. of Wisconsin, the assignee cannot, without leave of court first obtained, appear in such action and in his own name answer in the main action or traverse the affidavit for the attachment. *Howitt v. Blodgett*, 61 Wis. 376.

An assignment by a debtor for the benefit of his creditors is not a devolution of his liability upon the assignee, within the meaning of sec. 2801, R. S. of Wisconsin, and gives such assignee no right to be substituted as a defendant in an action against such debtor. *Howitt v. Blodgett*, 61 Wis. 376.

3. *Thatcher v. Candee*, 4 Abb. Dec. (N. Y.) 387; *Brinkerhoff v. Wemple*, 1 Wend. (N. Y.) 470.

4. *Matter of Adams*, 15 Abb. N. C. (N. Y.) 61.

5. *Hart v. Crane*, 7 Paige (N. Y.), 37; *Meachem v. Stearns*, 9 Paige (N. Y.), 406;

6. *Bank v. Schumann*, 63 How. (N. Y.) 476; *Halstead v. Gordon*, 34 Barb. 422.

A sale at auction by direction of an assignee is *prima-facie* evidence of his receiving the price. *U. S. v. Clarke*, Paine (U. S.), 629.

7. *Hart v. Crane*, 7 Paige (N. Y.), 37.

8. *McDermott v. Lorillard*, 1 Edw. Ch. (N. Y.) 273.

9. *Chapin v. Weed*, Clarke (N. Y.), 490; *Johnson v. Bennett*, 39 Barb. (N. Y.) 237; *Davoue v. Fanning*, 2 John. Ch. (N. Y.) 252; *Gallatin v. Cunningham*, 8 Cow. (N. Y.) 361.

An assignee who buys in property of the assigned estate at a sale on an execution will be considered as having bought for the benefit of the estate. *Harrison v. Mock*, 10 Ala. 185.

10. Rents issuing out of land which has

An assignee may be compelled to produce the assignor's books and papers in the former's possession, for inspection by the creditors.<sup>1</sup>

An assignee must keep clear, distinct, and accurate accounts.<sup>2</sup>

An assignee who is a creditor can gain no advantage by his position.<sup>3</sup>

An assignee cannot use his discretion arbitrarily,<sup>4</sup> nor can he delegate his powers.<sup>5</sup>

An assignee is personally liable for all misfeasance or neglect of duty.<sup>6</sup>

been assigned for the benefit of creditors, subject to incumbrances, should be appropriated by the assignee to the payment of principal and interest on those prior liens which would be entitled to the proceeds of the land if sold. *Wolff's App.*, 106 Pa. St. 505.

1. *Ingraham v. Cox*, 1 Ashm. (Pa.) 38.

Where the assignment directs the payment of a specific debt, the assignee cannot resist payment on the ground that it is usurious. *Chapin v. Thompson*, 89 N. Y. 270; *Green v. Morse*, 4 Barb. (N. Y.) 332; *Pratt v. Adams*, 7 Paige (N. Y.), 615; *In re Thompson*, 30 Hun (N. Y.), 195.

He cannot refuse to pay a preferred claim on the ground that it is fraudulent. *Matter of Ward*, 10 Daly (N. Y.), 66.

The assignee can, however, show that preferred debts have been paid or released since the assignment was made. *In re Schaller*, 10 Daly (N. Y.), 57; *In re McCullum*, 10 Daly (N. Y.), 72.

2. *Perry on Trusts* (3d ed.), § 821; *Bishop on Insolvent Debtors*, § 291; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495.

If he neglect to keep regular accounts, or mingle the trust funds with his own, he will be charged interest. *Spear v. Tinkham*, 2 Barb. Ch. (N. Y.) 211.

3. Where lands were assigned to discharge debts and liabilities due to the assignee and others, it was held that the former had no lien on any other lands not assigned, but that he might prove any other debt not included within the provisions of the deed, and would, as to it, stand on an equality with the other creditors. *Gibbs v. Cunningham*, 4 Md. Ch. 322.

By accepting the trust an assignee waives any specific lien he may have on the property, and must take according to the stipulations of the deed. *Harrison v. Mock*, 10 Ala. 185.

Where a deed of assignment distinctly directs that the proceeds of the property of the assignor shall be applied, first, to the payment of certain preferred creditors in

full of their debts in the order in which they are named, and the assignee named in said deed is the first preferred creditor, and accepts the trust and enters upon the discharge of its duties, he is not entitled to compensation for the care and management of the assigned property if there is not a sufficient amount of the proceeds thereof to pay said preferred creditors in full. *Greeley v. Percival*, 21 Fla. 535.

4. Where the deed gives an assignee discretion to make a *pro rata* distribution of the property, he must show a good reason for not doing so. *Dobbins v. Porter*, 38 Ga. 167.

5. An authority in the deed "to appoint an attorney one or more under them, the said assignees, with full power, etc.," gives the assignees no power to delegate their trust. *Nye v. Van Husan* 6 Mich. 329.

6. An assignee who receives money which should be paid over to creditors becomes their debtor, without any subsequent violation of the trust, or any demand made by the creditors. The fact that they resided in another State is immaterial. *McLemore v. Nuckolls*, 1 Ala. Sel. Cas. 591.

An assignee who allows a claim of the estate to lie over until the statute of limitations has run, even if he does so out of charity, is personally liable to the creditor whose dividend is reduced thereby. *Simpson v. Gowdy*, 19 Ind. 292.

Where assignees promised certain debtors to pay their claim, and one of the former afterwards wrote, "I have not forgotten that you will look to us for the payment of your claim," held, that they were liable as assignees only, and not personally. *Faber v. Finch*, 12 Iowa. 95.

Where assignees of an auctioneer took property of his principal *bona fide* and without notice of the fact, sold it, and distributed the proceeds among the auctioneer's creditors, they were not responsible to the principal. *Fahnestock v. Bailey*, 3 Met. (Ky.) 48.

When the assignees have received the

If a sole assignee die or resign, a receiver should be appointed.<sup>1</sup> If he mismanage and waste the property entrusted to him and persist in so doing, injunction and appointment of a receiver is the proper remedy.<sup>2</sup>

An assignee may be compelled, either by creditors<sup>3</sup> or by the assignor,<sup>4</sup> to account and to make distribution of the trust fund. Or he may himself apply for a judicial settlement of his accounts.<sup>5</sup>

After the final account is settled, the assignee and his sureties are entitled to be discharged.<sup>6</sup>

**12. Rights and Powers of Creditors.**—A creditor who can prove that the assignment is fraudulent may attach the debtor's property.<sup>7</sup>

debtor's property into their possession, they are liable for it to the debtor if the assignment be invalid, and to the creditors if the assignment be valid. Being each liable for the other, either may secure the other against such liability in any manner not repugnant to law. *Perkins v. Hitchcock*, 49 Me. 468.

An assignee who pays over money to the assignor before he has paid all the debts in full is liable to any unpaid creditor for money had and received. *Fitch v. Workman*, 9 Metc. (Mass.) 517.

A sale without public notice, without disclosing the nature of the debtor's interest, and for an inadequate price, is evidence of fraud, and will make the assignee personally liable to creditors in a court of equity even after he has settled his account. *Hays v. Doane*, 11 N. J. Eq. 84.

An assignee who at once accepts is responsible, though he take no active part in the duties of the assignment, but leaves the management to his co-assignee. *Bowman v. Rainetaux*, 1 Hoff. (N. Y.) 150.

An assignee who allows the assignor to retain possession of and use any of the property is responsible for the value of such use. *Harrison v. Mock*, 10 Ala. 616.

An assignee is responsible for any loss sustained by his negligence in not taking a legal defence to a claim against the estate. *Blackburne's App.*, 39 Pa. St. 160.

An assignee who refuses to account for his receipts of rents will be charged with rent. *Green v. Winter*, 1 John. Ch. (N. Y.) 26.

1. The trusts arising under general assignments for the benefit of creditors are peculiarly objects of equity jurisdiction. When, therefore, the assignee resigned, and it became necessary for the benefit of those interested that there should be some one to carry out the trust, the appointment of a receiver, as successor to the as-

signee, was proper. *McFerran v. Davis*, 70 Ga. 661.

2. *Cohen v. Morris*, 70 Ga. 313.

Where a small store of goods was assigned, the assignee was bound to sell immediately either privately or at public auction; and he having undertaken to retail the goods, a receiver was appointed with directions to sell without delay. *Hart v. Crane*, 7 Paige (N. Y.), 37.

3. *In re Farnum*, 13 Hun (N. Y.), 159; s. c., 75 N. Y. 79; *Goncelier v. Foret*, 4 Minn. 13.

The action may be brought by one of the creditors in behalf of himself and all others similarly situated. *Petrie v. Lansing*, 66 Barb. (N. Y.) 357. *Kerr v. Blodgett*, 48 N. Y. 62; *Brooks v. Gibbons*, 4 Paige (N. Y.), 374.

4. *Armstrong v. Byrne*, 1 Edw. Ch. (N. Y.) 79.

An administrator of the assignor cannot cite the assignee to account; he is not a creditor. *Ingraham v. Cox*, 1 Parson's Cas. (Pa.) 70.

5. *Ludlow v. Simond*, 2 Caines Cas. (N. Y.) 1, 39, 52.

The practice in these matters of account is regulated by statute. See *Bishop on Insolvent Debtors*, §§ 361, 403.

6. *Bishop on Insolvent Debtors*, § 408.

7. *Bishop on Insolvent Debtors*, §§ 217, 220, 221.

All personal property capable of manual delivery can be seized by the sheriff. *Rinchey v. Stryker*, 28 N. Y. 45; s. c., 26 How. (N. Y.) 75; 31 N. Y. 140; *Hall v. Stryker*, 27 N. Y. 596; *Carr v. Van Hoesen*, 26 Hun (N. Y.), 316; *Castle v. Lewis*, 78 N. Y. 131.

Choses in action cannot be attached after the title has passed to the assignee. *Thurber v. Blanck*, 50 N. Y. 80; *Smith v. Longmire*, 24 Hun (N. Y.), 257; *Bowe v. Arnold*, 31 Hun (N. Y.), 256.

Property which the assignee has al-

A judgment creditor may proceed by execution,<sup>1</sup> or, if this fails, he can proceed in equity.<sup>2</sup>

The more usual and effective mode of obtaining relief is by an action to set aside the assignment.<sup>3</sup>

Only creditors who are injured by the assignment<sup>4</sup> and disaffirm it<sup>5</sup> can assert their rights against it in law.

The priority of the United States as a creditor is not affected by an assignment.<sup>6</sup>

Creditors should present their claims on receiving notice.<sup>7</sup>

ready sold cannot be attached. *Lanning v. Sreeter*, 57 Barb. (N. Y.) 33; *Greenleaf v. Mumford*, 50 Barb. (N. Y.) 343; s. c., 35 How. (N. Y.) 148; *Lawrence v. Bank*, 35 N. Y. 320.

Where a deed for the benefit of creditors is void as to them, and a creditor seeks to obtain payment of his claim by attaching the proceeds of the sale of the trust property in the possession of the trustees, the attachment must be laid in their hands jointly, and the plaintiff can only recover against them jointly. *O'Connell v. Ackerman*, 62 Md. 337.

A void assignment furnishes no ground for an attachment, but it is otherwise if it is fraudulent as well. *Friend v. Michaelis*, 15 Abb. N. C. (N. Y.) 354.

1. *Austin v. Bell*, 20 John. (N. Y.) 442; *McConnell v. Sherwood*, 84 N. Y. 582.

2. *Bishop on Insolvent Debtors*, § 223.

3. In New York this is done by a creditor's bill. *Bishop on Insolvent Debtors*, § 224. To maintain such a bill, the creditor must first have exhausted his remedy at law. *Andrews v. Durant*, 18 N. Y. 496; *Wilson v. Forsyth*, 24 Barb. (N. Y.) 105; *Willets v. Vandenberg*, 34 Barb. (N. Y.) 424.

The action may be brought by a creditor in his own behalf or in behalf of himself and all others similarly situated. *Hammond v. Hudson Riv. Co.*, 20 Barb. (N. Y.) 378; *Brownson v. Gifford*, 8 How. (N. Y.) 389.

The assignor and assignee are the only necessary parties defendant, as the latter represents the creditors interested in upholding the assignment. *Wheeler v. Whedon*, 9 How. (N. Y.) 293; *Russell v. Lasher*, 4 Barb. (N. Y.) 232; *Rogers v. Rogers*, 3 Paige (N. Y.), 379.

In *Cohen v. Morris*, 70 Ga. 313, the debts due the plaintiff were provided for in the assignment, but he claimed that some of the goods covered by the assignment were never sold to the assignors at all, but were delivered by the plaintiff to them for inspection and a selection of such as they would buy, and a recovery of these,

or the proceeds thereof, was sought. It was held that the remedy was more complete in equity than at law, and that the plaintiff could assail the assignment as fraudulent, and seek to set it aside as to property obtained from him by fraudulent representations with which the assignees are connected.

4. *Fox v. Heath*, 16 Abb. Pr. (N. Y.) 163; *Bank v. Eames*, 4 Abb. App. Dec. (N. Y.) 83; *Bank v. Root*, 3 Paige (N. Y.), 478; *Richardson v. Herron*, 39 Hun (N. Y.), 537.

Where in a general assignment by two partners, the assignee was directed, after paying certain preferred debts and all firm debts and liabilities, to apply the residue, if any, in payment of the individual debts, *pro rata*, and the individual properties of the partners differed in amount, as also their indebtedness, *held*, that the making the individual properties a joint fund for the payment of all debts defrauded the individual creditors of one partner, and that a firm creditor who was hindered and delayed, though not defrauded, by this direction, could have the assignment set aside on that account. *Crook v. Rindskopf*, 34 Hun (N. Y.), 457.

In *Wooldridge v. Irving*, 23 Fed. R. 676, a similar provision was held not to invalidate the assignment, as it did not show that a fraud on any creditor was intended thereby, and none might, in point of fact, result.

5. *Johnson v. Rogers*, 15 Nat. Bank. Reg. 1.

If a creditor takes a dividend, he cannot afterwards avoid the assignment. *Babcock v. Dill*, 43 Barb. (N. Y.) 577.

Unless he was ignorant of its fraudulent character. *Van Nest v. Yoe*, 1 Sand. Ch. (N. Y.) 4.

Conversely, upon a distribution of the proceeds of sale by an assignee for the benefit of creditors, no one claiming adversely to the assignment can participate. *Williams' App.*, 101 Pa. St. 474.

6. U. S. Rev. Sts. §§ 34, 66, 67.

7. *Bishop on Insolvent Debtors*, § 351. Under the Ohio statute relating to in-



## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Creditors may compel a proper management of the trust by the assignee.<sup>1</sup>

The assignment does not prevent a creditor from recovering judgment and proceeding against any property of the debtor not assigned.<sup>2</sup>

**ASSIGNOR—ASSIGNEE.** See ASSIGNMENT.

**ASSIGNS.** See DEEDS; POWERS; TRUSTS; WILLS.

solvent debtors, the creditor of an assignor, who does not present his claim prior to the payment of a dividend and within six months after publication of the notice of assignment, may afterwards present his claim and receive a dividend thereon equal to that paid to other creditors, in case there is money or assets remaining in the hands of the assignee sufficient to make such payment. *Carpenter v. Dick*, 41 Ohio St. 295.

A creditor who fails to prove his claim is not entitled to receive a dividend. *In re Baily*, 58 How. (N. Y.) 446.

The determination of what is "good cause" for admitting proof of a claim after the expiration of the time fixed by notice is within the assignee's discretion. *Bank v. Scudder*, 15 Mo. App. 463.

1. It seems that if such an assignee refuses, in a proper case, to proceed and get in the assigned property, the creditors collectively, or one in behalf of all who may come in and join, may compel the execution of the trust in equity, or may cause the removal of the assignee and the appointment of another. *Crouse v. Frothingham*, 97 N. Y. 105.

In *Merwin v. Richardson*, 52 Conn. 223, certain creditors requested the assignee to institute proceedings to subject certain real estate (which had been conveyed, prior to the assignment, to other creditors without consideration) to the payment of all the debts, and, he declining, brought a suit in their own names for the benefit of all the creditors, who were cited in, some of them filing a cross-complaint praying that the prayer of the original complaint might be granted. After the hearing, and before judgment, the assignee and H., the debtor, filed separate applications to be admitted as co-plaintiffs, and were so admitted. *Held*, that a judgment was properly rendered vesting the title of the real estate in the assignee for the benefit of all the creditors.

Where insolvent debtors have made an assignment for the benefit of their creditors, setting out in the deed of assignment the names of such creditors and the amounts due them, the persons so named

are *cestuis que trustent*; and although they may not be preferred creditors, they are interested in a just administration of the trust, and are entitled to equitable relief in case of mismanagement, waste, or violation of the trust by the assignees. *Cohen v. Morris*, 70 Ga. 313. See also *Windham v. Patty*, 62 Tex. 490.

2. In *Lawrence v. McVeagh*, 106 Ind. 210, it was held that the statute governing assignments for the benefit of creditors does not suspend the creditors' right to maintain an action at any time, in the proper court, for the recovery of a personal judgment against the assignor for the amount due.

In *Sanborn v. Norton*, 59 Tex. 308, it was held that where there was no stipulation for a release a creditor was not debarred from collecting any balance that might be due on his claim after crediting it with the amount received from the assignee, and that, the debt being established, the plaintiff was entitled to a judgment declaring that fact, and that it should not become a lien on any of the assigned property, but that execution might issue against any property not transferred by the assignment.

But in *Hatchett v. Blanton*, 72 Ala. 423, it was held that a creditor secured by an assignment of property voluntarily executed by the debtor may elect whether he will accept its provisions, or will assert his rights independent of it; but he must accept or reject it as an entirety, and cannot accept it in part and repudiate it in part—he cannot claim both under and against it.

In assignments stipulating for a release, though non-consenting creditors do not take, they may attach any excess which may remain in the hands of the assignee after the payment of consenting creditors. *Keating v. Vaughn*, 61 Tex. 518.

**Authorities for Assignment for Benefit of Creditors.**—Angell on Assignments, 1835; Burrill on Assignments (4th Ed.), 1882; Bishop on Insolvent Debtors (2d Ed.), 1884; Notes to *Thomas v. Jenks*, 1 American Leading Cases (5th Ed.), 71; 2 Kent's Comm. (13th Ed.) 1884, p. 532 *et seq.*; Article in 3 South. L. Rev. (N.S.) 553.

**ASSIZE—ASSIZES.** (See also *NISI PRIUS*.)—This word is derived from the Latin *assideo*, to sit together, and is used in several senses: as a species of jury or inquest;<sup>1</sup> the proceedings in court upon a writ of assize or species of real action;<sup>2</sup> the court or sittings of the court;<sup>3</sup> an ordinance or statute;<sup>4</sup> anything fixed, as a tax, tribute, fine.<sup>5</sup>

**ASSOCIATION.** (See also *CORPORATION*; *PARTNERSHIP*.)—The act of a number of persons in uniting together for some purpose. The persons so joining. This term is used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.<sup>6</sup> A corporation. In this sense it enters into the names bestowed by the legislatures upon many corporations.<sup>7</sup> In English law, writs of association.<sup>8</sup>

1. Litt. sec. 234; Co. Litt. 153; 3 Bl. Com. 185.

The distinction between an "assize" and a jury was that an "assize" was the regular mode of trying the main issue in questions of seizin; a jury was used to determine any incidental question arising in the cause. Bract. fol. 184b, 215, and Bract. fol. 192 b, 215.

2. Co. Litt. 159, b.; 3 Bl. Com. 184, 185.

The principal assizes were those of *novel disseisin*, *mort d'ancestor*, *darrein presentment*, and *utrum*. See Co. Litt. 153, b. These writs are all now obsolete.

3. This ancient use of the word "assize" to denote court is still used in England to denote the sessions of the judges of the superior courts, holden periodically in each county for the purpose of administering civil and criminal justice. The courts are called courts of assize and *nisi prius*. 3 Stephen Com. 421, 422. See *Simon's Executors v. Gratz*, 2 P. & W. (Pa.) 412; s. c., 23 Am. Dec. 1.

The court of "assize" is a superior court, with power of committing for contempt without being required to set out the cause of commitment with the particular circumstances. *In re Fernandes*, 6 H. & N. 717.

But it is not a court of error or superior court like the Court of Queen's Bench, so as to come within the principle "*in presentid majoris cessat potestas minoris*." Therefore the authority of the courts of Quarter Sessions is not in law either determined or suspended by the coming of the judges into the county under their commission of "assize." *Smith v. Queen*, 13 Ad. & Ell. (N. S.) 738.

4. The most important examples of these are "The Assizes of Jerusalem,"

a code of feudal jurisprudence compiled A. D. 1099. Butler's Co. Litt. note 77, book 3; 1 Robertson's Charles V., Appendix, note xxv. The assizes of Clarendon, of the forest, of arms, of bread, are noted English statutes.

5. Spelman, 2 Bl. Com. 42.

6. Abbott's Law Dict. *sub voce*.

7. In New York, associations under the general banking law of the State are corporations. *Board of Supervisors of the County of Niagara v. People ex rel.*, 7 Hill (N. Y.), 504. See *Gillet v. Moody*, 3 Comst. (N. Y.) 479; *Talmage v. Pell*, 3 Selden (N. Y.), 328.

8. These are writs directing certain persons (usually the clerk and his subordinate officers) to associate themselves with the justices and sergeants for the purpose of taking the assizes. 3 Bl. Com. 59.

**Associate.**—Such an officer is called an "associate." *Mozley & Whitley Law Dict.*

In common law an "associate" has been applied to a person in each court charged with the custody and formal preparation of records. *Abbott's Law Dict.*

Under statute this name has been confirmed. Stats. 15 & 16 Vict. ch. 73, §§ 1-6, and 17 & 18 Vict. ch. 125, § 2.

By the Judicature (Officers) Act, 1879, the existing associates were converted into masters of the supreme court, and the office of associate abolished. *Rap. & Lawr. Law Dict.*

In the United States the term "associate judge" is frequently used of judges of appellate courts, as the chief justice and the associate judges. U. S. Rev. Stat. § 673.

"Associates" used in a Charter.—In

It also places the property under the jurisdiction of the court to which the statute gives such jurisdiction.<sup>1</sup>

(N. Y.). 58; *Metcalf v. Van Brunt*, 37 Barb. (N. Y.) 621.

Where a note made after the assignment was antedated in order to be embraced in the schedule of preferred debts, it was held that the effect of the assignment could not be varied by any such means. *Sheldon v. Smith*, 28 Barb. (N. Y.) 593.

An assignment which is wholly invalid passes no title to the property, so that a subsequent conveyance by the assignor is good. *Juliand v. Rathbone*, 39 N. Y. 369.

It has, however, been held that where an assignment required the assignee to return the surplus after paying certain creditors named, without providing for the others, the lien of the plaintiff's judgment could not be effected by a subsequent assignment providing for the general creditors, as the first assignment being valid against the assignor, he could not alter it nor show that it was made under a mistake. *Sutherland v. Bradner*, 39 Hun (N. Y.), 134.

Similarly, where the assignment was void on account of a direction to sell on credit, a new one directing sales for cash could not be substituted after liens had attached. *Porter v. Williams*, 9 N. Y. 142.

But where the assignment is voidable, not void, and no liens have attached, it has been held that the property may be released and a new assignment executed. *Howe v. Woolsey*, 2 Edw. Ch. (N. Y.) 289; *Mills v. Argall*, 6 Paige (N. Y.), 577; *Whitcomb v. Fowle*, 7 Abb. N. C. (N. Y.) 295.

An assignment does not lose its legal validity simply because the parties choose to treat it as a nullity. *In re Becker*, 2 Abb. N. C. (N. Y.) 379.

A cancellation of the instrument does not re-vest the title in the assignor. *Metcalf v. Van Brunt*, 37 Barb. (N. Y.) 621.

Where an assignment is accepted by the assignee he cannot, by surrendering or cancelling the deed, destroy the trust or effect the rights of the creditors interested therein, nor can the assignee revoke it. *Scully v. Reeves*, 3 N. J. Eq. 84.

An assignment preferring debts enumerated in a schedule which was never filed, was void under the statute as lacking the assignee's assent. Subsequently an assignment with preferences was made and recorded. *Held*, that assuming the first to be valid at common law as to all

parties, because no creditor had, by attachment or levy before the second, acquired the right to raise the question of statutory irregularity, still the first could not operate as a general assignment without preferences as claimed, but the distribution must be by the second, for it contained the designation of the *cestuis que trustent* which the assignor had a right to make by reason of the power reserved in the first instrument. *Noyes v. Wernberg*, 15 Abb. N. C. (N. Y.) 164.

1. Under the Minnesota statute, upon the perfecting of such assignment, its entire subject-matter and everything involved in it, including the assigned property, come under the jurisdiction of the district court, *ipso facto*, and without the institution of any suit or proceeding. By consequence the assigned property is then *in custodia legis*. *In re Mann*, 32 Minn. 60.

Under the several provisions of the Illinois act of May 22, 1877, a new and special jurisdiction is conferred upon county courts over the subject-matter of such assignments, the exercise of which cannot be interfered with or embarrassed by process from other courts. Such jurisdiction attaches by the making, filing, and recording of the assignment in the mode prescribed in the act.

Under that act the county court, when exercising the powers therein conferred, is in effect an insolvency court, and the same general principles applicable to such courts must be applied.

After the county court has once acquired jurisdiction of the estate of an assigning debtor, he and the assignee, and all other persons having an interest in or upon the estate, are subject alike to the judgment of that court; and a claimant of any property assigned for the benefit of creditors will not be allowed to take the same from the assignee by writ of replevin from another court, but he may present his claims to the county court, which is authorized to call a jury to try the right of property. *Hanchett v. Waterbury*, 115 Ill. 220.

Under the New York General Assignment Act of 1877, the county courts act as courts of general jurisdiction in respect of the assigned estate and any matter involved therein. They have the powers of a court of equity. *In re Bonner*, 8 Daly (N. Y.) 75; *In re Nicholas*, 15 Hun (N. Y.), 317.

By the same act the jurisdiction in the city of New York is vested in the Court

A voluntary assignment passes personalty in another State as effectually as if made in that State.<sup>1</sup>

An assignment does not in any way exempt the property from taxation.<sup>2</sup>

of Common Pleas. See Bishop on Insolvent Debtors, § 249.

A court of equity can reform an assignment upon proof of mistake, and petitions for a reformation and an account may be united. *Garner v. Wright*, 28 How. (N. Y.) 92.

1. "A voluntary assignment by a party, made according to the laws of his domicile, will pass the personal estate, whatever may be its locality, abroad as well as at home. The law distinguishes that which results from the exercise of power under the law from that which comes by the free will of the party; the former is limited in its effect to the country where the law is in force, whilst the latter is given universal and general operation under the comity of nations." *Smith's App.*, 104 Pa. St. 381. It was also there said that "if the owner of personal estate in Pennsylvania may, at the place of his domicile in a foreign State, *bona fide* and for a valuable consideration dispose of the same, receiving and placing the consideration within his own control, and this he may undoubtedly do, he may certainly with like effect convey his estate to the benefit of his creditors here and elsewhere," and it was held that an assignment made in Maryland withdrew personalty in Pennsylvania from liability to seizure for debts existing there, and that claims on the property were barred after the statute of limitations had run in Maryland, though it had not run in Pennsylvania. See also *Speed v. May*, 7 Pa. St. 91; *Dundas v. Bowler*, 3 McL. (U. S.) 397; *Livermore v. Jenckes*, 21 (U. S.) How. 126.

But in *Faulkner v. Hyman*, 142 Mass. 53, it was held that an assignment of property, executed in another State, by a debtor domiciled there, for the benefit of his creditors, which is valid by the law of that State, but is invalid by the law of Massachusetts, because not executed or assented to by the creditors, will not be upheld there, as against attaching creditors of the assignor constituting a partnership, although some of such creditors are domiciled in the State where the assignment was executed, and where the firm has a place of business, and some in another State, the others being domiciled and the firm having its usual place of business in Massachusetts.

By the Pennsylvania statute such an assignment does not affect liens acquired before the assignment was recorded in the State, unless the creditor had notice. 1 *Purd. Dig.* 122, pl. 14; *Smith's App.*, 104 Pa. St. 381.

2. In *Jack v. Weiennett*, 115 Ill. 105, it was said that if the insolvent laws could be held to have the effect of releasing either persons or property from taxation, to that extent they would be unconstitutional, as the constitution denies the power of the legislature to release any person or property from his or its share of taxes levied for State purposes.

It was therefore held that if an insolvent debtor makes an assignment of his property for the benefit of his creditors, even before the tax books are placed in the hands of the collector, the State will still have the right to subject the property assigned for the payment of any taxes due from the assignor; and when the property assigned consists of notes and choses in action, the collector, on proper petition to the county court, will be entitled to an order of that court directing the assignee to first pay the taxes of the assignor out of the trust fund.

If, however, property assigned for the benefit of creditors is sold in good faith to a purchaser before the tax books come to the hands of the collector, so that no lien has as yet attached, the purchaser will take free of any lien for taxes. But tangible property in the hands of the assignee after the collector receives his warrant is subject to distress and sale by the collector as if in the hands of the assignor.

In *Huiscomp v. Albert*, 60 Iowa, 421, an assignment was made for the benefit of creditors, and the assignee was afterwards appointed a receiver to convert the property into money and hold the same subject to the order of the court. It was held proper for the court in ordering a distribution of the money, upon the intervention of the county, to order the receiver, after providing, possibly, for the expenses of the trial, to pay the taxes levied under the laws of this State against the insolvent debtor, in preference to other claims, notwithstanding no levy of the taxes had been made on the goods, and no claim had been filed for the taxes against the assignee.

The resignation, removal, or death of the assignee will not affect the assignment.<sup>1</sup>

A successful attack by creditors upon an assignment does not enlarge its operation as to those who claim under it.<sup>2</sup>

The effect of a general assignment by partners is that firm property is to be used first to pay firm debts, and individual property first to pay individual debts.<sup>3</sup>

Distribution of the assigned estate under a decree of the court, and absolute discharge of the assignee after accounting, is a complete defence to a subsequent action by a judgment creditor to set aside the assignment as fraudulent.<sup>4</sup>

#### 11. Rights, Duties, Powers, and Responsibilities of the Assignee.—

A valid assignment accepted by the assignee,<sup>5</sup> vests the property in him, but before he can proceed to carry out the trust he must give a bond,<sup>6</sup> with sufficient surety, approved by a judge of a court having jurisdiction of the assignment, for the faithful performance

1. In *McFerran v. Davis*, 70 Ga. 661, it was held that the resignation of the assignee was not a revocation of the deed of assignment. The title having passed into him, the trust should not be allowed to fail for the want of a trustee.

2. *Bank v. Hofheimer*, 23 Fed. Rep. 13.

3. *Friend v. Michaelis*, 15 Abb. N. C. (N. Y.) 354; *Peckham v. Mattison*, 15 Abb. N. C. (N. Y.) 367.

A general recital in the assignment, that it is the purpose and intention of the grantor to appropriate the property assigned to the payment of partnership and individual debts as a court of equity would marshal the assets, does not authorize the court, at the instance of a secured creditor, to change or subvert the uses expressly declared, and to appropriate property to the payment of partnership debts, on the ground that it is in fact partnership property, when the deed treats it as individual property, and directs its appropriation first to the payment of individual debts. *Hatchett v. Blanton*, 72 Ala. 423.

4. *McLean v. Prentice*, 34 Hun (N. Y.), 504.

5. See *ante*, 5, p. 855.

6. Before giving the required bond, the assignee has only an inchoate right to the property, but cannot dispose of it. *Van Hein v. Elkers*, 8 Hun (N. Y.), 516; *Woodworth v. Seymour*, 22 Hun (N. Y.), 376; *Brennan v. Wilson*, 4 Abb. N. C. (N. Y.) 279; *Rendleman v. Willard*, 15 Mo. App. 375.

A bond with a single surety is not void in Pennsylvania. *Mears v. Commonwealth*, 8 Watts (Pa.) 223.

If the assignee fail to give a bond, he cannot resign and be discharged on his own motion. The court should remove

him and hold him to account for the estate. *In re Parker*, 10 Daly (N. Y.), 16.

In Wisconsin the failure of the assignees to give bond in an amount not less than the nominal value of the assets ascertained in the manner provided by sec. 1694, R. S., before taking possession of the property and before assuming any trust conferred by the assignment, renders the assignment absolutely void. The statute is mandatory, and must be strictly pursued. *Goll v. Hubbell*, 61 Wis. 293.

The bond of an assignee running to "A. E. R., clerk of the circuit court," etc., is in substantial compliance with sec. 1694, R. S. of Wisconsin, requiring it to be "executed to the clerk of the circuit court of the county, by his name of office, as obligee." The omission of the word "as" before "clerk" is immaterial. *Bates v. Simmons*, 62 Wis. 69.

Under the Minnesota statute, where no inventory has been filed, and there has been no formal and express acceptance by the assignee before and independent of the filing of his bond, and before the expiration of fifteen days from the date of the assignment, of the trust thereby created, the assignee must file his bond within said period of fifteen days. *Perkins v. Zarracher*, 32 Minn. 71.

The failure of the assignee to give bond will not invalidate a deed of assignment properly made, or justify an attachment of the property transferred. The remedy of the creditors is to apply for the appointment of another to discharge the trust. *Windham v. Paity*, 62 Tex. 490.

An action on the bond, on account of non-payment of money in the assignee's hands, sounds in damages, the measure being the demand allowed, with interest. *State v. Hart*, 38 Mo. 44.

of the trust. In some States he must take an oath to perform his duties to the best of his ability.<sup>1</sup> He must also file a sworn inventory of all the property that has come into his hands.<sup>2</sup>

The assignee has power to take into his hands all the estate of the assignor, whether delivered to him or afterwards discovered,<sup>3</sup> and to that end to sue in his own name, or otherwise, and recover all property, claims, and things in action to the same effect as if sued for by the assignor if no assignment had been made.<sup>4</sup>

1. This is the law in New York. 3 Rev. Stats. (7th Ed.) 2266, § 5.

Taking the oath is a prerequisite to the complete vesting of title in the assignee. If he has entered upon the discharge of his duties, but not otherwise, the presumption is that he took the oath. *Hoag v. Hoag*, 35 N. Y. 469; *Rockwell v. Brown*, 42 How. Pr. (N. Y.) 226.

2. By the New York statute the inventory, both of assets and liabilities, should be made by the assignor within twenty days after the assignment. If he fail to do this, the assignee shall make it within thirty days from the date of the assignment. *Bishop on Insolvent Debtors*, §§ 252-262.

By the Pennsylvania statute the assignee must, within thirty days after the execution of the assignment, file a sworn inventory in the office of the prothonotary of the court of common pleas of the county of the assignor's residence. 1 *Purd. Dig.* 122, pl. 15; *Reigart's App.* 4 Pa. 479.

If an assignee files a bond as required by law, but the inventory and appraisal are sworn to by the appraisers and not by the assignee, the inventory is defective, but this is no ground for his removal. *Drain v. Mickle*, 8 Iowa, 438.

3. It is necessary for the assignee to take possession of the assigned estate, but so far as the formal act of taking possession is concerned, no stricter rule applies than in case of ordinary purchase. A formal delivery of the keys to storehouses, safe, and shops, accompanied by a pointing out and surrender of possession of stock in pens, horses, harness, wagon, etc., in barns, is sufficient. *Sullivan v. Smith*, 15 Neb. 476.

The right which an assignor for the benefit of creditors has to discharge the trusts, by payment of the debts before sale by the assignee, and to declare to whom the lands held in trust shall belong upon its termination, and his right to grant or devise the land subject to the execution of the trust, are merely equitable, and do not impair or diminish the estate of the assignee, which remains perfect and exclusive until the purposes

of the trust have in fact been accomplished. *People v. Bacon*, 99 N. Y. 275.

4. An assignee cannot sue in the federal courts if his assignor could not have sued in those courts. *Sere v. Pitot*, 6 Cranch, 332.

In a suit by an assignee in a voluntary assignment for the benefit of creditors, for the recovery of a part of the trust estate, he must allege that the deed of assignment to him has been duly recorded in the recorder's office of the proper county, and must file a copy of such deed as an exhibit; otherwise his complaint must be held bad on demurrer for the want of sufficient facts. *Wheeler v. Hawkins*, 101 Ind. 486.

An assignee can enforce payment of promissory notes, by a bill in equity, without indorsement or special assignment to him. *Lenox v. Roberts*, 2 Wheat. (U. S.) 373.

Where an assignee recovers judgment, a judgment recovered by the debtor on a debt contracted after he had notice of the assignment cannot be set off; but otherwise if the claim had been acquired before notice of the assignment. *Brashear v. West*, 7 Pet. (U. S.) 608.

Where in a partial assignment, covering only a judgment for \$2500, the assignor covenanted to make up the deficiency between the amount realized by the judgment and \$2500, and the judgment yielded nothing, the assignee recovered damages to the full amount in an action of covenant against the assignor. *Paschall v. Scott*, 22 Ark. 255.

When an assignee takes possession of the goods, he is taken to have accepted the trust, and may bring suit in replevin without filing an inventory or bond. *Price v. Parker*, 11 Iowa, 144.

If an interest in an action is assigned *pendente lite*, the fact of the assignment must be established before the assignee can proceed in the action. Moreover, if the assignor has taken any proceedings since the assignment, without the assignee's consent, they may be set aside. *Chisholm v. Clitherall*, 12 Minn. 375.

Security for costs cannot be demanded of an assignee who prosecutes a suit in

form services<sup>1</sup> or to account for the profits of lands or for money or goods;<sup>2</sup> for neglect or breach of professional duty;<sup>3</sup> on promises of indemnity,<sup>4</sup> etc.

**7. Requisites.**—It is not in place to discuss here at length either what considerations are valid, or what promises capable of supporting an action. Suffice it to say on the former point, the consideration must be one proceeding from the party to whom or for whose benefit the promise is made, and must be either a benefit to the party promising or to some third person, or else a detriment to the party to whom the promise is made. It must also be executory, *i.e.*, not antecedent to the time of the promise, or, if executed, performed at the defendant's request;<sup>5</sup> but there are cases where from the beneficial nature of the consideration a request will be implied by law;<sup>6</sup> and a party under a legal or moral obligation to pay is bound by his promise. The consideration must also be coextensive with the promise.<sup>7</sup> As to the second point, an action may be sustained on a promise made not to the plaintiff, but for his benefit, or where the consideration moved from him.<sup>8</sup> The promise is in the majority of cases one implied from the nature of the consideration, or from the defendant's legal obligation.<sup>9</sup> From a moral obligation, however, no promise will be implied, though it may form a sufficient consideration for an express promise.

1. *Halle v. Heightman*, 2 East, 145.

2. 1 Marsh, 115; *Topham v. Braddick*, 1 Taunt. 572; *Canfield v. Merrick*, 11 Conn. 425.

3. *Against Attorneys and Solicitors.*—*Stimpson v. Sprague*, 6 Greenl. (Me.) 471; *Ellis v. Henry*, 5 J. J. Marsh. (Ky.) 248; *Church v. Mumford*, 11 Johns. (N.Y.) 479.

*Wharfingers.*—*Baker v. Liscoe*, 7 T. R. 171.

*Surgeons.*—*Slater v. Baker*, 2 Wils. 359. *Innkeepers.*—*Dickinson v. Winchester*, 4 Cush. (Mass.) 115; *Bradish v. Henderson*, 1 Dane Ab. 310.

*Carriers.*—*Medford v. Boston, etc., Co.*, 102 Mass. 552.

*Other Bailies.*—*Bank of Mobile v. Huggins*, 3 Ala. 206; *Cooper v. Helsabeck*, 5 Blackf. (Ind.) 14; *Kennard v. Jones*, 9 Gratt. (Va.) 183; *Barker v. Cory*, 15 Ohio, 9.

4. *Goddard v. Vanderheyden*, 3 Wils. 262.

5. *Parker v. Crane*, 6 Wend. (N. Y.) 647; *Balcolm v. Croggin*, 5 Pick. (Mass.) 295; *Jewett v. Somersett*, 1 Greenl. (Me.) 128; *Stoever v. Stoever*, 9 Serg. & R. (Pa.) 434; *Harding v. Cragie*, 8 Vt. 501; *Bulkley v. Landon*, 2 Conn. 204; *Livingston v. Rogers*, 1 Caines (N. Y.), 583. See 43 Am. Jur. 2-16.

6. *Hicks v. Burhans*, 10 Johns. (N. Y.)

243; *Livingston v. Rogers*, 1 Caines (N. Y.), 585; *Greeves v. M'Allister*, 2 Binn. (Pa.) 591.

7. Where the plaintiff stated that the defendant was liable as executor to pay a certain debt, and then averred that in consideration thereof he personally promised to pay the same, the declaration was held bad in arrest of judgment, no *additional* consideration being shown for the enlarged responsibility. 7 T. R. 350, a, and 348. See *Berry v. Harper*, 4 Gill & J. (Md.) 470.

8. *Lovely v. Caldwell*, 4 Ala. 684; *Schemerhorn v. Vanderheyden*, 1 Johns. (N. Y.) 139; *Felton v. Dickinson*, 10 Mass. 287; *Stroecker v. Grant*, 16 S. & R. (Pa.) 241; *Steene v. Aylesworth*, 18 Conn. 244.

9. A promise is implied and *assumpsit* lies in cases coming under the principle of general average. *Backus v. Coyne*, 35 Mich. 5.

To recover money paid under the following circumstances:

*An Erroneous Judgment.*—*Hollingsworth v. Stone*, 90 Ind. 244; *Metzner v. Bauer*, 98 Ind. 425; *Scholey v. Halsey*, 72 N. Y. 578; *Hiler v. Hiler*, 35 Ohio St. 645; *Booth v. Commrs.*, 84 Ind. 428. See *Eoff v. Clay*, 9 Mo. App. 176; *Wright v. Aldrich*, 60 N. H. 161; *Conn. Mut. Life Ins. Co. v. Stewart*, 95 Ind. 588.

8. Where the Action will not Lie.—*Security of a Higher Nature.*—

If a party have a security of a higher nature he must found his action thereon,—as where the contract is under seal or of record,—where covenant and *scire facias*, respectively, or in either case debt, are the proper remedies.<sup>1</sup>

**Or Execution.**—*Hoxter v. Poppleton*, 9 Or. 481.

**Duress.**—*Schultz v. Culbertson*, 46 Wis. 313 and 49 Wis. 122; *Mobile, etc., v. Co. v. Steiner*, 61 Ala. 559; *Heckman v. Swartz*, 50 Wis. 267; *Lehigh Co. v. Brown*, 100 Pa. St. 338; *Swift Co. v. U. S.*, 111 U. S. 22; *Westlake & Button v. St. Louis*, 77 Mo. 47. Compare *Hines v. Hamilton Co. Commrs.*, 93 Ind. 266; *Jones v. Inness*, 32 Kans. 177.

But not where it is the same amount one should have paid voluntarily. *McVane v. Williams*, 50 Conn. 348.

**Fraudulent Misrepresentations.**—*Kiewert v. Rindskopf*, 46 Wis. 481; *Johnson v. Continental Ins. Co.*, 39 Mich. 33; *Bernard v. Colwell*, 39 Mich. 215; *Moore v. Marshall*, 76 Me. 353; *Van Santen v. Standard Oil Co.*, 81 N. Y. 171; *Grant v. Mellen*, 134 Mass. 335. See *Needles v. Burk*, 81 Mo. 569. *Tappan v. Warren Savings Bank*, 127 Mass. 107; *Young v. Lehman*, 63 Ala. 519.

Unless the plaintiff has subsequently affirmed the contract. *Fuller v. Atwood*, 13 R. I. 316.

Ordinarily *assumpsit* is not the proper remedy for a deceitful representation not embodied in a written contract, but *case* for fraud. *Meyer v. Everath*, 4 Camp. 22; *Powell v. Edmunds*, 12 East, 11. See, however, *Wood v. Smith*, 4 C. & P. 45; *Parlin v. Bundy*, 18 Vt. 582.

**Mistake of Fact.**—*International Bank v. Bartalott*, 11 Ill. App. 620; *Stebbins v. U. P. R. Co.*, 2 Wy. 71; *Davis v. Krum*, 12 Mo. App. 279; *Worley v. Moore*, 97 Ind. 15; *Glenn v. Shannon*, 12 S. Car. 570; *Alston v. Richardson*, 51 Tex. 1; *Talbot v. Com. Bank*, 129 Mass. 67; *Holmes v. Lucas Co.*, 53 Iowa, 211; *Neitzey v. Dist. of Col.*, 17 Ct. of Cl. 111; *Sharkey v. Mansfield*, 90 N. Y. 227. Compare *Moore v. Moore*, 127 Mass. 22; *Manzy v. Hardy*, 13 Neb. 36.

But not where it has been voluntarily paid under no mistake. *Union Savings Assoc. v. Kehlor*, 7 Mo. App. 158; *Thompson v. Doty*, 72 Ind. 336; *Fowler v. Hall*, 7 Ill. App. 332. And see *McArthur v. Luce*, 43 Mich. 435.

Nor for money paid under a mistake in law. *Beard v. Beard*, 25 W. Va. 486. Compare *Kinney v. Dodge*, 101 Ind. 573.

**An Illegal, Void, or Rescinded Contract.**—*American Steamship Co. v. Young*, 89

Pa. St. 186; *Lea v. Cassen*, 61 Ala. 312; *Spring Co. v. Knowlton*, 103 U. S. 49; *Mannen v. Bradberry*, 81 Ky. 153; *Gregory v. Wendell*, 39 Mich. 337.

But not for money paid for an illegal purpose, as for compounding a crime. *Clark v. U. S.*, 102 U. S. 322; *Collins v. Lane*, 80 N. Y. 627; *Haynes v. Rudd*, 83 N. Y. 251; *O'Reilly v. Cleary*, 8 Mo. App. 186; *English v. Rumsey*, 32 Hun (N. Y.), 486.

**A Consideration that has Failed.**—*Garber v. Armentrout*, 32 Gratt. (Va.) 235; *Wisner v. Chicago*, 6 Ill. App. 254; *Johnson v. Krassin*, 25 Minn. 117; *Walsh v. Rogers*, 15 Neb. 309; *Houghton v. Owen*, 60 N. H. 125; *Lambert v. Short*, 36 La. Ann. 477; *Barton v. Faherty*, 3 Iowa, 327.

1. *Hinkley v. Fowler*, 15 Me. 285; *Andrews v. Callander*, 13 Pick. (Mass.) 484; *Young v. Preston*, 4 Cranch (U. S.), 239; *McManus v. Cassidy*, 66 Pa. St. 260; *Miller v. Watson*, 5 Cowen (N. Y.), 195.

**Foreign Judgment.**—A simple contract debt is not merged in a foreign judgment. *Hall v. Odber*, 11 East, 118; *Lyman v. Brown*, 2 Curt. (U. S.) 559; *Taylor v. Bryden*, 8 Johns. (N. Y.) 173. See *Baber v. Harris*, 1 P. & D. 300; *Leslie v. Wilson*, 6 Moore, 415; *Cram v. Bangor House*, 3 Fairf. 354.

**Invalid Specialty.**—Where a contract under seal is invalid or rescinded, and there is evidence of an implied contract, *assumpsit* lies. *Hitchcock v. Lukens*, 8 Porter (Ala.), 333; *Little v. Morgan*, 31 N. H. 499; *Pierce v. Lacy*, 23 Miss. 193; *Brown v. Gauss*, 10 Mo. 265; *Hill v. Green*, 4 Pick. (Mass.) 114; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417.

**Statute.**—*Assumpsit* lies for money due under a statute. *Pawlet v. Sandgate*, 19 Vt. 621; *Bath v. Freeport*, 5 Mass. 325; *Watson v. Cambridge*, 15 Mass. 286.

**Corporations.**—The English rule that *assumpsit* does not in general lie against a corporation, as the latter cannot contract by parol, is much restricted in this country, the reason therefor not existing; and a corporation may be sued on an implied promise as well as an individual. *Smith v. Meeting House*, 8 Pick. (Mass.) 178; *Baptist Ch. v. Mulford*, 3 Halst. (N. J.) 182; *Canal Co. v. Knapp*, 9 Peters (U. S.), 541; *Sheldon v. Fairfax*, 21 Vt. 102; *Bank v. Macomber*, 29 Me. 564;



9. **New Agreement or Consideration.**—But where a new agreement, not under seal, is entered into which embraces or supersedes the contract contained in the specialty or recorded instrument, the whole is then regarded as a simple contract, and *assumpsit* will lie;<sup>1</sup> and so also where a new consideration, such as forbearance, has intervened, a promise, not under seal, made thereon will be sufficient to support an action.<sup>2</sup>

10. **Merger.**—Where a higher security is accepted in satisfaction of a simple contract debt the latter is merged, and no action thereon can be sustained;<sup>3</sup> but where the former is merely collateral to the principal debt *assumpsit* will lie.<sup>4</sup>

11. **Where Tort may be Waived.**—Though the action does not in general lie in cases of tort, yet in many of these cases the tort may be waived and *assumpsit* sustained against a defendant who has wrongfully taken or retained possession of the money or goods of another, and has profited in some manner thereby, as by selling them,<sup>5</sup> etc.

12. **Legacy and Distributive Share.**—*Assumpsit* will not lie for a

Palmer v. Ins. Co., 20 Ohio, 537; Danforth v. Turnpike Co., 12 Johns. (N. Y.) 227; Savings Bank v. Davis, 8 Conn. 202; Whitehall v. Whitehall, 3 S. & R. (Pa.) 117; Kortwright v. Com. Bank, 20 Wend. (N. Y.) 91; Waller v. Bank of Ky., 3 J. J. Marsh. (Ky.) 205; Wyman v. Amer. Powder Co., 8 Cush. (Mass.) 168; Angell & Ames Corp. § 237.

1. Lawall v. Rader, 24 Pa. St. 283; M'Voy v. Wheeler, 6 Porter (Ala.), 201; Latimore v. Hansen, 14 Johns. (N. Y.) 230; Munroe v. Perkins, 9 Pick. (Mass.) 208; Schack v. Anthony, 1 M. & Sel. 575; Smith v. Smith, 45 Vt. 433; King v. Lamouille Val. R. Co., 51 Vt. 369.

Where the contract was varied by parol, held the action was maintainable with respect to the terms so varied. Mill Dam Foundry v. Hovey, 21 Pick. (Mass.) 417.

2. White v. Parkin, 12 East, 578; Monroe v. Perkins, 9 Pick. (Mass.) 208; Andrews v. Montgomery, 19 Johns. (N. Y.) 162; Landis v. Urie, 10 S. & R. (Pa.) 321. See Russel v. Haddock, 1 Lev. 188; Duncan v. Kirkpatrick, 13 S. & R. (Pa.) 298.

3. Unless such security be void or inoperative. 1 Saund. 295, note 1; Scurfield v. Gowland, 6 East, 241; M'Crillis v. How, 3 N. H. 348; Hammond v. Hoppling, 13 Wend. (N. Y.) 505.

4. Willoughby v. Spear, 4 Bibb (Ky.), 397; Hills v. Elliott, 12 Mass. 26; Snow v. Thomaston Bank, 19 Me. 269.

5. Jones v. Hoar, 5 Pick. (Mass.) 289; Gardiner Mfg. Co. v. Heald, 5 Greenl. (Me.) 381; Carleton v. Haywood, 49 N. H. 314; Brown v. Holbrook, 4 Gray

(Mass.), 102; Whitwall v. Vincent, 4 Pick. (Mass.) 452; Stearns v. Dillingham, 22 Vt. 624; Morrison v. Rogers, 2 Scam. 317; Gray v. Griffiths, 10 Watts (Pa.), 431; Budd v. Heiler, 27 N. J. L. 43; Webster v. Drinkwater, 5 Greenl. (Me.) 319; Watson v. Stever, 25 Mich. 386; Isaacs v. Hermann, 49 Miss. 449; Johnston v. Salisbury, 61 Ill. 316; Bethlehem v. Perseverance Fire Co., 81 Pa. St. 445; Wagner v. Peterson, 83 Pa. St. 238; Miller v. King, 67 Ala. 575.

The plaintiff cannot recover unless the goods have been sold by the defendant. Jones v. Hoar, 5 Pick. (Mass.) 289; Hambly v. Trott, Cowp. 371; Smith v. Hatch, 46 N. H. 146; Tolan v. Hodgeboom, 38 Mich. 624. *Contra*, Hill v. Davis, 3 N. H. 384; Gordon v. Bruner, 49 Mo. 570; James v. Buzzard, Hempst. (U. S.) 240; Alsbrook v. Hathaway, 3 Sneed (Tenn.), 454; Hawk v. Thorn, 54 Barb. (N. Y.) 164. As to exchange, see Fuller v. Duren, 36 Ala. 73.

**Effect of Election.**—If the tort has once been waived, the defendant cannot afterwards be treated as a wrongdoer. Lythgoe v. Vernon, 5 H. & N. 180.

So if he has been sued in tort and judgment has been recovered against him, he cannot afterwards be sued in *assumpsit*. Floyd v. Brown, 1 Rawle (Pa.), 121.

But declaring in tort will not render one liable who would not have been so on his promise, the ground of the action being *assumpsit*. Green v. Greenbank, 2 Marsh. 485; Bretherton v. Wood, 3 B. & B. 62.

**Rents.**—Rents tortiously received may

pecuniary legacy payable out of the testator's assets, or for a distributive share of an intestate's property.<sup>1</sup>

**13. Pleading.—Declaration.**—The declaration must set forth the promise either expressly or by strong implication,<sup>2</sup> the consideration on which the contract was founded,<sup>3</sup> and the breach.<sup>4</sup> In cases of reciprocal or dependent contracts, performance, or readiness to perform on the plaintiff's part, must also be averred.<sup>5</sup> Damages must be laid sufficient to cover the whole amount claimed.

**Pleas.**—Under the general issue—*non-assumpsit*—evidence may be introduced to show either that the plaintiff never had a cause of action or that matters of discharge or satisfaction have inter-

be recovered in this action. *Boyter v. Dodsworth*, 6 T. R. 683; *Lindon v. Hooper*, Cowp. 414.

1. *Deeks v. Strutt*, 5 T. R. 690; *Jones v. Tanner*, 7 B. & C. 544.

Otherwise as to a legacy in many of the States. *Farwell v. Jacobs*, 4 Mass. 635; *Cowdin v. Perry*, 11 Pick. (Mass.) 503; *Knapp v. Hanford*, 6 Conn. 176; *Clark v. Herring*, 5 Bin. (Pa.) 33; *Cowell v. Oxford*, 6 N. J. L. 432; *Prescott v. Morse*, 62 Me. 447; *Kelsey v. Deyo*, 3 Cowen (N. Y.), 133.

And as to a distributive share, see *Harris v. Harris*, 2 Harr. (Del.) 354; *Holloback v. Van Buskirk*, 4 Dall. (Pa.) 147.

2. *Avery v. Inhab. of Tyrringham*, 3 Mass. 160. See *Cook v. Sims*, 2 Cal. 39; *Muldrows v. Tappan*, 6 Mo. 276; *Bruner v. Stout*, Hard (Ky.), 225; *Grant v. Jackson*, Kirby (Conn.), 90; *Roget v. Merritt*, 2 Ca. (N. Y.) 117.

As to this defect being cured by verdict or judgment, see *Clark v. Reed*, 20 Miss. 554; *Hoard v. Little*, 7 Mich. 468.

3. *Douglass v. Davie*, 2 McC. (S. C.) 218; *Burnet v. Biscoe*, 4 Johns. (N. Y.) 235; *Lansin v. M'Killip*, 3 Caines (N. Y.), 288; *Beauchamp v. Bosworth*, 3 Bibb (Ky.), 115; *Beverleys v. Holmes*, 4 Munf. (Va.) 95; *Hendrick v. Seeley*, 6 Conn. 176; *Brooke v. Lowrie*, 1 Nott. & M. (S. C.) 342; *De Forest v. Frary*, 6 Cowen (N. Y.), 151; *Tavor v. Philbrick*, 7 N. H. 326; *Hemmenway v. Hicks*, 4 Pick. (Mass.) 497; *People's Bank v. Adams*, 43 Vt. 195; *Davison v. Ford*, 23 W. Va. 617.

Otherwise as to actions on bills of exchange and promissory notes, the consideration there being implied. *Peaveley v. Boatwright*, 2 Leigh (Va.), 198.

As to bank-notes, see *Gilbert v. Nantucket Bank*, 5 Mass. 97.

As to notes not negotiable, see *Jerome v. Whitney*, 7 Johns. (N. Y.) 321; *Odiorne v. Odiorne*, 5 N. H. 316.

4. *Williams v. Staton*, 13 Miss. 347; *Benden v. Manning*, 2 N. H. 289.

5. *Parker v. Parmele*, 20 Johns. (N. Y.) 130; *Smith v. Woodhouse*, 2 New Rep. 233.

**When Performance must be averred in the Declaration.**—The rules on this subject are as follows:

(1) Where the day appointed for the defendant's payment or other action was to happen before the day on which the consideration was to be performed, the plaintiff need not aver performance. *Robb v. Montgomery*, 20 Johns. (N. Y.) 15; *Couch v. Ingersoll*, 2 Pick. (Mass.) 292; *Smith v. Woodhouse*, 2 New. 233.

(2) Where the day of the defendant's performance is to happen after the time of the consideration, performance of the latter must be averred. *Zerger v. Sailer*, 6 Binn. (Pa.) 24; *M'Intire v. Clark*, 7 Wend. (N. Y.) 330; *Bank v. Hagner*, 1 Pet. (U. S.) 467; unless the defendant has disabled himself. *Newcomb v. Brackett*, 16 Mass. 161; *Johnson v. Caulkins*, 1 Johns. (N. Y.) 116; *Clark v. Moody*, 17 Mass. 149.

(3) Where the plaintiff's stipulation constitutes only a part of the consideration and the defendant has received a partial benefit and the plaintiff's breach may be compensated in damages, there performance need not be averred. 1 Saund. 320, b; *Boon v. Eyre*, 1 Hen. Bla. 273.

(4) Where the mutual covenants constitute the whole consideration on both sides, they are mutual conditions, and performance must be averred. *Harrison v. Taylor*, 3 Marsh. 168; *Tanner v. Beareford*, 1 Bay (S. C.), 237; *Leonard v. Bates*, 1 Blackf. (Ind.) 175; *Bean v. Atwater*, 4 Conn. 3; *Tinney v. Ashley*, 15 Pick. (Mass.) 552.

(5) Where two acts are to be done at the same time, as where one covenants to convey an estate or to deliver goods on a certain day, and the other to pay on

vened before the bringing of the action;<sup>1</sup> in short, the question in *assumpsit* upon the general issue is whether there was a subsisting debt or cause of action at the time of commencing the suit.<sup>2</sup> In many of the States, purely equitable defences are admitted under this plea, and matters of set-off and recoupment may be shown under the plea of payment, in accordance with the provisions of local statutes.<sup>3</sup>

**14. Verdict and Judgment.**—The verdict, if for the plaintiff, must be for a sum certain as damages, that sum not to exceed the amount named in the declaration.<sup>4</sup> Judgment in such a case is that the plaintiff recover his damages and costs against the defendant.

**ASSURANCE.** See INSURANCE.

**AT.**—The definition of *at* has been frequently the subject of legal adjudication. It has been held equivalent to "in" or "within;"<sup>5</sup> to "in" or "near;"<sup>6</sup> to "into."<sup>7</sup> Constructions given to

the same day or generally, neither can maintain an action without showing performance or an offer to perform on his part, or at least readiness to do so, though it is not certain which was obliged to do the first act. *Dana v. King*, 2 Pick. (Mass.) 156; *Kilgour v. Miles*, 7 Gill & Johns. (Md.) 268; *Champlin v. Rowley*, 13 Wend. (N. Y.) 258; *Green v. Reynolds*, 2 Johns. (N. Y.) 207; *Vankirk v. Talbot*, 4 Blackf. (Ind.) 367.

1. *Wilt v. Ogden*, 13 Johns. (N. Y.) 56; *Young v. Black*, 7 Cranch (U. S.), 565; *Craig v. Missouri*, 4 Pet. (U. S.) 426.

2. *Tidd*, 699, 700.

The effect of the general issue was much restricted in England by the Reg. Gen. Hil. T. W. 4 (see 1 Chit. on Pl. 512 *et seq.*), before the old system of pleading was abolished.

3. *Nichols v. Alsop*, 6 Conn. 477; *Blessing v. Miller*, 102 Pa. St. 45.

4. *Tidd*, 9th Ed., 896; *Tenant v. Gray*, 5 Munf. (Va.) 494; *Harris v. Jaffray*, 3 Har. & J. (Md.) 546; *Hoit v. Malony*, 2 N. H. 322; *Silzell v. Michael*, 3 W. & S. (Pa.) 329; *Grether v. Klock*, 39 Conn. 133.

See in general *Tidd's Practice*, 2 *et seq.*; 1 Chitty on Pleading, 98–108, 289–360, 475, 513, etc.; 2 T. & H. Pr. (Pa.) 2–16.

5. Where it was required by charter that a railroad should commence near or at a city bounded northerly by the centre of a river, it was held that thereby authority was given to commence it in the city, and to carry it across the river by a bridge. *Mohawk Bridge Co. v. Railr. Co.*, 6 Paige (N. Y.), 554.

"At the parish of Caddo" was held equivalent to "in the parish of Caddo," in *State v. Nolan*, 8 Rob. (La.) 517. And see *Ches. & Ohio Canal Co. v. Key*, 3 Cranch C. C. (U. S.) 606, cited *post*, p. 891 (AT AND FROM).

6. Where in an action for assault and battery the venue was laid "at Montebello, in the county of Hancock," and the assault was proved to have been committed five miles off from Montebello, *held*, that "at" means either "in" or "near," and by considering it as laying a venue and not descriptive of the place, no variance existed between the declaration and the proof. *Hurley v. Marsh*, 1 Scam. (Ill.) 329.

A statute making it unlawful to play cards, dice, etc., "at any tavern" means "in or near" such tavern. *Ray v. State*, 50 Ala. 172.

An act exempting from taxation land "at the terminus" of a company's road was held to mean "near the terminus." "Its primary idea, the lexicographers say, is nearness, and it is less definite than 'in' or 'on.' In this latter sense it was doubtless used in the act now under consideration." *State v. Receiver of Taxes*, 38 N. J. L. 299.

A company was ordered to appear on parade "at or near" a certain house. *Held*, that the place was sufficiently designated. "The words 'at' and 'near' are in this connection synonymous. The word *at* is used 'to denote near approach, nearness or proximity.' Richardson's Eng. Dict. 'In general, 'at' denotes nearness of presence; as, at the ninth hour; at the house may be *in* or *near* the house.' Webster's Dict. This exception must be overruled." *Bartlett v. Jenkins*, 22 N. H. 63.

"At the dwelling house" was held to express the idea of "nearness of place," and to be less definite than "in" or "on the house." *Kibbe v. Benson*, 17 Wall. (U. S.) 624, cited *post*, p. 893 (AT THE DWELLING-HOUSE).

7. By the articles of association the object of the company was stated to be

particular phrases in which the word occurs may be found in the note.<sup>1</sup>

to construct a road to commence in Brooklyn and to terminate "at Newtown, Queen's County." The township of Newtown borders on Brooklyn, but there is a village of the same name twenty-five miles from the starting-place of the road. *Held*, that even if "Newtown" be construed to mean the "township of Newtown," there was nothing in the articles to sanction a construction which would terminate the road at the boundary between Brooklyn and Newtown. "The natural interpretation of this language certainly is that the road is to be built into Newtown." *Mason v. Brooklyn*, etc. R. Co., 35 Barb. (N. Y.) 378.

1. "At and from" a Port.—"What is the true construction of these words in policies must in some measure depend upon the state of things and the situation of the parties at the time of underwriting the policy. If at that time the vessel be abroad in a foreign port, or expected to arrive at such port in the course of a voyage, the policy by the word 'at' will attach upon the vessel and cargo from the time of her arrival at such port. If, on the other hand, the vessel has been a long time in such port without reference to any particular voyage, the policy will attach only from the time that preparations are begun to be made with reference to the voyage insured. And if the party insured acquired the ownership subsequent to such time and before the date of his policy, then the policy will attach only from the time of acquiring such ownership. If, on the other hand, the ship be at a home port at the time of effecting such insurance, the policy seems generally to be deemed to attach only from the date of the policy." *Story*, J., in *Seamans v. Loring et al.*, 1 Mas. (U. S.) 140.

In a homeward policy these words are to be construed in their natural geographical sense without reference to the expiration of an outward policy "to" the same place, and therefore the policy attaches as soon as the vessel arrives within the port named and although not safely moored. Accordingly where a vessel insured "at and from" Havana was injured by coming in contact with an anchor, after entering the harbor, and whilst passing over a shoal up to her place of discharge, it was held that the policy had attached. *Haughton v. Ins. Co.*, L. R. 1 Ex. 206. See also *Foley v. United, etc., Ins. Co.*, L. R. 5 C. P. 155, where the policy was held to attach be-

fore the whole of the cargo "at" Mauritius had been discharged.

A policy of insurance "at and from an island" protects a vessel in sailing from port to port in order to take in a cargo. *Dickey v. Baltimore Ins. Co.*, 7 Cranch (U. S.) 327.

And where a vessel insured "at and from" a foreign port, after leaving the same and being found leaky, returned, was repaired and sailed again, it was held that the insurer was liable while the vessel was in port, after her return, and during the subsequent voyage. *Taylor v. Lowell*, 3 Mass. 331; *Merchants' Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303.

And such a policy will attach though the ship at the time be undergoing extensive repairs, so as to be utterly unseaworthy for a voyage. *M'Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 184.

But in such a voyage policy it is an implied understanding that the ship shall be at the port within such a time that the risk shall not be materially varied; and if there is delay beyond such time, the policy does not attach. *De Wolf v. Bank & Ins. Co.*, L. R. 9 Q. B. 451.

"At and from" in a charter.—These words were held not to have an exclusive signification in a charter for a "navigable canal from the tide-water of the river Potomac, . . . [to] begin at the District of Columbia." "'At' in ordinary speech more generally means *within* than *without*. Thus *at* a town or *at* a county means at some place *within* the town or *within* the county, rather than a place *without* or even at the utmost verge of, but not *in* the town or county." *Ches. & Ohio Can. Co. v. Key*, 3 Cranch C. C. (U. S.) 606.

**At large.**—A dog, loose, following his master through the public streets at such a distance that such control could not be exercised as would prevent mischief is "at large." *Com. v. Dow*, 10 Metc. (Mass.) 382.

To be "at large without a keeper" means, without the charge of any one having the right to control; and such charge does not imply necessarily physical power of control, but voice, gestures, etc. *Jennings v. Wayne*, 68 Me. 468.

A dog at play with his owner's son upon his owner's land is not "at large" within the meaning of an act authorizing the killing of dogs "going at large."

McAneany v. Jewett, 10 Allen (Mass.), 151.

Also, in old practice, "not limited to any particular matter, point, or question, as a special verdict is a 'verdict at large.'" Burr. L. Dict.

**At law.**—Where a statute declares that a deed or other instrument shall not be valid "at law," it does not mean simply that it shall be held invalid in a court of law only, but in all courts, equitable as well as legal. Fleming v. Burgin, 2 Ired. Eq. (N. Car.) 589.

According to law; by, for, or in law. Applied exclusively to the English common law and corresponding to "in equity." Burr L. Dict.

**At least.**—These words in the phrase "eight feet wide at least" "import uncertainty; and it is obvious on which side the uncertainty lies. The words 'fully, or not less than,' would have the same effect, as they would express that the grantee would have eight feet certain, and more if more should be indispensable, but eight at all events whether indispensable or not." Roberts v. Wilcock, 8 W. & S. (Pa.) 470.

**At merchant's risk.**—It was stipulated in a charter-party that the "ship should be provided with a deck cargo if required at full freight, but at merchant's risk." Held, that the words "at merchant's risk" did not exclude the right of the charterers to general average contribution from the ship-owners in respect of deck cargo shipped by the charterers, and necessarily jettisoned to save the ship and the rest of the cargo. Burton v. English, L. R. 12 Q. B. D. 218.

**At or near.**—Under a charter which fixes one terminus of a railroad "at or near" a certain point, a large discretion is conferred upon the railroad company in locating their road, the exercise of which will not be revised by the court unless they have clearly exceeded its just limits or acted in bad faith; and where a charter authorized a railroad company to construct a railroad "from a point at or near the present terminus of its track," a location starting at a point 2475 feet by the line of the railroad northerly from the termination of the old track was held authorized. Fall River Co. v. Old Colony R. Co., 5 Allen (Mass.), 221.

In the return of a road made by surveyors the statement that it was to begin "at or near" a certain corner of land was held too vague. Griscom v. Gilmore, 1 Har. (N. J.) 105. Otherwise, in an application for a road. State v. Northrop, 3 Har. (N. J.) 275.

"At" and "near" held synonymous. See Bartlett v. Jenkins, 22 N. H. 63, cited *supra*, n. 2.

**At, in, or near.**—A testator devised all his messuages, tenements or dwelling-houses, and buildings situate "at, in, or near" Snig Hill in Sheffield which he had lately purchased from the Duke of Norfolk. The testator had six houses at Sheffield, all purchased from the Duke, and comprised in one conveyance, four of which houses were distant about twenty yards from Snig Hill, and the remaining two about four hundred yards therefrom. He had redeemed the land tax for all the houses by one contract. It was held that the devise did not comprise the two latter houses, part only of the description applying to them and there being other houses to which the whole of the description did apply. Doe d. Ashforth v. Bower, 3 B. & A. 453. See Attwater v. Attwater, 18 Beav. 330; Newton v. Lucas, 6 Sim. 54.

**At or upon.**—On a bond conditioned for payment of a sum "at or upon" a certain day, a tender before that day is good in discharge of the same. M'Hard v. Whitcroft, 3 Har. & M. (Md.) 85.

**At once,** in a contract to furnish building materials "not exceeding the value of \$2000, at once," means "at one and the same time." Platter v. Green, 26 Kan. 268.

**At their death.**—Bequest of residue, the interest thereof to be paid to C. and J. equally for their lives, and "at their death" the principal to be divided between the children of C. and J. Held, that the words "at their death" meant "at their respective deaths," and that, on the death of C., the moiety to the interest of which C. had been entitled became divisible among his children. Wills v. Wills, L. R. 20 Eq. 342.

"At his death" was held equivalent to "on his death" in a devise over, and to entitle the first devisee to an estate in fee with an executory devise over in case he left no issue living "at his death." Parker v. Birks, 1 K. & J. 156. See Stratford v. Powell, 1 Ba. & Be. 1. Rackstraw v. Vile, 1 S. & St. 604.

**At the trial.**—A judge's certificate directed by statute to be granted "at the trial of the cause," in order to enable the plaintiff to recover more costs than damages, is in time if granted four days after the trial. "The words . . . cannot be expounded literally because the certificate cannot be granted at the trial, but only after the trial, when the jury have found their verdict." Johnson v. Stanton, 2 B. & C. 621.

But where by a statute regulating appeals the judge was directed, "at the trial or hearing" of the cause, at the request of either party to make a note of a question of law, etc., it was held that the request must be made during or immediately at the end of the trial or hearing, and if not made until an hour and a half after judgment was too late. *Pierpoint v. Cartwright*. L. R. 5 C. P. D. 139.

**At sea.**—A vessel is to be deemed "at sea" within the terms of a policy of insurance while in a foreign port, having been captured and carried there against the will of the master. *Lord v. Dall*, 12 Mass 115; s. c., 7 Am. Dec. 38; *Wood v. N. E. Ins. Co.*, 14 Mass. 31.

Where a clause in a time policy extends the insurance beyond the term named if at the expiration thereof the ship is "at sea," this contemplates her pursuing her voyage, and on her way to some port, intermediate or final, and does not cover the entire period till her final return to her home port. *Gookin v. N. E. Mut. Mar. Ins. Co.*, 12 Gray (Mass.), 501. Compare *Eyre v. Mar. Ins. Co.*, 6 Whar. (Pa.) 247.

"The term 'at sea' may have different meanings according to the connection in which it is used. Here it is used in contradistinction to 'arrival in port.' If the vessel has sailed or commenced her voyage from one port to another, she must be considered to be at sea, within the meaning of this clause, from the commencement to the termination of that voyage, although during parts of it she may have sought shelter in a place on the way." *Shaw, C. J.*, in *Bowen v. Hope Ins. Co.*, 20 Pick. (Mass.) 278.

A vessel is "at sea" when she is actually on her voyage. *Union Ins. Co. v. Tysen*, 3 Hill (N. Y.), 118.

And she is so within the acts of Congress of 1813 and 1819 when without the limits of any port or harbors on the sea-coast. *The Harriet*, 1 Story (U. S.), 251, 259.

**At the end of one year** was held to mean at the expiration of "one full and entire year," and "at" to be equivalent in meaning to "after." *Annan v. Baker*, 49 N. H. 169.

**At this date** in a receipt for "various payments," cannot by itself be construed to mean "up to this date." *Moore v. Korty*, 11 Ind. 343.

**At the date of its passage**, in an act declaring that the "act to increase the pay of the soldiers, etc., shall not be so construed as to increase the emoluments of the commissioned officers of the army

at the date of its passage" was held not to have any retrospective or retroactive effect. *Bassett v. U. S.*, 2 Ct. of Cl. (U. S.) 450.

**"At" in a Bill of Exchange.**—In an instrument in the form of a bill of exchange, "at" before the drawees' names was held equivalent to "to," so as to support a declaration on a bill of exchange, or perhaps on a promissory note, at the option of the holder. *Shuttleworth v. Stephens*, 1 Camp. 407. See *Allan v. Mawson*, 4 Camp. 115.

**At the pit's mouth.**—Where the lessee of a coal-mine covenanted to pay a moiety of all such sums of money as the coals there raised should sell for "at the pit's mouth," it was held that he was not liable to pay any part of the money produced by sale of the coals elsewhere. *Gerrard v. Clifton*, 7 Term, 676, reversing 1 Bos. & Pul. 524.

**At the warehouse.**—A covenant to deliver tobacco at a warehouse does not require the covenantor to put it in the house. 5 T. B. Mon. (Ky.) 374; s. c., 4 Wheel. Am. C. L. 54.

**At an office or banking-house.**—The clause of the National Currency Act of 1864 which directs that the "usual business" of the banks created under it shall be transacted at an office or banking-house in the place specified in its organization certificate, does not prevent the purchase of coin by one bank at the banking-house of another. *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604.

**At the dwelling-house.**—Where a statute required that the declaration in an action of ejectment should be served by delivering a copy thereof to the defendant or a member of his family "at the dwelling-house of such defendant," it was held that a delivery of it to one who was at the distance of 125 feet from the house and in the corner of a yard of the house was not a compliance with the statute. "It may be delivered to one who is at the dwelling-house merely. This expresses the idea of nearness of place, and is less definite than if it had been said in the house or on the house. . . It is not unreasonable to require that it should be delivered on the steps or on a portico, or in some out-house adjoining to or immediately connected with the family mansion, where, if dropped or left, it would be likely to reach its destination." *Kibbe v. Benson*, 17 Wall. (U. S.) 624.

**At that time**, in a devise, construed. *Doc, Lessee of Cholmondeley v. Maxey*, 12 East, 589.

**ATTACHMENT.** (See also EXECUTION; GARNISHMENT.)

1. *Definition*, 894.  
*Origin and General Nature*, 894.
2. *In whose Favor the Process will Lie*, 894.  
*Attachment will not Lie for Tort*, 895.  
*Unliquidated Damages*, 896.  
*Character of Debt*, 896.  
*Defects taken Advantage of*, 896.
3. *Against whom the Process may Issue*, 896.  
*Absconding Debtors*, 897.  
*Concealment*, 897.  
*Non-Residence*, 897.
4. *The Affidavit*, 901.  
*Contents*, 902.  
*Manner of Statement*, 904.
5. *Attachment Bonds*, 905.  
*Object, Form, and Requisites*, 905.  
*Amendments*, 907.  
*Liabilities*, 908.
6. *Issuing the Writ*, 909.  
*Object and Requisites*, 909.
7. *What Property is Subject to Attachment*, 911.  
*Real Estate*, 911.  
*Personalty*, 913.  
*Exemptions*, 914.
8. *Execution and Return of Writ*, 918.  
*Kind of Possession*, 920.  
*Return*, 921.  
*Amendment*, 922.
9. *Bonds to Dissolve*, 923.  
*Bail Bonds*, 923.  
*Delivery Bonds*, 925.
10. *Simultaneous, Successive, and Fraudulent Attachments*, 926.
11. *Liability of Officer*, 929.
12. *Property and Rights Affected*, 930.
13. *Dissolution*, 931.
14. *Notice by Publication*, 934.

**1. Definition.**—Attachment may be defined to be a provisional remedy whereby a debtor's property, real or personal, or any interest therein capable of being taken under a levy and execution, is placed in the custody of the law to secure the interests of the creditor, pending the determination of the cause.

**Origin and General Nature.**—Attachment, as it exists in the United States, is derived from the custom of London, as modified by local legislation in accordance with our peculiar wants and necessities. It is essentially a creature of statute, and as the proceeding involves the involuntary dispossession of the owner and antagonizes the common-law idea of proprietary right, the statute upon which it is founded is strictly construed,<sup>1</sup> and to confer jurisdiction it must appear affirmatively on the record that all the requirements of the statute have been complied with; otherwise the proceedings are extra-judicial, and the judgment may be impeached collaterally. In the absence of special legislation enabling the decrees of courts of equity to operate *proprio vigore* upon the subject-matter of the controversy, it cannot issue from a court of equity consistently with the maxim, "Equity acts *in personam* and not *in rem*."<sup>2</sup> The proceeding partakes largely of the nature of both actions *in personam* and actions *in rem*, and hence has been denominated an action in the nature of a proceeding *in rem*.<sup>3</sup>

**2. In whose Favor the Process will Lie.**—By the custom of London all attachments are grounded upon actions of debt, and the debt must be due and of such nature as will sustain an action at

1. Wade on Attach. §§ 2, 3.  
2. Wade on Attach. § 5; Pomeroy's Eq. Jur. §§ 134, 135; 3 Pomeroy's Eq. Jur. § 1317, show such legislation to exist in most of the States. For classification, see 3 Pomeroy's Eq. Jur. § 1317, n. 2; American Land Co. v. Grady, 33 Ark. 550.  
3. Wade on Attach. § 7.

law.<sup>1</sup> Formerly, except in New England, resort to this process was almost exclusively restricted to creditors.<sup>2</sup> A creditor is one who has the right to require of another the fulfilment of a contract or obligation.<sup>3</sup>

*Attachment will not Lie for Tort.*—The rights which the process is designed to secure arise from contract, and, in the absence of statutory provision to the contrary, attachment will not issue in actions founded on tort.<sup>4</sup> When the action is one sounding in damages, to be recovered for a wrong inflicted upon the plaintiff by defendant, the mere fact that an action might have been brought for the breach of a contract between the same parties and some of the facts which go to prove the breach of contract would be competent evidence of the tortious acts of defendant, will not bring it within the general description of "actions arising upon contract expressed or implied."<sup>5</sup> An important distinction is to be observed in this connection; for while it is true that every incidental implied contract that is broken in the commission of a wrong will not convert an action essentially *ex delicto* into an action *ex contractu*, the converse of the proposition is equally true. The wrong or even crime committed in connection with a breach of contract will not prevent the bringing of an action for such breach by attachment of property.<sup>6</sup> In the latter case the party waives the tort and sues on the contract express or implied.<sup>7</sup>

1. Drake on Attach. (6th Ed.) § 9.

Equitable debts are not sufficient to ground an attachment upon. Such is a legacy which is recoverable only in the spiritual court or in a court of equity, or dividends due to a creditor from the assignees under a commission in bankruptcy, as well as all trust property; for the creditor cannot sue for them at law, but must petition the chancellor or file a bill in equity to recover them. Ashby on Attach. 21, 22.

In New York it has been held that the remedy by attachment could not be resorted to in equity actions. Ebner v. Bradford, 3 Abbott Pr. N. S. (N. Y.) 248.

2. In the absence of any statutory provision to the contrary, non-residents, as well as residents, may avail themselves of this process; and when the remedy is allowed only to residents, and the non-residence of plaintiff does not appear on the face of the proceedings, the defendant can avail himself of it only by a plea in abatement. Calhoun v. Cozzens, 3 Ala. 21, Ward v. McKenzie, 33 Tex. 297.

3. 1 Bouvier's Law Dict. 383.

4. Drake on Attach. (6th Ed.) § 10.

A statute without expressly providing that attachment shall issue in actions for tort may yet be sufficiently comprehensive to include such process. Thus,

in New York, under the Civil Code of Procedure, allowing an attachment "in an action for the recovery of money," conflicting decisions existed until the provision was changed so as to read "in an action arising in contract for the recovery of money only," which leaves no room for using it in actions founded on tort. In Ohio an attachment may issue "in a civil action for the recovery of money" where the defendant has "fraudulently or criminally contracted the debt or incurred the obligation for which suit is about to be or has been brought;" and it was there held that the term "obligation" there is equivalent to liability, and that an attachment would lie in an action for damages for an assault and battery. Sturtevant v. Tuttle, 22 Ohio St. 111; Creaser v. Young, 31 Ohio St. 57. See also, for good summary of legislation on the subject, Wade on Attach. § 10, n. 1.

5. Wade on Attach. § 12, and cases cited.

6. Hunt v. Miles, 4 Mart. (La.) 517; Pa. R. Co. v. Peoples, 31 Ohio St. 537; S. C. V. Peat Fuel Co. v. Tuck, 53 Cal. 804.

7. Wade on Attach. § 122.

Where a railroad company agrees for consideration to carry a passenger over its road, and by its negligence an in-



**Unliquidated Damages.**—In those States where the amount of the claim must be averred in the affidavit in order to comply with the statutory provision, attachment will not lie for unliquidated damages resulting from the breach of a contract, unless there is something in the contract itself which affords a rule by which they can be estimated.<sup>1</sup>

**Character of Debt.**—The debt for which an attachment will lie must be an actually subsisting debt, due or about to become due by efflux of time. If the liability be merely possible, and dependent on a contingency which may never happen, attachment does not lie.<sup>2</sup> In the absence of statutory authority the debt must be not only subsisting, but actually due at the time of making the application.

**Defects taken Advantage of.**—If the cause of action for which the attachment is obtained be one upon which that process may not be legally issued, the defect may be taken advantage of by a motion to dissolve or a plea in abatement at any time before judgment.<sup>3</sup>

**3. Against Whom the Process may Issue.**—Attachments are generally authorized against absent, absconding, concealed, and non-resident debtors.<sup>4</sup> The absence must not be merely casual and temporary;<sup>5</sup> must be such as will prevent the service of process,<sup>6</sup> and indicates a general intent to delay or defraud the creditor.<sup>7</sup>

jury results, he may at his election sue upon the contract or in tort; and if he elects to sue on the contract, attachment will lie. *Pa. R. Co. v. Peoples*, 3 Ohio St. 537.

1. *Clark v. Wilson*, 3 Wash. C. C. 568; *Fisher v. Consequa*, 2 Wash. C. C. 382; *Redwood v. Consequa*, 2 Browne (Pa.), 628; *Carland v. Cunningham*, 37 Pa. St. 228, illustrate the application of the maxim *id certum est quod certum reddi potest* to this subject. See also *Wilson v. Louis Cook Mfg. Co.*, 88 N. Car. 5.

For a good summary of the law in the various States, see *Drake on Attach.* (6th Ed.) §§ 13-23; *Wade on Attach.* § 12.

Attachment will lie in covenant where the damages are purely compensatory. *Wade on Attach.* § 13.

2. *Drake on Attach.* (6th Ed.) §§ 24, 25; *Wade on Attach.* § 17.

Where an attachment is authorized for a debt not due, if the grounds of the attachment be peculiar to that case they cannot be resorted to for the recovery of a debt already due. If with the debt not due there be combined a claim that is due, the attachment will be good as to the former but not as to the latter. *Troy v. Millmans*, 7 Ga. 167; *Damont v. Carte*, 1 Iowa, 566.

In the case of a suit for a debt not due, it is erroneous to enter judgment

before the maturity of the demand. *Ware v. Todd*, 1 Ala. 144.

3. *Drake on Attach.* (6th Ed.) § 36.

4. *Drake on Attach.* (6th Ed.) § 38.

5. *Drake on Attach.* (6th Ed.) § 39; *Fuller v. Bryant*, 20 Pa. St. 144; *Mandell v. Peet*, 18 Atk. (Eng.) 236. In *Matter of Thompson* is opposed to the course of authority. 1 *Wend. (N. Y.)* 43.

6. This would appear to be the better opinion. In New York the intent to avoid the service of process, and in Missouri the fact that process cannot be served, are made to constitute the ground of application. *Kingsland v. Wortham*, 15 Mo. 657; *Ellington v. Moore*, 17 Mo. 424; *Morgan v. Avery*, 7 Barb. (N. Y.) 656.

7. *Gibson v. McLaughlin*, 1 Browne (Pa.), 292.

In this State the statute reads, "when defendant had absconded or departed from his abode, or remained out of the State with design to defraud his creditors," and the "design to defraud" is the ground of the application. Evidence of return is admissible, but not conclusive, to show that the defendant intended to return at time of departure; and hence that a statute allowing attachment when defendant "had departed from the State, never to return," did not apply. *New Orleans Banking Co. v. Comly*, 1 *Robinson (La.)*, 231; *Reeves*

*Absconding Debtors.*—To abscond, in a legal sense, means to hide, conceal, or absent one's self clandestinely, with intent to avoid legal process.<sup>1</sup> The act of absconding necessarily involves intention to abscond. Therefore a public and open removal, or a departure unaccompanied with that intention, will not constitute an absconding. Much less will such a departure accompanied with the expressed purpose to return, when there are no suspicious circumstances to the contrary.<sup>2</sup>

*Concealment.*—The concealment which will justify an attachment is but a phase of absconding; though sometimes in attachment laws the two acts are set forth separately, so as to indicate that they are regarded as distinct. When, however, the act reads "absconds or conceals," or "absconds or secretes," the two acts are regarded as undistinguishable.<sup>3</sup> The concealment to authorize an attachment must be with intent to defeat or delay the claims of creditors by avoiding service of process,<sup>4</sup> and must be averred to be the act of the defendant.<sup>5</sup>

*Non-Residence.*—Non-residence will authorize an attachment either where the debtor resides in another jurisdiction, or where a resident debtor has changed his abode *sine animo revertendi*.<sup>6</sup>

*v. Comly*, 3 Robinson (La.), 363; *Simons v. Jacob*, 15 La. Ann. 425.

1. *S. C. of Tenn. in Bennett v. Avant*, 2 Sneed (Tenn.), 152.

The ulterior object of the debtor is, of course, in a majority of cases, to defeat or delay his creditors; and in States where "design to defraud" is the foundation of the application, fraudulent intent must be proved. *Gibson v. McLaughlin*, 1 Browne (Pa.), 292.

When, on the other hand, the obstruction to service of process, or the intent to avoid process, is the statutory ground for the application, it will be sufficient to prove such obstruction or such intent without proving an ulterior motive to defraud creditors. Such was the course in *Kingsland v. Wortham*, 15 Mo. 657; *Morgan v. Avery*, 7 Barb. (N.Y.) 656; and in *Young v. Nelson*, 25 Ill. 565. In the last case it was held also that when a particular act done by a debtor will authorize an attachment if coupled with either one of two several intents, and an attachment is obtained on an averment of the doing of the act with one of these intents, it will be sustained by proof of the other.

2. *Drake on Attach.* (6th Ed.) § 51; *Boardman v. Beckford*, 2 Aikens (Vt.), 345.

3. *Drake on Attach.* (6th Ed.) § 54.

4. *Drake on Attach.* (6th Ed.) § 56.

Therefore one who conceals himself to avoid a criminal prosecution is not within the law. *Evans v. Saul*, 8 Mart. N. S. (La.) 247.

5. It must appear positively from the averment that the concealment resulted from the defendant's own misconduct or bad faith, and not from the acts of any other person. Hence, under a statute authorizing attachment "where debtor conceals himself so that process cannot be served upon him," an affidavit that defendant "is concealed," etc., is bad because it did not allege that he concealed himself. *Winkler v. Barthel*, 6 Bradwell (Ill.), 111.

Provided the intent to obstruct process or the actual obstruction be established, the length of time the concealment lasts is wholly immaterial. *Young v. Nelson*, 25 Ill. 565.

6. The test of residence would appear to be the presence of the *animus manendi* at the time of the issuing of the writ. *Drake on Attach.* (6th Ed.) §§ 57 *et seq.*; *Mattee v. Wrigley*, 8 Wend. (N. Y.) 134; also Ch. Walworth's remarks, 4 Wend. (N. Y.) 602; *Clarke v. Pratt*, 18 La. Ann. 102. Thus in *Brown v. Ashbough*, 40 How. Pr. (N. Y.) 260, one Ashbough left Hamilton, Canada, where he had resided and done business for several years, on the 24th of September, 1870, and went to the State of New York with the intention of taking up his residence there, but his wife still remained in Canada. On the third day of October of that year an attachment was issued against him in New York upon the ground that he was a non-resident. It was held that the defendant was a resident of the State. *Heidenbach*.

*v. Schland*, 10 How. Pr. (N. Y.) 477, is to the same effect. See also *Barnet's Case*, 1 Dallas (Pa.), 152; *Thurneyssen v. Vouthier*, 1 Miles (Pa.), 422; *Kennedy v. Baillie*, 3 Yeates (Pa.), 55; *Lyle v. Foreman*, 1 Dallas (Pa.), 480; *Smith v. Story*, 1 Humph. (Tenn.) 420; *Stratton v. Brigham*, 2 Sneed (Tenn.), 420; *Shipman v. Woodbury*, 2 Miles (Pa.), 67; *Wheeler v. Degnan*, 2 Nott & McC. (S. Car.) 323; *Matter of Wrigley*, 4 Wend. (N. Y.) 602; *Swaney v. Hutchins*, 13 Neb. 299.

**Finding of Non-residence Sustained.**—Where a question of the residence or non-residence of the defendant in Kansas on November 12, 1883, is presented to the court on February 11, 1884, as a question of fact, and the preponderance of the evidence tends to prove that in May, 1883, the defendant was a resident of Bourbon County, Kansas, owning real and personal property therein, but that at that time he sold nearly all his household goods, farming utensils, and other personal property; offered his farm for sale, and placed it in the hands of land-agents for that purpose; rented his farm; told many persons that he was going West to hunt another home; did go West to Colorado; and did not return to his farm until November 22, 1883, after an attachment had been levied upon it; and then admitted that when he left Kansas in May, 1883, he did not expect to return to make it his home,—*held*, that such evidence is sufficient upon which to make a finding that the defendant was a non-resident of the State of Kansas on November 12, 1883, and to sustain the attachment issued on the ground of his non-residence and levied upon the farm aforesaid. *Ritter v. Phoenix Ins. Co.*, 32 Kan. 504.

**Non-resident.**—Under Code 1873, ch. 148, § 3, an attachment cannot create a lien on the property of a non-resident defendant who has never been a resident of this State. Otherwise as to a non-resident who has but lately absconded from this State, § 6 providing that the return shall be "to the next term of the circuit, county, or corporation court of the county or corporation wherein the debtor last resided." *Long v. Ryan*, 30 Gratt. (Va.) 718; *Starke v. Scott*, 78 Va. 180.

A residence or place of abode in this State of a temporary or permanent character, at which a summons might lawfully be served, is the condition on which process of attachment cannot be issued. If a debtor has not, at the time the writ of attachment is issued, such a place of abode that a summons could be served at

it, he is a non-resident within the meaning of the statute, and may be proceeded against by attachment. *Baldwin v. Flagg*, 43 N. J. L. 495.

One S. in May, 1881, came from Illinois to this State with the intention of abandoning his former residence and residing here, but his wife remained in Illinois until October of that year. In January, 1881, an action by attachment was commenced against S. and wife upon the ground that they were non residents. *Held*, that the attachment could not be sustained. *Swaney v. Hutchins*, 13 Neb. 266.

**Claim before Due.**—An attachment issued by the clerk without an order, on a debt before due, on the sole ground that the defendant is a non-resident of the State, is null and void, and confers no jurisdiction on the court issuing the same. *Philpott v. Newman*, 11 Neb. 299.

In an action by one partner against a copartner to recover one half of the profits of the business of the firm prior to an accounting, or the ascertainment of a balance, where an attachment is sued out by the plaintiff against the property of the defendant on the ground of the non-residence of the latter, *held*, on a motion to discharge the attachment, the district court has the legal right to inquire and determine whether the alleged cause of action arose wholly within this State. *Stone v. Boone*, 24 Kan. 337.

**Corporations.**—The law of this State providing for the issuance of an attachment against a non-resident debtor is not in conflict with section 2, article 4 of the constitution of the United States, which declares that citizens of each State shall be entitled to all privileges and immunities of citizens of the several States, nor is it in conflict with the fourteenth amendment of that constitution. *Pyrolusite Co. v. Ward*, 73 Ga. 491.

A corporation is not a citizen. *Pyrolusite Co. v. Ward*, 73 Ga. 491.

Attachment on the ground of non-residence will lie against a foreign corporation when the statute is silent as to distinctions between individuals and corporations. *Wade*, § 51; *Harley v. Charleston S. P. Co.*, 2 Miles (Pa.), 249; *Hazard v. Agricultural Bank of Miss.*, 11 Rob. (La.) 326; *Ruthe v. Green Bay Co.*, 37 Wis. 344.

But it does not lie against persons who hold in a representative capacity unless they have done some act which renders them personally liable. *Wade on Attach.* § 53; *Thorington v. Merrick*, 101 N. Y. 5.

A debt due by a foreign corporation to

one of its employees at the place of its domicile, not being within the jurisdiction of the courts of Alabama, cannot be reached and subjected by a creditor here by attachment against the non-resident debtor and garnishment against the corporation. *Louisville, etc., R. Co. v. Dooley*, 78 Ala. 524.

**Attachment of Property in Hands of Assignee.**—The trust property in the hands of an assignee, under a general assignment for the benefit of creditors, cannot be taken on attachment in an action against the assignee personally, although the debt upon which the action is brought was contracted by the assignee in the execution of the trust and constituted an expenditure for which he would have a right to be reimbursed out of the trust estate. *Noyes v. Beaupre*, 32 Minn. 496.

In several States attachment also lies against debtors who fraudulently contracted the debt or incurred the obligation. In such case the fraud must have furnished the ground of the plaintiff's action, and false representations of debtor after he has contracted the debt that he has property from the proceeds of which he will pay does not make the debt fraudulently contracted. *Marqueze v. Southheimer*, 59 Miss. 430.

**Fraud.**—One C., a member of the firm of C. & Co., went to Chicago and arranged with Y. & Co. to purchase stock for them and draw on them for the necessary advances. C. then returned to this State, drew a draft on Y. & Co. for \$2000, and wrote to them that he had purchased 125 hogs, and would have 200 by Saturday night. Upon these representations the draft was paid. C. & Co. then sold the hogs to other parties. *Held*, that an attachment against the property of C. & Co., upon the ground that the debt was fraudulently contracted, would be sustained. *Young v. Cooper*, 12 Neb. 610.

A debtor who by fraudulently representing himself to be solvent obtains a surrender of his over-due notes, and induces his creditor to accept new notes for the same amounts payable at a future day, fraudulently incurs an obligation, within the meaning of sub-d. 4, sec. 2731, R. S., and renders his property subject to attachment in an action on such notes. *Wachter v. Famachon*, 62 Wis. 117.

The defendant, for the purpose of obtaining credit, stated that his indebtedness was a certain sum, when in fact he knew it to be much larger. Upon the faith of the statement the plaintiffs gave him credit. *Held*, that the transaction

was a fraud upon the plaintiffs, and was sufficient ground for suing out a writ of attachment. *Rosenthal v. Wehe*, 58 Wis. 621.

The fraudulent act of a debtor, made the ground of an attachment, must have accrued before or exist at the time the affidavit for the attachment is made by the creditor. *Bumberger v. Gerson*, 24 Fed Repr. 257.

**Debtors Removing their Property.**—

Some of the States have provisions authorizing the issue of attachments where the debtor "is removing or about to remove his property out of the State or dispose of it" to the injury of the creditor or before the debt becomes due. In Louisiana, Wisconsin, and Iowa it was held that to entitle the creditor to the attachment the property must be such as the creditor had a right to suppose would remain in the State. Hence a steamboat running between States, a raft of pine lumber on its way to market, and a farm-wagon driven across the line for farm purposes were held not proper subjects for attachment. *Russell v. Wilson*, 18 La. 367; *Hurd v. Jarvis*, 1 Pinney (Wis.), 475; *Warder v. Thielkeld*, 52 Iowa, 134.

In Illinois, Mississippi, Florida, California, and Alabama it was held that the removal must be an injury to the creditor, and hence if enough of the defendant's property remain to discharge the debt, or if the debt be secured by a mortgage, attachment will not lie. *White v. Wilson*, 10 Ill. 21; *Ridgway v. Smith*, 17 Ill. 33; *Page v. Latham*, 63 Cal. 75; *Montague v. Gaddis*, 37 Miss. 453; *Haber v. Nassitts*, 12 Fla. 589; *Stewart v. Cole*, 46 Ala. 648.

But in Arkansas, if a debtor is removing his property out of the State, not leaving sufficient to pay all his debts, a creditor may attach, although sufficient be left to pay his debt; and testimony of other debts is admissible to prove the insufficiency of the property to pay all. *Holliday v. Cohen*, 34 Ark. 707.

Shipping cotton by a debtor of this State to a creditor in another State in payment of a debt in good faith and without fraudulent intent will not authorize an attachment against the debtor's property, even if he be in failing circumstances. *Rice v. Pertuis*, 40 Ark. 157. *Contra*, *Mack v. McDaniel*, 4 Fed. Rep. 294.

In Arkansas the statute declares a creditor may have attachment against his debtor who "is about to remove or has removed his property, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's

**Debtors Removing their Property—Continued.**

claim or claim of said defendant's creditors," and the intent to defraud is immaterial. *Durr v. Hervey*, 44 Ark. 301.

Similar statutes in Kentucky and North Carolina are similarly construed.

The only rational construction of section 194, subsection 2, Civil Code, is that an attachment is authorized against all the property of the debtor not exempt from execution, whenever he is without enough property subject to execution to satisfy the debt against him, although the debtor may have no design to do anything to render the collection of the debt less certain than if an attachment was issued forthwith. *Burdett v. Phillips*, 78 Ky. 246.

The allegations in the affidavit that the defendant was about to leave the State with a view to defraud his creditors was immaterial in the application for the warrant of attachment; such removal is not made a cause for such warrant, but it would be a material allegation in an affidavit for a warrant of arrest. The Code, §§ 291, 349; *Wilson v. Barnhill*, 64 N. Car. 121; *Hale v. Richardson*, 89 N. Car. 62.

And the same construction has been given to similar provisions elsewhere. *Montague v. Gaddis*, 37 Miss. 454; *Runyan v. Morgan*, 7 Humph. (Tenn.) 210; *Friedlander v. Pollock*, 5 Cold. (Tenn.) 490; *Branch Bank v. White*, 12 Iowa, 141; *Sherrill v. Fay*, 14 Iowa, 292.

When, however, this intent to "defraud" or "to delay, hinder, or defraud" by the removal or disposition is the ground of the application, it must be alleged in the affidavit and proved. *Harris & Co. v. Capell*, 28 Kan. 117.

Where an order of attachment has been issued upon an affidavit charging that the defendant had assigned and disposed of his property with a fraudulent intent, and the defendant moves to discharge the attachment and files a counter-affidavit positively denying the grounds for attachment laid in the plaintiff's affidavit, the burden is upon the plaintiff to sustain the allegations of fraud which he has made; and if he fails to do so by a preponderance of testimony, the attachment should be discharged.

Upon the trial of the motion to discharge the attachment, the only testimony offered was a voluntary assignment executed by the defendant for the benefit of his creditors. To uphold the attachment in such a case, the deed of assignment must clearly show upon its face an actual personal intent on the part of the defendant to hinder, delay, or defraud his creditors. If the instrument has been

executed in good faith and solely for the benefit of the creditors, the mere fact that it may be defectively executed, or that it may contain provisions not authorized by the statute, is not alone sufficient to sustain the attachment.

Fraud is not to be presumed from the provisions of an assignment where it will admit of an interpretation favorable to honesty and good faith. *McPike v. Atwell*, 34 Kan. 142.

Attachment should be dissolved which contains no positive averment of facts sufficient to show that the mortgage given (the basis of the attachment) was with intent to defraud. *Ivy v. Caston*, 21 S. Car. 583.

The fact that a debtor designs to sell his property, or to remove it beyond the jurisdiction of a court, when not accompanied by an intent to defraud his creditors, is not ground for an attachment. *Hunter v. Soward*, 15 Neb. 215.

The mere fact of a removal of property from the jurisdiction of a particular court, or from the State even, unless accompanied with an intent to defraud creditors, does not give the right of attachment under our law. The particular intent mentioned in the statute is essential to that right. Without such intent a debtor is at full liberty to change his place of abode and go with his effects whithersoever he wills, with all the freedom from lawful molestation of one not indebted. We are of the opinion that the court below took the correct view of the case, and the judgment will be affirmed. *Steele v. Dodd*, 14 Neb. 496.

Section 398, Revised Statutes of Missouri, 1879, authorizes attachment to issue in the following, among other cases: (7) Where the defendant has fraudulently conveyed or assigned his property, so as to hinder or delay his creditors. (8) Where the defendant has fraudulently concealed, removed, or disposed of his property or effects, so as to hinder, etc. *Held*, that the word "disposed," as here used, covers all such alienations of property as may be made in ways not otherwise pointed out in the statute; for example, pledges, gifts, pawns, bailments, and other transfers and alienations which may be effected by mere delivery and without the use of any writing, assignment, or conveyance. It does not include any species of conveyance. Hence, a charge that defendant has fraudulently disposed of his property is not supported by proof that he has executed a fraudulent mortgage. *Bullene v. Smith*, 73 Mo. 151.

4. **Affidavit.**—The affidavit is the foundation of the jurisdiction of the court; it must be a sworn statement of such facts as the law requires as a condition precedent to the issue of the writ;<sup>1</sup> its entire omission or the omission of any essential fact will render all the proceedings *coram non judge*.<sup>2</sup>

Where a defendant, who is in embarrassed circumstances in regard to his pecuniary affairs, executes a fraudulent mortgage to another without any consideration therefor, to cover up and conceal his interest in real estate, with intent to defraud and hinder his creditors, such action is sufficient ground of attachment in favor of any creditor who has a just claim against him.

The fact that such debtor thereafter offers to give the creditor an additional mortgage upon such property will not defeat proceedings by attachment against him. *Taylor v. Kuhuke*, 26 Kans. 132.

A chattel mortgage given with the understanding, express or implied, that the mortgagor shall go on selling the property in the usual course of trade and applying the proceeds to his own use is fraudulent as to his other creditors, and is ground for an attachment. *Anderson v. Patterson*, 64 Wis. 557.

Where the affidavit for attachment against the property of a defendant in an action on a claim before it was due alleged that the defendant was about to make a sale and conveyance of his property with the fraudulent intent to cheat and defraud his creditors, and to hinder and delay them in the collection of their debts, and plaintiff established upon the hearing of the motion to discharge the attachment that a few days prior to the attachment the defendant went to a young lady to whom he was engaged, and urged their immediate marriage, giving as his reason for the haste that his business affairs were becoming involved, and that he wanted to deed to her the land on which he lived, and to make over to her his personal property so that nobody could get it away from them; that he showed her his deeds to the land and said that he wanted to go to a neighboring city the next morning to consult his lawyer, and promised, if she would go along with him and be married, that he would make over to her his personal property, *held*, that the evidence was sufficient to sustain the attachment. *Curtis v. Hoadley*, 14 Neb. 566.

Mercantile partners, though knowing that they are in some difficulty, so long as they have a reasonable expectation of extricating themselves cannot be charged with a fraudulent diversion of their prop-

erty from firm creditors for simply drawing money upon private account, within small and reasonable limits, whether for the payment of their individual expenses or the payment of their honest individual obligations. *McKinney v. Rosenband*, 23 Fed. Repr. 785.

A creditor who has an attachment in an action at law begun by a trustee process cannot maintain a bill for discovery, in aid of such attachment, to obtain evidence to contradict the answers made by the trustee in the trustee process, even though the trustee is an administrator, and his answers are in respect to matters of which he has no personal knowledge. *Emery v. Bidwell*, 140 Mass. 271.

A sale or conveyance by a debtor to cheat, hinder, or delay any one creditor, or his removal from the county of his residence to avoid the service of summons by any one creditor, will justify an attachment of his property by any other creditor. *Sherrill v. Bench*, 37 Ark. 560.

1. *Wade on Attach.* § 57.

2. *Drake on Attach.* (6th Ed.) § 84.

In some States the affidavit is required simply to state the existence of a particular fact, as the ground of attachment. Here nothing is required but substantial conformity with the statute. The officer inquires only whether there is such conformity, and if there is he issues the writ in a ministerial, not in a judicial capacity. He need not be satisfied judicially that the alleged fact is true, but is simply to see whether it is sworn to. Where, however, the existence of the ground of attachment must be proved to the satisfaction of the officer, or where the officer must be satisfied of the existence of the ground of attachment by proof of facts and circumstances tending to establish its existence, he acts in a judicial as well as a ministerial capacity; and if he issues the writ without proof, he is liable to the defendant as a trespasser. *Drake on Attach.* (6th Ed.) §§ 98, 99, 100; *Vosburgh v. Welch*, 11 Johns. (N. Y.) 175.

There can be no valid writ of attachment without a sufficient affidavit. *Earl v. Camp*, 16 Wend. (N. Y.) 562; *Parker v. Walrod*, 16 Wend. (N. Y.) 514, 517; *Beach v. Botsford*, 1 Doug. (Mich.) 109; *LeRoy v. East Saginaw City R.*, 18 Mich. 233; *Watkins v. Wallace*, 19 Mich. 57; *Mathews v. Densmore*, 43 Mich. 461.

**Debtors Removing their Property—Continued.**

claim or claim of said defendant's creditors," and the intent to defraud is immaterial. *Durr v. Hervey*, 44 Ark. 301.

Similar statutes in Kentucky and North Carolina are similarly construed.

The only rational construction of section 194, subsection 2, Civil Code, is that an attachment is authorized against all the property of the debtor not exempt from execution, whenever he is without enough property subject to execution to satisfy the debt against him, although the debtor may have no design to do anything to render the collection of the debt less certain than if an attachment was issued forthwith. *Burdett v. Phillips*, 78 Ky. 246.

The allegations in the affidavit that the defendant was about to leave the State with a view to defraud his creditors was immaterial in the application for the warrant of attachment; such removal is not made a cause for such warrant, but it would be a material allegation in an affidavit for a warrant of arrest. The Code, §§ 291, 340; *Wilson v. Barnhill*, 64 N. Car. 121; *Hale v. Richardson*, 89 N. Car. 62.

And the same construction has been given to similar provisions elsewhere. *Montague v. Gaddis*, 37 Miss. 454; *Runyan v. Morgan*, 7 Humph. (Tenn.) 210; *Friedlander v. Pollock*, 5 Cold. (Tenn.) 490; *Branch Bank v. White*, 12 Iowa, 141; *Sherrill v. Fay*, 14 Iowa, 292.

When, however, this intent to "defraud" or "to delay, hinder, or defraud" by the removal or disposition is the ground of the application, it must be alleged in the affidavit and proved. *Harris & Co. v. Capell*, 28 Kan. 117.

Where an order of attachment has been issued upon an affidavit charging that the defendant had assigned and disposed of his property with a fraudulent intent, and the defendant moves to discharge the attachment and files a counter-affidavit positively denying the grounds for attachment laid in the plaintiff's affidavit, the burden is upon the plaintiff to sustain the allegations of fraud which he has made; and if he fails to do so by a preponderance of testimony, the attachment should be discharged.

Upon the trial of the motion to discharge the attachment, the only testimony offered was a voluntary assignment executed by the defendant for the benefit of his creditors. To uphold the attachment in such a case, the deed of assignment must clearly show upon its face an actual personal intent on the part of the defendant to hinder, delay, or defraud his creditors. If the instrument has been

executed in good faith and solely for the benefit of the creditors, the mere fact that it may be defectively executed, or that it may contain provisions not authorized by the statute, is not alone sufficient to sustain the attachment.

Fraud is not to be presumed from the provisions of an assignment where it will admit of an interpretation favorable to honesty and good faith. *McPike v. Atwell*, 34 Kan. 142.

Attachment should be dissolved which contains no positive averment of facts sufficient to show that the mortgage given (the basis of the attachment) was with intent to defraud. *Ivy v. Caston*, 21 S. Car. 583.

The fact that a debtor designs to sell his property, or to remove it beyond the jurisdiction of a court, when not accompanied by an intent to defraud his creditors, is not ground for an attachment. *Hunter v. Soward*, 15 Neb. 215.

The mere fact of a removal of property from the jurisdiction of a particular court, or from the State even, unless accompanied with an intent to defraud creditors, does not give the right of attachment under our law. The particular intent mentioned in the statute is essential to that right. Without such intent a debtor is at full liberty to change his place of abode and go with his effects whithersoever he wills, with all the freedom from lawful molestation of one not indebted. We are of the opinion that the court below took the correct view of the case, and the judgment will be affirmed. *Steele v. Dodd*, 14 Neb. 496.

Section 398, Revised Statutes of Missouri, 1879, authorizes attachment to issue in the following, among other cases: (7) Where the defendant has fraudulently conveyed or assigned his property, so as to hinder or delay his creditors. (8) Where the defendant has fraudulently concealed, removed, or disposed of his property or effects, so as to hinder, etc. *Held*, that the word "disposed," as here used, covers all such alienations of property as may be made in ways not otherwise pointed out in the statute; for example, pledges, gifts, pawns, bailments, and other transfers and alienations which may be effected by mere delivery and without the use of any writing, assignment, or conveyance. It does not include any species of conveyance. Hence, a charge that defendant has fraudulently disposed of his property is not supported by proof that he has executed a fraudulent mortgage. *Bullene v. Smith*, 73 Mo. 151.

4. *Affidavit.*—The affidavit is the foundation of the jurisdiction of the court; it must be a sworn statement of such facts as the law requires as a condition precedent to the issue of the writ;<sup>1</sup> its entire omission or the omission of any essential fact will render all the proceedings *coram non judice*.<sup>2</sup>

Where a defendant, who is in embarrassed circumstances in regard to his pecuniary affairs, executes a fraudulent mortgage to another without any consideration therefor, to cover up and conceal his interest in real estate, with intent to defraud and hinder his creditors, such action is sufficient ground of attachment in favor of any creditor who has a just claim against him.

The fact that such debtor thereafter offers to give the creditor an additional mortgage upon such property will not defeat proceedings by attachment against him. *Taylor v. Kuhuke*, 26 Kans. 132.

A chattel mortgage given with the understanding, express or implied, that the mortgagor shall go on selling the property in the usual course of trade and applying the proceeds to his own use is fraudulent as to his other creditors, and is ground for an attachment. *Anderson v. Patterson*, 64 Wis. 557.

Where the affidavit for attachment against the property of a defendant in an action on a claim before it was due alleged that the defendant was about to make a sale and conveyance of his property with the fraudulent intent to cheat and defraud his creditors, and to hinder and delay them in the collection of their debts, and plaintiff established upon the hearing of the motion to discharge the attachment that a few days prior to the attachment the defendant went to a young lady to whom he was engaged, and urged their immediate marriage, giving as his reason for the haste that his business affairs were becoming involved, and that he wanted to deed to her the land on which he lived, and to make over to her his personal property so that nobody could get it away from them; that he showed her his deeds to the land and said that he wanted to go to a neighboring city the next morning to consult his lawyer, and promised, if she would go along with him and be married, that he would make over to her his personal property, *held*, that the evidence was sufficient to sustain the attachment. *Curtis v. Hoadley*, 14 Neb. 566.

Mercantile partners, though knowing that they are in some difficulty, so long as they have a reasonable expectation of extricating themselves cannot be charged with a fraudulent diversion of their prop-

erty from firm creditors for simply drawing money upon private account, within small and reasonable limits, whether for the payment of their individual expenses or the payment of their honest individual obligations. *McKinney v. Rosenbaud*, 23 Fed. Repr. 785.

A creditor who has an attachment in an action at law begun by a trustee process cannot maintain a bill for discovery, in aid of such attachment, to obtain evidence to contradict the answers made by the trustee in the trustee process, even though the trustee is an administrator, and his answers are in respect to matters of which he has no personal knowledge. *Emery v. Bidwell*, 140 Mass. 271.

A sale or conveyance by a debtor to cheat, hinder, or delay any one creditor, or his removal from the county of his residence to avoid the service of summons by any one creditor, will justify an attachment of his property by any other creditor. *Sherrill v. Bench*, 37 Ark. 560.

1. *Wade on Attach.* § 57.

2. *Drake on Attach.* (6th Ed.) § 84.

In some States the affidavit is required simply to state the existence of a particular fact, as the ground of attachment. Here nothing is required but substantial conformity with the statute. The officer inquires only whether there is such conformity, and if there is he issues the writ in a ministerial, not in a judicial capacity. He need not be satisfied judicially that the alleged fact is true, but is simply to see whether it is sworn to. Where, however, the existence of the ground of attachment must be proved to the satisfaction of the officer, or where the officer must be satisfied of the existence of the ground of attachment by proof of facts and circumstances tending to establish its existence, he acts in a judicial as well as a ministerial capacity; and if he issues the writ without proof, he is liable to the defendant as a trespasser. *Drake on Attach.* (6th Ed.) §§ 98, 99, 100; *Vosburgh v. Welch*, 11 Johns. (N. Y.) 175.

There can be no valid writ of attachment without a sufficient affidavit. *Earl v. Camp*, 16 Wend. (N. Y.) 562; *Parker v. Walrod*, 16 Wend. (N. Y.) 514, 517; *Beach v. Botsford*, 1 Doug. (Mich.) 199; *LeRoy v. East Saginaw City R.*, 18 Mich. 233; *Watkins v. Wallace*, 19 Mich. 57; *Mathews v. Densmore*, 43 Mich. 461.



**Contents.**—The essential facts differ in different States, but in nearly all the affidavit must show the nature of the demand,<sup>1</sup>

Nevertheless it has been held that a complaint containing what is required in an affidavit for attachment, if sworn to, may subserve the purposes of a complaint and the required affidavit for attachment. *Dunn v. Crocker*, 22 Ind. 324; *Waples on Attachment*, §4; *Miller v. Chandler*, 29 La. Ann. 83. See also *Fremont v. Fulton*, 103 Ind. 393.

**Before whom Made.**—An affidavit for an attachment may be made before any officer authorized by law to administer oaths, and it is not necessary that it should be made before the officer by whom the writ is issued, though that is the general practice. *Wright v. Smith*, 66 Ala. 545.

**That it was so Made must be Properly Certified.**—An affidavit for an attachment on warrant made before an associate judge of the district court of Allegheny county, Pennsylvania, recited that it was taken before "the subscriber, a judge of the district court of said county, being a court of record." The clerk of the court certified that the judge before whom the affidavit was made was at the time associate law judge of said court, but did not certify that the same was a court of record. *Held*, that the authentication in regard to the character of the court was insufficient, and the attachment was, therefore, improvidently issued, and the judgment of condemnation thereon was a nullity. *Coward v. Dillinger*, 56 Md. 59.

On the other hand, in an action in which an order of attachment is obtained, the clerk of the court administers the oath to the party making and filing the affidavit for the order of attachment, and signs his name to the *jurat* as follows: "W. W. Church, Clerk," without writing out or giving the title to his office in full, and without putting the seal of the court to the paper. It was held, under the circumstances of the case, that the said failure of the clerk did not render the attachment void. *Simon v. Stetter*, 25 Kan. 155.

If the affidavit for an attachment is not signed by the affiant, the court acquires no jurisdiction, and a sheriff's deed based upon a judgment in the case is a nullity. *Hargadine v. Van Horn*, 72 Mo. 370.

It may, however, be signed by an attorney or agent. *Tessier v. Crowley*, 16 Neb. 369; *Weaver v. Roberts*, 84 N. C. 493; *Gilkeson v. Knight*, 71 Mo. 403.

Section 3 of the final title of the revised statutes of Texas requires that they shall be liberally construed with a view to effect

their objects and to promote justice. *Held*, that thus construed, under the statute which permits the issuance of a writ of attachment when the statutory grounds are sworn to by an "attorney," it is competent for two attorneys to verify, each knowing distinct facts which must be stated, but which are unknown to the other. *Lewis v. Stewart*, 62 Tex. 352.

Where an affidavit is made by an agent or attorney to obtain an attachment, he may swear to the amount claimed to be due according to his best knowledge and belief, but the ground of attachment must be sworn to positively, and the language used must be such as not to leave it doubtful whether this requirement has been complied with. *Horn v. Guiser Mfg. Co.*, 72 Ga. 897.

An affidavit for attachment made by an agent need not disclose his means of knowledge. *Gilkeson v. Knight*, 71 Mo. 403; *Rice v. Morner*, 64 Wis. 599.

But in nearly all the States the agency must appear, and in many the affidavit must be expressly sworn to have been made on the defendant's behalf.

An affidavit for an attachment under sec. 3702, R. S., if not made by the plaintiff, must contain a sworn statement that it is made on his behalf. A mere recital, as "J. K., on behalf of I. S., being duly sworn," etc., is insufficient. *Miller v. C., M. & St. P. R. Co.*, 58 Wis. 310. See also *Wiley v. Aultman*, 53 Wis. 560.

In Missouri an affidavit for attachment not made by the plaintiff in person did not, on its face, state that it was made for him. It was, however, made by the same person who signed the petition as plaintiff's attorney. *Held*, sufficient. *Gilkeson v. Knight*, 71 Mo. 403.

In Indiana a recital in an affidavit in attachment, that "the plaintiff's acting secretary, S. B., being duly sworn, upon his oath says," etc., is sufficient, the statute, R. S. 1881, section 916, not requiring a sworn statement that the affiant is the agent, attorney, or officer of the plaintiff, and that he makes the affidavit in his behalf; and, in the absence of any showing to the contrary, that the affidavit is made in behalf of the plaintiff will be presumed from the fact that it is made by such agent, attorney, or officer. *Fremont Cultivator Co. v. Fulton*, 103 Ind. 393.

1. Except in New York, general language is sufficient. *Wade on Attach.* § 65. See *Bowers v. London Bank*, 3 Utah, 417; *Hudkin v. Haskin*, 22 W. Va. 645; *Bell v. Allen*, 76 Ala. 450; *Gunlit v. Be Bose*.

*i.e.*, the facts from which the indebtedness arose, the amount of the claim,<sup>1</sup> whether the demand is actually due<sup>2</sup> or about to become due;<sup>3</sup> and in many averment must be made that the demand is just,<sup>4</sup> and that the action is not brought to vex or harass the

77 Ala. 326. But see also *Beard v. Woodward*, 78 Ala. 317.

Attachment should not issue upon affidavit charging fraud, but not stating facts which show it. *Claussen v. Fultz*, 13 S. Car. 476.

An affidavit for an attachment, under the act of March 17, 1869, is sufficient, if made in the words of the act without setting out specific acts of fraud. *Sharpless v. Ziegler*, 92 Pa. St. 467.

1. When a statute provides that attachment may issue where the debt "exceeds" a given sum. An averment that the debt "equals" the sum is insufficient. *Hughes v. Martin*, 1 Ark. 386; *Hughes v. Stinnett*, 9 Ark. 211.

An affidavit for an attachment (under sec. 2731, R. S.), made by the attorney or agent of the plaintiff, which states positively the amount due, need not state the means of the affiant's knowledge thereof. An intimation to the contrary in *Wiley v. Aultman*, 53 Wis. 560, disapproved. *Anderson v. Wehe*, 58 Wis. 615.

Though the presumption of law in a suit on a promissory note, where the date of a partial payment is alleged, would ordinarily be that it occurred on the day of the execution of the note no such presumption will obtain in suits by attachment. The requirement of the statute, that the amount of the demand shall be stated in the affidavit, must be strictly observed; and this is not done when, by an omission to state the date of an acknowledged credit, there is nothing by which, in computing interest, the amount due may be certainly determined. *Espey v. Heidenheimer*, 58 Tex. 662.

An averment in an affidavit for an attachment, that "the defendant is indebted to the plaintiff in a sum stated," and that the latter "is justly entitled to recover said sum," is not a compliance with the requirement of the Code of Civil Procedure (§ 636), that plaintiff must show by affidavit that he "is entitled to recover a sum stated therein, over and above all counterclaims known to him;" and when the requirement is only met by the averments stated, the affidavit is insufficient to give the judge jurisdiction to grant the warrant. *Rupert v. Haug*, 87 N. Y. 141; *Thorington v. Merrick*, 101 N. Y. 5.

A variance between the affidavit and

attachment and the complaint, as to the amount of the plaintiff's debt, can probably be taken advantage of only by plea in abatement; and it is not available on error after judgment by default. *McAber v. Parker*, 78 Ala. 573.

Where the affidavit for attachment obviously means that the defendant is indebted to the plaintiff in the amount named, a clerical omission of the word "is" will not vitiate. *Buchanan v. Sterling*, 63 Ga. 227.

An affidavit for attachment, which by itself might be regarded as defective for want of certainty as to the amount of the debt, may be rendered certain by reference to the allegations of the petition, when consistent therewith. *Cleveland v. Boden*, 63 Tex. 103.

2. If the demand is due, the maturity of the debt must be averred. *Wade on Attach* § 67; *Batchelder v. White*, 80 Va. 103.

In those States where attachment lies for debts about to become due, the conditions necessary to maintain the action must distinctly appear. *Batchelder v. White*, 80 Va. 103; *Gowan v. Hansons*, 55 Wis. 341.

3. A debt not due may be consolidated with one that is due, and an attachment be issued for the aggregate amount of both, where grounds of attachment applicable to either debt are alleged in the affidavit. *Kahn v. Kahn*, 44 Ark. 404.

In a proceeding by attachment upon claims, part of which are due and part not due, it is not necessary that the affidavit, should show, in terms, how much of the debt was due and how much not due, when the petition and affidavit, which refer to each other, contain the requisite data for making certain that fact by calculation. *P. J. Willis & Bro. v. Mooring & Blanchard*, 63 Tex. 340.

4. An affidavit for attachment which omits to state that the defendant is justly indebted to the plaintiff, or which states that the debt is due at one time and the petition states a different time, is fatally defective. A variance between the petition and the affidavit may be reached by plea in abatement, as well as by motion to quash. *Evans & Martin v. Tucker*, 59 Tex. 249. See also *Grebe v. Jones*, 15 Neb. 312.

In Kansas the code (§ 191) requires that the affidavit for attachment shall

debtor, nor to hinder, delay, or defraud his creditors.<sup>1</sup> In addition to these essential facts the statutory "grounds of the attachment" must also be alleged to entitle the plaintiff to the writ.

*Manner of Statement.*—All the elements of positiveness, knowledge, information or belief, conjointly or separately, which the statute may require in the making of an affidavit should therein appear, or be substantially included in its terms, or it will be bad.<sup>2</sup> Uncertainty in the affidavit will vitiate it;<sup>3</sup> surplusage not inconsistent with the substantial averment required by the statute will not.<sup>4</sup> Where there are several grounds for the application, they should be stated cumulatively.<sup>5</sup> A disjunctive statement is bad.<sup>6</sup> It is not necessary that the probative facts should be stated,

show—not that it shall state—that the plaintiff's claim is just. A mere statement that it is just is doubtless sufficient; but if there be no such statement, and the facts as stated in the affidavit show that the claim is just, that is also sufficient. *Toutellott v. Wilkins*, 28 Kan. 825; *Ludlow v. Ramsay*, 11 Wall. (U. S.) 581.

1. In those States where this averment is necessary, it is a condition precedent to the issue of the writ; its omission is a matter of substance, and cannot be supplied by amendment. *Wade on Attach.* § 69.

In Georgia, in attachment for purchase-money, the goods liable to seizure must be particularly described. In California, Oregon, Nevada, and the Territories of Arizona, Idaho, Montana, Utah, and Washington, averment is also necessary that plaintiff holds no valuable security by mortgage, lien, or pledge. *Wade on Attach.* § 69. See also *Welke v. Cohn*, 54 Cal. 212.

2. An affidavit to obtain an attachment against a debtor's property that affiant is "informed and believes that the defendant is indebted" is not sufficient. The indebtedness should be directly stated, or the affiant should state such facts as would show the indebtedness. *Ross v. Steen*, 20 Fla. 443.

This remedy is justified, not by the belief of the affiant, however honestly entertained upon reasonable grounds, that the fact sworn to in the affidavit exists, but by the existence of that fact. See *Claffin v. Steenbock*, 18 Gratt. (Va.) 853; *Sublett v. Wood*, 76 Va. 318; *Flower v. Hall*, 80 Va. 864; *Davidson v. Hackett*, 49 Wis. 183.

3. *Drake on Attach.* (6th Ed.) § 104. In stating amount due it is insufficient to aver "as near as deponent can now ascertain." *Contra*, *Chronicle v. Rowland*, 72 Ga. 195.

4. *Drake on Attach.* (6th Ed.) § 105.

It will always be safe to follow the

language of the statute, paying due regard to the different application of the words after they have been transcribed. *Wade on Attach.* § 59.

Example, nonresidence; that defendant "absconds or conceals himself." *Wade on Attach.* § 72.

5. When so stated, a single ground will be sufficient to sustain the affidavit. *Simon v. Sletter*, 25 Kan. 155.

6. An averment is disjunctive only where it sets forth several facts as distinguished from two or more phases of the same fact. Thus the averment that the debtor "absconds or conceals" is not disjunctive. It merely sets forth two phases of this fact. The reason for the objection is that the ground upon which the plaintiff relies is not stated with certainty. *Wade on Attach.* § 56.

An affidavit for an attachment stating that the defendants "were about to convert their property or a part thereof into money for the purpose of placing it beyond the reach of their creditors" is not open to the objection that it states two separate grounds for an attachment in the alternative. *Blum v. Davis*, 56 Tex. 423. *Compare* *Miller v. Munson*, 34 Wis. 579; *Goodyear & Co. v. Krapp*, 61 Wis. 103. See also *Penniman v. Daniel*, 90 N. Car. 154; *Cleveland v. Boden*, 63 Tex. 103.

Under the statute which makes the fact that a debtor has disposed in whole or in part of his property with intent to defraud, etc., one ground for attachment, and which makes the fact that "he is about to dispose of his property with intent to defraud," etc., another and different ground, an affidavit which states them conjunctively as coexisting facts is bad, for the affidavit must on its face, as to one or the other ground, be untrue. *Dunnenbaum v. Schram*, 59 Tex. 281.

Though an affidavit for attachment may be bad for uncertainty, yet if there be another affidavit verifying the allega-

but only the ultimate fact upon which is based the application for the writ.<sup>1</sup>

The proper mode to take advantage of defects in the affidavit is by motion to quash or dissolve. This motion is in the nature of a plea in abatement, and if successful its effect is the same.<sup>2</sup> The motion should be resorted to *in limine*, as, after appearance by defendant and plea to the action, defects in the preliminary proceedings will be considered waived, unless peculiar statutory provisions direct otherwise.<sup>3</sup> The right of amendment must be conferred by statute, otherwise the attachment will stand or fall upon the original sworn statement.<sup>4</sup>

**5. Attachment Bonds.—Object, Form, and Requisites.**—The object of requiring a bond is to protect the defendant from a wrongful, malicious, or unnecessary attachment; and it is generally conditioned to prosecute the attachment to judgment without vexatious delay, and pay any judgment awarded against plaintiffs, costs, and damages arising from the wrongful suing out of the attachment.<sup>5</sup> The bond is a prerequisite to jurisdiction,<sup>6</sup> must precede the writ,<sup>7</sup> and conform substantially to statutory requirements as to conditions and obligations.<sup>8</sup> Its entire omission is fatal, and can be taken

tions in the petition for the writ, and the allegation as to the cause for attachment be distinct, specific, and sufficient as to the existence of a statutory ground, it will support the writ. *Dunnenbaum v. Schram*, 59 Tex. 281; See also *Pearre v. Hawkins*, 62 Tex. 431.

1. *Wade on Attach.* § 55.

2. *Drake on Attach.* (6th Ed.) § 112.

In Alabama and North Carolina the only way to reach such defects is by plea in abatement.

3. *Garman v. Barringer*, 2 Devereaux & B. (N. Car.) 502; *Stoney v. McNeil*, Harp. (S. Car.) 156; *Watson v. McAllister*, 7 Mart. (La.) 368; *Enders v. Steamer Henry Clay*, 8 Rob. (La.) 30; *Symons v. Northern*, 4 Jones (N. Car.) 241; *Burt v. Parish*, 9 Ala. 211; *Drake on Attach.* (6th Ed.) § 112.

By appearance and going to trial on the merits defendant waives all objections to the manner in which the original process was served; but defects in the affidavit are not waived by appearance except where some express statutory provision gives it that effect. *Wade on Attach.* § 72.

This view is certainly more in accord with the doctrine that consent cannot give jurisdiction, and hence if requirements which are necessary to ground the jurisdiction upon are not complied with, the appearance of the party and readiness to submit to decision of the court cannot give it. Appearance of defendant by attorney to move for a dismissal of the at-

tachment and to except to jurisdiction of the court will not be construed into submission to the jurisdiction. *Johnson v. Buell*, 26 Ill. 66; *Bonner v. Brown*, 10 La. Ann. 334.

4. *Drake on Attach.* (6th Ed.) § 84; *Wade on Attach.* § 72; *Marx v. Abramson*, 53 Tex. 264.

Such statutes exist in *Arkansas*. *Nolan v. Royston*, 36 Ark. 562; *Sherril v. Bench*, 37 Ark. 560. See also *Tommey v. Gamble*, 66 Ala. 469; *De Bedian v. Gola*, 64 Md. 262.

5. *Wade on Attach.* § 102.

6. *Wade on Attach.* § 103.

**Bond—When not Required.**—Where an order of attachment is obtained against a defendant who is a non-resident of the State, no attachment bond or undertaking is required, although the action is commenced under section 230 of the civil code on a claim before it is due. *Civil Code of Kansas*, §§ 192, 234; *Simon v. Stetter*, 25 Kan. 155.

7. *Drake on Attach.* (6th Ed.) §§ 121, 122.

8. In *Kentucky*, if the bond be not of required amount, the attachment was declared void. *Martin v. Thompson*, 3 Bibb. (Ky.) 252.

In *South Carolina* voidable only. *Chamberford v. Hall*, 3 McCord (S. Car.), 345.

No condition subsequent between the plaintiff and the officer who is to issue the attachment can affect the right of defendant to recover. In all cases of de-

advantage of by the defendant either by motion to dismiss or by plea in abatement.<sup>1</sup> The name of the obligor should appear in the body of the instrument and also be signed; the absence of the names of the sureties from the body of the bond or in the execution is an irregularity.<sup>2</sup> If the bond is not entitled it is liable to be quashed.<sup>3</sup> The bond should run to all the defendants.<sup>4</sup> The ag-

gressive or insufficient bond the defendant is the only person who can take advantage of the defect. *Drake on Attach.* (6th Ed.) § 143.

Exception must be taken *in limine*, and defect is cured by appearance and plea. *Drake on Attach.* (6th Ed.) § 144. and cases cited, *South Carolina* alone excepted.

Where a statute in one clause provides what shall be the condition of the bond and in another sets forth the form of the condition, the proper course is to follow the form without regard to whether its terms coincide with the language of the statute elsewhere. *Drake on Attach.* (6th ed.) § 126.

If the bond follow the language instead of the form it will be void. *Love v. Fairfield*, 10 Ill. 353; *Lucky v. Miller*, 8 Yerger (Tenn.), 90.

A bond void as to defendant will justify the officer in making a levy. *Drake on Attach.* (6th Ed.) § 117.

1 *Drake*, § 115; *Davis v. Marshall*, 14 Barb. (N. Y.) 96; *Stevenson v. Robbins*, 5 Mo. 18.

2. Where it is apparent that the principal obligor is not plaintiff, nor one to whose use the action is brought, there should be something to show the capacity in which he acts. The evidence of the agent's authority need not accompany the bond; objection to agency to be raised by plea in abatement and not by motion to quash. *Wade on Attach.* § 106. See *Work v. Titus*, 12 Fla. 628.

An attachment bond executed by two persons other than the plaintiff in the proceeding, they justifying in proper amounts, is sufficient, although there was no principal obligor in the bond to whom the other obligors stood in the relation of sureties. *Howard v. Manderfield*, 31 Minn. 337.

Where an action is brought upon an attachment undertaking by the assignee of the defendant in the attachment, for damages against the sureties, and the principal on the undertaking, who is not made a party, has a judgment against the defendant, obtained in the attachment action, greatly in excess of the alleged damages, which is unpaid, and the defendant in the attachment is insolvent,

*held*, that the court, upon the request of the sureties and the principal, may properly permit such principal to become a party and defend; and further *held*, that after the principal has been made a party and has filed a verified answer setting forth all the foregoing facts, the court commits no error in refusing to allow the plaintiff to dismiss his action against the principal so that he may proceed against the sureties alone. *Gerson v. Hanson*, 34 Kan. 590.

This is a substantial compliance with the statute which requires a bond "on the part of the plaintiff with sufficient sureties." It was not necessary that there should be in the bond a principal obligor to whom the other persons obligating themselves in favor of the defendants should stand in the relation of sureties. *Keene v. Deardon*, 8 East, 293; *Dixon v. Dixon*, 2 Bos. & P. 443; *Taylor v. Richards*, 9 Ark. 378; *Barnett v. Warren Cir. Ct.*, *Hardin* (Ky.), 180; *Thom v. Savage*, 1 Blackf. (Ind.) 51; *People v. Judges Court C. P.*, 5 Cow. (N. Y.) 34; *Chandler v. Smith*, 14 Mass. 313; *Wade on Attach.* § 104; *Hayden v. Boyers*, 58 Ala. 139.

The individual stockholder in an incorporated company may be a surety on an attachment bond for the company; were it otherwise the objection could not be made available on a motion to quash. *City Nat. Bank v. Cupp*, 59 Tex. 268.

3. *Benner v. Brown*, 10 La. Ann. 324.

Attestation and filing are non-essential formalities. *Wade on Attach.* § 104.

Sealing may be amended. *Lea v. Vail*, 3 Ill. 473.

4. An attachment bond made payable to a firm in the partnership name is sufficient when the suit is against the firm in the firm name. *De Cussley v. Bailey*, 57 Tex. 665.

**Attachment.—Writ.**—Where an action in attachment was brought against a firm and against the individual members thereof, but the bond which plaintiff filed ran to the firm alone and not to the individual members, and the clerk, following the bond, issued the writ against the property of the firm only, but the sheriff thereunder seized the individual property

gregate worth of the sureties should at least equal the penalty of the bond.<sup>1</sup> While mere surplusage will not vitiate a bond, it is important that the conditions imposed by the statute should be expressed without other qualifications than those to which they are subject by the statute.<sup>2</sup> A sufficient penalty must be expressed; and where none is expressed parol evidence is inadmissible to supply the omission.<sup>3</sup> Approval is *prima-facie* evidence of sufficiency of surety.<sup>4</sup> The failure to give bond is not to be reached by demurrer; the bond is essential to the jurisdiction; and appearance and pleading to the merits, when the requirement has not been complied with, will not cure the defect.<sup>5</sup>

*Amendments.*—In the absence of express statutory provision, substantial defects cannot be supplied by amendment.<sup>6</sup> Some States go so far as to allow a new bond in lieu of one which was void.<sup>7</sup> In others, any defect may be cured by filing a good and sufficient undertaking after objection raised and within the time ordered by the court.<sup>8</sup>

of one of the members, *held*, that such seizure was not warranted by the writ, and that an action for trespass might be maintained therefor, but that the partner whose property was so seized could not maintain an action on the attachment bond on account of the damage done him by such seizure, the bond being only for the security of the firm against the wrongful suing out of the attachment, and not to secure others against the tortious acts of the sheriff in levying the writ. *Mason v. Rice*, 66 Iowa, 175.

1. *May v. Sample*, 14 Fla. 467.

In some States attorneys and counsellors are disqualified for sureties. Where a statute prescribes "two or more," one is insufficient. That the sureties satisfy the requirements need not appear save by approval of officer, until questioned by a plea in abatement. *Wade on Attach.* § 109.

It is proper to inquire into their other obligations. *Durham v. Lisse*, 23 La. Ann. 115.

The insufficiency of a surety on the bond at the time the attachment was issued will not render it void and entitle defendant to have it dissolved, but additional security may be required and taken by the court. *Bumberger v. Gerson*, 24 Fed. Repr. 257.

2. Where a bond undertook to fix the amount beyond which obligee could not recover, while the statute allowed him to collect for all damages, the bond was held void. *Kahn v. Herman*, 3 Ga. 266.

But where it contains the statutory condition unimpaired by any such qualifications, the mere insertion of other condi-

tions will not vitiate that part which is essential. *Wade on Attach.* § 110.

3. Parol evidence is not admissible to show the amounts for which the bond should have been given. The affidavit is the proper criterion by which to judge whether the amount of the penalty has been properly set forth and not recitals in the bond itself. *Lawrence v. Featherstone*, 10 Sm. & M. (Miss.) 345.

Objection can never be made that the penalty is too large. *Hoozer v. Buckner*, 11 B. Mon. (Ky.) 183.

4. *Blany v. Findley*, 2 Blackf. (Ind.) 331.

5. *Alexander v. Pardue*, 30 Ark. 359.

It is a jurisdictional matter, and hence the bond should appear on the record, and its absence could be taken advantage of by writ of error. *Henrie v. Sweasy*, 5 Blackf. (Ind.) 273.

6. *Tyson v. Hamer*, 2 How. (Miss.) 669.

Going to trial on the merits would be a waiver of such defects as could be cured by amendment if objected to at an earlier stage of the proceedings. *Voorhees v. Haagland*, 6 Blackf. (Ind.) 232.

7. *Jackson v. Stanley*, 2 Ala. 326; *Livery v. Stowe*, 7 Porter (Ala.), 483.

8. *Bretney v. Jones*, 19 Greene (Iowa), 336.

The rulings of the courts are generally favorable to substitution of such bonds for those which are not defective, where the defects are not sufficiently serious to render the undertaking absolutely void. *Beardsley v. Morgan*, 29 Mo. 471; *Shore v. Wilson*, 29 Ga. 642; *Peirce v. Miles*, 6 West (Wash. Rep.), 94.

It has been held that defects in the original bond are not cured by this

**Liabilities.**—Liability may accrue when the suit has not been prosecuted to judgment, or when there has been no action against the principal obligor;<sup>1</sup> and even when the judgment is against defendant, provided the attachment be wrongful and oppressive.<sup>2</sup> The validity of an attachment must be determined before the defendant can be said to have a cause of action.<sup>3</sup> Unless writ of error operate as a *supersedeas* it cannot affect defendant's right to sue on bond, even while the main case is pending on error.<sup>4</sup>

**Damages.**—Actual damages only can be recovered—"damages adequate to the injury to property attached and loss arising from deprivation of its user, together with actual costs and expense of amendment. *Houston v. Beecher*, 12 Sm. & M. (Miss.) 514; *Wade on Attach.* § 115.

The statute of *Wisconsin* allowing an action to be maintained on a demand not yet due, upon the filing of a bond conditioned in three times the amount of the claim, must be strictly complied with. The bond is a prerequisite: to the right of action, and if it is defective in the first instance the fault cannot be afterwards healed by the substitution of a regular bond. *Bradley v. Kroft*, 19 Fed. Repr. 295; *Gowan v. Hanson*, 55 Wis. 341.

1. *Bliss v. Heasty*, 61 Ill. 338; *Cox v. Robinson*, 1 Rob. (La.) 313; *Baere v. Armstrong*, 32 How. Pr. (N. Y.) 515; *Hibbs v. Blair*, 14 Pa. St. 413; *McDowell v. Gardner*, 34 La. Ann. 314; *Kerr v. Reeve*, 27 Kan. 469; *Sannes v. Ross*, 105 Ind. 556. *Contra*, *Boatwright v. Stewart*, 37 Ark. 614; *Pettit v. Mercer*, 8 B. Mon. (Ky.) 51; *Cooper v. Hill*, 3 Bush (Ky.), 219; *Noekles v. Eggspeler*, 47 Iowa, 400; *Ranning v. Reeves*, 2 Tenn. Ch. 263.

2. *Harper v. Keys*, 43 Ind. 220.

In *Indiana* the wrong and oppression is the gist of the action. *Uppinghouse v. Mundel*, 103 Ind. 238. *Contra*, *Spengler v. Davey*, 15 Gratt. (Va.) 381.

3. *Nolle v. Thompson*, 3 Metc. (Ky.) 121; *Pixley v. Reed*, 26 Minn. 80; *Sloan v. McCracken*, 7 Lea (Tenn.), 626; *State v. Beldsmeier*, 56 Mo. 226.

After a plea in abatement to affidavit has been sustained, the truth of the affidavit cannot be inquired into. *Sacket v. McCord*, 23 Ala. 37. See also *Hoge v. Norton*, 22 Kan. 374; *Hayden v. Sample*, 10 Mo. 215; *Dunning v. Humphrey*, 24 Wend. (N. Y.) 31.

On the other hand, the mere fact that judgment is against plaintiff is not conclusive that the attachment was wrongfully or oppressively sued out. *Hayden v. Sample*, 10 Mo. 215.

If dismissed for mere irregularities of procedure, sureties cannot be held liable

in full damages. *Garretson v. Zacharie*, 8 Mart. (La.) 481.

But this doctrine was held inapplicable to the plaintiff. *Cox v. Robinson*, 2 Robinson (La.), 313. Cases summed up throughout the *Union in Drake on Attach.* (6th Ed.) § 170 *et seq.*

The fact that an attachment has been set aside for technical defects is not *prima-facie* evidence that it was wrongfully obtained. *Sharpe v. Hunter*, 16 Ala. 765; *Boatwright v. Stewart*, 37 Ark. 614; *Eaton v. Bactsherer*, 5 Neb. 469.

A complaint on an undertaking in attachment which avers the execution of the undertaking, the issuing of a writ, the seizure of the plaintiff's property, that the attachment was disposed of against the defendant, and that the latter did not duly prosecute the attachment proceedings which, it is alleged, were wrongful and oppressive, resulting in damages to the plaintiff which remain unpaid, is good as against a demurrer. An averment that the undertaking was approved by the clerk before the writ issued is not necessary. *Sannes v. Ross*, 105 Ind. 556.

4. *Bing Gee v. Ah Jim*, 7 Sawy. C. C. 117.

The conditions of the bond measure the liability of the obligors and determine when the right of action accrues. As a general rule, when the statutory form of bond is followed the party damaged by the attachment may maintain his action thereon without first pursuing his remedy against the plaintiff for wrongfully suing out the attachment. *Herndon v. Fomey*, 4 Ala. 243; *Churchill v. Abraham*, 22 Ill. 455; *Boatwright v. Stewart*, 37 Ark. 615; *Dickerson v. McCraw*, 4 Rand. 158. *Contra*, *Sledge v. Lee*, 19 Ga. 411; *Sterling C. M. Co. v. Cook*, 2 Col. 20; *Holcomb v. Foxworth*, 34 Miss. 265.

In the *Nebraska* bond the surety is liable for all damages up to the time of

penses incurred."<sup>1</sup> In some States vindictive damages as for a tort are allowed, where the bond has been vexatiously sued out;<sup>2</sup> to recover vindictive damages requires proof of a fixed intent to injure the defendant in the attachment.<sup>3</sup>

**6. Issuing the Writ.—Object and Requisites.**—The effect of the issue of the writ is to authorize the officer to whom it is directed to make the levy.<sup>4</sup> The facts stated in the affidavit, and the filing of the

the delivery of the attached property, when the attachment is dissolved as wrongful. *McRaed v. Rogers*, 1 Neb. 124.

1. *Drake on Attach.* (6th Ed.) § 156; *Pettit v. Mercer*, 8 B. Mon. (Ky.) 81; *Reidhar v. Berger*, 8 B. Mon. (Ky.) 160; *Smith v. Eaken*, 2 Sneed (Tenn.), 456; *Senecal v. Smith*, 9 Rob. (La.) 418.

The determination in value must be a consequence of seizure. *Kisler v. Carr*, 34 Cal. 641; *Lowenstein v. Monroe*, 55 Iowa, 82; *Mitchel v. Harcourt*, 62 Iowa, 349.

In *Iowa* it was held defendant is entitled to recover at least the fair cash value of the property when taken, with six per cent interest thereon. *Porter v. Knight*, 63 Iowa, 365.

The depreciation in value of marketable merchandise during the attachment is the measure of damages whether caused by direct injury to the goods or by a falling market. *Fleming v. Bailey*, 44 Miss. 132.

When by attachment the defendant is prevented from performing a contract, and material or property procured or prepared for that purpose goes to waste or depreciates, the loss occasioned by such consequent depreciation, as well as damage from being hindered in completing the contract, is generally embraced. *Carpenter v. Stevenson*, 6 Bush (Ky.), 259.

Purely speculative damages, such as injury to credit or business, cannot be recovered. *Wade on Attach.* § 301.

2. *Hays v. Anderson*, 57 Ala. 374; *Transit Co. v. Cusen*, 13 La. Ann. 214.

3. *Wade on Attach.* § 302; *Nordhaus v. Peterson*, 54 Iowa, 68.

In *Kentucky* to recover for other than actual damages defendant must resort to an action for malicious prosecution. *Pettit v. Mercer*, 8 B. Mon. (Ky.) 51.

In *Georgia* the bond is held to be security only for such damages as may be recovered in an action for malicious attachment. *Hedge v. McLaren*, 29 Ga. 64.

In *Missouri*, *New York*, *Tennessee*, and *Ohio* actual damages are allowed in a case presenting no ingredient of malice. *Hayden v. Semper*, 10 Mo. 215; *Dun-*

*ning v. Humphrey*, 24 Wend. (N. Y.) 31; *Bruce v. Coleman*, 1 Handy (Ohio), 515; *Smith v. Eaken*, 2 Sneed (Tenn.), 456.

In *Alabama*, *Kansas*, *Texas*, and *Iowa* vindictive damages may be recovered in an action on the bond. *Drake Attach.* (6th Ed.) § 157 *et seq.*

**A Cause for an Attachment.**—To maintain an action for malicious attachment there must be a want of probable cause, malice of the defendant, and injury to the plaintiff. *Parmer v. Keith*, 16 Neb. 91.

The obligation of the bond extends to the final determination of the causes. *Drake on Attach.* (6th Ed.) § 152.

Errors do not affect the liability of defendant. When a bond is given though not required it is good as a common-law bond. *Drake on Attach.* (6th Ed.) § 155.

Damages need not be first recovered in a distinct action. *Hernden v. Forney*, 4 Ala. 243; *Churchhill v. Abraham*, 22 Ill. 455. *Contra* in *Georgia*, *Mississippi*, and *Colorado*. *Hedge v. Lee*, 19 Ga. 411; *Sterling C. M. Co. v. Hughes*, 3 Col. 224; *Holcomb v. Foxworth*, 34 Miss. 265. See also *Drake on Attach.* (6th Ed.) § 156, for a good summary.

Damages claimed for wrongfully suing out the original writ may be set up by way of counter-claim or cross-demand to the original debt sued on, and this matter may be tried at same time as the original action, and to support such counter-claim the burden of proof is on defendant. *Veiths v. Hogge*, 8 Iowa, 163; *Boatwright v. Stewart*, 37 Ark. 614. *Contra* in *Kentucky*. *Nolle v. Thompson*, 3 Met. (Ky.) 121; *Wade on Attach.* § 303. See also *Dent v. Smith*, 53 Iowa, 262.

Under the *Iowa* statute, in an action on the bond the plaintiff must show that the defendant had not good cause to believe the facts to be true upon which he based his affidavit for the writ, and it is not sufficient to show that as a matter of fact they were not true. *Burton v. Knapp*, 14 Ill. 196; s. c., 81 Am. Dec. 465. For a good summary of cases on the subject of actions on attachment bonds and for malicious prosecution, see the note to this case, 81 Am. Dec. 467.

4. *Wales v. Clarke*, 43 Conn. 183.



bond when required, are prerequisites to the issue of the writ; and when it issues in advance of either of the two former, and sometimes even of the declaration, it is held void.<sup>1</sup> The writ must proceed from an officer having competent authority;<sup>2</sup> must be attested and signed by the officer issuing it;<sup>3</sup> and in order to take effect as a writ issued it must be delivered to one authorized to make a levy.<sup>4</sup> The writ should state the amount for which the levy is made according to what is set forth in the affidavit,<sup>5</sup> and should

1. *Ely v. Guest*, 94 Pa. St. 160. But under attachment execution act of 1836 bond and affidavit are held essential only when a third party claims property. *Betts v. Townsend*, 97 Pa. St. 367.

When the ground for attachment is sufficiently set forth in the affidavit, a general prayer in the petition for "process" is sufficient to authorize the issuance of the writ. The writ becomes a matter of right on the filing of the proper affidavit and bond required by the statute. 57 Tex. 665.

When in the petition for sequestration the property was described as "sixteen hundred and forty-six head of sheep, known as the Du Bose sheep," and the writ which issued thereon required the seizure of the Du Bose flock of sheep, computed to number twenty-four hundred head, it was held that the variance was fatal. *Woessner v. Fly*, 63 Tex. 198.

The summons must be issued and served on a non-resident before the issue of the writ of attachment; and unless this be done the levy will be held void; and although the issuing of the writ is cured by the subsequent summons, the levy is not, and a motion to vacate the attachment after the entry of judgment will be sustained. *Zerega v. Benoist*, 7 Robertson (N. Y.), 199.

2. From the clerk of a court of record when from such court. *Wade on Attachment*, (6th Ed.) § 109.

3. When not signed held void. *Wiley v. Bennett*, 9 Baxt. (Tenn.) 581.

4. A levy made before the officer has power to execute it is void, and renders the officer liable as a trespasser. *Wales v. Clarke*, 43 Conn. 183.

If the officer be properly authorized, the fact that the writ is void will not render him liable. An officer is justified in obeying any process which appears to be lawfully issued to him, and which on its face apprises him of no legal reason why he should refrain from doing so. *Ersine v. Hohnbach*, 14 Wall. (U. S.) 613; *Bird v. Perkins*, 33 Mich. 28; *Watson v. Watson*, 9 Conn. 140; *Lott v. Hubbard*, 44 Ala. 593; *Hill v. Figley*, 25 Ill. 156; *Seekins v. Goodale*, 61 Me. 400; *Under-*

*wood v. Robinson*, 106 Mass. 296; *Walden v. Dudley*, 49 Mo. 419; *Gore v. Martin*, 66 N. Car. 371.

The writ should be issued to the proper officer when there is attachable property in several counties; several copies of the writ may be issued at the same time and sent to the several jurisdictions for service. *Morris v. Trustees*, 15 Ill. 266.

And these copies, or rather these several writs, will be of equal power, each within its own jurisdiction. If directed to a deputy instead of the proper officer, the writ is curable by amendment. *Warren v. Purtell*, 63 Ga. 428.

An attachment issued by a deputy clerk who is performing the duties of the office under appointment by his principal, is not voidable, nor subject to be abated on plea, because he has never taken the official oath prescribed by law; his official acts, like those of any other officer *de facto*, having the same force and effect, so far as the public and third persons are concerned, as the acts of an officer *de jure*. *Joseph v. Cawthorn*, 74 Ala. 411.

5. At all events, it should not express a larger sum, though it will not be void for indicating less than is sworn to. *Reed v. Bank of Kentucky*, 5 Blackf. (Ky.) 227; *Page v. Beet*, 17 Mo. 263.

A demand in writing, under Mass. Pub. Sts. c. 161, § 75, by a mortgagee of personal property attached on a writ against the mortgagor, in which, although he refers to the mortgage by its date and by the book and page of its record, he states that it covers certain articles specified, but omits to name one article covered by the mortgage and included in the attachment, does not defeat the attachment as to such article. Several chattels which had been mortgaged were attached by an officer on a writ against the mortgagor. The mortgagee made a demand upon the officer, which was a valid demand as to all the chattels but one. The officer did not comply with the demand, and delivered the chattels to a receiptor, who delivered them to the mortgagor. The mortgagee subsequently foreclosed his mortgage. The officer levied an execu-

direct the executive officers to levy upon the property of defendant.<sup>1</sup> While considerable liberality has been shown in allowing amendments, it has been held that an attachment of real estate which was void could not be cured by amendment of the writ;<sup>2</sup> and where the writ was defective by reason of clerical errors, it was held that an amendment thereof did not affect the rights of subsequent attachment creditors acquired prior to such amendment.<sup>3</sup> Objection to an order in relation to amending process must be made in open court or it will be considered waived.<sup>4</sup>

**7. What Property is Subject to Attachment.—Real Estate.**—Every species of property, whether real or personal, which is capable of being taken under a levy and execution is attachable.<sup>5</sup> It may be considered a sound doctrine, that in the absence of any positive limitation to the right of attachment real estate may be as well attached as personalty, and that the existence within the knowledge of the officer of a sufficiency of the latter which he might seize will not invalidate an attachment of the former.<sup>6</sup> Another established principle affects with peculiar force attachments of real estate—the attachment can operate only upon the right or interest of the defendant at the time it is made.<sup>7</sup> Moreover, in executing a levy upon real estate it is not necessary for the sheriff to take actual possession of the property,<sup>8</sup> and therefore many intangible rights and interests in realty physically incapable of

tion, issued in the action in which they had been attached, upon the chattels, and was about to sell them, when they were replevied by the mortgagee. *Held*, that the officer was entitled to judgment for a return of the chattel as to which the demand was insufficient, and that the mortgagee was entitled to judgment for the rest of them. *Woodward v. Ham*, 140 Mass. 154. See *Bowds v. Jordan Bank of Utah*, 3 Utah, 477.

1. But it is not required to designate the particular kind of property. *Layman v. Beam*, 6 Whart. 181.

2. *Drew v. Bank*, 55 Me. 450.

3. *Putnam v. Hall*, 3 Pick. (Mass.) 445.

In *Scott v. May*, 3 Ala. 250, a writ returnable on a day other than that required by law was held amendable; in another State the attachment was declared void. *Dames v. Fales*, 3 N. H. 70.

In *Alabama* defects in writ sufficient to render the attachment void are cured by appearance. *Goldsmith v. Stetson*, 39 Ala. 183.

A writ of attachment was tested "the twenty-eighth of March, eighteen hundred and seventy ——" By the transcript it appeared that the writ was issued March 28th, 1879. The erroneous statement of the year was an oversight of the justice in filling up a printed blank. The mistake did no injury to the defendant, and

was curable by amendment. An error which is the result of an oversight of the justice, which might have been cured by amendment, and has caused no injury, is no ground for reversal. *Wright v. Moran*, 43 N. J. L. 49.

The short note in attachment is fatally defective if it does not set out the individual names of the members of the firm in whose favor the attachment is issued. *Hirsh v. Thurber*, 54 Md. 210.

Where an attachment is sued out against one partner on a partnership account under § 3276 of the Code, the declaration in attachment need not be against both partners, but only against him who is thus subject to summary process. *Connon v. Dunlap*, 64 Ga. 680.

4. *Fowble v. Walker*, 4 Ohio, 64.

5. *Drake on Attach.* (6th Ed.) § 263.

6. *Isham v. Downer*, 8 Conn. 182.

7. If prior to the attachment he had sold and conveyed land in good faith, but the vendee did not put the deed on record until afterward, but did so before a sale of the land under execution, it cannot be held for the debt of the vendor. *Cox v. Milner*, 23 Ill. 476.

Nor, on the other hand, can any interest which the defendant subsequently acquires be reached by it. *Crocker v. Pierce*, 31 Maine, 177.

8. *Drake on Attach.* (6th Ed.) § 232.

actual seizure may well be the subject of attachment. Thus whether the debtor be seized with another in severalty as tenant in common, or be seized *per my et per tout* as joint tenant, his interest, provided he could make a conveyance, is subject to attachment.<sup>1</sup>

1. Where the levy is made upon land in which the debtor is interested as tenant in common, it holds such debtor's interest notwithstanding the subsequent partition of the property by which the debtor becomes entitled to his own specific portion in severalty. But in such case the attachment follows the interest originally attached without obstructing partition, and if a sale be made on execution in the attachment suit it must be of that portion of the land set off to the debtor, and not of his undivided interest. The interests of joint tenants is also liable to execution, but not of tenants by entireties, because they are seized *per tout et non per my*. Their interest is at once undivided and indivisible, and neither has power to convey. This estate exists where land is conveyed to husband and wife by the same deed. Wade, § 252, and cases cited.

The purchaser at execution sale of property subject to redemption within one year has no interest subject to attachment or execution within the year—that it might be redeemed. Thornton v. Wood, 42 Me. 282.

Obviously until the expiration of the year it could not lawfully make a conveyance. The equity of redemption is subject to attachment. Beams v. Leonard, 4 Pick. (Mass.) 297.

The interest of the mortgagee is not subject to attachment; until entry is made for condition broken it was said to be a mere chose in action, and even after such entry its character was not substantially changed until foreclosure. Lincoln v. White, 30 Me. 291.

On the other hand, in *New York* and *Vermont*, after breach of condition, the mortgagor has no attachable interest in the property. Norris v. Sowles, 57 Vt. 360; Champlain v. Johnson, 39 Barb. (N.Y.) 608; Judson v. Easton, 52 N.Y. 664.

If the mortgage is fraudulent, the property covered by it may be attached, and without calling for an account of the mortgage debt. Angier v. Ash, 26 N.H. 99.

In *Tennessee* it was held that the equity of redemption could not be attached in an action at law. Hilman v. Werner, 9 Heisk. (Tenn.) 586.

Obviously the attachment of the equity so as to be of any practical value to the creditor is not without difficulty. Grant-

ing that the equity may be attached, the creditor cannot perfect his title without the aid of a court of chancery, but the proceedings in attachment being harsh and strictly statutory, a chancellor will not lend his aid to enforce it. Kelly v. Mill, 41 Miss. 267.

One holding a bond for a deed has an attachable interest in the property so bonded; but if he transfer such bond to a *bona-fide* purchaser prior to the levy he has not. Lambard v. Pike, 33 Me. 141.

The interest of a settler on public land in a town site laid out in pursuance of acts of Congress is attachable. Fessler v. Haas, 19 Kans. 216.

Likewise the possessory right of a mine upon public land. McLaughlin v. Kelly, 22 Cal. 211.

Dower at common law is not an attachable interest until assigned. Newman v. Willetts, 48 Ill. 534.

Nor courtesy until death of wife. Greenwelch Nat. Bank v. Hall, 11 R. I. 124; Wade on Attach. (6th Ed.) § 252.

The tendency of our legislation is to increase the efficacy of this remedy. Thus in *California* it is held that the term "land" embraces all titles, legal or equitable, perfect or imperfect, including such rights as lie in contract—those which are executory as well as those which are executed. Any interest, therefore, in land, legal or equitable, is subject to attachment or execution. Fish v. Fowle, 58 Cal. 373.

The homestead is exempt unless abandoned. Fessler v. Haas, 19 Kans. 216.

But property cannot be converted into a homestead by the debtor after levy. Kelly v. Dill, 23 Minn. 435.

The fact that several tracts of land are distant from each other several miles will not divest either of them of the homestead protection if they be each used for homestead purposes; but when the rural homestead has been fixed on one of them, there must be such use of the subsequently acquired parcel to invest it with the homestead character as would be required to make an original designation of a homestead. Mere intention to use is not sufficient; if the tract be separated from that on which the home place is located, some act must be done evincing an intention to use it in some way in connection with the home place for the com-

*Personalty.*—Bearing in mind the fact that any such property as can be taken under a levy and execution<sup>1</sup> is attachable, and that to make a levy upon personalty, it is essential for the sheriff to take actual possession, it is at once seen that only tangible property, *i.e.*, that which may be seized in specie, is the subject of attachment. When the officer can gain possession of chattels, the property of the defendant, they are subject to seizure in whosever possession they may be.<sup>2</sup> The defendant's interest in personal property need not, in order to its being subject to attachment, be several and exclusive. An interest held by him in common with others may be attached, and the property may be seized and removed, though the rights of the other joint owners may thereby be impaired. In such case only the undivided interest of the defendant can be sold, and the purchaser becomes a tenant in common with the co-tenant.<sup>3</sup>

fort, convenience, or support of the family, or as a place of business for the head of the family. Mere ownership, coupled with an intention at some time to use the detached tract in connection with the home place for homestead purposes, is not sufficient. *Brooks v. Chat-ham*, 57 Tex. 31.

Where an attachment is levied upon real estate belonging to the debtor whether held in his own name or not, the attaching creditor acquires a lien upon the interest of the debtor in the land which he may enforce after he recovers judgment. *Keene v. Sallenbach*, 15 Neb. 200.

A general creditor of a non-resident debtor may, by bill in chancery, attach the interest of his debtor in land sold by judicial sale, and subject the same to the satisfaction of his demand. *Herndon v. Pickard*, 5 Lea (Tenn.), 702.

1. *Drake on Attach.* (6th Ed.) § 2.

2. *Wade on Attach.* 263.

Written evidences of debt must be reduced to manual possession to make valid seizure. The possession of the officer must be exclusive of everybody else, particularly of defendant. *Fibly v. Ferne*, 22 La. Ann. 163.

Money may be attached in specie. *Handy v. Dobson*, 12 Johns. (N. Y.) 220. Bank-notes. *Spencer v. Blaisdell*, 4 N. H. 198. And treasury notes. *State v. Lawson*, 7 Ark. 391.

Stock in a corporation cannot be attached unless authorized by express statute. *Yelverton v. Burton*, 26 Pa. St. 381.

Mortgaged personal property is not subject to attachment or execution for a debt of the mortgagor, and a tender of the mortgage debt by an attaching creditor after the levy of his attachment on the property will not cure the illegal levy. *Jennings v. McIlroy*, 42 Ark. 236; *s. c.*, 48 Am. Rep. 61.

1 C. of L. 58

A mortgagor of personal property, who is rightfully in possession at the time when it is wrongfully attached, may maintain an action against the attaching officer, although the attachment constitutes a breach of a condition of the mortgage. No exception lies to the giving of instructions which were requested by the excepting party. *Copp v. Williams*, 135 Mass. 401.

Where horses are placed in the custody of a horse-trader, to be sold by him as a part of his stock, or in such circumstances as to appear to be his, and thus furnish him a basis of credit, they become liable for his debts, under sec. 1300 of the Code of 1880, which provides that, "if any person shall transact business in his own name, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property." *Reed v. Howard*, 2 Metc. (Mass.) 36; *Remington v. Cady*, 10 Conn. 44.

*Semble*, that where property is placed in the hands of a factor or auctioneer to be sold, in the usual course of his business, for the benefit of the owner the statute quoted would not apply. *Shannon v. Blum*, 60 Miss. 828.

Where goods sold to a salesman in the employ of the vendor remain in the vendor's store, and in the course of trade his stock is replenished through purchases made by the vendor with money turned over to him by the vendee, as proceeds of sales of these goods, an attachment against the vendor may be levied on the new goods as well as on the original stock. *Franklin v. Gumersell*, 11 Mo. App. 306.

3. *Mercerau v. Norton*, 15 Johns. (N. Y.) 179.

**Exemptions.**—Property the sale of which is penal cannot be attached.<sup>1</sup>

A fundamental principle is that an attaching creditor can acquire no greater rights in attached property than the defendant had; the attachment only operates upon the interest of the debtor.<sup>2</sup> If, therefore, the property be in such situation that the

An officer holding an order of attachment against the property of an individual partner may levy such attachment on the interest of such partner, and take the partnership property, or a portion thereof, into his possession, and sell the interest of the partner in such property. *Hershfield v. Clafin*, 25 Kan. 166; s. c., 37 Am. Rep. 237.

The Mass. Gen. Sts. c. 123, §§ 87, 88, providing that personal property, which has been attached in a suit against one part-owner, shall, at the request of the other part-owner, be appraised and delivered to him upon his giving bond to the attaching officer, do not apply to an attachment of partnership property in an action against one partner. *Breck v. Blair*, 129 Mass. 127.

Under a writ of attachment against an individual partner the whole of the partnership property cannot be taken into the possession of the officer. *Parsons on Partnership*, 356, 357; also 350 *et seq.*; 20 Pa. St. 228; *Newman v. Bean*, 22 N. H. 93; 12 N. H. 271; *Buffum v. Seavern*, 16 N. H. 160; 14 N. H. 271; *Pierce v. Jackson*, 6 Mass. 242; *Levy v. Cowen*, 27 La. Ann. 556; *La. Ann.* 444; *Bears v. Estill*, 50 Miss. 300; *Anderson v. Cheney*, 51 Ga. 372; *Menagh v. Whitwell*, 52 N. Y. 146; *Harris v. Murray*, 28 N. Y. 574.

But the levy and sale thereunder must be in recognition of, and as far as possible in harmony with, the rights of the other partners, and not in hostility thereto; otherwise the officer becomes a trespasser *ab initio*. *Snell v. Crowe*, 3 Utah, 26.

A writ of attachment issued against N. W. as the sole member of the firm of N. W. & Co. was levied upon a tract of land belonging to W. T. Subsequently the creditor discovered that W. T. was a member of the firm of N. W. & Co., and sued out an attachment against him for the same debt. This writ was not levied on the land above-mentioned, but under it W. T. was summoned to defend the suit, the two attachments being treated as in one case. A judgment was rendered against both N. W. and W. T. as members of the firm of N. W. & Co., and the land was condemned to be sold to satisfy the same. It was accordingly sold. *Held*,

that the purchaser acquired no title, as the levy under the first writ did not affect W. T.'s interest in the land, and the second writ was not levied upon it. *Armistead v. Cocke*, 62 Miss. 198.

In an action against the members of a partnership upon a joint and several promissory note, signed by them individually, but not with the firm name, an attachment was issued and levied upon the interests of defendants in the partnership property, upon which one attachment previously had been, and others were subsequently, levied in actions against the firm. Subsequently the plaintiff, under § 432 of the California Code of Civil Procedure, amended his complaint, by alleging the partnership of the defendants, and that the note was a partnership debt; but the action still ran against the defendants as individuals, and judgment was entered against them in that capacity. Judgments having been entered in all the cases, the property was sold under execution in one of the cases against the firm, and the proceeds applied in satisfaction of that execution and another in a similar case. *Held*, that the money was properly applied on the executions against the firm in preference to those of the plaintiff. *Commercial Bank v. Mitchell*, 58 Cal. 42.

1. Where, therefore, the sale of spirituous liquor was forbidden by law, it was held that it could not be attached, because its subsequent sale under execution would be illegal. *Nichols v. Valentine*, 36 Me. 322.

2. *Drake on Attach.* (6th Ed.) § 245; *Wade on Attach.* § 264. *Vide Samuel v. Agnew*, 10 Ill. 553.

Thus, a chattel pawned or mortgaged is not attachable in an action against the pawnor or mortgagor. *Badlam v. Tucker*, 1 Pick. (Mass.) 389.

And the pawnee may maintain trespass against the officer, and recover the whole value in damages, for he is answerable for the excess to the person who holds the general property. *Tyle v. Becket*, 3 Bin. Pa. 57.

Under Michigan Comp. L., § 6401, personal property covered by a mortgage may be taken on an attachment against the mortgagor. *King v. Hubbell*, 42 Mich. 597.

defendant has lost his power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt.

When property is of such nature that an attachment of it would produce a sacrifice and a great injury to defendant, without producing any corresponding benefit to the plaintiff, it is not attachable.<sup>1</sup>

When property is so in the process of manufacture and trans-  
 ition as to be rendered useless, or nearly so, by having that process arrested, and to require art, skill, and care to finish it, and

An attachment of mortgaged personal property in the possession of the mortgagor is invalid if the mortgagee, summoned as trustee, under the Massachusetts Gen. Sts. c. 123, § 67, is a resident of another State, and has no usual place of business in this Commonwealth. *Allen v. Wright*, 134 Mass. 347.

Where the mortgagor of a chattel, by the terms of the mortgage, holds at the will of the mortgagee, his equitable interest is not subject to attachment. *Sams v. Armstrong*, 8 Mo. App. 573.

So goods upon which freight is due cannot be attached without paying freight; so goods manufactured cannot be attached in an action against the general owner, for the manufacturer has a lien on them. *Townsend v. Newell*, 15 Pick. (Mass.) 332.

Property in the hands of a bailee for hire cannot be attached in a suit against the bailor during the term of the bailment. *Hartford v. Jackson*, 11 N. H. 145.

Nor can personalty leased for a term of years be seized under an attachment against the lessor, even though the sale of it by the sheriff be with a reservation of the lessor's right to retain possession during the continuance of the term. *Smith v. Niles*, 20 Vt. 315.

**Fraud.**—Thus the vendor may rescind the contract because of false representations, and as against attaching creditors of debts claims the property as though he had never parted with the possession. *Wade on Attach.* § 264.

Where goods were obtained upon a letter of credit which the party giving it told defendant not to use, it was held this gave the wrongdoer only a naked possession, which was not attachable, and the party whose credit was used against his consent was entitled to the goods as against attaching creditors of the purchaser. *Gasket v. Johnston*, 2 La. 514.

Even where the purchaser of goods can be shown to have made the contract and obtained possession with the inten-

tion not to pay for them, the vendor may rescind the sale and recover the goods as against all save *bona-fide* purchasers or attachers who became creditors on the faith of the goods being in the possession of defendant. *Thompson v. Rose*, 16 Conn. 71; *Wiggin v. Day*, 9 Gray (Mass.), 47.

As a rule, mere equities cannot be reached by attachment. Hence a levy by virtue of an attachment upon a promissory note creates no lien thereon, unless at the time the attachment debtor has a legal title thereto. Where, therefore, before the levy, the debtor has parted with the legal title, although with intent to defraud his creditors, as there remains in him only an equity for their benefit, this cannot be reached by the attachment, and the sheriff may not assail the transfer as fraudulent. *Anthony v. Wood*, 96 N. Y. 180.

An employee or tenant working on shares has no attachable interest in the product of his labor—at least not until it is in condition to be divided, and he is tenant in common of such proceeds. *Frost v. Kellogg*, 23 Vt. 308; *Esdon v. Colborn*, 28 Vt. 631.

Has the husband at common law an attachable interest in his wife's choses in action before he has reduced them to possession? This question was answered in the affirmative in *Massachusetts, Maryland, Delaware, Virginia, and Missouri*; in the negative in *Pennsylvania, New Hampshire, Vermont, North Carolina, and South Carolina*. Since the passage of the married woman's acts in most of the States the question is of small moment. *Drake on Attach.* (6th Ed.) § 247.

1. Such is the rule in relation to defendant's books of account or private papers. *Oystead v. Shed*, 12 Mass. 506; *Bradford v. Gillespie*, 8 Dana (Ky.), 67. Also perishable goods. *Wallace v. Barker*, 8 Vt. 440.

It has been held a growing crop of grass could not be attached. *Miles v. Watson*, 2 Foster (N. H.), 364.

when completed it will be a different thing, it is not subject to attachment.<sup>1</sup>

Property *in custodia legis* cannot be attached,<sup>2</sup> nor goods in actual use when worn about the defendant's person.<sup>3</sup> The property of individuals or corporations who owe duties to the public is not for that reason exempt, except so long as it is in actual use in the discharge of such duties.<sup>4</sup> It is not necessary that defendant's property, in order to be subject to attachment, should be in his possession. It may be attached wherever found.<sup>5</sup> The possession of personal property is an indication of ownership, and, if nothing appear to the contrary, may and should be subject to attachment.<sup>6</sup>

1. Hides in vats in process of tanning have been exempted. *Bond v. West*, 7 Mass. 123.

If, however, the process is nearly completed, and requires nothing but ordinary care to finish it, if the officer see fit to attach and take possession of the property, and run the risk of being able to keep it properly, he has the right to do so, and will not be liable for slight nonfeasance. *Hale v. Huntly*, 21 Vt. 147; *Drake on Attach.* (6th Ed.) § 259.

2. Thus goods attached by an officer and in his possession cannot be attached by another officer. So goods held by a U. S. Revenue Collector to enforce payment of, or as security for, the duties thereon are not attachable by a creditor of the importer. *Drake on Attach.* (6th ed.) § 281, *Taylor v. Carryl*, 24 Pa. St. 259.

Repeated attempts have been made to levy attachments or executions upon money collected under execution; but such money while in the hands of the officer who collected it has been uniformly held to be *in custodia legis*, and for that and other reasons not subject to his levy. *Drake on Attach.* (6th Ed.) § 281.

The rule, however, applies only where the officer is bound to have the money in hand to pay the execution plaintiff, and not to cases in which he has in his possession, after satisfying the execution, a surplus of money raised by the way of sale of the property. Such surplus is the property of the execution defendant, and being held by the sheriff in a private and not in an official capacity, it may be attached in his hands. *Drake on Attach.* (6th Ed.) § 281, and cases cited.

Moneys in the hands of a sheriff, raised by him in pursuance of a decree of the court of chancery, are liable to seizure by virtue of a writ of attachment. *Conover v. Ruckman*, 33 N. J. Eq. 303.

Judgment debts and moneys collected on execution by and in the hands of a

sheriff are liable to attachment under process issued in an action against the judgment creditor. The right so to attach is not affected by the fact that the judgment debtor is also the attaching creditor. *Wehle v. Conner*, 83 N. Y. 231.

Property in the possession of an assignee under a voluntary assignment, purporting to be made by the debtor in pursuance of the statute of Minnesota, approved March, 1881, is not *in custodia legis*, so as to exempt it from seizure by a writ of attachment issued out of the Circuit Court of the United States. *Lapp v. Van Norman*, 19 Fed. Repr. 406.

3. The attempt to engraft this principle of the law of distress was only partially successful. It appears to have been adopted in *Tennessee* and *Massachusetts*. *Bell v. Douglass*, 1 Yerger (Tenn.), 397; *Potter v. Hall*, 3 Pick. (Mass.) 368.

In *Vermont* the doctrine is carried to great length. It is not necessary that the horse be in actual use, at the time of attachment, to be exempt. It is exempt if the owner keeps it with the honest intention and purpose of using it, within a reasonable time, for team work, to enable him with the aid of the animal to procure a livelihood. Future intended use is as controlling upon the question of exemption as any past use. *Rowell v. Powell*, 53 Vt. 302. *Sullivan v. Davis*, 50 Vt. 648, distinguished. There, the colt claimed to be exempt was too young for team work.

4. *Drake on Attach.* (6th Ed.) § 252. Under the Mass. Pub. Sts. c. 161, §§ 38, 39, railroad cars are, for the purposes of attachment, personal property; and an attachment of them in the manner pointed out in the Pub. Sts. c. 161, § 69, is sufficient. *Hall v. Carney*, 140 Mass. 131.

5. *Livingstone v. Smith*, 5 Pet. (U.S.) 90.

6. *Killey v. Scannell*, 12 Cal. 73.

An officer making an arrest, or a jailer

upon committing a person to jail, may search him, and take from him not only all offensive weapons, but also all other property which might be used by him in effecting an escape. But where the sheriff upon committing the defendant to jail took from his person two watches and some money, which were in no way connected with the crime with which he was charged, and which could not be used as evidence in the prosecution, it was his duty to return them, and while he retained them, his possession was that of the prisoner, and they were no more subject to attachment in an action against the prisoner than if they had been in his pockets. In such a case the consent of the prisoner to the search and to the taking of the property by the officer cannot be inferred from the fact that he made no resistance thereto. *Bank v. McLeod*, 65 Iowa, 665.

**Statutory Exemptions.**—Tools or implements of a man's trade are generally exempt from attachment. *Fish v. Street*, 27 Kan. 270.

A pedler's wagon designed to be used in trade from place to place, with the body hung upon three elliptic steel springs, with drawer behind and doors at the sides, and a railing around the top, and dasher in front, is not a vehicle which is exempted from attachment and execution under Maine R. S. c. 81, § 59, clause 9, which exempts "one cart or truck-wagon." *Smith v. Chase*, 71 Me. 164.

A defendant in attachment, claiming (under the statute, subdivision 6 of sec. 26, ch. liii. Colorado Gen. Laws) as exempt from levy "implements or stock in trade . . . used or kept for the purpose of carrying on his trade or business," not specifically exempt by law, is entitled to select such articles as are suitable to his trade or business; and a failure on his part to make such selection is a waiver of his right thereto. A sheriff is not liable for damages for levying an attachment upon property not specifically exempt by statute, in case the defendant declines to designate the articles he desires to claim. Under the statute, no property is exempt from levy to satisfy a claim for the purchase-money thereof; and a defendant cannot, by selecting such property, under the sixth subdivision of the exemption law, *supra*, exempt it from such liability. *Behyneer v. Cook*, 5 Colo. 395.

Where the exemption of property from attachment is of specific things *in numero*, the number of things exempt is not doubled when ownership is of an undivided half of each. Thus, one who

owns an undivided half of a yoke of oxen, of a yoke of steers, and of more than twenty sheep, is entitled to an exemption in either the oxen or the steers, and in ten of the sheep—not in both oxen and steers and in twenty sheep. A grindstone kept and used on a farm in the ordinary manner is exempt from attachment. *White v. Capron*, 52 Vt. 634.

A man owning two horses only one of which was exempt gave a bill of sale of one, which described it as "kept for team work and exempt from attachment." There was no change of possession. *Held*, that the horse could not be attached by the owner's creditors; that the owner could make his selection before attachment; that no change of possession was necessary; that, having selected which of the two was exempt, evidence tending to show that he selected the other one, after attachment was inadmissible. Vermont R. L. s. 1556, Exemptions, construed. *George v. Bassett*, 54 Vt. 217.

In *Wilkinson v. Wait*, 44 Vt. 508, the court held that where the debtor had sold one of two yoke of oxen, on condition that they should remain his until paid for, and delivered them, but nothing had been paid on them, the other yoke was exempt, although he made no claim to that effect when they were subsequently attached, and notwithstanding his interest as conditional vendor in the oxen sold.

The right given by section 3 of the Homestead Act, as amended February 27, 1873 (70 Ohio L. 51), to a debtor who is the head of a family and not the owner of a homestead, to hold exempt from levy and sale property as therein mentioned, to be selected by him "at any time before sale," applies as well to property levied on by attachment as by execution; and an order for the sale of the attached property, made in the proceeding in attachment, does not prevent the debtor from exercising his right of selection after the making of such order of sale. Where property has been levied on by attachment, and, pending the suit, the debtor assigns all his property for the benefit of creditors, excepting only such as he may lawfully hold exempt from execution, the right of the debtor to select the attached property as exempt from sale is not thereby waived. *Close v. Sinclair*, 38 Ohio St. 530.

The personal-property exemptions of an insolvent debtor cannot be reached by an attachment or execution, and his right to such exemptions is not forfeited by the fraudulent conveyance of his



**8. Execution and Return of Writ.**—The writ should be directed to the executive officer of the court or courts of similar jurisdiction in other counties or districts whose duty it is to obey the mandate contained in the process; it must be directed to him in his official character, and be served by the officer to whom it is directed.<sup>1</sup> In proceeding under the writ the officer need only look into the sufficiency of the process he has to execute. If it be

property. *Naumburg v. Hyatt*, 24 Fed. Repr. 898.

Where a plaintiff in replevin has recovered a judgment for a horse, or his value, and also for damages for the wrongful taking and detention of the horse, the damages for the taking and detention are not exempt from his debts because the horse is exempt property. *Johnson v. Edde*, 58 Miss. 664.

A public officer, charged with a trust created by a public statute in respect to funds in his possession, cannot be made liable in respect to them by an attachment in favor of a person not claiming under the trust. *Providence, etc., Co. v. Virginia Ins. Co.*, 11 Fed. Repr. 284; s. c., 20 Blatchf. (U. S.) 405.

A claim for speculative damages for a tort in a case which presents no fixed standard by which those damages can be liquidated is not liable to attachment execution. *Selheimer v. Elders*, 98 Pa. St. 154.

Goods of household character are generally exempt. *Griffith v. Bailey*, 79 Mo. 472; *Copp v. Williams*, 135 Mass. 401.

The property of a married woman is exempt unless made liable to attachment by statute. *Williams v. St. Louis, etc., R. Co.*, 8 Mo. App. 135; *Griffith v. Bailey*, 79 Mo. 472.

A judgment in a personal action can be obtained against a married woman only for necessities contracted for by herself, or in some of the cases enumerated in the act of Assembly; and the facts to fix her liability must affirmatively appear on the record, otherwise the judgment is void. Where an attachment execution issued upon a judgment against a married woman, which was void for the above reasons, and the defendant in the attachment pleaded *nulla bona*, the defendant in the judgment can nevertheless come in at the trial and show that the judgment is void and so prevent the married woman's money or property being taken by the attachment. *Hugus v. Dithridge Glass Co.*, 96 Pa. St. 161.

Medical services rendered the family are within the provisions of Missouri R. S., section 3295, subjecting her property to attachment and execution for debts and

liabilities created by the husband for necessities for the wife and family. *Alexander v. Lydick*, 80 Mo. 343.

Under the Massachusetts Gen. Sts. c. 58, § 62, if a policy of insurance is expressed to be for the benefit of the wife of the assured, her children have no interest in it during her lifetime, and her interest in it may be attached by a creditor of hers under the Gen. Sts. c. 113, § 2, cl. 11, although her husband is living, without making their children parties defendant. *Troy v. Sargent*, 132 Mass. 408.

Where there is no prescribed form for making a claim of exemption it may be made orally in court. *Bassett v. Trimman*, 7 Colo. 275.

And if an officer attaches personal property which is exempt from attachment, an omission of the owner to claim it as exempt does not, as matter of law, constitute a waiver of the exemption. *Copp v. Williams*, 135 Mass. 401.

In the sale of personal property exempt from attachment no change of possession is required in order to make it valid as against subsequent attaching creditors. Being exempt, the retention by the vendor does not enable him to acquire a false credit on the strength of it. *Foster v. McGregor*, 11 Vt. 595; *Jewett v. Guyer*, 38 Vt. 218; *George v. Bassett*, 54 Vt. 217.

1. If the writ is directed to the sheriff of a particular county it cannot be served by the sheriff of a different county, though property of defendant be found within latter's bailiwick and none in that of former. *Menderson v. Specker*, 79 Ky. 509; *Wade on Attach.* § 125.

It may, however, be served by deputy-sheriff. Under the New York code the required certificate may be signed and served by the deputy-sheriff. *Gibson v. Nat. Bank*, 98 N. Y. 87.

The property to be affected must be within the county at the time of service; hence the service of an attachment upon a railway company creates no lien upon property not within the county at the time it is served. *Sutherland v. Second Nat. Bank*, 78 Ky. 250; s. c., 6 Am. & Eng. R. Cas. 368.

regular on its face and shows that it was issued by competent authority, he will be protected against the consequences of any previous errors or omissions, any false statements in the affidavit, or insufficiency in the undertaking.<sup>1</sup> In order to create a lien even after all the prerequisites thereto have been complied with, it is essential that the executive officer having charge of the writ omit no act in making the levy which the governing statute prescribes.<sup>2</sup> In executing a levy upon personal property of a tangible sort the officer must take possession, and this possession, to render the attachment effectual as against the defendant or subsequent purchasers, must be actual, in the sense that it takes the property from the immediate control of the defendant and gives the officer custody over it.<sup>3</sup>

1. Whether it be necessary or not for the writ to recite the preliminary steps to the issuing of the attachment, it will be unnecessary for him to look beyond the writ to satisfy himself that these requirements have been complied with. *Garnett v. Wimp*, 3 B. Mon. (Ky.) 360; *Bogert v. Phelps*, 14 Wis. 88.

An invalid writ of attachment will not justify the officer who executes it in seizing property in the possession of mortgagees. *Mathews v. Densmore*, 43 Mich. 46.

2. If any of the provisions of the statute are not complied with by the officer in levying or executing his writ, the lien obtained is lost. *Greenvault v. Farmers', etc., Bank*, 2 Doug. (Mich.) 502; *Buckley v. Lowry*, 2 Mich. 420; *Roelofson v. Hatch*, 3 Mich. 277; *Millar v. Babcock*, 29 Mich. 526; *Adams v. Abram*, 38 Mich. 302; *Fairbanks v. Bennet*, 52 Mich. 61.

3. Wade on Attach. §§ 12, 129.

Where property is in the possession of a receptor upon an attachment the officer who placed it there may make another attachment or levy without an actual seizure by making return thereof and giving notice to the bailee of such attachment or levy and that he must hold the property to answer the same. But if the property never came to the actual possession of the receptor, or has been returned by him to the defendant, it must be seized wherever it can be found upon such subsequent attachment or execution. *Bell v. Shafer*, 58 Wis. 223.

To constitute a valid levy of a writ of attachment, under § 2967 of the Code, the officer having the writ must do what amounts to a change of possession of the property, or something which is equivalent to a claim of dominion, coupled with the power to exercise it. *Crawford v. Newell*, 23 Iowa, 453.

And so where the officer having

the writs in question, merely barricaded the front door of a store-room which he found locked, leaving the back door unguarded, the key thereof being in the control of the claimant of the goods within, *held* that there was no valid levy on the stock of goods, and even if the claimant of the goods at the time recognized the levy as valid, that did not make it so. *Bickler v. Kendall*, 66 Iowa, 703.

An officer on making a levy upon personalty, must reduce the property to actual possession in so far as may be, and must maintain such custody and control as will give unequivocal notice thereof. This is not done in the case of a portable engine by simply telling the owners that it is attached, leaving it in their hands with full permission to work it as before, and asking a man who lives in the neighborhood to keep an eye on it that it is not removed. *Sams v. Armstrong*, 8 Mo. App. 573.

To make a legal, valid levy upon personal property the officer must do such acts as that but for the protection of the writ he would be liable in trespass. A levy under which the officer does not have actual control of the personal property levied upon, with power of removal, is invalid. *Rix v. Silknitter*, 57 Iowa, 262.

A deputy-sheriff can maintain an attachment of personal property on the farm of an attachment debtor who does not reside upon it, through a receptor who obtains the record-title to the farm, for the purpose of keeping such property there, and the direction and control of the agents of the debtor in charge of the farm for him, one of whom was placed in chief control after the attachment was made. *Dudley v. Lamaille, etc., Bank*, 14 Fed. Repr. 217.

Under the Code of Procedure, §§ 232-6, a debt evidenced by a negotiable secur-

*Kind of Possession.*—The possession while actual need not always be manual; but while the method of obtaining possession may be to a certain extent *secundam subjectam generis*, it must always be the recognized way of obtaining control and dominion over the particular species of property.<sup>1</sup> The doctrine of constructive possession, however, is very sparingly applied, and always restricted by the well-settled principle that a property upon which a levy is to be made must be in view of the officer at the time of making such levy.<sup>2</sup>

It is the duty of the officer not only to execute the writ promptly,<sup>3</sup> and to make a sufficient levy, but to do so consistently with the rights of the defendant and third parties. Hence if in executing the writ he cause the defendant unnecessary vexation or loss,<sup>4</sup> or break open the doors of his house,<sup>5</sup> or obtain possession of the property through any kind of violence or fraud, he will be personally liable. A levy accomplished through fraud or violence is absolutely void.<sup>6</sup> The officer is authorized to execute the writ upon the property of the defendant; and if he levies upon the property of third parties, he becomes a trespasser *ab initio*.<sup>7</sup>

ity owned by and in the hands of an attachment debtor could be attached by serving the attachment upon the maker of the security. While the attachment might be defeated by a subsequent transfer of the security to a *bona-fide* holder for value, payment thereof by the maker to one who to his knowledge did not hold it for value or in good faith, but simply for the benefit of the attachment debtor, was no defence to an action to enforce the lien of the attachment. *Bills v. Nat. Park Bank*, 89 N. Y. 343.

1. *Wade on Attach.* (6th Ed.), 129.

An unripe growing crop is personal property not capable of manual delivery, and an attachment may be levied upon it as such. An attachment upon such property in the possession of the defendant is sufficiently levied by serving upon him copies of the writ and statutory notice; and if the sheriff does nothing further until the crop is ripe, when he gathers it, there is no abandonment of the attachment. *Raventas v. Green*, 57 Cal. 254.

An attachment upon machinery bolted to the freehold is binding if the sheriff obtains full control of it, and he need not detach and remove it either to perfect his levy or to deliver possession on receipt of a forthcoming bond. *Patch v. Wesels*, 46 Mich. 249.

Where an officer levies an attachment upon certain goods subject to a chattel mortgage and takes possession of the goods as against all persons except the mortgagee, and the defendant in the at-

tachment is wholly divested of his possession of the goods, *held* that the levy is sufficient as to the defendant, whether it be sufficient or not as to some third person who claims some interest in the goods, and who may not be wholly and entirely divested of his possession. *Myers v. Cole*, 32 Kan. 138.

A levy can only be made upon a promissory note obtaining actual custody of the instrument. *Anthony v. Wood*, 96 N. Y. 181.

2. *Barrett v. White*, 3 N. H. 213.

3. If he fail to make the levy until the rights of third parties have intervened he will be personally liable for the deficiency. *Wade on Attach.* § 131, and cases cited.

4. To have property seized released on ground of excessive levy, evidence must show the value of the property clear of incumbrances. *Gilman v. Andrews*, 66 Iowa, 116.

A removal of cut grass in an unfit and improper season was held abusive. *Barrett v. White*, 3 N. H. 213. See also *Taylor v. Jones*, 42 N. H. 25; *Peeler v. Stebbins*, 26 Vt. 644.

5. He may, however, break open an inner door; and it is well settled that the mere fact that property is in a safe will not protect it. *Wade on Attach.* § 129.

6. *Wade on Attach.* § 129.

7. Possession is usually relied on as a justification. When property is claimed by a third person under an alleged purchase without delivery, it is held that the officer cannot justify the tak-

In levying upon the property of tenants in common the entire thing passes under control of the officer for the reason that segregation is impossible; but the sale is only of the interest of the defendant.<sup>1</sup> When perishable goods are levied upon, they are sold by order of court and the lien transferred to the purchase-money.<sup>2</sup> The mortgagor of chattels may demand payment of his debt before the mortgaged property is attachable.<sup>3</sup> In the attachment of personal property the officer obtains a special property in the thing attached, and can maintain either trover or trespass.<sup>4</sup> In the attachment of real estate he obtains no such property, with its concomitant right of possession.<sup>5</sup>

**Return.**—The return should state facts and not merely conclusions of law<sup>6</sup> and the following facts should appear: (1) date of

ing on the ground that the alleged sale is fraudulent, without proving the indebtedness of defendant to plaintiff to show that the party he represents is within one of the classes to be protected. *Miller v. Bannister*, 109 Mass. 289, § 3 a.

**Goods Confused.**—When the third party is in possession of property and fails or refuses, through unwillingness or inability, to point out that which he claims as his own, the officer will be justified in making the levy upon the whole. *Robinson v. Holt*, 39 N. H. 557.

In other States the question has turned upon the good faith of the claimant. *Hazleton v. Shockwell*, 30 Me. 237; s. c., 1 Am. Dec. 627; *Weil v. Silverstone*, 6 Bush (Ky.), 628; *Smith v. Sanborn*, 6 Gray (Mass.), 134; *Treat v. Barber*, 7 Iowa, 274; *Wade on Attach.* § 134.

**Indemnity.**—It is proper practice for an officer before levying a writ upon personal property, when the ownership is in dispute, to require indemnity. If the writ be regular on its face and the officer acts in good faith, he will be entitled to reimbursement of all damages he may sustain, should the service prove to be a trespass. The remedy on such bond is equally availing whether it be a statutory bond or a voluntary obligation but, to be held valid, the act to be done must not be in contravention of a statute or against the peace or policy of the law. *Porter v. Stopp*, 6 Colo. 32.

An attaching officer to whom has been given a bond by the defendant, with sureties, conditioned to indemnify and save harmless the officer "of and from all suits, damages, and costs whatsoever" to which the officer "may be liable," as well as the costs which he may "be obliged by law to pay to any person or persons" by reason of said attachment, may, in a suit upon the bond, recover of

the defendant counsel fees reasonably incurred in the defence of a suit occasioned by the attachment; and he may recover in such suit, although in the suit against him judgment was entered against him, by agreement,—there being no evidence that the judgment was collusive or fraudulent as affecting the parties to it, or others collaterally affected, or that it could have been successfully defended. *Lindsey v. Parker*, 8 N. Eastern Repr. (Mass.) 745.

No authority is given by the Code of Civil Procedure to order, on motion of the attaching creditor, a person holding property of one against whom attachment has been issued, to deliver it to the sheriff. An action or proceeding to reduce such property to the possession of the sheriff must be instituted by him in his name or in that of the debtor. *Hall v. Brooks*, 89 N. Y. 33.

1. *Wade on Attach.* § 135.

2. *Wade on Attach.* § 136.

The sheriff may be held for their value on his bond. The liability is not extinguished when the proceeds of the sale are paid over to owner on motion, he having established his right as an intervenor. Nor is the fund chargeable with costs. *Wade on Attach.* § 136.

3. *Wade on Attach.* § 139.

4. *Lathrop v. Blake*, 23 N. H. 46; *Newton v. Adams*, 4 Vt. 437.

5. *Oldham v. Scrivener*, 3 B. Mon. (Ky.) 579.

6. Thus are turn, "served according to law," "served according to statute in such case made and provided," served as "a garnishee," was held fatal because a mere conclusion of law and not a statement of facts from which the conclusion could be drawn by the court. *Oldham v. Scrivener*, 3 B. Mon. (Ky.) 579; *Brisman v. Swither*, 28 N. J. L. 149; *More v. Coats*, 43 Miss. 225. See also *Ezelle v. Simpson*, 42 Miss. 575.

levy;<sup>1</sup> (2) that the levy was made within the officer's bailiwick;<sup>2</sup> (3) a description and value of the property levied on;<sup>3</sup> (4) that it was levied on property of defendant; (5) the manner of making the levy, whether by possession or otherwise; (6) the return should be true, (7) and should show by whom the levy was made; (8) date of return.<sup>3a</sup>

The return, except in the case of fraud or violence, is conclusive upon the defendant and those claiming under him by subsequent purchase.<sup>4</sup>

*Amendment.*—Amendments can only be made on application to court and leave granted. Such an application is addressed to the sound discretion of the court, except when it is made too late;<sup>5</sup> but while the court will, upon application, allow such amendments, it will not compel them to be made.<sup>6</sup>

1. Date of levy is necessary that it may appear that the writ was executed subsequent to its date. *Wade on Attach.* § 141.

2. *Wade on Attach.* § 142. The fact may be informally stated. *Marvine v. Murphy*, 8 Ind. 272.

3. Description of property attached is essential to attachment of real estate. It should be complete in itself and contain such a description of the property as will suffice to establish its identity without the aid of presumption or parol testimony. *Pond v. Baker*, 55 Vt. 400.

The return should be made by the officer who made the levy—he to whom it is directed. If made by an unauthorized third person it will be void. *Hughes v. Martin*, 1 Ark. 386.

Where the sheriff intended to attach land in township 67, but the return on his writ showed an attachment of land in township 68 only, but his entry in the incumbrance-book recited an attachment of land in township 67, *held*, that such entry did not constitute constructive notice to subsequent purchasers and incumbrancers of an attachment of land in township 67. *Collier v. French*, 64 Iowa, 577.

3a. *Wade on Attach.* § 140 *et seq.*

4. *Morse v. Smith*, 47 N. H. 474.

5. *Baxter v. Rice*, 21 Pick. (Mass.) 197; *Miller v. Shackelford*, 4 Dana (Ky.) 264; *Hill v. Cunningham*, 25 Tex. 25; *Meyers v. Prosser*, 40 Mich. 644.

6. *Morris v. Schermerhorn*, 3 Whart. (Pa.) 113; *Wade on Attach.* § 140.

*Examples of Defects Curable or Amendable.*—The attachment being levied by a proper officer, any mistake in directing it is amendable, and therefore neither the process nor the levy is void for the misdirection. *Warren v. Purtell*, 63 Ga. 428.

The return of an officer on an order of

attachment, which attachment is levied upon real estate, should show that the officer left with the occupant, or, if there were no occupant, in a conspicuous place on the real estate, a copy of the order. But an omission so to state in the return is like the lack of an official signature—an amendable defect. *Wilkins v. Tourtelotte*, 28 Kan. 825.

The direction of attachment to sheriffs and constables, when it ought to be directed to constables only, is amendable; and the levy being made by a constable, the proceeding is not void. *Buchanan v. Sterling*, 63 Ga. 227.

A blank date left in the attestation of the clerk to a writ of attachment issued by him may be filled on motion when the writ itself shows the date of its issuance. *Brack v. McMahan*, 61 Tex. 1.

Discrepancy between attachment and levy as to whose possession property was in, immaterial after replevy. *Cooper v. Lockett*, 65 Ga. 702.

A writ of attachment is not invalid for containing a summons for the defendant, and garnishment clause. *Weil v. Kittay*, 40 Ark. 528.

To support a judgment by default, in an action commenced by attachment which is levied on land, if the sheriff's return states that he left notice in writing of the levy at the residence of the defendant (Code, § 3260), it will be presumed that the defendant resided in the county, although the record does not affirmatively show it. *McAbee v. Parker*, 78 Ala. 573.

Where on its face a writ of attachment embraces nothing but the defendant's interest, or his distributive share in the personal assets in an administrator's hands, and the return of service shows no attachment of lands or interest therein, and it was admitted the administrator was

**9. Bonds to Dissolve.**—Bonds to dissolve the attachment are of two kinds—bail bonds and delivery bonds.

**Bail Bonds.**—A bail bond is a bond whereby the obligor or obligors undertake to pay any judgment recovered against the defendant.<sup>1</sup> It is the defendant's right to give this bond at any

not in possession of the land, the writ and service do not bind the defendant's interest in the real estate of the decedent. Roth's App., 794 Pa. St. 186.

1. Drake on Attach. (6th Ed.) § 322, a. The action must be sufficiently described in the bond to identify the bond with the action. Thus if an action is brought against A and B jointly, and process is served only upon A and his property alone attached, and a bond is given by a third person to dissolve the attachment, in which the action is described as against A alone, and the condition is to pay any judgment that may be recovered in that action, and judgment is rendered against A alone, the bond sufficiently identifies the action. Central Mills Co. v. Stewart, 133 Mass. 461.

The trustee and not the beneficiary has the right of action at law. A bond in attachment must run to the sheriff who holds it in trust, and the plaintiff in attachment has no right to sue on it or transfer it until failure of execution, and then only in the sheriff's name, unless the latter has assigned the bond to him. Forrest v. O'Donnell, 42 Mich. 556.

Upon a bond given under the Massachusetts statute of 1877, c. 97, by a person having an interest in money or credits attached by trustee process to dissolve such attachment, with condition to pay to the plaintiff the sum for which the trustee may be charged, if any, within thirty days after final judgment, no action can be maintained if the trustee has been discharged in the trustee process. Porter v. Giles, 129 Mass. 589.

Upon a bond given under the Massachusetts statute of 1877, c. 97, by a person having an interest in money or credits attached by trustee process to dissolve such attachment, with the condition to pay to the plaintiff the sum for which the trustee may be charged, if any, within thirty days after final judgment, no action can be maintained if the trustee has been defaulted, and, although adjudged a trustee, has not been charged for any sum. Cunningham v. Hogan, 136 Mass. 407.

The bond must fulfil the requirements of the statute or it will not be valid as a statutory bond. Edwards v. Pomeroy, 7 Colo. 254.

In proceedings under the statute to se-

cure a release of property from attachment by means of a bond to the plaintiff, a bond in favor of the plaintiff, specifically named as obligee, conditioned that if "said plaintiff recover judgment in the said action," etc., is a compliance with the statute providing for a bond to the plaintiff, conditioned that "if the plaintiff recovers judgment in the action," etc. A plaintiff to whom such a bond had been executed made an assignment, pursuant to statute, for the benefit of creditors. The assignee was substituted as plaintiff in the action, and recovered judgment. *Held*, that the obligors in the bond became liable to the assignee thereon. Slosson v. Ferguson, 31 Minn. 448.

When in an action against the principal and sureties in a note the property of the principal is attached, and he executes a cross-bond with sureties, as provided by sec. 406 Gantt's Digest, such sureties are, as between them and the sureties on the note, primarily liable to the extent of the value of the property attached, for the satisfaction of the debt. Fletcher v. Menkin, 37 Ark. 206.

Complaint in action on undertaking given under Code Civ. Proc. § 540, that alleges that "a judgment was recovered, entered, and docketed," is sufficient although there were two defendants and judgment was rendered against one only. McCutcheon v. Weston, 65 Cal. 37.

An undertaking executed to the sheriff, and agreeing to satisfy any judgment that plaintiff in a certain action might recover, is not a "special promise to answer for the debt, default, or miscarriage of another." Such an undertaking is not void because the consideration not is expressed therein. The release of property from an attachment constitutes a sufficient consideration for the undertaking. Lightle v. Berning, 15 Nev. 389.

**Release of Sureties.**—A mere mistake in the recital of a bond, executed to secure the release of an attachment, whereby the writ of attachment was stated to have issued from the circuit court instead of the district court, will not release the sureties from liability on the bond. Ripley v. Gear, 58 Iowa, 460.

Where, by the terms of an undertaking to prevent the levy of an attachment, the parties thereto undertook to pay, on de-

time before judgment. This right is a privilege accorded by law to, and not a duty enjoined upon, the defendant; and the plaintiff cannot complain if it be not exercised.<sup>1</sup> In taking this bond, the officer is not to be regarded as the plaintiff's agent, so as to render the plaintiff responsible for his neglect of duty.<sup>2</sup> If the statute requires more than one surety, and only one is given, the obligors when sued on the bond cannot object to its validity on that account; for the plurality of sureties is for the benefit of the creditor, and he may dispense with more than one without invalidating the instrument.<sup>3</sup> If there be no statute authorizing it, the court has no power to order new sureties to be given in such a bond, on the ground that those first taken have become insolvent. The law is complied with by the giving of the bond, without reference to the subsequent ability of the sureties to respond to its obligation.<sup>4</sup> By the execution of the bond the action loses the characteristics of a proceeding *in rem*, and proceeds to judgment as an action *in personam*.<sup>5</sup> After the execution of the bond the defendant cannot take exception to the attachment or to the regularity of the proceedings under it.<sup>6</sup> The bond is available

mand, any judgment which the attaching creditor might recover against the attachment debtor, they are not, as between themselves and the attaching creditor, released from liability by reason of the sheriff having attached property prior to the giving of the undertaking and subsequently released it, nor because the judgment in the attachment suit was entered by consent and execution stayed for sixty days by stipulation of the parties. *Preston v. Hood*, 64 Cal. 405.

The defendant in attachment gave bond as provided by § 2094 of the Code, and the attached property was restored to him. On the trial the judgment was for the defendant for costs, the attachment was dissolved, and the sureties on defendant's bond were discharged. Plaintiff excepted to all parts of the judgment except the order discharging the sureties, and he appealed from the judgment generally. The order discharging the sureties was in no way raised or considered on the appeal, but the judgment otherwise was reversed. Upon a new trial plaintiff recovered judgment, and thereupon moved for judgment against the sureties on defendant's bond, and judgment was entered against them. *Held*, that the judgment against the sureties was erroneous, because the order discharging them in the former trial was within the jurisdiction of the court, and was not excepted to, and was a final adjudication as to their liability. Especially in this case was the judgment inequitable, since the sureties, after the order of discharge, had parted with the

security which the defendant had given them as indemnity, and the defendant himself was insolvent. *Barton v. Thomson*, 66 Iowa, 526.

1. Drake on Attach. (6th Ed.) § 313; *Watson v. Kennedy*, 8 La. Ann. 280.

2. Drake on Attach. (6th Ed.) § 314; *Cook v. Boyd*, 16 B. Mon. (Ky.) 556.

3. Drake, § 316, *Ward v. Whitney*, 3 Sanf. (N. Y.) 399; 4 Seld (N. Y.) 442.

4. Drake on Attach. (6th Ed.) § 316 a.

5. Drake on Attach. (6th Ed.) § 15.

So held in Mississippi, Kentucky, Illinois, South Carolina, Georgia, Pennsylvania, Ohio, Arkansas, and Texas. *Ins. Co. v. Whitney*, 70 Pa. St. 248; *Myers v. Smith*, 29 Ohio St. 120; *Hill v. Harding*, 93 Ill. 77; *Morrison v. Alphin*, 23 Ark. 136; *Shirley v. Byrnes*, 34 Tex. 625; *Harper v. Bell*, 2 Bibb. (Ky.) 221; *Phillips v. Hines*, 33 Miss. 163; *Drake on Attach.* (6th Ed.) § 317.

In Louisiana execution of bond renders the defendant liable to a judgment *in personam*, whether he was served with process or not. *Love v. Voorhies*, 13 La. Ann. 549.

6. *Barry v. Foyles*, 1 Pet. (U. S.) 311; *Payne v. Snell*, 3 Mo. 409.

And under the New York Code of Procedure. *Cruyt v. Phillips*, 16 How. Pr. (N. Y.) 120; *Dunn v. Crocker*, 22 Ind. 324.

In Mississippi the execution of the bond releases any technical objections to the preliminary proceedings. *Wharton v. Conger*, 9 Smedes & M. (Miss.) 515.

In South Carolina it is held that defendant having given a bond did not

to the plaintiff only for the satisfaction of such judgment as he may obtain against the defendant. Third parties claiming the attached property can have no recourse upon the bond, there being no privity between them and the obligors.<sup>1</sup>

**Delivery Bonds.**—The delivery bond is usually conditioned for the delivery of the property to the officer, either to satisfy the execution which the plaintiff may obtain in the cause, or when and where the court may direct. Sometimes the alternative is embraced of the delivery of the property or the satisfaction of the judgment recovered in the action.<sup>2</sup> It differs, too, from a bail-bond in that it does not discharge the lien of the attachment, since the very object of the bond is to insure the safe-keeping and faithful return of the property: the continuance of the attachment is required.<sup>3</sup> By executing such bond the defendant is held to have acknowledged notice of the suit, and to be bound to enter an appearance or be liable to be proceeded against as in case of personal service of process.<sup>4</sup> The surety may exonerate himself from liability by delivering the property to the officer at any time before judgment is rendered against him on the bond.<sup>5</sup> The delivery must be actual—that is, the property must be brought,

thereby waive his right to have the attachments discharged as irregularly and improvidently granted. *Bates v. Killian*, 17 S. Car. 553.

1. *Dorr v. Kershaw*, 18 La. 57; *Beal v. Alex*, 1 Rob. (La.) 277; *Drake on Attach.* (6th Ed.) § 322.

2. Such a bond is no part of the record in the cause, and cannot be looked to to explain or contradict the sheriff's return. *Kirksey v. Bates*, 1 Ala. 303.

When the bond calls for the delivery of the property at a specified time no demand is necessary. When the property is to be delivered "when and where the court shall direct," an order of court is necessary to render the obligors liable. *Brotherton v. Thomson*, 11 Mo. 94; *Drake on Attach.* (6th Ed.) § 334.

The undertaking stipulated that in case of the recovery of a judgment by the plaintiff in the attachment suit, the defendant should surrender the property on demand to be applied in payment of the judgment, or that in default thereof he and his sureties would on demand pay to the plaintiff the value of the property not exceeding a specified sum. The only demand alleged in the complaint was a demand on the principal for the amount of the payment, and for the re-delivery of the property. *Held*, that in order to maintain an action against the sureties on the undertaking, a demand upon them and their principal for the payment of the value of the property was also necessary, and that the complaint was fatally de-

fective in failing to allege such a demand. *Pierce v. Whiting*, 63 Cal. 538.

If the bond be given where not authorized by statute, it will be good as a common-law bond where it does not contravene public policy nor violate statute. *Barnes v. Webster*, 16 Mo. 258; *Wright v. Keyes*, 103 Pa. St. 567. Provided it be executed by one thereto authorized by law. *Cummings v. Gray*, 2 Stewart & Porter (Ala.), 341; *Sewall v. Franklin*, 2 Porter (Ala.), 493 and 333.

No set form of words is necessary to render it valid, and mere surplusage will not vitiate it as a statutory bond. *Yocum v. Barnes*, 8 B. Mon. (Ky.) 496; *Purcell v. Steel*, 12 Ill. 93; *Drake on Attach.* (6th Ed.) §§ 327-329.

A bond taken by a sheriff in consideration of the release of attachment is not void for want of conformity to the requirements of the statute, which while prescribing one form does not prohibit another. *Smith v. Fargo*, 57 Cal. 157.

3. *Drake on Attach.* (6th Ed.) § 331, and cases cited.

Hence it cannot be seized under another attachment, or under a junior execution either against the attachment debtor or by a third person claiming it adversely to the debtor and creditor.

4. *Wilkinson v. Patterson*, 6 How. (Miss.) 193; *Drake on Attach.* (6th Ed.) § 333.

5. *Hansford v. Perrin*, 6 B. Mon. (Ky.) 595; *Drake on Attach.* (6th Ed.) § 335.



pointed out, and offered to the officer.<sup>1</sup> In an action on the bond the obligors cannot complain that the penalty in it is not as large as the law required, and they are estopped by the bond from contesting the defendant's title to the property.<sup>2</sup> The measure of recovery is the value of the property secured, not exceeding the amount of the plaintiff's recovery in the attachment suit. If the value be stated in the bond, it will be conclusive on the obligors; if not stated, it must be established by proof.<sup>3</sup>

**10. Simultaneous, Successive, and Fraudulent Attachments.**—Simultaneous levies are held to share equally;<sup>4</sup> and where the judgments in two cases were for different amounts and the attachment was by garnishment, they were nevertheless held to take equal amounts of a sum insufficient to satisfy both judgments in full.<sup>5</sup> In the absence of any statutory provision authorizing subsequent attachment or general creditors to share *pro rata* the proceeds of property held by a prior attachment, priority in time creates a prior lien exclusively for the benefit of the vigilant creditor.<sup>6</sup> Where several attachments are filed on

1. *Pogue v. Joynes*, 7 Ark. 462.

2. *Jones v. R. Co.*, 5 How. (Miss.) 407; *Drake on Attach.* (6th Ed.) § 139; *Case v. Steele*, 34 Kan. 90; *Pierce v. Whiting*, 63 Cal. 538.

3. *Drake on Attach.* (6th Ed.) § 342; *Weed v. Dills*, 34 Mo. 483.

The judgment against sureties on a forthcoming bond, provided for in sec. 406, *Gantt's Digest*, must be for the value of the property as found by the court or jury trying the case, and not the value fixed by the appraisers for taking the bond. *Fletcher v. Menken*, 37 Ark. 206.

The condition of the undertaking given under § 565, Code of Civil Procedure, to release attached property, requires the property to be re-delivered, or its value paid upon a judgment for the plaintiff, and the terms of the undertaking are not complied with by an offer to return or by a return of a portion of the property attached. In an action for breach of such an undertaking, in which it appeared that a portion of the attached property was levied upon and sold by the sheriff under an execution upon the judgment, *held*, that the measure of damages was the full value of the property attached less the amount of the proceeds of the sale. *Metrovich v. Jovovich*, 58 Cal. 341.

If one joint obligor in a delivery bond be compelled to pay the whole amount of the judgment recovered on the bond, he may maintain an action against his co-obligor for contribution. *Labeaume v. Sweeney*, 17 Mo. 153; *Chrisman v. Jones*, 34 Ark. 73.

Where a delivery-bond is given for the release of attached property, and there is judgment against the attachment defendant, and he appeals and gives a *superseas* bond with the same surety as the delivery bond, the surety is liable on both bonds, but his total liability cannot exceed the amount for which his principal is in default upon the judgment rendered against him. Where a delivery bond is given for the release of attached property, it remains in full force until the conditions thereof are performed, and is not annulled by a *superseas* bond given on an appeal taken from the judgment rendered against the attachment defendant. *State v. McGlothlin*, 61 Iowa, 312.

4. *Thurston v. Huntingdon*, 17 N. H. 438.

5. *Davis v. Davis*, 2 Cush. (Mass.) 111; *Wade on Attach.* § 222.

6. *Drake on Attach.* (6th Ed.) § 260.

In some States all attachment creditors have liens of equal dignity, regardless of the order in which they are levied, provided the action is commenced prior to judgment in those suits pending with which the plaintiff seeks to prorate. *Lexington R. Co. v. Ford Plate Glass Co.*, 84 Ind. 516.

Judgment creditors are not allowed to prorate with attachment creditors. *Baum v. Gosline*, 15 Fed. Rep. 220.

On the other hand, it is held that where judgment is obtained at the same terms in an ordinary action as in the attachment suit, both executions are equal as to the inception of the liens. *Pollack v.*

the same day, in the absence of any showing to the contrary they will be presumed to have been filed at the same time;<sup>1</sup> but if priority of the fraction of a day is shown, those first in time will take precedence of the others.<sup>2</sup> "The order of precedence is governed by the validity of the levy. Subsequent valid levies necessarily exclude those prior in point of time but wanting in compliance with the law in essential particulars."<sup>3</sup> The invalidity may arise from an improper levy, or from a failure to perfect the lien acquired by the levy by duly prosecuting the suit to judgment and execution.<sup>4</sup> If an officer suffer his possession of attached property to be lost, it may be attached by another officer, though the latter may be aware of the former attachment having been made, provided he does not know that the prior attachment subsists at the time of the levy. If, however, he has such knowledge, the second attachment is fraudulent and void.<sup>5</sup> After he has made a levy, notice to him that a prior attachment exists will not affect the validity of the levy.<sup>6</sup> A discontinuance of the suit upon which the prior levy is made is an abandonment of the attachment lien and leaves the property subject to the lien of any valid subsequent levy.<sup>7</sup> And this result follows where the property is turned over to the first attaching creditor absolutely, in satisfaction of his demand, where the subsequent attachment lien has been perfected by judgment. Nor is the officer discharged from liability by turning over the property to the first attaching creditor in pursuance of the arrangement made with the debtor.<sup>8</sup> As each attacher has a right to the surplus of the defendant's property after satisfying prior attachments, any act of an attaching creditor after the institution of the suit, altering his writ, or changing or increasing the demand upon which he attached, is regarded as a

Slack, 92 Ill. 221; Hill v. Child, 3 Devereux (N. Car.), 265.

In New Jersey all creditors may come in and share the benefit of an attachment, but one is not bound to file his claim at the time he makes his application. Hanness v. Smith, 21 N. J. L. 495.

In Pennsylvania all foreign attachments levied on the same day become equal liens and share *pro rata*. Yelverton v. Burton, 26 Pa. St. 351.

1. Steffens v. Wanbocker, 17 S. Car. 475.

2. Ginsberg v. Pohl, 35 Md. 505; Tufts v. Carradin, 3 La. Ann. 430.

3. Wade on Attach. § 219; Robinson v. Ensign, 6 Gray (Mass.), 300; Culver v. Rumsey, 6 Ill. App. 598.

4. Drake on Attach. (6th Ed.) § 262.

Thus where there were several successive attachments, and the first attacher, having a claim large enough to absorb all the property attached, by agreement with the defendant took all the property in suit, it was held that as against subsequent

attachers who perfected their lien by judgment and execution he acquired no title to the property. Brandon Iron Co. v. Gleason, 24 Vt. 228; Cole v. Wooster, 2 Conn. 203.

When goods in the custody of the law are to be levied upon, a return of the levy on the writ by the officer in charge of the goods is sufficient. Rogers v. Fairfield, 36 Vt. 641.

When they are in hands of bailee the return should be made by the officer who placed them in his custody, and notice given him. Tomlinson v. Collins, 20 Conn. 364; Drake on Attachm. (6th Ed.) § 269.

5. Bagley v. White, 4 Pick. 395; Young v. Walker, 12 N. H. 502; Morse v. Smith, 47 N. H. 474.

6. Bruce v. Holden, 21 Pick. (Mass.) 187; Drake on Attachm. (6th Ed.) § 271.

7. Wade on Attachm. § 218.

8. Wade on Attachm. § 218; Brandon Iron Co. v. Gleason, 24 Vt. 228.

fraud upon subsequent attachers and dissolves the attachment so far as concerns them.<sup>1</sup>

While mere irregularities in the conduct of the suit cannot be taken advantage of by subsequent attaching creditors,<sup>2</sup> unless they amount to a substantial departure from the legal mode prescribed for enabling a party to obtain the benefit of his attachment, if the demand upon which the attachment is founded is fraudulent, or if in fact there is actually no demand, the case is different. Fraudulent attachments will also be overturned when brought in conflict with the rights of third persons other than attaching creditors.<sup>3</sup> Claims of third parties to property attached on mesne process may be brought to an issue without trying the question of indebtedness between plaintiff and defendant by replevin and the interplea, though the question is also raised by a plea in abatement, motion to dissolve the attachment or quash the writ.<sup>4</sup>

1. Drake on Attachm. (6th Ed.) § 282.

"But where a declaration contains the money counts, how is it to be determined what demands were put in suit and what were afterwards introduced? The rule seems to be that those which the plaintiff owned when the suit was brought, and which were due and payable, and liable to be introduced without amendments, and which were so introduced, and judgment obtained upon them cannot, in the absence of contradictory proof, be regarded as not in suit; for instance, none of the cases decide that an attachment would be dissolved by proving a promissory note under a money count originally contained in the declaration." Drake on Attachments (6th Ed.), § 286; Fairbanks v. Stanley, 18 Me. 296.

Referring the action and all demands between plaintiff and defendant to arbitration will dissolve the attachment, unless it be shown that the reference covered only the demands sued on. Drake on Attachm. (6th Ed.) § 288.

In Massachusetts it was held that if it be shown that no new demand was admitted by the referees, the attachment will not be dissolved. Seeley v. Brown, 14 Pick. (Mass.) 177.

2. Kincaird v. Neal, 3 McCord (S. Car.), 201; Camberford v. Hall, 3 McCord (S. Car.), 345; McBride v. Floyd, 2 Bailey (S. Car.), 209; Van Arsdale v. Krum, 9 Mo. 397; Walker v. Roberts, 4 Richardson, 561; Ball v. Claffin, 5 Pick. (Mass.) 303; In re Griswold, 13 Barb. (N. Y.) 412; Seibert v. Switzer, 35 Ohio St. 661; Freidenberg v. Pierson, 78 Cal. 152; Jacobs v. Hogan, 22 N. Y. S. C. 197.

But when the defendant is not served with process and the officer fails to make

return of the attachment in the manner provided by law (Stone v. Miller, 62 Barb. (N. Y.) 430), or when the defendant makes a confession of judgment anterior to the time the action is triable (Hall v. Walbridge, 2 Aikens (Vt.), 215), or where there is an appearance and trial resulting in a judgment for the plaintiff before the return day of the writ (Murray v. Eldridge, 2 Vt. 388), the irregularity amounts to a departure from the mode provided by law for a party to obtain the benefit of the remedy, and the attachment is dissolved as against subsequent attachers.

"The principle upon which subsequent attaching creditors may except to prior attachments upon the same property and seek to have them dissolved is the same that enables a mortgagee to attack prior liens by attachment upon the property embraced in his mortgage." Wade, § 220; Peters v. Conway, 4 Bush. 566.

Subsequent attaching creditors may have prior liens vacated. Woodmansee v. Rogers, 20 Hun (N. Y.), 285.

3. Drake on Attach. (6th Ed.) § 289.

4. Wade on Attach. § 226.

The rules of procedure by which the claimant may assert his right to property seized on mesne process in an action against another are not uniform in the different States throughout the Union.

Under the New York Code, § 682, any one who acquires an interest in the property or a lien thereon, subsequent to the attachment, may appear to contest the validity of the attachment. Nat. S. & L. Bank v. Mechanics' Nat. Bank, 89 N. Y. 440. See also Bamberger v. Halberg, 78 Ky. 376.

The privilege may be taken advantage

**11. Liability of Officer.**—The officer may render himself and his sureties liable to plaintiff (1) by failure or refusal to levy the writ;<sup>1</sup> (2) by failure to carefully keep the property until final process;<sup>1</sup> (3) by failure to execute the final writ by a sale;<sup>1</sup> (4) by failure to account for the proceeds of the sale.<sup>1</sup> To the defendant he may become liable by (1) persistently levying upon property exempt;<sup>2</sup> (2) by seizure under a writ which is void on its face;<sup>3</sup> (3) by refusal to release property seized, upon tender of a good bail and delivery-bond as prescribed by law;<sup>4</sup> (4) by a false return;<sup>5</sup> (5) by a failure of duty as custodian;<sup>5</sup> (6) abuse of process by levying by unlawful means;<sup>5</sup> (7) failure to return the property to defendant on dismissal of the attachment.<sup>5</sup> Furthermore, he may become liable to third parties by making the levy upon their property,<sup>6</sup> and may become liable

of by any one claiming an interest regardless of whether the interest be legal or equitable, or acquired before or after the attachment. *Printing Co. v. Hart*, 85 N. Y. 500. See also *Bank v. Keeler*, 103 Ill. 425.

In West Virginia any one interested may appear and move to quash the attachment, traverse the affidavit, or go to trial on the issue presented. *Copeland v. Davery*, 10 W. Va. 130.

In South Carolina none but a party to the proceedings can move to set the attachment aside.

The rule of exclusion embraces an assignee by a deed of assignment, he not being a party to the action. *Copeland v. Piedmont Ins. Co.*, 17 S. Car. 116.

1. Wade on Attach. § 227.

Where order of sale is regularly issued by a justice in attachment proceedings, the officer is bound to sell, though title to the property is disputed, and the plaintiff does not give indemnity bond. The order of the court having custody of the property is complete protection to him in making the sale. If attachment proceedings are irregular, but not void, the sheriff must execute the order of sale. In an action on sheriff's bond for failure to execute and return order of sale issued by a justice of the peace in attachment proceedings, the officer returned the order indorsed, "I went on to sell the corn, and it was disputed, and I would not sell without a bond." *Held*, the officer could not require indemnity bond in such case, and he was liable. *State v. Manly*, 11 Lea (Tenn.), 636.

2. An adjudication by a justice, discharging property from an attachment upon the ground that it is exempt, is final and conclusive unless suspended or reversed according to law. A writ of error to remove such proceeding, where no

*supersedeas* bond is given, will not operate to continue the lien of the attachment. *Pellersells v. Allen*, 56 Iowa, 717.

3. As a rule, if the writ be regular on its face, the officer need not concern himself as to the regularity of preliminary proceedings. But where an officer, under a writ of attachment against A, levied upon goods in the possession of B, in an action by B against the officer to recover the value of the property, the officer attempted to justify the taking, on the ground that the plaintiff's title was derived from the defendant in the writ, by a transfer which was fraudulent and void as to creditors. It was held that it was incumbent upon the officer to prove, not only the writ and the indebtedness of the plaintiff's vendor to the person in whose favor the writ was issued, but the preliminary proceedings authorizing the issuing of it. *Howard v. Mansfield*, 31 Minn. 337.

4. When a sheriff on receipt of a forthcoming bond has surrendered possession of attached property, he is not bound to secure the attachment debtor from interference with his possession by third parties. *Rhead v. Hounson*, 46 Mich. 249.

5. Wade on Attach. (1st Ed.) § 227.

6. Where an officer levies an attachment upon the goods of a person not the defendant, in good faith, believing the property to belong to the defendant in attachment, he is not liable in exemplary, but in actual damages only. *Heidenheimer v. Lides*, 2 Northwest. Rep. 87.

An officer about to levy an attachment upon personal property is bound by actual notice of a prior mortgage upon such property, whether he receives such notice before or after the writ is placed in his hands. *Stewart v. Smith*, 60 Iowa, 275.

to any one injured by failure to make return of writ.<sup>1</sup> The officer is entitled to his necessary expenses.<sup>2</sup>

**12. Property and Rights Affected.**—The attachment creates a lien upon all the property of the defendant, real or personal, within the territorial jurisdiction of the court, not exempt by law, or so much thereof as is sufficient to satisfy the debt and costs.<sup>3</sup> The lien is binding upon the interests of the heirs or personal representatives of the debtor in the property attached,<sup>4</sup> unless the action be one which abates on the death of the defendant.<sup>5</sup> It takes precedence of the rights of subsequent purchasers at a voluntary or involuntary sale, or of the lien created by statute in favor of judgment and execution creditors, in all cases where the judgment is rendered or the execution issued subsequent to the attachment.<sup>6</sup> It takes effect only upon such interest as the debtor has in the property at the time of the levy,<sup>7</sup> it does not *per se* affect the title at all,<sup>8</sup> and extends only to the amount due at the time the writ is issued, with judgment and costs.<sup>9</sup> Judgment in favor of defendant terminates the lien. If plaintiff appeal, it may be perpetuated until judgment is rendered in the court of last resort.<sup>10</sup> The priority of an attachment as between attachment creditors, or an attaching creditor, and a judgment creditor is determined by the levy of the writ.<sup>11</sup> The right of attachment creditor to attack prior fraudulent conveyances and assignments

1. An officer who fails to complete an attachment of property by returning the writ upon which the attachment is made cannot, after judgment against him, in an action by the owner of the attached property, maintain an action against the obligors in a bond, given to the officer by the attaching creditor, to indemnify the officer against liability by reason of the attachment. *Wiggins v. Atkins*, 136 Mass. 292.

2. Sheriff levied upon goods under attachments and kept the same. Mortgagees sued for recovery, and by consent property was sold and proceeds put at interest, and afterwards the mortgage was sustained as prior lien. *Held*, that sheriff was entitled to all expenses since institution of this suit, but not for disbursements under the attachments. *Ex parte Ferguson*, 22 S. Car. 591.

3. Wade on Attach. § 25.

Expenses of taking care of goods under attachment are not, it seems, a lien on the property after the goods have been released by a *supersedeas* bond and the case is ended; and it is doubtful if such expenses are taxable as costs. *Savings Bank v. Ottawa C. Judge*, 54 Mich. 305.

4. *Frelson v. Green*, 19 Ark. 376; *Grosvenor v. Golo*, 9 Mass. 209.

5. *Crocker v. Radcliffe*, 3 Brev. (S. Car) 23.

6. *Shacklett v. Glyde's App.*, 14 Pa. St. 326; *Moore v. Holt*, 10 Gratt. (Va.) 284; *Reeves v. Johnson*, 12 N. J. L. 29.

7. It cuts off all subsequently acquired rights. Where the debtor marries subsequently to the levy upon real estate it is held that in case the husband dies before judgment the attachment takes precedence of the widow's claim of dower. *Brown v. Williams*, 31 Me. 403.

8. It merely places it in a position to be subjected to the plaintiff's judgment, provided he obtain one in preference to any other demand. *Snell v. Allen*, 1 Swan. 208; *Warner v. Everett*, 7 B. Mon. (Ky.) 262.

The owner still holds the title and may transfer it subject to the lien, and the officer may be the purchaser. *Arnold v. Brown*, 24 Pick. (Mass.) 89.

9. A subsequently maturing demand, even though it be an instalment of the same debt, and evidenced by the same instrument of writing, for which the plaintiff may obtain judgment, will not extend the lien beyond the amount originally sued for. *Syracuse Bank v. Colville*, 19 How. Pr. (N. Y.) 385; *Zeisenhager v. Doe*, 1 Ind. 296.

10. *Harrison v. Trader*, 29 Ark.; *Suydam v. Haggeford*, 23 Pick. (Mass.) 465.

11. Wade, § 32. The first attachment creditor may enjoin a creditor under a

is undoubted.<sup>1</sup> It is a necessary deduction from the doctrine that the levy of an attachment does not affect the title, that in order for the attachment to have the effect of satisfying the debt it must be shown that the property levied upon was so applied.<sup>2</sup> Mere stay of execution after levy of attachment, whether such stay be granted under existing laws or be awarded by subsequent act of legislation, does not destroy the force of the lien.<sup>3</sup> The legislature cannot withdraw the property when over attached from execution, but it may limit the duration of the lien.<sup>4</sup>

When the receptor claims the property as his own, he may, notwithstanding the admissions of the receipt to the contrary, assert his title in defence of an action by the officer for possession of the property after judgment.<sup>5</sup>

**13. Dissolution.**—There are two general grounds of dissolution and two distinct methods of procedure; one is by traverse of the facts alleged in the affidavit as grounds of attachment, and the other by motion to quash or dissolve because of irregularities in procedure. These are generally apparent on the face of the papers, and include the insufficiency of the facts stated and all other matters going to the jurisdiction.<sup>6</sup> Where the attachment is dissolved on account of irregularities on the face of the papers, the objections may be purely technical; but where the attachment is met by a denial of the truth of the allegations in plaintiff's affidavit, an issue is tendered on the merits of the attachment; and if the alleged grounds upon which the attachment proceedings are based are found untrue, the property seized is released from the lien irrespective of the question of indebtedness.<sup>7</sup>

subsequent attachment but prior judgment. *Moore v. Holt*, 10 Gratt. (Va.) 284.

1. "The most obvious method of reaching the fraud would seem to be to levy upon the property as that of the debtor. If the fraudulent transfer of interest has been accompanied by a change of possession, colorable or real, the party in possession may be garnisheed, and if his answer is adverse to the claim of the plaintiff issue may be taken thereon and such question may be determined in the trial of that issue, except in States where law and equity are administered in separate tribunals. Where the statute provides no means for attaching real estate except where it is recorded in the name of the defendant, a bill in the nature of a creditor's bill for discovery and relief is the proper course." *Wade on Attach.* § 33.

2. *Maxwell v. Stewart*, 22 Wall. 77. Where money attached in the hands of a bank is lost through the failure of the bank, the loss is the defendant's. *McBride v. Farmers' Bank of Salem*, 28 Barb. (N. Y.) 476; *Wade on Attach.* § 34.

3. *Hannahs v. Felt*, 15 Iowa, 141; *Einsworth v. King*, 5 Mo. 477.

4. *Wade on Attach.* § 35.

5. *Adams v. Fox*, 17 Vt. 361; *Barron v. Cobleigh*, 11 N. H. 557; *Webster v. Harper*, 7 N. H. 594; *Lathrop v. Cook*, 14 Me. 414; *Wade on Attach.* § 209.

But in Alabama it has been held that the holder of a mortgage lien on personalty may lose his security by becoming bailee for the officer after seizure under the writ. *Read v. Sprague*, 34 Ala. 101.

6. In some of the States the issues are raised by plea in abatement. *Blum v. Massey*, 3 Stew. (Ala.) 226.

In others by a plea in the nature of a plea in abatement. *R. S. Mo.* (1845) pp. 139, 140.

In New York by a *supersedeas*, and elsewhere by motion, petition, or traverse.

An application to vacate an attachment, when made to the court at special term, need not be made before the judge who granted the writ. *Ruppert v. Haug*, 87 N. Y. 141.

7. *Shulenberg v. Farwell*, 84 Ill. 400; *Ramscher v. McElhenny*, 11 Mo. App. 434.

The defendant is the proper party to interfere by a plea in abatement.<sup>1</sup> The burden of proof rests on the plaintiff,<sup>2</sup> and the judgment is final on that branch of the case which involves the validity of the attachment.<sup>3</sup>

An attachment may be dissolved without traversing the affidavit —(1) for irregularities apparent on the face of the proceedings; (2) for irregularities to be shown on the motion to dissolve.<sup>4</sup>

Unless some statute authorizes the appearance of others than parties, a motion to set aside an attachment for irregularity should be made by the defendant; and when made by a third person, will not be entertained.<sup>5</sup> Whether the affidavit be sufficient or not is a matter which will appear upon the face of the papers; objections upon this ground are generally raised by motion. The motion will be treated substantially as a demurrer to pleading, and the court will not go behind the face of the paper itself unless the objection embraces some feature connected with the execution or filing of the affidavit which is not apparent on the face.<sup>6</sup> Defects and insufficiency in the bond are more generally amendable than in the affidavit; dissolution of the attachment by reason of such defects is only decreed as a penalty for not giving sufficient security within the time fixed by the court.<sup>7</sup> When it is necessary to insert in the writ matters con-

1. Wade on Attach. § 278; McCabe v. Parker, 78 Ala. 573.

In New York a judgment creditor, and in West Virginia any one interested may interpose. Bank v. Alberger, 55 How. Pr. (N. Y.) 481; Capehart v. Doulmy, 10 W. Va. 130.

2. Wade on Attach. § 281.

When the facts set up in the affidavit for an attachment are denied upon a motion to dissolve it, the plaintiff in attachment has the burden of protecting his lien by proofs outside of the affidavit. Genesee Sav. Bank v. Mich. Barge Co., 52 Mich. 164.

3. Wade on Attach. § 282; Sublett v. Wood, 76 Va. 318; Hawkins v. Albright, 70 Ill. 87; Hilton v. Ross, 9 Neb. 406.

While the court cannot inquire into the validity or justice of the cause of action upon the hearing of a motion to dissolve and vacate an order of attachment, yet it may inquire into the alleged existence of the grounds of attachment set forth in the affidavit; and if such inquiry incidentally refers to some of the allegations of the petition, this does not compel the court to refuse consideration of the motion or suspend the decision until the final trial of the cause. A dissolution of the attachment does not defeat the action. Bundrem v. Denn, 25 Kans. 430.

A defendant to the action may take the

proper steps to vacate an attachment issued against him upon allegations of a fraudulent transfer of his property, although not the owner of such property at the time the attachment was levied thereon. Claussen v. Esterling, 19 S. Car. 509.

4. Wade on Attach. § 284.

In New York the question of the sufficiency of the affidavit is raised by special motion; in Texas and Alabama, by a plea in abatement; in South Carolina, by a motion to quash the writ. Wade on Attach. § 285.

5. Wade on Attach. § 286; Copeland v. Piedmont Ins. Co., 17 S. Car. 116; May v. Courtney, 47 Ala. 185.

But it has been held that one appearing as *amicus curiæ* may move to quash. Bank v. Andrews, 8 Port. (Ala.) 404.

The ground on which a junior attaching creditor may procure the vacation of a senior attachment is that it operates a fraud on him. Henderson v. Thornton, 37 Miss. 448.

He cannot take advantage of mere irregularities in the prior attachment, though constituting good grounds for objection by the defendant, who may waive anything which is no injustice to other creditors. Jones v. Moody, 59 Miss. 327; Ward v. Howard, 12 Ohio St. 158.

6. Wade on Attach. § 287.

7. Wade on Attach. § 288; Gapen v.

tained in the affidavit, it is important that there should be no material variance.<sup>1</sup> The writ must follow the affidavit with reasonable promptness.<sup>2</sup> As the filing of the bond and affidavit authorize the writ, their destruction by fire or other means before the writ is returnable does not work a dissolution of the attachment.<sup>3</sup> The attachment may be dissolved on demurrer sustained to the declaration, by reason of the omission of certain jurisdictional allegations. If the complaint is defective merely, and can be made good by amendment, the plaintiff should be allowed to amend before the discussion of the motion to dissolve; but if the complaint is incurable, the attachment must be dissolved.<sup>4</sup> Inasmuch as the condition upon which the attachment is granted is that the plaintiff shall obtain judgment against the defendant, it necessarily follows that the attachment is dissolved by the death

Stevenson, 18 Kan. 140; Beardslee v. Morgan, 29 Mo. 471; McCook v. Willis, 28 La. Ann. 448.

1. Thus, where the firm name of a partnership appeared in the affidavit, and the names of the individuals in the writ, and neither paper furnished any explanation as to who composed the firm, the variance was held to be fatal. Bennett v. Zabriskie, 2 N. Mex. 7.

2. Wade on Attach. 289.

Eleven days has been held unreasonably long. Forster v. Illinski, 3 Ill. App. 345.

3. Wheeler v. Slavens, 13 Sm. & M. (Miss.) 623.

4. Wade on Attach. §§ 289, 295; Third Nat. Bank v. Teal, 4 Hughes C. C. 572; Hathaway v. Davis, 33 Cal. 161.

The effect of the amendment upon intervenors remains to be considered, and upon this question a fair result of all the authorities is, that an amendment changing the form of the action merely, or substituting or adding a new count for the same, will not dissolve an attachment. Loughton v. Lord, 29 N. H. 257; Austin v. Town of Burlington, 34 Vt. 512; Hill v. Smith, 34 Vt. 541; Wright v. Brownell, 3 Vt. 440; Ball v. Clafin, 5 Pick. (Mass.) 304; Wood v. Denny, 7 Gray (Mass.), 541; Seeley v. Brown, 14 Pick. (Mass.) 177; Page v. Jewett, 46 N. H. 443; Miller v. Clark, 8 Pick. (Mass.) 413; Mendes v. Freiters, 16 Nev. 388.

An attachment to enforce a lien for wages, is lost by an amendment changing the Christian name of the plaintiff from "Edward" to "Edmund." Flood v. Randall, 72 Me. 439.

The amendment of a writ against "William Robinson," by inserting the

words "otherwise called William J. Robinson," does not vacate an attachment of personal property so as to give a mortgage of the property to a third person, made after the attachment and before the amendment, priority over the attachment, of which the mortgagee was ignorant. Diettrich v. Wolffsohn, 136 Mass. 335.

Where an action of attachment is brought in the name of a firm, and in the papers as originally filed the name of one of the partners is omitted, which omission is subsequently cured by amendment, the omission is not such a defect as vitiates the levy or can be taken advantage of by subsequent attaching creditors, or postpones the lien of the levy to that of such creditors. Henderson v. Stetter, 31 Kan. 56. See Stout v. Folger, 34 Ia. 71; Ward v. Howard, 12 Ohio St. 158.

An attachment was issued against the property of a non-resident to recover freight claimed to be due the plaintiffs, as owners of a steamship. The defendant gave bond with sureties, as required by the Code, and the attachment was dissolved. At the trial of the short note case, on motion of the plaintiffs and against the objection of the defendant, sixteen other persons, part owners of the steamer, were made co-plaintiffs, and upon issues joined in the case as thus amended, judgment was recovered against the defendant. In an action on the bond to recover the amount of this judgment, it was held, that the amendment which made new parties plaintiffs, and changed the nature and character of the claim itself, thus depriving the defendant of the benefit of defences which he otherwise might have taken, released the sureties on the bond. Furness v. Read, 63 Md. 1.



of the defendant,<sup>1</sup> but not by his bankruptcy.<sup>2</sup> If, when an attachment has been obtained against the defendant on the ground of non-residence, it be shown that he is within the jurisdiction of the court and can be served with process, the attachment is forthwith dissolved.<sup>3</sup> When a motion to dissolve is in contemplation, it is essential that notice be given the plaintiff. The notice must not only state the time such motion is to be made, but also the particular grounds upon which a dissolution is asked.<sup>4</sup>

By dissolution the lien of an attachment is at an end, and the defendant has a right to have the property restored to him free of the expense of care during custody.<sup>5</sup> But in case the title has been transferred, the officer is not liable to the purchaser for failure to return the property unless he has been notified of the transfer.<sup>6</sup> Dissolution does not affect the action, when the demand is due, and there has been a personal service or general appearance on part of defendant. In such case the action proceeds as though begun by summons.<sup>7</sup>

**14. Notice by Publication.**—The subject presents itself in a two-fold aspect: (1) As to the sufficiency of the notice as the foundation of further proceedings in the cause; (2) As to the effect of failing to publish notice, or of publishing insufficient or invalid notice, upon the validity of the subsequent proceedings in the suit, when afterwards called in question *inter alios*.

The sufficiency of the notice to authorize judgment against the defendant depends upon its conformity to the statute, both in its terms and in the manner of its publication.<sup>8</sup> When, therefore,

1. Wade on Attach. § 291.

In Tennessee it is held that under the statutes of that State an attachment once levied does not abate by the death of the defendant. *Boyd v. Roberts*, 10 Heisk. (Tenn.) 474. See *Lord v. Allen*, 34 Iowa, 281; *Thacher v. Bancroft*, 15 Abb. Pr. 243; *Kennedy v. Raguet*, 1 Bay (S. Car.), 484; *More v. Thayer*, 10 Barb. (N. Y.) 258; *Holman v. Fisher*, 49 Miss. 472; *White v. Heavner*, 7 W. Va. 324. *Contra*, *Kenrick v. Huff*, 71 Mo. 570; *Loubat v. Kipp*, 9 Fla. 60; *Collins v. Duffy*, 7 La. Ann. 39; *Green v. Shaver*, 3 Humph. (Tenn.) 139; *Crocker v. Radcliffe*, 3 Brev. (S. Car.) 23; *Redlow v. Cressey*, 65 Me. 128; *Hensley v. Morgan*, 47 Cal. 522; *Dwyer v. Benedict*, 12 R. I. 459.

The death of the defendant after final judgment does not affect the attachment except as it offsets judgment liens.

In Pennsylvania it was held that in foreign attachment the plaintiff was required to give bond for the benefit of defendant's personal representatives, to repay, in case they came within a year and a day, and disproved the debt. *Fitch v. Ross*, 4 S. & R. (Pa.) 557. See *Bowman v. Stark*, 6 N. H. 459.

2. Wade on Attach. § 291.

3. *Leonard v. Stout*, 36 N. J. L. 370.

4. Wade on Attach. § 292; *Freeborn v. Glazier*, 10 Cal. 337; *Bank v. Alberger*, 83 N. Y. 274.

5. *Murphy v. Crew*, 38 Ga. 139; *O'Connor v. Blake*, 29 Cal. 312; *McReady v. Rogers*, 1 Neb. 124; *Jackman v. Anderson*, 33 Ark. 414.

6. *State v. Fitzpatrick*, 64 Mo. 185.

7. *Bundrem v. Denn*, 25 Kan. 435; *Hills v. Moore*, 40 Mich. 210.

8. *Drake on Attach.* (6th Ed.) §§ 438, 439.

As to the terms, there should be a substantial if not a strict compliance. When the advertisement was required to state "the names of the parties, the day, month, and year when and from what court, and for what sum the writ issued," and it omitted to state the day, month, and year when the writ issued, it was held insufficient. *Ford v. Wilson*, Tappan (Ohio), 235.

In Ohio no description of the attached property is necessary. *Core v. Oil Co.*, 40 Ohio St. 636.

A request on the part of a defendant, against whom an attachment has been is-

the legislature fix the term of a court for a time anterior to that at which it was previously established, and the full time required by the governing statute for publication of notice is thereby abridged, no proceedings in the attachment suit, depending for their validity upon the correct publication of notice can be taken.<sup>1</sup> All defects in the notice, or in its publication, are waived by the defendant's appearance and traverse of the allegations of the affidavit.<sup>2</sup>

Whether in the event of insufficient publication or none at all the judgment rendered in the proceedings against the defendant can be impeached collaterally, on the ground that publication is essential to jurisdiction, and in its absence all the proceedings are *coram non judice*, is a question about which there is a great contrariety of opinion. The more general opinion would appear to be that the proceedings of the court are not so invalidated thereby as to make a sale under them void.<sup>3</sup>

sued, to suspend legal proceedings, does not excuse a failure to serve the summons or to commence publication within the time prescribed by the Code of Civil Procedure (§ 638), and does not operate as an estoppel, precluding the defendant from setting up want of publication or service. *Mojarrietta v. Saenz*, 80 N. Y. 547.

A plaintiff after having obtained one attachment and order of publication, may abandon them and take out a new attachment and order, provided this is not done for the purpose of vexation. *Mojarrieta v. Saenz*, 80 N. Y. 547.

If at the time of the institution of a suit by attachment the law require an order of publication to be made by the court, a subsequent statute requiring it to be made by the sheriff, but having in it no words indicating an intention in the legislature to give it a retroactive effect, will not invalidate an order made by the court. *Parsons v. Paine*, 26 Ark. 124.

Where publication was required to be made for two months it was held not sufficient to publish it for eight weeks. *Hunt v. Wickliffe*, 2 Pet. (U. S.) 201.

A writ of attachment may issue and be served in an action against a non-resident or absconding defendant before the publication of the summons; but unless the proper publication is thereafter made the attachment proceedings will be void. A delay of a year or more in making such publication is a sufficient ground for setting aside the attachment. *Cummings v. Tabor*, 61 Wis. 185.

The transcript stated that the constable returned the writ of attachment as follows: "March 29, 1879. Return, etc." "Whereupon I appointed Friday, the 18th of

April, 1879, to hear and determine the cause." *Held*, that it sufficiently appeared that the justice, upon the return of the attachment, appointed a day for the hearing of the cause. The justice certified in the transcript that on the day of trial "it appeared in evidence that notices had been posted according to law."

*Held*, it sufficiently appeared that the plaintiff had proved to the satisfaction of the justice that he had advertised the attachment in the manner prescribed by the statute. *Wright v. Moran*, 43 N. J. L. 49.

An order for an attachment may be general, and need not contain all the recitals prescribed for the notice by publication. *Howard v. Jenkins*, 5 Lea (Tenn.), 176.

1. *Saffaracus v. Bennett*, 6 Howard (Miss.) 277; *Colville v. Bank of Steubenville*, 2 Ohio, 229.

2. *Williams v. Stewart*, 3 Wis. 773.

3. *Zeizenhagen v. Doe*, 1 Ind. 296; *Paine v. Moreland*, 15 Ohio, 435. See *Field v. Dortch*, 34 Ark. 359; *Beech v. Abbott*, 6 Vt. 586; *Matter of Clark*, 3 Denio, 167; *Hardin v. Lee*, 51 Mo. 241; *Johnson v. Gage*, 57 Mo. 160; *Greg v. Thompson*, 17 Iowa. 107; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308. *Contra*, *Clark v. Bryan*, 16 Md. 171; *Haywood v. Collins*, 60 Ill. 328; *Westcott v. Archer*, 12 Neb. 345; *Miller v. Babcock*, 29 Mich. 526; *Anderson v. Coburn*, 27 Wis. 558.

Where the law required the clerk issuing an order of publication to designate the newspaper in which the order should be published, it was held that the omission of the clerk to make such designation would not authorize the collateral im-

Where no process is served on the defendant, nor property attached, nor garnishee charged, nor appearance entered, a judgment against the defendant, based on a publication of the pendency of the suit, will be void, and may be impeached collaterally or otherwise, and forms no bar to a recovery sought in opposition to it, nor any foundation for a title claimed under it,<sup>1</sup> notwithstanding the statute law of the State expressly authorizes a judgment to be rendered against a defendant under such circumstances.<sup>2</sup>

**ATTEMPT.** (See also ASSAULT; INTENT.)—An effort or endeavor; an act tending towards the accomplishment of a purpose which exceeds a mere intent or design and falls short of an execution of it.<sup>3</sup> The word is usually used in the phrase "attempt to commit

peachment of the attachment suit. *Kane v. McCown*, 55 Mo. 181.

1. *Bruce v. Cloutman*, 45 N. H. 37; *Cooper v. Smith*, 25 Iowa, 269; *Smith v. McCutcheon*, 38 Mo. 415.

2. *Pennoyer v. Neff*, 95 U. S. 714.

Service by publication, or in any other authorized form, is sufficient to inform a non-resident of the object of proceedings taken, where property is once brought under the control of the court by seizure or some equivalent act; but where the suit is brought to determine his personal rights and obligations, that is, where it is merely *in personam*, such service upon him is ineffectual for any purpose. *Pennoyer v. Neff*, 95 U. S. 714.

3. To "attempt" is to make an effort to effect some object; to make a trial or experiment; to endeavor; to use exertion for some purpose. *Com. v. McDonald*, 5 Cush. (Mass.) 365.

In an action for libel the alleged libel was an imputation on the plaintiff of an "attempt" to destroy religious institutions; the court, *Hosmer, C. J.*, said: "By the attempt to do an act I understand an effort or endeavor to effect its accomplishment. This denotes something beyond the infidelity of an individual or the declaration of his opinions, unless they are intentionally made the vehicle of effectuating some object;" and *held*, that evidence in justification of the libel was rightly rejected which consisted only of expressions of opinion. *Stowe v. Converse*, 4 Conn. 17, 37.

The word "attempt" in its largest signification means a trial or physical effort to do a particular thing. *Lewis v. State*, 35 Ala. 380, 387, citing 1 Bish. Cr. Law, § 511. "When we say that a man attempted to do a thing we mean that he intended to do specifically it, and proceeded a certain way in the doing of it. The intent in the mind covers the thing in full; the act covers it only in part."

"Attempt" is expressive rather of a moving toward doing the thing, than of the purpose itself. An "attempt" is an overt act itself. *State v. Martin*, 3 Dev. L. (N. Car.) 329. See *Uhl v. Com.*, 6 Gratt. (Va.) 706; *State v. Davis*, 1 Ired. L. (N. C.) 125; *Morton v. Shopper*, 3 Carr. & P., 373; *Stephens v. Myers*, 4 Car. & P. 349; *Rex v. Higgins*, 2 East, 12.

The word "attempt" means to "make an effort, or endeavor, or an attack." An attempt implies more than an intention formed. Some step towards consummation must be taken before the intention becomes an "attempt." *Gray v. State*, 63 Ala. 66, 73.

There can be no "attempt" without an act, and an indictment for attempting to commit a felony in which no act is laid is too vague and uncertain to be supported. *Randolph v. Com.*, 6 S. & R. (Pa.) 398.

**Attempt and Intent (Distinguished).**—Indeed it seems impossible to doubt that the only distinction between an intent and an attempt to do a thing is that the former implies the purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution. *Prince v. State*, 35 Ala. 367. See *Johnson v. State*, 14 Ga. 59, in which case it was held that in crimes which require force as an element in their commission there is no substantial difference between an assault with intent and an assault with attempt to perpetrate the offence. The word "attempt" signifies both the act and the intent with which the act is done. *Cumming v. State*, 49 Miss. 685, 701; *Bullock v. State*, 13 Ala. 416; *Hart v. State*, 38 Tex. 382.

In *State v. Prince*, 35 Ala. 367, it was held that under an indictment for rape a verdict finding the prisoner "guilty of an assault with attempt to commit a rape" is equivalent in substance and legal effect to a verdict of guilty of an assault with

a crime or a felony."<sup>1</sup> For a full discussion of this subject of "attempt" see Bishop on Criminal Law.<sup>2</sup>

**ATTENDANCE.**—The act of attending; being present at.<sup>3</sup>

intent to commit a rape, inasmuch as an attempt to do a thing necessarily involves an intent to accomplish what is attempted; but in the same State it has been held that an allegation in an indictment that an assault was made with an attempt to kill and murder is not sufficient to authorize a conviction, as an attempt to murder is not equivalent to an intent to murder, which is the language of the statute under which the indictment was framed. *State v. Marshall*, 14 Ala. 411; the court, Dargan, J., saying: "It must be admitted by all that there is a marked distinction between the words 'attempt' and 'intent.' The former conveys the idea of a physical effort to do or accomplish an act; the latter, the quality of the mind with which an act was done. It is not descriptive of the physical act, but describes the will that induced or governed the act. It cannot then be said that the words 'with an attempt' are equivalent to the words 'with intent.'" See *State v. Martin*, 3 Dev. Law (N. Car.) 329.

**Attempt and Preparation (Distinguished).**—"Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement toward the commission after the preparations are made;" therefore it was held that upon a trial on an indictment for an attempt to contract an incestuous marriage something more must be shown than mere intention to contract such a marriage. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offence but for the intervention of circumstances independent of the will of the party. *People v. Murray*, 14 Cal. 159.

1. What is an attempt to commit a crime? It is an endeavor to accomplish it, but falling short of execution of the ultimate design. In many cases it is difficult to determine the difference between preparations and attempts to commit crime. One may intend to commit a crime and do many things towards its commission, and yet repent of his purpose. The law gives to such a one a *locus penitentiae*. In such cases all that has been done would amount only to

preparation. *Griffin v. State*, 26 Ga. 493, 506.

Attempt imports an act which if consummated would accomplish the object in view. A statutory punishment for an attempt to poison is not incurred by an unexecuted determination to poison, though preparation is made for the purpose. *State v. Clarissa*, 11 Ala. 57.

But the failure to accomplish the crime must arise from the intention of the party charged himself. See *McDermott v. People*, 5 Park C. C. (N. Y.) 104, where the court said (page 105): "We have then the fixed design of the defendant to burn this barn, and overt acts toward the commission of the offence, and a failure in the perpetration of it. The offence then is fully made out, for the intent to do the wrongful act coupled with the overt acts towards its commission constitutes the attempt spoken of by the statute. Where the individual indicted proceeded no farther toward an actual discharge or shooting than to raise and point a pistol uncocked at the party threatened, it was held not to be "an attempt" to discharge a pistol. *Mulligan v. People*, 5 Park C. C. (N. Y.) 105. See *Reg. v. Lewis*, 9 Car. & Payne, 523; *Reg. v. St. George*, 9 Car. & Payne, 483. But see *Stephens v. Myers*, 4 Car. & Payne, 349.

Every attempt to commit an offence is a misdemeanor unless it is otherwise specially provided for. Attempts to commit murder and some other crimes are felonies. *Steph. Crim. Dig.* 29; 1 *Russell on Crimes*, 188.

An offer to bribe is an "attempt" to bribe, and punishable as such. *Com. v. Harris*, 1 Pa. L. Gaz. 455.

The filing by the mortgagor of a voluntary petition in bankruptcy is an "attempt" to sell within the meaning of the usual clause in chattel mortgages. *Moore v. Young*, 4 Biss. (U. S.) 128.

2. 1 *Bishop's Criminal Law*, c. 51, §§ 723-772 (7th Ed.).

**Attempt to Enter.**—Used in treaties in regard to blockaded ports. Persisting in an intention to enter a blockaded port after warning is not "attempting" to enter it. The intention must be accompanied by some overt act. *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch S. C. (U. S.) 185; *Calhoun v. Ins. Co. Penn.*, 1 Binn. (Pa.) 293.

3. The words "each day's attend-

**ATTESTATION.** (See also ACKNOWLEDGMENT; AUTHENTICATION.)

1. **Definition.**—The act of witnessing an instrument in writing at the request of the party making the same, and subscribing it as witness.<sup>1</sup>

2. **Deeds.**—Attestation of deeds was not, at common law, requisite to their validity.<sup>2</sup>

Most States have some statutory provision for the attestation of deeds.<sup>3</sup>

ance," in the provision of the constitution of Wisconsin (art. 4, § 21) relating to compensation of members of the legislature, does not mean for the time only that the members are actually engaged in the business of legislation, but covers the whole period of time during which the legislature are in session. *State ex rel. Boyd v. Hastings*, 15 Wis. 337. See *Ex parte Pickett*, 24 Ala. 95.

But where an act for the incorporation of religious societies provided that no person should be entitled to vote at any election held by any society incorporated under the act "until he shall have been a 'stated attendant' on divine worship in the said congregation or society," etc., it was held that "stated attendance" must be interpreted to mean the personal presence of the voter steadily at the religious meetings of the society; and that the regular attendance of the wife or other member of the family is not sufficient. *People v. Tuthill*, 31 N. Y. 550.

Where a statute directs that the magistrate taking a deposition shall annex thereto a statement as to whether the opposite party or his attorney "attended" at the taking of the deposition, it was held, "By the word 'attended,' as here used, the legislature undoubtedly meant something more than mere personal presence. It signifies that the party was present and participated in the examination of the witnesses." And, therefore, where it appears from the deposition that a portion of the testimony favorable to the party taking it "was objected to," it will be presumed that the objection was made by the adverse party, it being certified by the officer that such party "attended" at the taking of the deposition. *Miller v. McDonald*, 13 Wis. 673.

**Attending Physician.**—A physician not engaged in practice, who is present as a friend or neighbor when a wounded man is brought into his own house, and who, at the request of another neighbor, examines the wounds and administers an opiate, is not necessarily an "attending physician" within the conditions of a life-insurance policy on that subject. At the

most, it is a question for the jury. *Gibson v. American Mut. Life Ins. Co.*, 37 N. Y. 580.

The words "medical attendance" are not restricted in their meaning to the professional attendance of a physician, but may include nursing and watching. *Scott v. Winneshiek County*, 52 Iowa, 579.

1. Bouvier Law Dict.

2. 2 Black. Com. 307; 3 Wash. R. P. 572; *Dole v. Thurlow*, 12 Metc. (Mass.) 157, 166; *Craig v. Pinson*, Cheves (S. Car.), 272; *Thacher v. Phinney*, 7 Allen (Mass.), 146, 149.

3. Indiana, Iowa, Kansas, and New Mexico appear to be the only States that have no statutory provisions whatever. In Indiana (R. S. 1881, § 2919, *sed vide* § 2933) and New Mexico (C. L. 1884, § 2752) acknowledgment is requisite to the validity of the deed as a conveyance. In Kansas it is not, and provision is made for the proof for purposes of recording of an unacknowledged deed by any competent testimony (C. L. 1881, Conveyances, § 12.) The law is the same in Iowa (Code, § 1959).

In Conn. (R. S. 1875, tit. 18, ch. 6, part 1, § 5), Fla. (Dig. 1881, ch. 32, § 1), Ga. (Code 1882, § 2690 and Sess. Laws 1885, ch. 84), La. (Rev. Civ. Code, § 2234), Mich. (How. Stats. 1882, § 5658), Minn. (G. S. 1878, ch. 40, § 7), Neb. (C. S. 1881, Pt. 1, ch. 73, § 1), N. H. (G. L. 1878, ch. 135, § 3), Ohio (R. S. 188, § 4106), Ore. (G. L. 1876, ch. 6, § 10), Utah (C. L. 1876, § 617), Wash. (Code 1881, § 2312), Wis. (R. S. 1878, § 2216), and Wy. (Laws 1882, ch. 1, § 8), attestation is a formal requisite to the valid execution of a deed.

In Ariz. (C. L. 1877, ch. 42, § 10), Cal. (Civ. Code, 1883, § 1198), Colo. (G. S. 1883, § 213), Dak. (Civ. Code, § 648), Del. (R. C. 1874, ch. 83, § 14), Ky. (G. S. 1873, ch. 24, § 15), Me. (R. S. 1883, ch. 73, § 18), Mass. (P. S. 1882, ch. 120, § 12), Miss. (Code 1880, § 1209), Mo. (R. S. ch. 20, §§ 682, 691), N. J. (R. S. 1877, Conveyances, § 4), Nev. (Comp. Laws 1873, §§ 233-246), N. Y. (Banks Bros. R. S., 7th Ed., pt. 2, ch. 1, tit. 2, § 137),

**3. Unacknowledged Deed—Proof for Record.**—Proof by attesting witnesses is in most States necessary in order to entitle an unacknowledged deed to be recorded.<sup>1</sup>

**4. Wills.**—Attestation is everywhere, by statute, made a formal requisite to the execution of a will or codicil.<sup>2</sup>

Tex. (R. S. 1879, §§ 554, 4314), Tenn. (Code 1884, § 2811), Vt. (R. L. 188, § 1945), Va. (Code 1873, ch. 117, § 2), and W. Va. (R. S. 1879, ch. 65 §2), attestation is necessary in the case of an unacknowledged deed, in order that the deed may be proved for record, but it is not a necessary formality to the execution of the deed, and is, therefore, immaterial as between the parties themselves, and as to subsequent purchasers or attaching creditors with notice. *Stimson American Statute Law*, § 1566.

In Ala. (Code 1876, §§ 2145, 2146), Ark. (Dig. 1884, § 650), Tex. (R. S. 1879, § 554), attestation is necessary to the validity of the deed as between the parties only when not acknowledged. *Stimson Am. Stat. Law*, § 1566.

In R. I. (P. S. 1882, tit. xxii., ch. 173, § 8), Pa. (Brightley Pur. Dig. 1885, Deeds, etc., §§ 20, 24, 25), Ill. (R. S. 1885, ch. 30, § 24), N. Car. (Code 1883, §§ 1245-9), and Md. (Sess. Laws 1882, ch. 77), provision is made for the proof of an unacknowledged deed, for the purpose of recording it, by one or more witnesses, where the grantor has died or removed from the State. But no witnesses are necessary, even in this case, since the deed may, in the absence of attestation, be proved by proving the grantor's signature.

The number of witnesses required in Ark., Conn., Fla., Ga., Ky., La., Mich., Minn., N. H., Ohio, Ore., Pa., S. Car., Tenn., Tex., Vt., Va., W. Va., Wash., and Wis. is two. In Colo., Ida., Ill., Iowa, Me., Md., Mass., N. J., N. Y., Neb., Utah, and Wy., one. In La., three, if grantor is blind. In Ala., in case of an unacknowledged deed, one witness is required, unless the party cannot write, when there must be two. Ala. (Code 1876, § 2145).

1. See preceding note.

Proof by witnesses is not allowed, in case the grantor is living, unless he refuse or fail to acknowledge the deed, in Me. (R. S. 1883, ch. 73, §§ 18, 20), Mass. (P. S., ch. 120, § 9), Mich. (How. Stats. § 5666), Minn. (G. S. 1878, ch. 40, § 13), Neb. (C. S. 1881, pt. 1, ch. 73, § 7), N. H. (G. L. 1878, ch. 135, § 10), R. I. (P. S., ch. 173, § 6), Vt. (R. L. 1880, § 1939), and Wis. (R. S. 1878, § 2228). *Stimson Am. Stat. Law*, § 1591, A.

Generally, but a single attesting witness need be present to prove deed, even when the statute requires more than one witness to the deed. *Stimson Am. Stat. Law*, § 1593, A.

This is the case in Ala. (Code 1876, § 2159), Colo. (G. S. 1883, § 213), Mass. (P. S. ch. 120, § 9), N. J. (R. S. 1877, Conveyances, 4), N. Y. (Banks Bros. R. S., 17th Ed., pt. 2, ch. 3, § 12), Wis. (R. S. 1878, § 2228), and in many other States and Territories. *Stimson Am. Stat. Law*, § 1593, A (1).

In Tenn. (Code 1884, § 2850) and W. Va. (Sess. Laws 1883, ch. 13), all the witnesses must be present, if living, and within the State. (Tenn. Code, 1884, § 2862). *Stimson Am. Stat. Law*, § 1593, A (2).

In Vt. (R. L. 1880, § 1940) it seems the officer making proof may, in his discretion, require presence and testimony of all the witnesses. *Stimson Am. Stat. Law*, § 1593, A (3).

For details of facts that subscribing witness must prove, see *Stimson Am. Stat. Law*, § 1593, B.

When subscribing witnesses are all dead, the deed may commonly be proved by proving the signature of the grantor and that of at least one witness. *Stimson Am. St. Law*, § 1595.

2. At common law, attestation of a will was not necessary. *Williams' Ex'rs and Adm'rs*, p. 81.

The statute of frauds (29 Car. II. ch. 3, § 5), requiring wills devising realty to be by writing, signed by the testator and attested and subscribed in the presence of the deviser by three or four credible witnesses, was the first statutory provision in England making attestation necessary. Until the Wills Act. 1 Vict. c. 26, § 9, in England a will of personalty need not be attested. *Williams' Ex'rs and Adm'rs*, p. 81. That statute required that no will (whether of realty or personalty, or both) should be valid unless the signature of the testator "shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator."

**Number of Witnesses.**—In Conn. (Laws 1885, ch. 110, § 131), Fla. (Dig. 1881, ch. 200, § 1), Ga. (Code 1882, § 2414), Me.

**5. Wills—Attestation in Presence of Testator.**—The attestation of wills is ordinarily required to take place in the presence of the testator.<sup>1</sup>

(R. S. 1883, ch. 74, § 1), Md. (R. C. art. 49, § 4), Mass. (P. S. ch. 127, § 1), N. H. (G. L. 1878, ch. 193, § 6), N. M. (C. L. 1884, § 1380), S. Car. (G. S. 1882, § 1854), and Vt. (R. L. 1880, § 2042), three witnesses to a will are required. Stimson Am. Stat. Law, § 2644.

In England, and in Ala. (Code 1876, § 2294), Ark. (Dig. 1884, § 6492), Ariz. (C. L. 1877, § 1493), Cal. (Code, § 1276), Colo. (G. S. 1883, § 3482), Dak. (Civ. Code, § 691), Del. (R. C. 1874, ch. 84, § 3), Ill. (R. S. 1880, ch. 148, § 2), Ind. (R. S. 1881, § 2576), Iowa (Code 1880, § 2326), Kan. (R. C. 1881, ch. 117, § 2), Ky. (G. S. 1873, ch. 113, § 5), Mich. (How. Stat. 1882, § 5789), Minn. (G. S. 1878, ch. 47, § 5), Miss. Code 1880, § 1262), Mo. (1 R. S. § 3962), Neb. (C. S. 1881, pt. 1, ch. 23, § 127), Nev. (C. L. 1873, § 814), N. J. (R. S. 1877, Wills, § 22), N. Y. (Banks Bros. R. S. 7th Ed. pt. 2, ch. 6, tit. 1, art. 3, § 40), N. Car. (Code 1883, § 2136), Ohio (R. S. 1880, § 5916), Ore. (G. L. 1872, ch. 64, § 4), Pa. (Pur. Br. Dig. 1872, Wills, § 6), Tenn. (Code 1884, § 3003), Tex. (R. S. 1879, § 4859), Utah (Sess. L. 1884, ch. 44, tit. 1, ch. 1, § 6), Va. (Code 1873, ch. 118, § 4), Wash. (Code 1881, § 1319), W. Va. (Am. Code, 1884, ch. 77, § 3), Wis. (R. S. 1878, § 2282), Wy. (Laws 1882, ch. 104, § 4), two witnesses are required, Stimson Am. Stat. Law, § 2644.

In Pa. the witnesses need not sign the will.

1. This is the case in England, and in Ala., Ariz., Cal., Conn., Del., Dak., Fla., Ga., Ill., Ind., Kan., Ky., Me., Md., Mass., Mich., Minn., Miss., Mo., Mon., Neb., Nev., N. H., N. J., N. Y., N. Car., Ohio, Ore., R. I., S. Car., Tenn., Tex., Utah, Vt., Va., Wash., W. Va., Wis. Stimson Am. Stat. Law, § 2644.

In Conn., S. Car., Utah, Vt., Va., and W. Va. the witnesses must also sign in each other's presence. Stimson Am. Stat. Law, § 2644.

And in Ark., Cal., Dak., Mon., N. Y., Utah, at the testator's request.

Attestation in the presence of the testator means within his view. It is not necessary that the testator actually see the witnesses sign, but they must sign in a place where he can see them sign if he desires to. Hill v. Barge, 12 Ala. 687; Robinson v. King, 6 Ga. 539; Lamb v. Girtman, 26 Ga. 625; s. c., 33 Ga. 289; Howard's Will; 5 T. B. Mon. (Ky.) 199; Dewey v. Dewey, 1 Metc. (Mass.) 349;

Wright v. Lewis, 5 Rich. (S. Car.) 212; Ray v. Hill, 3 Strobb. (S. Car.) 297; Meurer's Will, 44 Wis. 392; Spoonmore v. Cables, 66 Mo. 579; Matter of Downie's Will, 42 Wis. 66; McElfresh v. Guard, 32 Ind. 408; Bradford v. Vinton, 26 N. W. R. (Mich.) 401; Clerk v. Ward, 4 Bro. P. C. 71.

The witnesses need not be in the same room, or even the same house, with the testator, if within his view. Watson v. Pipes, 32 Miss. 451; Neil v. Neil, 1 Leigh (Va.), 6; in the Goods of Trimmell, 11 Jur. N. S. 248; Casson v. Dade, 1 Bro. C. C. 99.

Where testator is *in extremis* and unable to move, witnesses must sign in a place where he can see them without changing his position. Reed v. Roberts, 26 Ga. 294; Jones v. Tuck, 3 Jones (N. Car.), L. 202; Neil v. Neil, 1 Leigh (Va.), 6; Watson v. Pipes, 32 Miss. 451; Tribe v. Tribe, 1 Rob. Ecc. R. 775.

Attestation in an adjoining room is not in the presence of the testatrix, although she could have seen it by changing her position from that occupied by her when she signed, unless she actually did so change her position, especially when it did not appear that testatrix knew at the time that the witnesses were signing. In the Goods of Killick, 3 S. & T. 578; Doe v. Manifold, 1 M. & S. 294; Mandeville v. Parker, 31 N. J. Eq. 242, and note.

Where the attestation was made in an adjoining room within the view of the testatrix, but she was unaware that they were signing, *held*, that the attestation was not in her presence. Jenner v. Finch, L. R. 5 P. D. 106.

In case the testator is blind, attestation takes place in his presence if made where he can be sensible of the presence of the witnesses through his other senses, and where, but for his blindness, he could see them sign. Riggs v. Riggs, 135 Mass. 238; Piercys Goods, 1 Rob. Ecc. 278; Reed v. Roberts, 26 Ga. 294.

So where an attestation was made in an adjoining room within the testator's hearing, and where he could have seen them if he had been able to turn his head (which by reason of an injury he was unable to do), he being conscious of what was being done, it was held that the attestation was in his presence. Riggs v. Riggs, 135 Mass. 238.

Attestation in the same room is not *Per*

6. **Subscription by Attesting Witness.**—Any mark made by the witness upon the attested document with the intention of indicating his attestation is a valid subscription of it.<sup>1</sup>

7. **Proof of Attested Writings.**—In general attested writings cannot be proven without producing in court at least one of the attesting witnesses. If none of the witnesses can be produced in court, the regular mode of proof is by proving the handwriting of at least one witness.<sup>2</sup>

attestation in the presence of the testator when taking place out of sight of the testator, although the intervening object was only a door-shutter. *Brooks v. Duffell*, 23 Ga. 441.

Attestation is not made in the presence of the testator if the testator is insensible at the time, although the witnesses sign in a place within his view. *Right v. Cater*, 1 Dougl. 241.

1. In the Goods of Duggins, 39 L. J. P. 24.

But the witness must himself make the subscription. In the Goods of Duggins, 39 L. J. P. 24; *Pryor v. Pryor*, 29 L. J. P. 114.

Where witness at testator's request subscribed her husband's name instead of her own, *held*, that the subscribing witness did not intend the subscription to represent her own signature, and that, therefore, the attestation was invalid. *Pryor v. Pryor*, 29 L. J. P. 114.

So the witness may sign a name not his own, if with the intention of indicating his own attestation of the instrument. In the goods of Duggins, 39 L. J. P. 24.

But where a servant subscribed, "servant to Mr. Sperling," without any name, the subscription was held sufficient. In the Goods of Sperling, 3 Sw. & Tr. 272.

A witness may subscribe by a mark, although able to write. *In re Amiss*, 2 Rob. R. 116; *Doe v. Davies*, 9 Q. B. 648.

The initials of witness constitute a sufficient subscription. *In re Christian*, 2 Rob. Eccl. R. 110.

Subscription by witness need not be at the end of the will. *Roberts v. Phillips*, 4 El. & Bl. 450.

It is a sufficient subscription where the witness, being unable to write, holds the top of the pen, while a third person writes witness's name upon the will. *Lewis v. Lewis*, 2 Sw. & Tr. 153; In the Goods of Frith, 27 L. J. P. 6; *Harrison v. Elvin*, 3 Q. B. 117; *Bell v. Hughes*, 5 L. R. Ir. 407.

Name of attesting witness who can not write may be written by a third person at his request and in his presence.

*Lord v. Lord*, 58 N. H. 7; *Derry's Estate*, Myrick's Prob. (Cal.) 202.

A subscription is valid, although the witness did not know he was witnessing until he had partly written his name. *Re Phillips*, 98 N. Y. 267.

Witness need not know the nature or contents of the instrument he subscribes. He attests the signature of the testator. *Canada's Appeal*, 47 Conn. 450.

Where a witness starts to subscribe his name, but by reason of weakness is unable, after writing his Christian name, to complete his signature, *held* not a sufficient subscription. In the Goods of Maddock, L. R. 3 P. D. 169.

An acknowledgment by a witness of a previous subscription by correcting an error therein (*Hindmarsh v. Charlton*, 8 H. of L. C. 160), or by retracing his signature with a dry pen (In the Goods of Maddock, L. R. 3 P. D. 169), is not a valid subscription or a valid substitute therefor.

2. The rule applies to attested documents not required by law to be attested. *Higgs v. Dixon*, 2 Stark. 180; *Heckert v. Haine*, 6 Binn. (Pa.) 16; *Wishart v. Downey*, 15 S. & R. (Pa.) 77.

An admission of execution does not dispense with proof by subscribing witnesses. *Abbot v. Plumbe*, 1 Dougl. 216; *Fox v. Reil*, 3 Johns. (N. Y.) 477. See also *Henry v. Bishop*, 2 Wend. (N. Y.) 575. But such proof may be waived by solemn agreement pending the cause. *Laing v. Kaine*, 2 B. & P. 85.

The production of a subscribing witness is not required where he is dead. 1 Greenl. Ev. § 572; *Barnes v. Trompowsky*, 7 T. R. 265; *Fox v. Reil*, 3 Johns. (N. Y.) 477. Or cannot be found after diligent search. 1 Greenl. Ev. § 572; *Coghlan v. Williamson*, 1 Dougl. 93; *Anon.*, 12 Mod. 607; *Jackson v. Burton*, 11 Johns. (N. Y.) 64; *Mills v. Twist*, 8 Johns. (N. Y.) 121. Or is out of the jurisdiction of the court. 1 Greenl. Ev. § 572; *Holmes v. Pontin*, *cf.* *Peake's Cas.* 99; *Banks v. Farquharson*, 1 Dick. 167; *Sluby v. Champlin*, 4 Johns. (N. Y.) 461; *Homer v. Wallis*, 11 Mass. 309; *Cooke v. Woodrow*, 5 Cranch, 13. Or is.



## ATTESTATION—ATTORNEY AND CLIENT.

**ATTORNEY AND CLIENT.** (For Professional Communications, see PRIVILEGED COMMUNICATIONS. See also CHAMPERTY; PROSECUTING ATTORNEYS; IMPLIED TRUSTS.)

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| <ol style="list-style-type: none"> <li>1. <i>Definition.</i></li> <li>2. <i>Admission.</i></li> <li>3. <i>Summary Jurisdiction of Courts over Attorneys.</i></li> <li>4. <i>Privileges and Disabilities.</i></li> <li>5. <i>Liability to Third Parties.</i></li> <li>6. <i>Retainer and Appearance.</i></li> <li>7. <i>Powers Implied by Retainer.</i></li> </ol> | <ol style="list-style-type: none"> <li>8. <i>Duration of Authority.</i></li> <li>9. <i>Duties and Dealings.</i></li> <li>10. <i>Liability to Client.</i></li> <li>11. <i>Liability of Client to Attorney.</i></li> <li>12. <i>Express Contract.</i></li> <li>13. <i>Liens.</i></li> </ol> <p style="text-align: center;"><i>Charging Lien.</i></p> |
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**1. Definition.**—"An attorney is one that is set in the turn, state, or place of another."<sup>1</sup> The term includes any substitute or agent who is appointed to act for another.<sup>2</sup> An attorney in fact is a private or special agent appointed for some particular or definite purpose, not connected with a proceeding at law, by a formal

insane. 1 Greenl. Ev. § 572; Currie v. Child, 3 Campb. 283. (But the fact that the witness is dangerously sick is not sufficient to admit proof of handwriting. Harrison v. Blades, 3 Campb. 457.) Or has subsequently become infamous. 1 Greenl. Ev. § 572; Jones v. Mason, 2 Stra. 833. Or he has, without the agency of the party, become interested in the suit or otherwise incapacitated. 1 Greenl. Ev. § 572; Goss v. Tracy, 1 P. Wms. 289; Godfrey v. Norris, 1 Stra. 34; Hamilton v. Marsden, 6 Binn. 45; Saunders v. Ferrill, 1 Ired. (N. Car.) 97.

In the above cases the instrument may be proved by proving the handwriting of at least one witness. 1 Greenl. Ev. § 575; Kay v. Brookman, 3 C. & P. 555; Mott v. Doughty, 1 Johns. Cas. (N. Y.) 230; Sluby v. Champlin, 4 Johns. (N. Y.) 461; Douglas v. Sanderson, 1 Dall. 116; Cooke v. Woodrow, 5 Cranch, 13.

Where the instrument has been lost or destroyed, the attesting witnesses need not be called. 1 Greenl. Ev. § 572; Keeling v. Ball, Peake Evid. Append. 78. And proof of handwriting is of course unnecessary.

Attesting witnesses need not be called in case of official bonds, nor need the witness's handwriting be proved. 1 Greenl. Ev. § 573; Kello v. Maget, 1 Dev. & Bat. (N. Car.) 414.

So where the instrument is not directly in issue, the witnesses need not be called or their handwriting proved. Commonwealth v. Castles, 9 Gray (Mass.), 121; 1 Greenl. Ev. § 573 (b); Curtis v. Belknap, 21 Vt. 433.

Execution need not be proved by calling the subscribing witnesses or proving their handwriting when the adverse

party produces the instrument when called upon, and claims an interest under it in reference to the subject-matter of the suit. Pearce v. Hooper, 3 Tau. 60; Rearden v. Minter, 5 M. & G. 204.

The testimony of a subscribing witness may be rebutted by other evidence or testimony. Whitaker v. Salisbury, 15 Pick. (Mass.) 534; Duckwall v. Weaver, 2 Ohio, 260; Smith v. Asbell, 2 Strobb. (S. Car.) 141; Reinhart v. Miller, 22 Ga. 402.

Where none of the subscribing witnesses are available, and no proof of their handwriting can be had, evidence of the handwriting of the party executing the instrument is competent. Jones v. Blount, 1 Hayw. (N. Car.) 238; Clark v. Sanderson, 3 Binn. (Pa.) 192; Duncan v. Beard, 2 Nott. & Mc. (S. Car.) 400. Inability to produce any of the witnesses must be shown before proof of handwriting can be resorted to. Jackson v. Burton, 11 Johns. (N. Y.) 64.

Where an attested instrument is lost or destroyed, its execution must be proved by the subscribing witnesses. Gillies v. Smither, 2 Star. R. 528; Keeling v. Ball, Peake Evid. Append. lxxviii.

Unless the party offering the instrument is unable to ascertain who they were. Keeling v. Ball, Peake Evid. Append. lxxviii.

Where it is necessary to resort to proof of handwriting, the handwriting of but a single witness need generally be proven. 1 Greenl. Evid. § 575.

1. The word "attorney" is derived from the old French *attourner*, signifying substitute. Co. Litt. 51, b.

2. Com. Dig. Attorney; Weeks on Attorneys, § 28.

authority, called a letter or power of attorney, in which is expressed the particular act or acts for which he is appointed.<sup>1</sup> An attorney-at law is an officer in a court of justice who is employed by a party in a cause to manage the same for him.<sup>2</sup>

2. **Admission.**—"The office of attorney-at-law is public so far as concerns the necessity of license of some kind for its exercise, and the duty imposed upon the attorney of subserving the interests of public justice in the mode pointed out in his oath of admission."<sup>3</sup>

1. Story on Agency, ch. 3, § 25; Co. Litt. 51, b, 52, b; Weeks on Atty. § 28. See POWER OF ATTORNEY.

2. Bouv. Dict. 206.

In France appearance by attorney was first allowed by letters patent under Philip de Bel, A.D. 1240. In civil actions such appearance has been allowed in England from the time of the earliest records of the courts of that country. They are mentioned in Glanville, Bracton, Fleta, and Britton, and a case turning on a party's right to appear by attorney is reported. Y. B. 17 Edw. III. p. 8, case 23.

In criminal actions, however, only such legal questions as the accused himself could suggest were counsel permitted to argue for him. Not until after the revolution of 1688 was a full defence allowed on trials for treason, and the privilege was not extended to persons accused of other felonies until 1836. The apology for its denial was the fiction that the judge was counsel for the prisoner. Cooley's Const. Limitations (3d Ed.), 332; 4 Macaulay's Hist. of Eng. ch. 21; Weeks on Attorneys, § 184.

"It is a universal principle of American constitutional law that a prisoner shall be allowed counsel. If unable to employ counsel, the court will assign some one to defend him." Weeks on Attorneys, § 184.

Counsel so assigned cannot refuse to act. *Vise v. Hamilton Co.*, 19 Ill. 18; Sharswood's Legal Ethics, 91, 92.

In the absence of statutory provision, an attorney assigned by the court to defend one charged with a crime cannot recover from the county for his services. Cooley's Const. Lim. (3d Ed.) 334; *Case v. Shawnee Co.*, 4 Kan. 511; *People v. Albany Co.*, 23 How. Pr. (N. Y.) 22; *Wayne Co. v. Waller*, 90 Pa. St. 99; *Wright v. State*, 3 Heisk. (Tenn.) 256; *Elam v. Johnson*, 48 Ga. 348; *Rowe v. Yuba Co.*, 17 Cal. 61; *Kelley v. Andrew Co.*, 43 Mo. 338; *Weistod v. Winnebago Co.*, 20 Wis. 418; *Reg. v. Fogarty*, 5 Cox C. C. 161; *Jones v. Coza*, 16 La. Ann. 428; *Gordon v. Dearborn Co.*, 52 Ind. 322.

In England the term attorney is given

to those officers who practise in courts of common law; solicitors, to those who practise in courts of equity; proctors, to those who practise in courts of admiralty and ecclesiastical courts. 1 Bouv. Dict. 206.

3. In England the admission of attorneys is governed by 6 & 7 Vict. ch. 73. Barristers are called to the bar by the benchers of their respective inns. The applicant must be twenty-one years old, and have kept twelve terms. Weeks on Attorneys, § 15 *et seq.*

It is requisite to the admission of attorneys or counsellors to practise in the Supreme Court of the United States that they shall have been such for three years past in the supreme courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair. Rules of Supreme Court of United States, Rule 2, originally promulgated Feb. 5, 1790; 1 Cranch (U. S.), xvi; 1 Wheat. (U. S.) xiii; Pet. (U. S.) vi. Revised and corrected, Dec. Term, 1858. 21 How. (U. S.) 5; *Ex parte Tillinghast*, 4 Pet. (U. S.) 108.

The requisites differ somewhat in the different States, but in all the applicant must be twenty-one years of age, pass an examination either in open court or before a committee appointed by the court, be of fair moral character, and take an oath to support the Constitution of the United States and of the State. Weeks on Attorneys, § 67 *et seq.*

The oath in Pennsylvania reads: "You do swear or affirm that you will support the Constitution of the United States and the Constitution of this Commonwealth, and that you will behave yourself in the office of attorney within this court with all good fidelity as well to the court as to the client, and that you will use no falsehood nor delay any person's cause for lucre or malice." 1 Brightly's Purdons Dig. c. 189. Under the last clause the attorney violates his oath when he presses for an unjust judgment or the conviction of an innocent man. *Rush v. Cavanaugh*, 2 Pa. 189.

A similar provision exists in the New

Due admission to practice, according to the *lex fori*, is essential to enable a person to practise either as attorney, solicitor, or counsel in a particular court."<sup>1</sup> The admission is held to be a judicial and not a ministerial act, and is therefore not the subject of a writ of *mandamus*.<sup>2</sup> A citizen of one State is not entitled as of right to admission to the bar of another State.<sup>3</sup> Nor can the legislature take the power of examination and passing upon the qualifications of an applicant away from the court and confer it upon non-residents by passing an act allowing such admission.<sup>4</sup> Proceedings taken by practitioners whose qualifications are defective are not themselves void on that account.<sup>5</sup>

**3. Summary Jurisdiction of Courts over Attorneys.**—The summary jurisdiction of courts over attorneys is sufficiently accounted for by the necessary and inherent control vested in them over the conduct of their own officers,<sup>6</sup> and was expressly recognized by the statutes of Westminster, 1 & 4 Hen. IV. ch. 18.<sup>7</sup> The jurisdiction exists "whenever the employment is so connected with their professional character as to afford a presumption that their character formed the ground of their employment."<sup>8</sup> The ground of the inter-

mitting an attorney to practice, should it appear that the order was obtained by means of fraudulent artifices or concealment; and it seems (though held unnecessary to decide) that in ascertaining whether fraud has been practised by an application for admission, the court would hear evidence to show that the order of admission was secured by fraudulent concealment of facts affecting the moral character of the person admitted. *Case of Lowenthal*, 61 Cal. 122.

York Code of Civil Procedure of Jan. 2, 1850, § 511; s. c., 3 Am. Law Journal (N. S.) 451.

An attorney is not a civil, governmental, or public officer; he is not the holder of an office of public trust within the meaning of the Constitution. He is simply an officer of the court. *Ex parte Garland*, 4 Wall. (U. S.) 332.

An attorney or counsellor does not hold an office, but exercises a privilege or franchise; as attorneys or counsellors perform no duties on behalf of the government, they execute no public trust. *Seymour v. Ellison*, 20 Johns. (N. Y.) 492.

Hence a statute providing that "every person elected or appointed to any office of trust, civil or military," shall take a particular form of oath does not apply to attorneys. *Ex parte Faulkner*, 1 W. Va. 269; *Ingersoll v. Howard*, 1 Heisk. (Tenn.) 247; *Champion v. State*, 3 Colw. (Tenn.) 114. See also, in this connection, *Cummings v. Mo*, 4 Wall. (U. S.) 277.

The order of this court admitting an attorney to practice is in the nature of a judgment that he possessed the requisite qualifications when the order was made and entered. It follows that the judgment, while it continues in force, is an adjudication determinative of the fact that the defendant was of "good moral character" when he was admitted by this court, and an attack upon his previous character cannot be made the basis of an order for his removal. Nevertheless, this court will be justified, of its own motion in setting aside the order ad-

mitting an attorney to practice, should it appear that the order was obtained by means of fraudulent artifices or concealment; and it seems (though held unnecessary to decide) that in ascertaining whether fraud has been practised by an application for admission, the court would hear evidence to show that the order of admission was secured by fraudulent concealment of facts affecting the moral character of the person admitted. *Case of Lowenthal*, 61 Cal. 122.

If an attorney is admitted under a misapprehension of facts, the court will rectify the error by striking his name from the roll. *Brown's Case*, 8 Pitts. L. J. (Pa.) 1; *People v. Betts*, 4 Pac. Rep. 42.

As to public duties of attorneys, see *Waters v. Whittemore*, 22 Barb. (N. Y.) 505; *Austin's Case*, 5 Rawle (Pa.), 191; *Sharswood's Leg. Eth.*

1. Weeks on Attys. § 43, and cases cited.

2. *In re Brackenridge*, 1 S. & R. (Pa.) 187.

3. *In re Henry v. Snyder*, 40 N. Y. 560; *Bradwell v. State*, 16 Wall. (U. S.) 130.

4. *In re Moseness*, 39 Wis. 509.

5. *Peterson v. Parriott*, 4 W. Va. 42; *Reader v. Bloom*, 3 Bing. (Eng.) 9.

6. No rule or statute is necessary to authorize its exercise. *In re Goodrich*, 79 Ill. 148; *Penobscot Bar v. Kemble*, 64 Me. 140.

7. Weeks on Attorneys, § 80; *Bradley v. Fisher*, 13 Wall. (U. S.) 323.

8. Weeks on Attorneys, §§ 77, 78; *In re Aitken*, 4 Barn. & A. 47; *In re Cardross*, 5 M. & W. 547.

ference is the dignity of the court offended in the conduct of its officer, and its object to punish summarily by attachment his misconduct or disobedience, and to reinstate the injured party in his rights. This jurisdiction extends to compelling an attorney to perform his undertakings;<sup>2</sup> to staying proceedings begun without authority, on motion, and compelling attorney to pay the costs;<sup>3</sup> to compelling them to observe the strictest good faith in their relations with their clients;<sup>4</sup> to preventing them from disclosing privileged communications;<sup>5</sup> to delivering up documents;<sup>6</sup> to payment of money and costs;<sup>7</sup> to answering matters of affidavits;<sup>8</sup> to contempts of court;<sup>9</sup> and to striking them from the

1. Weeks on Attorneys, § 78.

2. Weeks on Attorneys, § 78; Burrell v. Jones, 3 Barn. & A. 47; *In re* Swan, 10 Jur. 75; 15 L. J. Q. B. 402; *Ex parte* Hughes, 5 Barn. & A. 482; Iverson v. Corington, 1 Barn. & C. 160. See also *In the Matter of H—*, an attorney, 87 N. Y. 251.

3. Weeks on Attorneys, § 79.

On application to stay proceedings on ground that plaintiff's attorney is going on with the action contrary to the direction of his client, the plaintiff should be made a party to the rule. *Thatcher v. D'Aguilar*, 11 Ex. 436.

4. Weeks on Attorneys, § 77.

The question of negligence will not generally be tried on motion, but only questions of good faith and integrity. *Sharp v. Hawker*, 3 Bing. N. C. 66; *In re Aitken*, 4 Barn. & A. 47; *Cohen v. Wright*, 22 Cal. 315.

Proceedings on motion for money collected by an attorney will not bar an action on the case for negligence. *Coopwood v. Baldwin*, 25 Miss. 129.

But proceeding by action for money collected is usually a waiver of the right to proceed by attachment. *Bohenan v. Peterson*, 9 Wend. (N. Y.) 503.

In the absence of fraud or misconduct, lapse of time, for instance seven years, after settlement of transactions between attorney and client will operate as a bar to any summary interference. *Ex parte* Shipden, 6 Dowl. & R. 338.

One who was an attorney remains liable to the summary jurisdiction of the court for his misconduct while he was an attorney, although he may have taken his name off the roll and ceased to be one. *Simes v. Gibbs*, 2 Jur. 418; *Scott v. Van Alstyne*, 9 Johns. (N. Y.) 216.

5. If an attorney should so far forget his professional duty as to voluntarily offer to give in testimony facts communicated to him by his client, without express consent of his client so to do, "a short way of preventing him would be to strike his name off the roll." *Earl of*

*Cholmondeley's Case*, 19 Ves. 261; *People v. Barker*, 56 Ill. 287.

6. Weeks on Attorneys, §§ 92, 93.

Papers upon which the attorney, as a lien for the balance of his account, or deeds which he holds as party or trustee, are excepted. *In re* Williams, 4 L. T. N. S. 103; *Duncan v. Richmond*, 7 Taunton, 391.

But an attorney is not entitled to retain drafts and copies of original deeds for which his client has paid, and on his refusal to deliver them up the court may compel him to do so. *Miles v. Evans*, 3 Jur. 170.

An attorney with whom a will has been deposited by the testator will not be compelled to deliver it up to the sole legatee under it. *Ex parte* Smart, 1 Har. & W. 526.

Nor to produce papers in order to give evidence of a charge of forgery against his client. *Rex v. Dixon*, 3 Burr. 1687.

The court can only interfere at the instance of the party who deposited the papers with him. *In re* Thornton, 2 D. P. C. 156; *In re* Bunting, 2 Ad. & E. 467.

7. Costs have been imposed in cases of fraud and malpractice, sometimes for gross negligence, for pleading a sham plea, though instructed by the client to do so. *Vincent v. Grodiell*, 1 Chit. 182. For drawing papers with unnecessary prolixity. *Ex parte* Smith, 1 Atk. 139. For inserting immaterial, irrelevant, or scandalous matter in the pleadings. *Cushman v. Brown*, 6 Paige (N. Y.) 539. For making obviously unnecessary applications to the court or causing expense clearly unnecessary. *Rolfe v. Rogers*, 5 Barn. & A. 533.

8. Weeks on Attorneys, § 95.

Where the misconduct charged amounts to an indictable offence, the court will not grant a rule calling upon the attorney to answer the matters of the affidavit, but will grant a rule *nisi* calling upon him to show cause why he should not be struck off the roll. *Stevens v. Hill*, 10 Mees. & W. 28.

9. Weeks on Attorneys, § 97.

rolls or suspending them from practice for professional misconduct. The court will exercise the jurisdiction when necessary to vindicate its honor, even though the undertaking be not strictly enforceable at law,<sup>1</sup> or the misconduct be not such as would subject the attorney to an indictment.<sup>2</sup>

Matters of contempt rest within the discretion of the court, and *mandamus* will not lie. *People v. Turner*, 1 Cal. 143, 138; *People v. Justices*, 1 Johns. Cas. (N. Y.) 181; *Ex parte Secombe*, 19 How. (U. S.) 9.

To swear to an incredible story in an affidavit has been held a contempt. *In re Elsam*, 3 Barn. & C. 597.

The publication of letters in a newspaper, tending to influence the result of a pending suit, is a contempt. *Daw v. Ely*, 7 L. R. Eq. 49.

But not the publication of a criticism of the rulings in a case after determination of causes. *Weeks on Attorneys*, § 97. See also *State v. Anderson*, 40 Iowa, 207.

When an attorney is in contempt for disobeying a rule, the proper practice is to move for an attachment, and not to apply to have him stricken from the rolls. *Ex parte Grant*, 3 D. P. C. 320.

1. *Weeks on Attorneys*, § 78.

The courts have enforced summarily an undertaking by an attorney on which an action could not be brought by reason of the provisions of the Statute of Frauds. *In re Hilliard*, 9 Jur. 664; *Evans v. Duncombe*, 1 Comp. & J. 372.

But the guarantee must be good in form, and one on which an action would lie. *In re Kearns*, 11 Jur. 521.

Similarly lapse of time forms no ground for preventing the court from interfering in enforcing such an undertaking, though it does in the ordinary course of applications against attorneys. *In re Kearns*, 11 Jur. 521.

The question is simply did he or did he not enter into the undertaking in the character of an attorney? If he did, the court will hold him liable. *Weeks on Attorneys*, § 78, and cases cited. See also *In the Matter of H* —, an attorney, 87 N. Y. 251.

2. **Suspension and Disbarment.**—To maintain a motion to strike from the rolls, the charge must affect the official character of the attorney. *People v. Allison*, 68 Ill. 151; *Ex parte Steinman & Hensel*, 95 Pa. St. 220; 40 Am. Rep. 637.

The offence need not be such as to subject him to indictment, but its character must be such as shows him unfit to be intrusted with the powers of the profession. *Baker v. Com.*, 10 Bush (Ky.). 502; *In re Blake*, 30 L. J. (Q. B.) 32;

*United States v. Porter*, 2 Cranch (C. C.). 60; *Austin's Case*, 5 Rawle (Pa.), 191.

Discreditable acts, if not connected with his duties, will not give the court jurisdiction. *Dickens' Case*, 67 Pa. St. 169.

As attempting to make an opposite attorney drunk. *Dickens' Case*, 67 Pa. St. 169.

Indulgence in vices not affecting his personal or professional integrity is not sufficient ground. *Baker v. Com.*, 10 Bush (Ky.), 592.

Nor is ignorance of the law a good cause. *Bryant's Case*, 24 N. H. 147.

An attorney cannot be disbarred for refusing in presence of the court to make answer in writing to a rule, upon the ground of punishing the refusal as a contempt. *Ex parte Robinson*, 19 Wall. (U. S.) 505.

Contempt of process and refusal to appear before an examiner is not sufficient. *Com. v. Newton*, 1 Grant's Cases (Pa.), 453.

Contempt and gross misbehavior in office generally are distinct offences. *Ex parte Bradley*, 7 Wall. (U. S.) 364.

The court cannot for contempt alone at once compel an attorney to show cause why he should not be disbarred. *Ex parte Grant*, 3 Dowl. 324; *Ex parte Burger*, 1 Dowl. N. S. 322.

If, however, he continues in contempt the question may arise as to the propriety of his continuing any longer on the roll. *Week's on Attorneys*, § 81. See also *Withers v. State*, 36 Ala. 252.

Disrespect to the court may amount to gross misbehavior in office, and in such case is good ground for disbarment. Appearing in court armed with deadly weapons. *Sharon v. Hill*, 24 Fed. Rep. 726.

Assaulting or threatening to assault a judge. *Beene v. State*, 22 Ark. 140; *Ex parte Heyfron*, 7 Miss. 127; *Saxton v. Stowell*, 11 Paige (N. Y.), 526; *People v. Green* (Colo.), 3 Pac. Rep. 65. 374; *Bradley v. Fisher*, 13 Wall. (U. S.) 323; *Ex parte Wall*. (U. S.) 107; U. S. 265.

But if the offence be committed out of court the offensive language or conduct complained of must have reference to the judge's official acts. *Bradley v. Fisher*, 13 Wall. (U. S.) 323; *Jackson v. State*, 21 Tex. 660. See also *Wolfe v. Kirk*, 12 Fla. 478.

**Any Breach of the Oath of Fidelity to the Court is Good Ground for Disbarment.**

—An attorney who takes as notary and antedates a jurat and acknowledgment of a justice of the peace, and then tries the case before the justice (*Nordin v. Arctander*, 1 N. W. Rep. 43); or swears falsely to an affidavit used before the court (*In re Houghton* (Cal.), 8 Pac. Rep. 52); or obtains a change of venue by means of an affidavit forged by him (*Ex parte Walls*, 64 Md. 461), may be disbarred.

An attorney who, in proceedings upon the probate of a will, takes out a commission to examine witnesses, draws up answers to the interrogatories and cross-interrogatories, reads a part of the answers before the surrogate and leaves the rest to be repeated by the witness and thus gets the answers before the surrogate as honest testimony, is liable to be disbarred, although the answers were not shown to be false, and it appeared the attorney believed them to be true. *In re Eldridge*, 82 N. Y. 161; s. c., 37 Am. Rep. 558.

Bringing a divorce suit without authority, and acting in fraudulent collusion with the husband to procure the divorce without the knowledge or consent of the wife, is good ground for disbarment. *Dillon v. State*, 6 Tex. 55.

So for wilfully proceeding in an action not legally commenced. *Jerome's Case*, Y. B. 20 Hen. VI., fol. 37.

Forging a writ. *Osbaston's Case*, 30 Eliz. Cro. Car. 74.

Fraudulently altering a roll. 4 Inst. 100.

Procuring a witness to keep out of the way on trial. *Williams v. Hill*, 1 Dowl. N. S. 669.

Packing a jury. *Hanson's Case*, Moor, 882.

Hiring straw bail. *Clifford v. Porter*, 5 Dowl. 226.

Perjury or subornation of perjury. *Stephens v. Hill*, 10 Mees. & W. 28; *State v. Holding*, 1 McCord (S. Car.), 379.

He may be disbarred for the bribery of a witness. *Walker v. State*, 4 W. Va. 749.

Or a false oath taken, or any unprofessional statement made without a prior conviction for perjury. *Perry v. State*, 3 Greene (Iowa), 550. See also *In re Stewart*, L. R. 2 P. C. App. 88.

**Gross Violation of the Confidence of the Client is Good Ground for Disbarment.**—*In re Martin*, 6 Beav. 337. See also *Farlin v. Shook* (Kan.), 1 Pac. Rep. 124; *Strout v. Proctor*, 71 Me. 288; *Goodwin v. Gosnell*, 2 Colly C. C. 457.

An attorney is liable to be struck off the roll if he makes default in the payment of money directed to be paid upon

summary application. *Stephens v. Hill*, 10 M. & W. 28, 32.

But to render him liable to the summary jurisdiction of the court, it is requisite that the money should be received by virtue of his professional employment or as a consequence of his professional character. *In re Keep*, 13 C. P. 283; *Anon.* 12 C. L. J. 204; *People v. Appleton*, 105 Ill. 474.

Where a solicitor has been appointed a trustee under a will or other instrument, it is assumed that his professional character has been one of the considerations influencing the appointment, and his wrongful retention of money renders him liable to the penalty in question. *In re Chandler*, 22 Beav. 253.

**An Attorney may be Suspended or Disbarred for any Matter showing his Unfitness to Practise in the Courts**, whether it be a criminal offence or creates a civil liability or not. *State v. Winton* (Or.), 5 Pac. Rep. 337; *Ex parte Wall*, 2 Sup. Ct. Rep. 569; s. c., 13 Fed. Rep. 814; *Ex parte Cole*, 1 McCrary (U. S.), 405; *In re Treadwell* (Cal.), 7 Pac. Rep. 724.

Collusion by a husband's attorney with the wife to manufacture deceptive evidence to enable the husband to procure a divorce is professional misconduct. *In re Gale*, 75 N. Y. 526.

Advertising to procure divorces without compliance with the requisites of the law is ground for striking an attorney's name off the roll. *People v. Goodrich*, 79 Ill. 148.

So with advising a breach of trust with design to benefit himself, or assistance rendered to his client in a scheme which he knows to be dishonest and fraudulent. *Goodwin v. Gosnell*, 2 Colly C. C. 457; *Barnes v. Abby*, L. R. 9 Ch. 251.

An attorney conniving at the violation of the bankrupt law renders himself liable to suspension. If he deceives the court by bringing a collusive suit on a fictitious note to enable a creditor to escape compulsory bankruptcy he may be disbarred. *In re Nathaby* S. C. Cal. 14 Central L. J. 90.

Taking an unfair advantage of the opposite party in the absence of his professional adviser (*In re Oliver*, 2 Ad. & E. 692), or appearing for both plaintiff and defendant in the same action (*People v. Spencer*, 61 Cal. 128), renders an attorney liable to suspension.

An attorney may be disbarred for aiding or abetting a lynching. *Ex parte Wall*, 107 U. S. 265.

Erasing the word "not" in a letter from a judge advising another judge to

**4. Privileges and Disabilities.**—The privileges of counsel consist of their exemption from arrest while attending court *eundo, morando, redeundo*,<sup>1</sup> and their freedom from liability for speaking or writing anything, "however false, defamatory, or malicious may be the words, provided the matter was material to the issue or inquiry before the court."<sup>2</sup> If, however, counsel wantonly depart from

allow bail for one indicted for murder. *Baker v. Corn*, 10 Bush (Ky.), 592.

Withholding from his client and his client's administrator money collected by him. *People v. Cole*, 84 Ill. 327; *Kepler v. Klingensmith*, 50 Ind. 434; *In re Treadwell* (Cal.), 7 Pac. Rep. 724; *Jeffries v. Lowrie*, 23 Fed. Rep. 786.

Fraud and deceit practised toward his client or a third party. *Slemmer v. Wright*, 54 Iowa, 164; *In re Temple* (Minn.), 23 N. W. Rep. 463.

The institution of proceedings by one attorney from improper motives, and without just grounds, to disbar another is misconduct. *In re Kelly*, 62 N. Y. 198.

On being convicted of felony an attorney loses his right to practise in court without an order of court removing him. *In re Niles*, 5 Daly (N. Y.), 465; *R. v. Vaughn*, 1 Wils. 22; *Ex parte Frost*, 1 Chit. 558.

Neither pardon for felony nor satisfactory settlement with the injured party affect the court's power to disbar. *Penobscot Bar v. Kimball*, 64 Me. 140; *In re Davies*, 93 Pa. St. 116.

Restoration is left to the sound discretion of the court. *Ex parte Frost*, 1 Chit. 558, n.; *People v. Ryalls*, 7 Pac. Rep. 290.

**The Practice in England and America** is for the court to issue a rule, the attorney reciting specifically the charges against him, and requiring him to show cause why he should not be stricken from the roll. *Weeks on Attorneys*, § 83.

The particular acts by which the attorney has violated his duty must be particularly alleged. *Reilly v. Cavanaugh*, 3 Ind. 214; *In re Orton*, 54 Wis. 379.

The attorney must have full notice of the application by personal service. *Ex parte Smith*, 28 Mo. 47; *Thatcher v. Dangerfield*, 20 Cal. 430; *Jones v. Miller*, 1 Swan. 151; *In re Peyton*, 12 Kan. 390.

The intervention of a jury is not necessary. 1 Yerg. (Tenn.) 228.

A court cannot, when rendering a judgment of suspension or removal, adjudge the attorney infamous; no such power belongs to any court or any judge. *Thatcher v. Dangerfield*, 20 Cal. 430.

**Mandamus is the Appropriate Remedy** to restore an attorney disbarred where

the court below has exceeded its jurisdiction. *Ex parte Robinson*, 19 Wall. 505; *Ex parte Garland*, 4 Wall. 378; *Ex parte Heyfron*, 7 How. (Miss.) 127; *Withers v. State*, 36 Ala. 252; *People v. Turner*, 1 Cal. 148; *State v. Start*, 1 Iowa, 499; *Fletcher v. Dangerfield*, 20 Cal. 430; *Beene v. State*, 22 Ark. 157; *Ex parte Bradley*, 7 Wall. (U. S.) 364; *Bradley v. Fisher*, 13 Wall. (U. S.) 354. See *Ex parte Secombe*, 19 How. (U. S.) 13; *Ex parte Burr*, 9 Wheat. (U. S.) 530; *Florida v. Kirke*, 12 Fla. 278; *White's Case*, 6 Mod. 18; *Leigh's Case*, 3 Mod. 335; *Rice v. Com.*, 12 Fla. 472; *McLaughlin v. Court*, 5 W. & S. (Pa.) 272.

Not, however, if the controversy touches a matter of contempt. *People v. Turner*, 1 Cal. 143, 188; *People v. Justices*, 1 Johns. Cas. (N. Y.) 181; *Ex parte Burr*, 9 Wheat. (U. S.) 529; *Ex parte Secombe*, 19 How. (U. S.) 9.

In Pennsylvania it has been held that as the admission of an attorney is a judicial and not a ministerial act, *mandamus* will not lie. *Com. v. Brackenridge*, 1 S. & R. (Pa.) 187.

That *mandamus* is improper, and that *certiorari* in the nature of a writ of error will lie where there is no appeal. *Ex parte Briggs*, 64 N. Car. 202; *In re Randall*, 11 Allen (Mass.), 473.

That an appeal will lie from an order suspending attorneys. See *Winkelman v. People*, 50 Ill. 449; *Turner v. Com.* 2 Metc. (Ky.) 619. See also *Weeks on Attys.* §§ 80, 84.

In connection with the general subject of disbarment and suspension, see notes to *In re Gates*, 2 Atl. Rep. 214, and *In re Houghton* (S. C. Cal.), 8 Pac. Rep. 52, and also 39 U. C. 171.

1. *Weeks on Attys.* § 200.

An attorney returning from a court where he has been attending as advocate to defend certain parties charged with felony is not privileged from arrest for a contempt of another court, that being of a criminal nature. *In re Freston*, Eng. Ch. App. 49 L. T. 290.

2. *Weeks on Attys.* § 110; *Mower v. Watson*, 11 Vt. 356; *Hastings v. Lusk*, 22 Wend. (N. Y.) 410; *Bradley v. Heath*, 12 Pick. (Mass.) 163; *Garr v. Selden*, 4 N. Y. 91; *Jennings v. Paine*, 4 Wis. 358.

the evidence or point in issue with intent to injure the character of the adverse party or others without propriety or probable ground, he is liable, even though he speak by instruction of the client.<sup>1</sup> The degree of invective allowed to counsel and the time during which the argument may continue have generally been considered the subject of judicial regulation.<sup>2</sup> It is the duty of counsel to confine themselves to the facts in evidence; and of the court, to check any departure.<sup>3</sup> An attorney cannot act on both sides; nor change sides in the same suit, though at different trials;<sup>4</sup>

1. Rolle's Abr. 91; Wood v. Gunston, Styles, 462; Weeks on Attys. § 110; Hodgson v. Scarlett, 1 Barn. & Cl. 258.

The privilege is strictly one of counsel in court, although any one is "at liberty to publish a history of the trial—that is, of the facts of the case, and of the law as applied to those facts. He is not at liberty to publish observations made by counsel injurious to the character of individuals." Flint v. Pike, 4 Barn. & C. 480. See also May v. Williams, 17 Ala. 23.

2. State v. Hamilton, 55 Mo. 526; Proffat on Trial by Jury, § 249; Trial of Dean of St. Asaph, 21 How. St. Tr. 847; Weeks on Attys. § 115; Hunt v. State, 49 Ga. 255; State v. Collins, 70 N. Car. 241; People v. Herndon, 43 Cal. 581; Proffat on Trial by Jury, § 254; People v. Bezy (Cal.) 7 Pac. Rep. 643.

3. Lloyd v. Hannibal R. Co., 53 Mo. 509; Jack v. Thweatt, 39 Ark. 340.

It is error to permit counsel to make comments outside of the evidence; but the objection should be made at the time. Tucker v. Henniker, 41 N. H. 317; Davis v. State, 33 Ga. 98; Yung v. State, 65 Ga. 525; Stager v. Harrington, 27 Kan. 414.

But where there is conflict of testimony it is not error for the court to permit counsel to state to the jury the facts as proved, according to his view of the case. McNabb v. Lockhart, 18 Ga. 495; Proffat on Trial by Jury, § 250.

Counsel ought not, under any circumstances, to be allowed to make himself a witness (without going upon the stand), and to state facts within his own knowledge touching the case under discussion. Proffat on Trial by Jury, § 250; Bell v. People, 14 Ill. 432.

But counsel may go on stand as witness for his client. Linton v. Com., 46 Pa. St. 294; State v. Cook, 23 La. Ann. 347; Follansbee v. Walker, 72 Pa. St. 230; Whart. on Ev. § 420; Weeks on Attys. § 124.

Where the cause was conducted by one member of a firm of attorneys, the fees of another member called as a witness

were allowed. Butler v. Hobson, 5 Bing. N. C. 128; 1 Arn. 424.

Quere, whether an attorney who calls himself as a witness can now recover his fees, since other parties calling themselves cannot. Grinnel v. Dennison, 12 Wis. 402; Hale v. Merrill, 27 Vt. 738; Nichols v. Brunswick, 3 Cliff. (U. S. C. C.) 88; Parker v. Martin, 3 Pittsb. (Pa.) 166; Grub v. Simpson, 6 Heisk. (Tenn.) 92; Delcomyn v. Chamberlin, 48 How. Pr. (N. Y.) 409; Stratton v. Upton, 36 N. H. 581. See Howes v. Barber, 18 Q. B. 588.

It seems a co-defendant who attended solely as a witness may recover. Barry v. McGrade, 14 Minn. 286.

So if the plaintiff call the defendant. Harvey v. Tebbutt, 1 J. & W. 197; Goodwin v. Smith, 68 Ind. 301; Leeds v. Amherst, 14 Sim. 357; Young v. English, 7 Beav. 10. See Hutchins v. Hutchins, Jr. L. R. (10 Eq.) 453.

If an attorney refuse obedience to a subpoena he can be punished for contempt as a witness only, and cannot be deprived of his office as attorney. Com. v. Newman, 2 Phila. (Pa.) 262.

If an attorney bears any other relation to the subject-matter of the suit, e.g., as an agent, auctioneer, etc., the court will not exercise summary jurisdiction over him. Cocks v. Harman, 6 East, 404; Grubb's Case, 5 Taunt. 206; Edwards v. Hodding, 5 Taunt. 815; Toms & Moore's Case, 3 Ch. Cham. 41. See Dickson v. Wilkinson, 4 De G. & J. 508; Carroll's Case, 2 Ch. Cham. 323; Allen v. Aldridge, 5 Beav. 401; Rawes v. Rawes, 7 Sim. 624; Weeks on Attys. §§ 77, 94; Smith v. McLendon, 59 Ga. 523; Pennock v. Fuller, 41 Mich. 153; 17 Am. Law Reg. (N. S.) 759 and note.

An attorney who is a party to a suit is entitled to recover his costs. Guty v. Brown, L. R. (1 P. C.) 411, reversing s. c., 11 Low. Can. 409; Jervis v. Dewes, 4 Dowl. P. C. 764.

He can recover nothing for loss of time. Pritchard v. Walker, 3 C. & P. 212.

4. Weeks on Attys. § 120; Anon., 7



or receive fees of two adversaries in the same cause.<sup>1</sup> But where an attorney has, in the course of other business, obtained a knowledge of matters connected with the suit in question, he will not on that account, in general, be restrained from acting against the party through whose business he obtained such knowledge.<sup>2</sup>

He cannot act as a special master to execute a decree in a cause in which he is engaged, nor make a writ and indorse his name upon it<sup>3</sup> as attorney for the plaintiff, and also sign it as justice of the peace,<sup>4</sup> nor act in any other capacity inconsistent with his position as attorney for one of the parties litigant.<sup>5</sup> An attorney cannot become bail or security in a cause in which he is engaged, nor even in any cause pending in a court of which he is attorney.<sup>6</sup> It is a contempt to do so in violation of a rule of court.<sup>7</sup> An attorney cannot purchase a chose in action.<sup>8</sup> The rule extends to purchases at judicial sales under the direction of an officer of the court.<sup>9</sup> The rule applies to suits in equity as well as to suits at law.<sup>10</sup> The rule, however, is not intended to prevent a purchase for the purpose of protecting some other important right of the assignee.<sup>11</sup> Notwithstanding such statute, an attorney has a right to purchase judgments for the purpose of issuing executions and collecting debts. The policy of the law does embrace such

Mod. 47; Mason's Case, 1 Freem. 74; Herick v. Colby, 30 How. Pr. (N. Y.) 208; People v. Spencer, 61 Cal. 128.

1. Herick v. Colby, 30 How. Pr. (N. Y.) 208; People v. Spencer, 61 Cal. 128.

2. Com. v. Gibbs, 4 Gray (Mass.), 146.

3. White v. Haffaker, 27 Ill. 349; Spinks v. Davis, 32 Miss. 152.

4. Ingraham v. Leland, 19 Vt. 304.

5. Weeks on Attys., § 122.

6. The rule that an attorney cannot become bail has been generally recognized in England since 1654, and obtains with some variations extensively in America. Mann v. Nottage, 1 Younge & J. 367, a; Costie v. Watson, 15 Johns. 535; Craig v. Scott, 1 Wend. 35; Love v. Sheffelin, 7 Fla. 40; Gilbank v. Stephenson, 30 Wis. 135; Massie v. Mann, 17 Iowa, 131; Hoffman v. Rowley, 13 Abb. Pr. (N. Y.) 398; Dillon v. Watkins, 2 Spear (S. Car.), 445; Miles v. Clarke, 4 Bosw. (N. Y.) 632. *Contra*, Abbott v. Zeigier, 9 Ind. 511.

In order that the rule may apply, the attorney must be in practice. King v. Sheriff, 2 East, 182.

While the disqualification is general, an attorney is sometimes allowed to become security for costs. Walker v. Holmes, 22 Wend. (N. Y.) 614.

And such is the general rule in chancery, and the disability is limited to bail for appearance of the party arrested. Walker v. Holmes, 22 Wend. 614, Weeks on Attys., § 119.

if an attorney at law indorses a writ in favor of a resident of another State, he cannot set up in defence to a *scire facias* to enforce a judgment for costs awarded against such party that in so doing he violated a rule of the court prohibiting an attorney from becoming bail or surety in any civil suit or proceeding in which he is employed as such attorney. Morrill v. Lamson, 138 Mass. 115.

7. Love v. Sheffelin, 7 Fla. 40 *et seq.*

8. Brotherson v. Consalus, 26 How. Pr. (N. Y.) 213; Warren v. Paine, 3 Barb. Ch. (N. Y.) 213; Mann v. Fairchild, 3 Abb. App. (N. Y.) 152.

In some States it has been made a criminal offence for an attorney to buy any chose in action with intent to bring suit thereon. Brotherson v. Consalus, 26 How. Pr. (N. Y.) 213; Warren v. Paine, 3 Barb. Ch. (N. Y.) 213; Mann v. Fairchild, 3 Abb. App. (N. Y.) 152.

The illegality constitutes the offence; and this being shown, it lies upon the defendant to show that he is within an exception or proviso in the statute. People v. Coalbridge, 3 Wend. (N. Y.) 120. See also Hall v. Bartlett, 9 Barb. (N. Y.) 297.

The rule does not exist in Louisiana. McMicken v. Perrin, 18 How. (U. S.) 507.

9. Mann v. Fairchild, 3 Abb. App. Dec. (N. Y.) 152.

10. Cases cited *supra*.

11. Van Rensselaer v. Sheriff, 1 Cow. (N. Y.) 443.

acts.<sup>1</sup> The disability continues as long as the reason for it exists.<sup>2</sup>

**5. Liability to Third Parties.**—An attorney is liable for costs when incurred through his own gross negligence, ignorance, or misbehavior;<sup>3</sup> he is liable for the costs of a sham plea,<sup>4</sup> for having scandalous or impertinent matter expunged from a pleading,<sup>5</sup> or where he expressly undertakes to pay them.<sup>6</sup> In some States the indorsement of the writ renders the attorney liable if the principal is out of the State or unable to pay.<sup>7</sup> Attorneys are generally liable on their undertakings, whether in reference to costs or any other matter,<sup>8</sup> for acts done in excess of authority,<sup>9</sup> and it is

1. *Warren v. Paine*, 3 Barb. Ch. (N. Y.) 630.

2. *Hall v. Good*, 7 Hill (N. Y.), 586.

3. *White v. Washington*, 1 Barnes, 302; *Glynn v. Kirby*, 1 Strange, 402; *Weeks on Attys.*, § 128; *Ex parte Robbins*, 63 N. Car. 309; *Cushing v. Brown*, 6 Paige (N. Y.), 539.

4. Even though instructed by his client to so plead. *Vincent v. Groome*, 1 Chit. 182; *Johnston v. Alston*, 1 Camp. 176.

5. *McVey v. Cantrel*, 8 Hun (N. Y.), 522; *Weeks on Attys.* § 233.

6. In such case he is bound although his client dies before the time for putting in bail arrives. *Hilling v. Jones*, 3 Bing. 70; *Ex parte Hughes*, 5 Barn. & A. 482.

7. When one is made lessor in ejectment without his authority the plaintiff's attorney and not he is liable for the costs. *People v. Bradt*, 6 Johns. (N. Y.) 318.

8. An attorney has been held liable to the sheriff for fees on process delivered to him for execution. *Towle v. Hatch*, 43 N. H. 270; *Kirkbeck v. Stafford*, 23 How. (U. S.) 236; *Sargeant v. Pettibone*, 1 Aiken, 355.

But he is not liable for witness fees unless upon a special promise to pay them. *Weeks on Attys.*, 232.

9. In some States an attorney who institutes a suit for a non-resident is liable for costs unless he recover; or even if he recover, and there is a return of no property to the execution. *Ross v. Harvey*, 32 Ga. 388; *Jones v. Savage*, 10 Wend. (N. Y.) 621.

Where an attorney is beneficially interested in the event of the suit by virtue of an agreement by which he is to have a portion of the recovery as a compensation for his services, he is liable for the defendant's costs the same as the plaintiff. *Voorhies v. McCartney*, 51 N. Y. 387.

The decisions upon liabilities for costs are by no means harmonious. *Weeks on Attys.* § 128.

In Maine an attorney at law is liable

to the officer for his fees for the service of writs delivered by him to such officer, although he is neither the plaintiff nor a party in interest; likewise to the clerk of courts for his fees on writs delivered by him to such clerk for entry. And neither the officer nor the clerk is required to perform the services without a prepayment of their respective fees. *Tilton v. Wright*, 74 Me. 214; s. c., 43 Am. Rep. 578.

7. *Robbins v. Hill*, 12 Pick. (Mass.) 569; *Harnut v. Watson*, 8 Greenl. (Me.) 27.

Attorneys, signing their names upon a writ under a direction to the officer as follows: "Mr. officer, attach hay," do not thereby become indorsers of the writ and liable for costs. Nor do they become indorsers of the writ by erasing the word "hay" and allowing their signatures to remain after giving verbal directions to the officer how to serve it. *Gilmore v. Crosby*, 76 Me. 599.

8. *Weeks on Attys.* § 130; *Burrill v. Jones*, 3 Barn. & A. 49; *Appleton v. Binks*, 5 East, 148.

Where an attorney signs a voluntary recognizance he cannot avoid judgment on the ground that there is a rule of court or a statute prohibiting him from becoming so bound. *Sherman v. State*, 4 Kan. 570; *Wallace v. Scales*, 6 Ohio, 429; *Jack v. People*, 19 Ill. 58; *Hicks v. Chouteau*, 12 Mo. 342.

As to implied undertakings, see *Grace v. Wittington*, 2 Barn. & Ch. 11. See also SUMMARY JURISDICTION OF COURTS OVER ATTORNEYS, *ante*, p. 944.

9. "Under some circumstances, if an attorney acts *bona fide* under a general authority, a particular authority will be presumed. Thus an attorney acting for a mortgagee whose money he had himself invested was held justified in taking proceedings to recover it without any express authority for the purpose, on discovering that the security was bad." *Rowles v. Senior*, 8 Q. B. 677; *Weeks on Attys.*, §§ 237, 239.

incumbent upon the attorney to determine whether his instructions are genuine and authentic.<sup>1</sup> If he maliciously procure an unauthorized order of attachment,<sup>2</sup> an unlawful and malicious arrest<sup>3</sup> upon a claim which he knows to be unfounded, or procure a judicial officer to act beyond the scope of his jurisdiction, he is liable in an action for damages.<sup>4</sup>

**6. Retainer and Appearance.**—"Retainer is the act of a client by which he engages a lawyer or counsellor to manage his cause."<sup>5</sup> The entry of appearance by an attorney is *prima-facie* evidence of his authority to appear.<sup>6</sup> Parties who appear for themselves may appoint attorneys at any stage of the proceedings.<sup>7</sup> The appointment of an attorney is a strictly personal act, and cannot usually be made by deputy or be assumed from the mere relation of the parties.<sup>8</sup> A verbal retainer is sufficient to support a judg-

1. *Jamaine v. Hooper*, 13 Law Jour. (N. S. C. P.) 63; *People v. Montgomery*, 18 Wend. (N. Y.) 633.

2. *Wood v. Wier*, 5 B. Mon. (Ky.) 544. And so is client.

3. *Stockley v. Hornidge*, 8 Car. & P. 16. No such action will lie unless the declaration charges the attorney with acting maliciously. *Lynch v. Com.*, 16 S. & R. (Pa.) 368.

Nor is an attorney responsible for an illegal arrest or levy under a regular writ unless he has actual knowledge of the illegality. *Stowell v. Champion*, 6 Ad. & E. 407; *Stokes v. White*, 1 Comp. M. & R. 223.

4. *Revill v. Pettit*, 3 Met. (Ky.) 314; *Williams v. Smith*, 14 C. B. (N. S.) 596.

Malice must be averred and proved. *Hunt v. Printup*, 28 Ga. 297.

5. 2 Bouv. Law Dict. 200; *Foulks v. Falls*, 91 Ind. 315.

A writing acknowledging the receipt of a claim "for collection" is a contract to collect, and if given by one not an attorney, who at the time represents himself as such, it imposes on him the duty and liability of an attorney. *Foulks v. Falls*, 91 Ind. 315.

Except where there is a special understanding to the contrary, the employment of one member of a legal firm is the employment of all, and the client is entitled, whether he specially consults all or not, to have the benefit of their united skill and judgment in the management of his business. *Smith v. Brittenham*, 109 Ill. 540.

6. *Weeks on Attys.* § 326.

An attorney's license is *prima-facie* evidence of his authority to appear for any person whom he professes to represent. *Weeks on Attys.* § 342.

It is not necessary to show the authority till called for. *Bank v. Fellows*, 28 N. H. 302.

After pleading and issue joined, it is said to be too late to require the plaintiff to file his warrant. *Campbell v. Galbreath*, 5 Watts (Pa.), 423.

The burden of proof rests upon him who denied the authority. *Weeks on Attys.* § 344.

The acceptance of service of process by an attorney of record, on behalf of his client, will, in the absence of proof to the contrary, be presumed to be authorized. *Dobbins v. Dupree*, 39 Ga. 394.

Although an authority will be presumed, when an attorney appears for a defendant not served with process, yet if the defendant prove he had no authority, his rights cannot be affected by the attorney's acts. *Denton v. Noyes*, 6 Johns. (N. Y.) 296; *Frye v. Calhoun*, 14 Ill. 132; *Legere v. Richard*, 10 La. Ann. 669; *Handely v. Statelov*, 6 Litt. (Ky.) 186; *Hess v. Cole*, 23 N. J. L. 116; *Kepley v. Irwin*, 14 Neb. 300; *Anderson v. Hawke*, 115 Ill. 33.

But the right of an attorney to enter an appearance for a party in an action can be called in question only by the party himself. *Baldwin v. Foss*, 14 Neb. 455.

7. *Kerresin v. Wallingborough*, 5 Dowl. 565.

8. *Weeks on Attys.* § 327.

An attorney cannot appear for the tenant in possession in ejectment by order of the landlord. *Doe d. Cooke v. Roe*, 1 Barnes, 39.

One executor cannot authorize an attorney to defend the other. *Williams on Executors* (6th Am. Ed.), 756, 1514.

One partner has no implied authority to retain an attorney to appear and defend the firm. *Hambridge v. De la Crouse*, 10 Jur. 1096; 8 L. T. 163. See *McCulloch v. Guetner*, 1 Binn. (Pa.) 214.

But a contrary rule appears to prevail as to suing a debtor of the firm. *Harrison*

ment, even in the case of a corporation, and although the corporation may be required to make the appointment under seal.<sup>1</sup> The retainer may be inferred;<sup>2</sup> and whether express or implied, the authority granted by it is determined by the death of the client.<sup>3</sup> The attorney, though an officer of the court, cannot generally in civil cases be compelled to appear or act for any one unless he has accepted a retainer.<sup>4</sup> If he has done this he may be compelled to appear at the risk of an attachment, or even of being stricken from the roll.<sup>5</sup> After having once entered an appearance, an attorney is not at liberty to strike it out without leave of court.<sup>6</sup>

Retainer in one action does not entitle an attorney *de facto* to defend a cross-action;<sup>7</sup> nor is a retainer in any action sufficient to authorize any proceedings which incidentally arise out of it.<sup>8</sup> A retainer implies a promise to pay all costs properly incurred upon the retainer.<sup>9</sup> Appearance by attorney is as effectual for purposes of jurisdiction as an actual service of summons. A record showing such appearance will bind the party until want of authority is shown.<sup>10</sup>

*v. Jackson*, 7 T. R. 207; *Collett v. Hubbard*, 2 P. Corp. 94.

A co-defendant may employ an attorney for other co-defendants, and the appearance by such an attorney for all will bind all, and in the absence of proof to the contrary an attorney appearing for an infant plaintiff will be presumed to have been employed by the plaintiff's guardian or next friend. *Hilliard v. Carr*, 6 Ala. 557; *Abbott v. Dutton*, 44 Vt. 546.

1. *Ford v. Killett*, 2 Mylne & K. 1; *Reg. v. Litchfield*, 16 Law T. N. S. 333; *Arnold v. Mayor*, 5 Scott N. S. 741; 12 Law J. N. S. C. B. 97.

Employment by the president of a bank is sufficient retainer by the bank. *Am. Ins. Co. v. Oakley*, 9 Paige (N.Y.), 496; *Weeks on Attys.* § 328; *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738.

While the retainer need not be in writing, yet if the attorney neglects to take the precaution, and his retainer is afterwards questioned, he may be compelled to bear the costs of the risk he thus undertakes. *Wiggins v. Peppin*, 2 Beav. 403.

2. *Lee v. Jones*, 2 Camp. 496; *May v. Wainman*, 7 Moore, 467; *Hall v. Laver*, 1 Hare, 571; *Cooper v. Moss & Hamilton*, 52 Ill. 119; *Tabram v. Horn*, 1 Man. & R. 228.

3. *Whitehead v. Lord*, 21 Law J. Ex. 239.

4. Salk 87, pl. 4.

5. *Mould v. Roberts*, 4 Dowl. & R. 719; *Burnfield v. James*, 2 Barnes, 232; *Wigg v. Rook*, 6 Mod. 86.

Provided it would appear that the undertaking is in writing and signed by the attorney. *Anon.*, Loft. 192.

6. *Hillings v. Jones*, 3 Bing. 70; *Parmeter v. Reed*, 1 W. W. & H. (Eng.) 575.

7. — *v. Lewis*, Law J. Ex. 212; *Parmeter v. Reed*, 1 W. W. & H. 575.

8. *Noble v. Bank*, 3 Marsh. (Ky.) 263; *Spencer v. Newton*, 6 Ad. & E. 630.

9. *Bolden v. Nicholay*, 3 Jur. U. S. 884.

Two attorneys retained together, not being partners, are supposed to be entitled to compensation in equal shares, irrespective of the amount of work performed by each. *Robinson v. Anderson*, 7 De Gex, M. & G. 239; *Henry v. Bassett*, 75 Mo. 89.

A proposed mortgagee's solicitor has no claim for his charges against the proposed mortgagor where the negotiation for the mortgage goes off through the fault of the latter; he must look to the person who retains him, leaving him to his remedy against the party who occasioned the fruitless expenses. *Wilkinson v. Grant*, 18 Com. Bench. 319; 25 Law J. C. P. 233.

10. *Weeks on Attys.* §§ 197-199; *Hamilton v. Wright*, 37 N. Y. 502; *Republic of Mexico v. De Arangoiz*, 5 Duer (N.Y.), 643; *Jackson v. Stewart*, 6 Johns. (N. Y.) 33. *Contra*, *Robson v. Eaton*, 1 Term Rep. 62.

"The practice of the English courts now seems to be not to consider the act of an attorney conclusively binding unless he is employed by the person for whom he appears; and the decisions of the courts of the United States have generally been in accord with that practice." *Weeks on Attys.* § 198; *Denton v. Noyes*, 6 Johns. (N. Y.) 298; *Critchfield v. Porter*, 3 Ohio 518; 11 Ill. 488; *Frye*

**7. Powers Implied by Retainer.**—"An attorney at law has authority, by virtue of his employment as such, to do on behalf of his client all acts, in or out of court, necessary or incidental to the prosecution or management of the suit, and which affect the remedy only, and not the cause of action."<sup>1</sup> This includes

*v. Calhoun Co.*, 14 Ill. 132; *Walworth v. Henderson*, 9 La. Ann. 339.

Especially will the plaintiff be relieved and proceedings set aside or stayed when it appears that the attorney is insolvent. *Campbell v. Bristol*, 19 Wend. (N. Y.) 101; *Meyer v. Littell*, 2 Pa. 177.

Where it appears that process was issued by an attorney without authority, such process may be set aside on motion of the opposite party. *Frye v. Calhoun*, 14 Ill. 132.

Or the court will stay proceedings and order the attorney to pay costs. *Hubbart v. Phillips*, 2 Dowl. & L. 707; *Hammond v. Thorpe*, 1 Crompt. M. & R. 64.

To such rule the plaintiff should be made a party. *Weeks on Attys.* § 345.

"If, in defraud of the rights of a *bona-fide* party, two nominal parties to a suit procure a judgment to be entered by means of an unauthorized appearance, such judgment may be impeached collaterally, so far as concerns any persons tainted with knowledge or bound to inquire into the fraud." *Wharton on Agency*, § 566; *Weeks on Attys.* § 198; *Beekley v. Newcomb*, 24 N. H. 359; *Hayes v. Shattuck*, 21 Cal. 51; *Dalton v. Dalton*, 33 Ga. 243; *Tally v. Reynolds*, 1 Ark. 99; *Williams v. Butler*, 35 Ill. 544.

Want of authority must be shown by special plea. *Nutfield* record is improper. *Hill v. Mendenhall*, 21 Wall. (U. S.) 453.

The authority of an attorney will not be questioned at the instance of a stranger to the record. *Bryan v. Taylor*, *Wright (Ohio)*, 245.

1. *C. J. Gray*, *Moulton v. Bowker*, 115 Mass. 40.

An attorney cannot, under his general authority, accept service for his client of the original process by which the action is begun. 1 *Wait's A. & D.*, 439; *Bagley v. Barkland*, 1 Exch. (W. H. & G.) 1; *Masterson v. LeClaire*, 4 Minn. 108; *State v. Hall*, 87 N. Car. 381; *Reed v. Reed*, 19 S. Car. 548.

For by such service the jurisdiction of the court over the client is established, and until that be done the relation of attorney and client cannot begin. 1 *Wait's A. & D.*, 439; *Bagley v. Barkland*, 1 Exch. (W. H. & G.) 1; *Masterson v. LeClaire*, 4 Minn. 108; *State v. Hall*, 87 N. Car. 381; *Reed v. Reed*, 19 S. Car. 548.

An attorney *ad litem* for a defendant constructively summoned has no author-

ity by virtue of his appointment to enter the appearance of the defendant or to waive any of his rights, and he is presumed to act only on that appointment in the absence of any showing of authority from the defendant. *Bush v. Visant*, 40 Ark. 124. See also *Robinson v. Murphy*, 69 Ala. 543.

A rehearing cannot be granted in equity on account of the bad advice of counsel. *Warner v. Warner*, 4 Stew. Eq. (N. J.) 549; *Smith v. Patton*, 12 W. Va. 541; *Shricker v. Field*, 9 Iowa, 372; *Winchester v. Grosvenor*, 48 Ill. 517; *Dickerson v. Comrs.*, 6 Ind. 128; *Hayden v. Moore*, 4 Bush (Ky.), 107.

Or his error or mistake as to the pertinence or force of evidence. *Baker v. Whiting*, 1 Story C. C. 218; *Jenkins v. Eldridge*, 3 Story, C. C. 316; *Lyon v. Bolling*, 14 Ala. 754; *Kelley v. McKinney*, 5 Lea (Ky.), 164; *Jamison v. My*, 8 Ark. 600.

Or as to the admissibility of evidence. *Robinson v. Sampson*, 26 Me. 11.

Or abandonment of the defence after hearing complainant's argument. *De Carters v. La Farge*, 1 Paige (N. Y.), 574; *Winchester v. Grosvenor*, 48 Ill. 517.

Or mismanagement of the defence by reason of counsel's delicate position in appearing at the same time for a co-litigant who might be injuriously affected by the establishment of the defence. *Carmichael v. Snodgrass*, 6 Lea (Tenn.), 184.

Or that the party who was his own solicitor was compelled to go to another court. *Whitman v. Brotherton*, 2 Term. Ch. 393.

Or was too sick to attend that term. *Lester v. Hoskins*, 26 Ark. 63.

Or had ceased to attend that court, and employed other attorneys to take charge of the case, who did not understand the defence, and permitted judgment to go against defendant without his knowledge. *Chester v. Apperson*, 4 Heisk. (Tenn.) 639.

Or that the counsel originally employed died, and the counsel who succeeded him was not familiar with the case. *Powell v. Stewart*, 17 Ark. 719.

Or that the attorney could not appear on account of his illness. *Mock v. Cundiff*, 6 Port. (Ala.) 24.

Or that the counsel retained had not only not appeared to defend the suit, but had appeared for the other party,

the right to demand and receive payment in money of the client's debts; and part payments are within his power to receive as well as payments in full. As long as he appears as attorney on record, *bona-fide* payments to him discharge the debt, no matter what private instructions he may have received from his client."<sup>2</sup> He may also sue out an *alias* execution;<sup>3</sup> may receive livery of seizin of land taken under an extent;<sup>4</sup> may waive objections to evidence and enter into stipulations for the admission of facts or conduct of the trial,<sup>5</sup> and for release of bail;<sup>6</sup> may waive notices, and give extensions of time to file papers and confess judgment;<sup>7</sup> and may open a default which he has taken (whether improperly or not) and vacate the judgment entirely, even though (it has been held) his client has instructed him to the contrary.<sup>8</sup> An attorney of record has power to agree, during the pendency of the suit, that after judgment the execu-

where only a general retainer to attend to all of defendant's business was proved. *Watts v. Gayle*, 20 Ala. 817.

There can be no rehearing of a decree made by consent of counsel, although made without the party's consent. *Harrison v. Rumsey*, 2 Ves., Sr. 488; *Bradish v. Gex*, Amb. 229; *Butterworth v. Clapham*, 1 J. & W. 653; *Gifford v. Thorn*, 1 Stock. (N. J.) 724; *Coster v. Clark*, 3 Edw. Ch. (N. Y.) 405; *Jones v. Williamson*, 5 Coldw. (Tenn.) 371; *Lawson v. Bettison*, 7 Ark. 401. See *Furnivale v. Bogle*, 4 Russ. 142.

1. *Ducett v. Cunningham*, 39 Me. 386; *Branch v. Burnley*, 1 Call. (Va.) 127; *Brackett v. Norton*, 4 Conn. 517; *Langdon v. Potter*, 13 Mass. 320; *Miller v. Scott*, 21 Ark. 396; *Wharton on Agency*, § 580.

Where a writ of *ad quod damnum* to condemn a water right is resisted upon the ground that the same will injure a mill already in course of erection, and an order of condemnation is rendered conditioned upon the payment within a year of damages found to accrue to the defendant, the attorney of the defendant in the proceedings cannot, by virtue of his general employment as such, bind his client by receiving such damages. *Test v. Larsh*, 98 Ind. 34.

The payment must, under any circumstances, be in good faith. *Chalfants v. Martin*, 25 W. Va. 394.

2. *State v. Hawkins*, 28 Me. 366.

3. *Cheever v. Merrick*, 2 N. H. 376.

4. *Pratt v. Putnam*, 13 Mass. 363.

5. *Alton v. Gilmanton*, 2 N. H. 520.

Admissions bind the client when made with a view to obviating the necessity of proving the fact admitted. *Young v. Wright*, 1 Camp. 140.

Written admissions made for the pur-

pose of a former trial may be used on a new one. *Elton v. Larkins*, 5 Car. & P. 285; 1 *Moody & R.* 106.

In the absence of fraud or gross mistake a client is concluded by admissions of his attorney in cases in which, on the faith of such admissions, reciprocal admissions have been made on the other side. *Wharton on Ev.* § 1184; *Stevens Ev.* art. 17; *Wilson v. Spring*, 64 Ill. 18; *Smith v. Milliken*, 2 Minn. 319; *Wharton on Agency*, § 585.

Non-contractual admissions of the attorney, not accepted as part of the mutual arrangements for the trial of the case, are *prima-facie* evidence only. They relieve, at the first instance, the opposing party from the burden of proving that which they admit, supposing the authority of the attorney to be first proved. *Young v. Wright*, 1 Camp. 141; *Floyd v. Hamilton*, 33 Ala. 235; *Moulton v. Bowker*, 115 Mass. 36; *Bathgate v. Haskin*, 59 N. Y. 533; *Cassels v. Usry*, 51 Ga. 621; *People v. Garcia*, 25 Cal. 531; *Truby v. Seybert*, 12 Pa. St. 101.

Admissions made after the case has been tried and the employment ended are not binding. *Walden v. Bolton*, 55 Mo. 405.

In criminal matters admissions are not admissible unless made at the trial by the defendant or his counsel. *Rex v. Thornhill*, 8 Car. & P. 575.

6. *Hughes v. Hollingsworth*, 1 Murph. (Tenn.) 146.

7. *Pike v. Emerson*, 5 N. H. 393; *Talot v. McGee*, 4 Monr. 377; *Bank v. Geary*, 5 Pet. (U. S.) 99; *Thompson v. Pershing*, 86 Ind. 304.

8. On the theory that the client has no right to interfere with the attorney in the due and orderly conduct of the suit, and certainly cannot claim to retain a judg-

tion shall be postponed,<sup>1</sup> put off a trial,<sup>2</sup> discontinue an action, or, after judgment rendered, give a stipulation allowing an extension of the time to perfect an appeal.<sup>3</sup> An attorney intrusted with a note for collection by suit is authorized to sue out the process of attachment, and his client is liable for the actual damage if the process is wrongfully sued out, although he may have instructed his attorney to use proper means only.<sup>4</sup> An attorney cannot destroy his client's cause of action by making a stipulation not to appeal or seek a new trial,<sup>5</sup> or by compromising the suit;<sup>6</sup> he may, however, submit the cause to arbitration, for this

ment obtained and an execution issued fraudulently. *Read v. French*, 28 N. Y. 293; *Weeks on Attys.* § 212.

1. *Wieland v. White*, 109 Mass. 392; *Union Bank v. Georgetown*, 5 Pet. (U. S.) 99.

2. *Shaw v. Kidder*, 2 How. Pr. (N. Y.) 244.

3. *Hoffenberth v. Muller*, 12 Abb. Pr. N. S. (N. Y.) 222.

4. *Kirkley v. Jones*, 7 Ala. 622; *Meyer v. Sage*, 65 Iowa, 606.

The power of an attorney to sue upon a bill of exchange implies a power to collect or receive the proceeds, and instructions restricting this power to taking judgment are not admissible in evidence unless they are shown to have been brought to the knowledge of the payor before payment. *Planters' Bank v. Massey*, 2 Heisk. (Tenn.) 360; *Weeks on Attys.* § 379.

An attorney has implied authority to indorse the name of his client on a check received in the course of litigation, for the purpose of collecting it. *Chatham Nat. Bank v. Hochstater*, 18 N. Y. Daily Reg. 848.

5. *People v. Mayor*, 11 Abb. Pr. (N. Y.) 66; *Bates v. Voorhies*, 20 N. Y. 525.

6. Such is the rule in the United States. *Maye v. Cogdell*, 69 N. Car. 93; *Stokeley v. Robinson*, 34 Pa. St. 318; *Albre v. Read*, 6 McLean (U. S.), 106; *Holker v. Parker*, 7 Cranch (U. S.), 436; *Spears v. Ledergerber*, 56 Mo. 465; *Adams v. Roller*, 35 Tex. 711; *Barrett v. Third Avenue R. Co.*, 45 N. Y. 628, 638; *Lewis v. Gamage*, 1 Pick. (Mass.) 347; *Derwort v. Loomer*, 21 Conn. 245; *Davidson v. Rozier*, 23 Mo. 387; *Filby v. Miller*, 25 Pa. St. 264; *Vail v. Jackson*, 13 Vt. 314; *Granger v. Batchelder*, 54 Vt. 248; s. c., 41 Am. Rep. 846; *Walden v. Bolton*, 55 Mo. 408; *Houseniek v. Miller*, 93 Pa. St. 514; *Whitehall Township v. Keller*, 100 Pa. St.; s. c., 45 Am. Rep. 361; *Mackey's Heirs v. Adair*, 99 Pa. St. 143; *Robinson v. Murphy*, 69 Ala. 543; *Chaffey v. Dexter* (Cal.), 14 Pac. Rep. 980.

But every reasonable presumption will be indulged in favor of a settlement made by an attorney duly employed, especially after it has been recognized by a court and a judgment thereon has been rendered. *Williams v. Nolan*, 58 Tex. 708.

Where an attorney at law does compromise and settle his client's claim, without any authority from his client, and in such settlement the attorney receives from the adverse party a consideration which is much less than the client's demand, the client may ignore such compromise and settlement, and treat the same as a nullity, and recover the full amount of his demand from the adverse party. *Jones v. Innes*, 32 Kan. 177.

A compromise acquiesced in for years by the principal will bind him forever. *Mayor v. Foulkrod*, 4 Wash. C. C. 511.

Where an attorney has an apparent authority to compromise, and the compromise made is not so flagrantly unfair as to imply fraud or to put the opposite party upon inquiry, it will stand even though it may subsequently appear that the attorney exceeded his authority. *Bank v. Rogers*, 75 Mo. 441.

Power to compromise cannot be inferred by persons dealing with an attorney from the relationship of attorney and client. *Isaacs v. Zugsmith*, 103 Pa. St. 77.

In England a compromise, *bona fide*, prudent, beneficial to the client, and not made in defiance of instructions, will be sustained. *Chown v. Parrott*, 14 Com B. (N. S.) 74; *Fray v. Voules*, 1 El. & El. 839; *Weeks on Attys.* § 395.

An attorney has no general power to compromise claims of the client; but where there is not time or opportunity for consultation with the client, he may, in the exercise of a reasonable discretion, negotiate a compromise where the circumstances are such that he must act without delay, and where the interests of his client will be seriously imperilled unless he so act, and if he act in good faith, with fair skill and vigilant care, he is not

is held to be within his power to direct the application of the remedy.<sup>1</sup> He cannot execute a discharge of the debtor, but upon actual payment of the full amount of the debt, and that in money only.<sup>2</sup> The attorney has power to waive technical advantages,<sup>3</sup> and confess judgment;<sup>4</sup> but not to enter a *retraxit* when it is a final bar,<sup>5</sup> nor to assign the claim or judgment to a third party;<sup>6</sup> to release indorsers on a note,<sup>7</sup> or to admit in such a way as to bind his client's erroneous positions of law.<sup>8</sup> He cannot execute an appeal bond in his client's name,<sup>9</sup> or bind him by a bond to indemnify the officer levying an execution;<sup>10</sup> or, in general,

liable for damages. *Ins. Co. v. Buchanan*, 100 Ind. 63.

1. *Talbot v. McGee*, 4 B. Mon. (Ky.) 377; *Inhabitants of Buckland v. Inhabitants, etc.*, 16 Mass. 396; *Scarborough v. Reynolds*, 12 Ala. 252; *Stokeley v. Robinson*, 34 Pa. St. 315; *Holker v. Parker*, 7 Cranch (U.S.), 436; *Brooks v. New Durham*, 55 N. H. 559; *White v. Davidson*, 8 Md. 169.

The doctrine is limited to cases where there is a suit pending which he has been employed to manage. *Nagle v. Ingersoll*, 7 Pa. St. 185, and the agreement to arbitrate should be precedent to the award, and be made in the cause in a formal manner. *Stokeley v. Robinson*, 34 Pa. St. 315; *Holker v. Parker*, 7 Cranch (U. S.), 436.

An attorney, in the absence of his client and witnesses when his case was called for trial, agreed in open court to a reference to arbitrators. Prior to the meeting of the arbitrators a rule was taken upon plaintiffs to show cause why the agreement to refer should not be set aside, and the submission stricken off, and after hearing the court discharged the rule. *Held*, not to be error. The client having obtained the benefit of the delay could not repudiate the act of his attorney and deny his authority. He received a consideration for the submission, which made it irrevocable. *Williams v. Tracey*, 95 Pa. St. 308.

An agreement to refer to arbitration will be sustained against the client's dissent. *Stokeley v. Robinson*, 34 Pa. St. 315; *Wader v. Powell*, 31 Ga. 1. But see *Markley v. Amos*, 8 Rich. (S. Car.) 468.

Where, however, the client expressly desires it shall not be done, he is said to have an action against the attorney for damages. *Thomas v. Hughes*, 2 Crompt. & M. 327.

2. *Hamrick v. Combs*, 14 Neb. 38; s. c., 16 Neb. 148; *Herriman v. Showman*, 24 Kan. 387; s. c., 36 Am. Rep. 261.

He cannot accept collateral security

for a judgment. *Hallway v. Thomas*, 18 Cent. L. J. 320.

Nor a draft payable in future. *Morris v. Grier*, 76 N. Car. 410.

If he takes anything else or a less amount than the entire sum, the plaintiff is not bound. *Turnbull v. Nicholson*, 27 Ill. 149; *Chapman v. Cowles*, 41 Ala. 103; *Abbe v. Rood*, 6 McLean (C. C.), 107; *Weeks on Attys.* §411; *Anderson v. Boyd*, 64 Tex. 108; *Kelly v. Wright*, 65 Wis. 236.

The burden of proof is upon the attorney to show that he was authorized to receive anything but money. *Portis v. Ennis*, 27 Tex. 574.

3. *Hanson v. Hoit*, 14 N. H. 56; *Hoit v. Spalding*, 1 Cal. 213.

4. *King v. Cartee*, 1 Pa. St. 147; *Denton v. Noyes*, 6 Johns. (N.Y.) 296; *People v. Lamborn*, 2 Ill. 123.

5. *Lambert v. Sandfort*, 2 Blackf. (Ind.) 137.

6. *Weathers v. Roe*, 4 Dana (Ky.), 474; *Mayer v. Blease*, 4 S. Car. 10.

A solicitor employed to collect money by a suit in chancery has no authority by reason of such employment to assign a decree obtained for his client for less than the full amount due thereon. *Rice v. Troup*, 62 Miss. 186.

7. *Mitchell v. Cotton*, 3 Fla. 136.

8. *Stokes v. Sheldon*, 13 Neb. 207.

9. *Ex parte Holbrook*, 5 Cow. (N.Y.) 35; *Clark v. Courser*, 29 N. H. 170. But see *Adams v. Robinson*, 1 Pick. (Mass.) 462; *Churchill v. Ins. Co.*, 92 N. Car. 485.

10. An attorney's promise to indemnify the levying officer is without consideration, and does not bind him personally. *Snow v. Hix*, 54 Vt. 478.

In *Minnesota* and *Wisconsin* it is held that the authority of the attorney of non-resident plaintiffs, after judgment was recovered and execution levied, extends to binding the plaintiffs in an undertaking under the statute to indemnify and save harmless the sheriff from all costs, damages, etc., resulting from the enforcement of the execution. *Schoregge v. Gordon*, 29 Minn. 367; *Clark v. Randall*, 9 Wis. 135.



affect him in collateral matters.<sup>1</sup> The retainer does not authorize him to release an attachment before judgment,<sup>2</sup> or make a fraudulent defence.<sup>3</sup> In criminal cases a waiver of trial by jury is not binding on the defendant, if made without consulting him, even though he was present in court.<sup>4</sup>

**8. Duration of Authority.**—After final judgment the attorney's authority is limited to receiving satisfaction;<sup>5</sup> to that end he may sue out execution and direct its management.<sup>6</sup> Death of the client or permanent incapacity of the attorney, as insanity or disbarment, terminate the relation.<sup>7</sup>

**9. Duties and Dealings.**—The legal duties of an attorney towards his clients are care, skill, diligence, and integrity;<sup>8</sup> he should disclose to his client every adverse retainer or even every prior retainer which may affect the discretion of the latter;<sup>9</sup> whatever it is important for the client to know, it is the duty of the attorney to communicate if he can.<sup>10</sup> It is incumbent upon him to notify his client immediately of money collected, and await instructions;<sup>11</sup> upon demand he must pay it over;<sup>12</sup> if the fund is

1. Weeks on Attys. § 234.

He cannot bind his client by a sale of the land sued for (*Corbin v. Mulligan*, 1 Bush (Ky.), 297), or purchase land for his client at a judicial sale under the client's execution. *Beardsley v. Root*, 11 Johns. (N. Y.) 464; *Whart. on Agency*, § 582.

2. *Moulton v. Bowker*, 115 Mass. 36.

3. *Williams v. Preston*, 47 L. T. 265; s. c., 15 Cent. L. J. 458.

4. *Brown v. State*, 16 Ind. 496; *Cancemi v. People*, 18 N. Y. 128.

5. Weeks on Attys. § 238.

There is no implied authority to bind the client by an agreement made after judgment to postpone execution. *Lovegrove v. White*, L. R. 6 C. P. 446.

6. If goods are seized on the execution he may order the sheriff to withdraw from possession. *Levi v. Abbott*, 4 Ex. 338; Weeks on Attys. § 238.

If an attorney is employed to collect a debt this implies as great discretion vested in him after judgment as before. *Bolter v. Knight*, L. R. 2 Ex. 109; Weeks on Attys. § 242.

Ordinarily an attorney is authorized to collect a judgment recovered for his client and to execute in the name of his client a proper acquittance therefor. His authority continues until the judgment is collected unless he is sooner discharged; and this rule applies to the attorney of a municipal or quasi-municipal corporation, as well as of any other client. *Conway County et al. v. Little Rock & Fort Smith R. Co.*, 39 Ark. 50.

The general power and liability of an attorney for a defendant cease upon the

entry of a judgment finally terminating the litigation, and do not include the payment of the judgment, although he be furnished with money for the purpose. *Hilleglass, Admr., v. Bender*, 78 Md. 225.

7. Weeks on Attys. § 256; *Wharton on Agency*, §§ 108, 634.

8. Weeks on Attys. § 259; *Lilly v. Boyd*, 72 Ga. 83.

9. Weeks on Attys. § 260.

Failure to do so unaccompanied with other circumstances is not necessarily conclusive evidence of fraud, although a clear misapprehension of professional duty. *Williams v. Reed, Mason* (U. S.), 404, per Story, J.

10. Weeks on Attys. § 262.

Failure to do so reduces his claim for compensation, and may be the ground of an action against him by his client. *Hoopes v. Burnett*, 26 Miss. 428; *Jett v. Hempstead*, 25 Ark. 462; *Fox v. Cooper*, 2 Q. B. 237.

11. The duty of rendering accounts is very strictly enforced against attorneys, and courts of equity may open accounts after many years have elapsed and vouchers are destroyed. *In re Lee* L. R. 4 Ch. 43; *Lewis v. Morgan*, 3 Anstr. 769.

The mere entry of a judgment by an attorney at law, without more, imposes on him no liability to notify his client or revive the judgment when the lien is about to expire. *Cook's Exrs. v. Foster's Admr.*, 5 Cent. Repr. (Pa.) 256.

12. Until demand made or unless circumstances exist which amount to a waiver of demand no action will lie. Weeks on Attys. § 263; *Voss v. Bachop*, 5 Kans. 67; *Taylor v. Bates*, 6 Cow. (N. Y.) 596.

claimed by third parties, he may demand security of the claimant or client, and pay either upon receiving indemnity.<sup>1</sup> While the fidelity due the client is generally inconsistent with the acceptance of a retainer from both sides, it is nevertheless not unusual for the same attorney to be employed by both vendor and purchaser in the sale of real estate.<sup>2</sup>

An attorney in a purchase or a mortgage transaction undertakes to investigate only the legal requisites of title and not its value; he is to see that the security is sufficient in law.<sup>3</sup>

*Dealings.*—The relation of attorney and client being *quasi-fiduciary*, all transactions between them to be upheld must be *uberrima fides*, and to establish that such is the case rests with him who would uphold the transaction.<sup>4</sup> The jealous care and scrutiny over such transactions extends to all gifts, conveyances, and contracts by the client, and all securities given by him pending the relation.<sup>5</sup> The foundation of the rule is the influence arising

The statute of limitations begins to run against an attorney from the time the client had knowledge or means of knowledge that the money had been collected, and before the attorney can avail himself of the defence he must prove that he notified the client of the collection. *McDowell v. Potter*, 8 Pa. St., 189; *Voss v. Bachop*, 5 Kans. 67; *Stafford v. Richardson*, 15 Wend. (N. Y.) 305.

Where, however, the duty of collection is immediate, the right of action accrues, and the statute begins to run from the receipt of the money. *Livingston v. Cox*, 6 Pa. St. 360.

1. Weeks on Attys. § 263; *Sims v. Brown*, 6 Thomp. & C. (N. Y.) 5; *Marvin v. Elwood*, 11 Paige (N. Y.), 365.

2. *Prima facie* when the fact of employment by both parties is known to both no great degree of turpitude attaches to the transaction. Weeks on Attys. § 265.

Still the practice is far from advisable, as the purchaser is liable to be affected with constructive notice of prior equities or fraud known to the attorney. *Suydam on Vendors & Purchasers* (11th Ed.), 7; *Burrows v. Locke*, 10 Ves. 470; *Taylor v. Blackfoot*, 3 Bing. N. C. 235.

3. Weeks on Attys. § 266; *Green v. Dixon*, 1 Jur. 137; *Howell v. Young*, 5 Barn. & C. 259; *Hayne v. Rhodes*, 8 Q. B. 342.

But where the attorney is employed to invest the money and find the proper security in point of value, a case of combined agency and trust is created, and he will be liable like any other trustee. *Dartwell v. Howard*, 4 Barn. & C. 345; *Craig v. Wilson*, 8 Beav. 427.

The fact that an attorney instructed to

invest a sum of money on good bond and mortgage takes his wife's mortgage of the property as a full security is not in itself evidence of bad faith, so that an action for the conversion of the same would lie, the security of the mortgage having in the mean time failed. *King v. Kellar* (N. Y. Ch. App.), 18 Cent. L. J. 251.

4. Weeks on Attys. § 268; *Merriman v. Euler*, Md. Ch. App. 18 Cent. L. J. 31.

5. *Gray v. Emmons*, 7 Mich. 533.

An attorney must show that the client acted freely and understandingly. If it be claimed that an instrument executed by the client during the professional relation was intended to provide a remuneration for past services, then the plaintiff must prove such services that there existed at the time of giving it at least a moral obligation to pay, that the instrument was fully understood by the person executing it, and that it was made in pursuance of and in accordance with a well considered, definite, and well settled purpose. *Jennings v. McConnell*, 17 Ill. 148; *Brock v. Barnes*, 40 Barb. (N. Y.) 521.

*Purchase of Property from Client.*—

The law does not absolutely prohibit an attorney from purchasing from his client: it simply casts upon him the burden of proving that the transaction was perfectly fair, and that a just and adequate price has been given. *Yeamans v. James*, 27 Kan. 195.

"The rule is that the attorney must make a full disclosure of every fact which might influence the decision by the client of the question of the sale." *Rogers v. Marshall*, 3 McCray (U. S.), 76.

Equity will not uphold a purchase of

from the relation; so long, therefore, as the influence exists the rule of course applies.<sup>1</sup>

An attorney cannot accept interests conflicting with those of

the subject-matter of the suit by the attorney from his client when it appears that while negotiating for the property he was at the same time advising his client upon the outcome of the litigation even upon a showing of good faith. *Rogers v. Lee Mining Co.*, 9 Fed. Rep. 721; *Lane v. Black*, 21 W. Va. 617.

The courts have sometimes decreed that conveyances to attorneys should stand as security for the services already performed, or for money due, and the surplus declared a trust. *Woods v. Downes*, 18 Ves. 120; *Sanderson v. Glass*, 2 Ark. 296; *Mason v. Ring*, 3 Abb. (N. Y. App.) 210.

A promissory note, and mortgage to secure its payment, given by a client to his attorney to secure payment for professional services, will be sustained if the transaction is fair, honorable, and proper. *Wharton v. Hammond*, 20 Fla. 934.

**Adverse Title.**—An attorney cannot in any case, without the client's consent, buy and hold otherwise than in trust any adverse title or interest touching the thing to which his employment relates. *Baker v. Humphrey*, 101 U. S. 494.

If he does so buy, he will hold the title as trustee for his client, who may recover the property by tendering the amount of the purchase-money with interest. *Henry v. Raiman*, 25 Pa. 354; *Zeigler v. Hughes*, 55 Ill. 288; *Harper v. Perry*, 28 Iowa, 57; *Wheeler v. Willard*, 44 Vt. 640; *Case v. Carroll*, 35 N. Y. 385; *Weeks on Attys.* §§ 268, 270, 273, 274, 277.

An attorney having recovered a judgment for his client, and having the control thereof, cannot, without the consent of his client, express or implied, become the purchaser of lands at a sale under execution issued thereon; and if he does so purchase, he becomes, like any other agent, a trustee for his client. Such a trust arises by operation of law, and continues until barred by lapse of time, or until terminated by an election to ratify the purchase, thereby giving it validity. *Pearce v. Gamble*, 72 Ala. 341.

An attorney who is employed to sue a debt, attach real estate, procure a judgment, and levy the same upon the land attached, is estopped from denying the validity of his own work, to his own profit or advantage; and when such attachment and levy are defective, and he purchases the land levied upon, the title that

he takes at once inures to the judgment creditor. A record that discloses the relation of attorney and client touching a levy upon real estate is notice to subsequent purchasers from the attorney that he cannot dispute the validity of the levy, and take an after-acquired title to such land in his own right. *Briggs v. Hodgdon*, 7 Atl. Repr. (Me.) 387.

**Gifts.**—In the absence of fraud a client may make a voluntary gift to his attorney or agent. *Wolmsey v. Booth*, 2 Atk. 40; *Craig v. Mansfield*, 1 Ves. 379; *Oldham v. Hand*, 2 Ves. 259, 549.

But third parties should be present to witness the transaction, as suspicion will always attach. *Harris v. Tremenhere*, 15 Ves. 40.

Courts of equity have, on grounds of public policy, set such gifts aside without actual fraud, when made during the period when the attorney has in his hands the management of his client's affairs. *Wells v. Middleton*, 1 Cox. 112; *Montesquieu v. Sandys*, 1 Bach. & B. 312.

But when the cause is finished and the relation no longer exists, the gift will be sustained. *Harris v. Tremenhere*, 15 Ves. 84.

In a gift by a testator it is not decisive evidence of fraud that the attorney who drew the will was one of the residuary legatees. *Paine v. Hall*, 18 Ves. 475.

*Mr. E.*, as solicitor, agreed with *Mrs. C.* to defend certain suits, for which she agreed to give him half of all the property or money that should be recovered; the defence entered failed, and the property was all rescued from *Mrs. C.* by judgment; *Mr. E.* procured *Mrs. C.* to execute and deliver to him a deed for one half of other property which she owned, without question, representing to her that it was for his compensation under the agreement. *Held*, that such deed is fraudulent and void both in law and in fact. *Cleine v. Engelbrecht*, 8 Eastern Repr. (N. J.) 406.

1. The authorities show that when this is the case the transaction will be scrutinized with the same jealousy as if the relation had continued. "It is not denied in any case that if the relation had completely ceased—if the influence can be supposed also rationally to cease—a client may be generous to his attorney or counsel as to any other person, but it must go

his client;<sup>1</sup> he cannot use information received by him from his client in opposition to his client.<sup>2</sup>

**10. Liability to Client.**—An attorney is responsible to his client only for the want of ordinary skill, ordinary care, and reasonable diligence;<sup>3</sup> and the skill required has reference to the character of the business he has undertaken to do.<sup>4</sup> If an attorney disobeys express lawful instructions of his client,<sup>5</sup> if he negligently fails to bring suit,<sup>6</sup> or if he loses deeds or valuable securities intrusted to

so far." Lord Eldon in *Woods v. Downes*, 18 Ves. 119.

1. Whart. on Agency, § 593; Weeks on Attys. § 271, Com. v. Gibbs, 4 Gray (Mass.), 146; Price v. Grand Rapids R., 18 Ind. 139; Gaudin v. State, 11 Ga. 47.

He cannot act as solicitor for the receiver for whose appointment he moves. *Warren v. Sprague*, 4 Edw. Ch. (N. Y.) 416.

Nor as administrator of an estate against which he is pressing a hostile claim. *Spinks v. Davis*, 32 Miss. 152.

He cannot represent both sides, even though the proceedings be amicable; nor can he, after having been retained by one side, obtain compensation for his services from the other. *Sherwood v. Saratoga R.*, 15 Barb. (N. Y.) 650; *Valentine v. Stewart*, 15 Cal. 387.

When, however, an attorney has been employed in a cause and is afterwards discharged by his client, not on the ground of misconduct, the court will not restrain him from acting for the opposite party, unless it clearly and distinctly appears that he has obtained information in his former character, which would be prejudicial to the cause of his former client to communicate. *Johnson v. Marriott*, 2 Crompt. & M. 183; *Grissell v. Peld*, 2 Moore & S. 2. Compare *People v. Spencer*, 10 Pac. Coast L. J. 127.

2. Weeks on Attys. § 279.

An attorney who has been consulted as to the title to lands cannot afterwards become a purchaser of such lands from the State, nor from a third person, to use the title against his client. Weeks on Attys. § 279; Wharton on Agency, § 578.

But it is said the mere fact that in other independent suits the attorney became acquainted with the business of the adverse party will not prevent him from acting professionally against such party. *Price v. Railroad*, 18 Ind. 137.

3. Weeks on Attys. § 284.

4. *Cox v. Sullivan*, 7 Ga. 144; *Holmes v. Peck*, 1 R. S. 242; *Pennington v. Yell*, 6 Eng. (Ark.) 212; *Minturn v. Jeffereys*, 2 Car. P. 113; *Pitt v. Yalden*, 4 Burr, 2060.

A metropolitan standard is not to be  
1 C. of L.—61

applied to a rural bar. A person claiming to be an ordinary practitioner must possess the skill and exhibit the diligence of lawyers in ordinary; so a person claiming to be an admiralty or equity lawyer, while not required to be an expert out of the department thus specified, must exercise due skill and diligence in it. Weeks on Attys. § 289; Green's note to Story on Agency (9th Ed.), § 27.

The lawyer is to exercise the diligence which good business men in such specialty are in such locality accustomed to exercise. *Pennington v. Yell*, 6 Eng. (Ark.) 212; *Wharton on Negligence*, § 750.

An attorney in the State of New York, employed there to draw a contract for building on lands in New Jersey, does not by accepting such employment impliedly undertake that he is acquainted with the laws of New Jersey respecting the necessity of filing such contracts for protection against the claims of workmen and material-men under the mechanics' lien law. By accepting employment to draw such contract he does not thereby undertake to file it; and in the absence of an express undertaking he will not be liable for failure to do so. *Fenaille v. Coudert*, 44 N. J. L. 284.

5. *Gilbert v. Williams*, 8 Mass. 57; *Cox v. Livingstone*, 2 W. & S. (Pa.) 103; *Wilcox v. Plummer*, 4 Pet. (U. S.) 172.

But not if he has only done what the court would order to be done. *Read v. French*, 28 N. Y. 293.

6. In an action against an attorney for breach of professional duty in neglecting to begin proceedings to collect a claim until after it was barred by the statute of limitations, the plea of the bar of the statute is a good defence. The statute begins to run from the time of the breach of professional duty, not from the time when knowledge of special consequential damages is brought home to the client. The retention of the attorney after the violation of his implied contract does not suspend the running of the statute. *Moore v. Juvenal*, 92 Pa. St. 484.

In order to hold an attorney liable for not making an attachment the plaintiff

him by his client, he will be responsible for any loss resulting therefrom.<sup>1</sup> "There is no implied agreement in the relation of counsel, or the employment of the former by the latter, that the attorney will guarantee the success of his proceedings in a suit, or the soundness of his opinions, or that he will ultimately be sustained by a court of last resort."<sup>2</sup> He only undertakes to avoid errors which no member of his profession of ordinary prudence, diligence, and skill would commit,<sup>3</sup> and cannot be held liable in any case of reasonable doubt.<sup>4</sup> If, however, he disregard rules of law which are well and clearly defined, both in text books and reports, and which have existed and been published long enough to justify the belief that they are well known to the profession;<sup>5</sup> if he ignore the practice of his court, the ordinary rules of pleading and evidence, the existence of statutes and rules of court, and in cases free from doubt even their construction;<sup>6</sup> if he commit blunders in process, and his papers are defective from lack of diligence on his part or on the part of his subordinates,—he will be liable.<sup>7</sup> The attorney is also held to the exercise of reasonable care and diligence,<sup>8</sup> and the want of either constitutes gross negli-

(client) must show that he offered to file the necessary bond and make the requisite affidavit. *Foulks v. Falls*, 91 Ind. 315.

1. *North Western Co. v. Sharp*, 28 Eng. L. & E. 555.

An attorney whose office has been broken open and papers stolen therefrom, without negligence on his part, is not liable for the loss. *Hill v. Barney*, 18 N. H. 607.

2. *Weeks on Attys.* § 290.

3. *Bowman v. Talman*, 27 How. Pr. (N. Y.) 212.

4. *Watson v. Muirhead*, 57 Pa. St. 161.

"The error being such an error as a cautious man might fall into." *Montison v. Jefferys*, 2 Car. & P. 113; *Pitt v. Yalden*, 4 Burr. 2060.

He cannot on account of such an error be deprived of his fee. *Pitt v. Yalden*, 4 Burr. 2060; *Godefroy v. Dalton*, 6 Bing. 467; 4 Moore & P. 149.

5. *Weeks on Attorneys*, § 284; *Goodman v. Walker*, 30 Ala. 482.

The attorney cannot be charged with negligence when he accepts as a correct exposition of the law a solemn decision of the supreme court of the State, especially in advance of any decision of the Supreme Court of the United States. *Marsh v. Whitman*, 21 Wall. (U. S.) 178.

6. Bringing an action of *assumpsit* on a deed under the common-law system. *Cliffe v. Prosser*, 2 Dowl. O. S. 21.

Bringing suit in a court which had no jurisdiction. *Williams v. Gibbs*, 5 Ad. & E. 208.

Omitting from mistake to procure the

ordinary instruments of evidence( *Hopping v. Quin*, 12 Wend. (N. Y.) 519), or laying the venue in the wrong county ( *Kemp v. Burt*, 4 Barn. & Adol. 424), has been held actionable. See also *Weeks on Attorneys*, § 285.

7. *Wharton on Agency*, § 598; *In re Bolton*, 9 Beav. 272; *In re Spencer*, 18 W. R. Ch. 240; *Varnum v. Martin*, 15 Pick. (Mass.) 450; *McWilliams v. Hopkins*, 4 Rawle (Pa.), 392; *Dearborn v. Dearborn*, 15 Mass. 316; *Rootes v. Stone*, 2 Leigh (Va.), 650; *Reiley v. Cavanaugh*, 29 Ind. 435; *Oldham v. Sparks*, 28 Tex. 425.

An attorney is bound to show the diligence of a good practitioner in issuing writs of execution, and such writs as are proper to make good the judgment when obtained. *Wharton on Agency*, § 598; *Dearborn v. Dearborn*, 15 Mass. 316.

If the law is plain he is liable both as to the proper parties to be sued and the form and order of the proceedings. *Davis v. Jenkins*, 11 Mees. & W. 745.

In a purchase or mortgage transaction the attorney is responsible for the security, in point of law only, not value. *Hayne v. Rhodes*, 8 Q. B. 342.

8. *Stephens v. Walker*, 55 Ill. 151; *Walpole's Admr. v. Carlisle*, 32 Ind. 415.

Thus if he undertakes to collect a debt and neglects to sue out all process necessary for the object. *Dearborn v. Dearborn*, 15 Mass. 316.

Or neglects to deliver a *fi. fa.* to the sheriff in time and the levy be lost. *Philips v. Bridge*, 11 Mass. 246.

gence, and will fasten liability upon him.<sup>1</sup> The usual remedy of a client against an attorney is by an action on the case.<sup>2</sup> In cases of gross neglect or misconduct the courts have interfered summarily, especially where the transaction has been tainted with fraud,<sup>3</sup> or the attorney has been paid for what he omitted to do.<sup>4</sup> In all actions against attorneys for negligence or want of skill, when the facts are ascertained the question of negligence or want of skill is for the jury.<sup>5</sup> The measure of damages is the loss actually sustained and not the mere nominal amount of the demand for collection.<sup>6</sup> The burden of proving negligence rests primarily upon the plaintiff;<sup>7</sup> when once established, it is for the solicitor to prove that the client was not injured by it.<sup>8</sup>

**11. Liability of Client to Attorney.**—An attorney may recover from his client all reasonable expenses occasioned by the litigation,<sup>9</sup>

Or if he allowed a cause to be called without previously inquiring whether a material witness was absent, and his client was non-suited. *Reece v. Rigby*, 4 Barn. & Ald. 202.

Or when being retained to defend a suit he allowed judgment to be taken for want of an answer; *Godefroy v. Jay*, 7 Bing. 413.

1. Weeks on Attys. § 293; *Brazier v. Bryant*, 2 Dowl. O. S. 600.

An attorney is not liable to one between whom and himself the relation of attorney and client does not exist for giving in answer to a casual inquiry an erroneous answer as to the contents of a deed. *Shillcock v. Passman*, 7 Car. & P. 288; Weeks on Attys. § 484.

2. Russell v. Palmer, 2 Wils. 235.

3. *Wendell v. Van Rensselaer*, 1 John. Ch. (N. Y.) 344; 4 John. Ch. (N. Y.) 118.

4. *Garner v. Lawson*, 1 Barn. 101; *Rex v. Jew, Sayers*, 50.

When summary jurisdiction is resorted to, the attorney may be proceeded against by attachment: *Floyd v. Nangle*, 3 Atk. 568. By an order to reimburse the client: *Rex v. Bennett, Sayers*, 169. Or an order to impose costs: *Rex v. Jew, Sayers*, 50.

But without some proof of fraud the courts generally prefer to leave the client to his regular remedy by action. *Barker v. Butler*, 2 W. Black. 780.

In cases of fraud, equity may take cognizance, but not in cases of mere negligence. *Wharton on Agency*, § 605; *British Mutual Investment Co. v. Cobhote*, L. R. 19 Eq. 627; *Brooks v. Day*, 2 Dick. 572; *Blair v. Bromley*, 5 Hare, 542; 2. Phill. 354; *Ware v. Lewis, Sr.*, L. R. 4 Eq. 235. *Dicta* to the contrary are to be found in *Floyd v. Nangle*, 3 Atk. 568. — *v. Jolland*, 8 Ves. 72; *Dixon v. Wil-*

*lamson*, 4 De Gex & J. 208; *Chapman v. Chapman*, L. R. 9 Eq. 276.

A bill in equity will not lie against a solicitor for negligence in investigating a title, upon the ground that he is an officer of the court, and the court of chancery has concurrent jurisdiction with courts of law over its own officers. L. R. 19 Eq. 627; 12 Alb. L. J. 75.

5. *Rhines v. Evans*, 66 Pa. 192; *Pennington v. Yell*, 6 Eng. (Ark.) 212; *Hunter v. Caldwell*, 10 Q. B. 69; *Reece v. Rigley*, 4 B. & A. 202; *Walpole v. Carlisle*, 32 Ind. 415. *Contra*, *Gambert v. Hart*, 44 Cal. 542.

6. Weeks on Attorneys, § 482; *Godefroy v. Jay*, 7 Bing. 413; *Governor v. Raley*, 34 Ga. 173; *Tasham v. Lewis*, 65 Pa. St. 65.

An averment that the attorney undertook the case without consideration is no answer. *Stephens v. White*, 2 Wash. (Va.) 203.

7. *Wharton on Negligence*, § 752.

8. *Godefroy v. Jay*, 7 Bing. 413. See *Harter v. Morris*, 18 Ohio St. 491.

9. *Champin v. King*, 6 Jur. 35.

Attorneys' fees are properly included in a judgment in railway condemnation proceedings. *Minneapolis R. Co. v. Woodworth*, 21 N. W. Rep. 476.

Sec. 2577 of the Mississippi Code of 1880 provides that "In all cases of the partition or sale of property for division of proceeds the courts may allow a reasonable solicitor's fee to the solicitor of the complainant to be taxed as a common charge on all the interests, and to be paid out of the proceeds, in case of sale, and to be a lien on the several parts in case of partition." For construction see *N. E. Potts et al. v. Ella Gray*, 60 Miss. 57.

In Pennsylvania the same result is reached by judicial decision. *Clark's App.*, 93 Pa. St. 369; *Fidelity Ins. Co.'s Appeal*, 108 Pa. St. 340.

and is entitled to compensation for all services rendered in good faith and in a proper manner.<sup>1</sup> If ill success, however, is attributable to the lawyer's bad faith or negligence, he cannot recover.<sup>2</sup> The attorney cannot recover when the service rendered was the maintenance of a procedure either illegal or immoral;<sup>3</sup> nor can a

The statute applies only to "amicable" suits. *Cowdrey v. Hitchcock*, 103 Ill. 263.

1. In England attorneys' and solicitors' fees are regulated by statute and rules of court. *Weeks on Attys.* §§ 324, 325.

A barrister's fee is termed *honorarium* and not *merces*. "Briefly, it is a gift of such a nature, and given and taken upon such terms, as, albeit the able client may not neglect to give it, without note of ingratitude (for it is but a gratuity or token of thankfulness), yet the worthy counsellor may not demand it without doing wrong to his reputation, according unto that moral rule, *Multa honeste accipi possunt, quæ tamen honeste peti non possunt.*" Preface to Sir John Davy's Reports. It follows that a barrister is incapable of making a contract for the compensation of his services as such. *Kennedy v. Brown*, 13 C. B. N. S. 677. And is exempt from all the ordinary liabilities of attorneys. *Swinfen v. Chelmsford*, 1 Fost. & F. 619.

Under the civil law, also, the recompense was purely honorary and the client was under no legal obligation to pay it. In Scotland, where the civil law prevails, an action can be sustained on a promise to compensate an advocate for his services; and in France the advocate may recover his fees by suit. But it seems to be considered dishonorable by the Parisian bar to bring suits for counsel-fees; and those who should attempt to do it would be immediately stricken from the roll of advocates. *Adams v. Stevens*, 26 Wend. (N. Y.) 455.

In the United States the English rule that counsel or barristers cannot recover by suit compensation for their services is not generally in force. *Wharton on Agency*, § 615; *Wylie v. Cox*, 15 How. (U. S.) 415; *Smith v. Davis*, 45 N. H. 566; *Nichols v. Scott*, 12 Vt. 47; *Miller v. Beal*, 26 Ind. 234; *Webb v. Browning*, 14 Mo. 354; *Harland v. Lilienthal*, 53 N. Y. 438; *Foster v. Jack*, 4 Watts (Pa.), 344; *Stephens v. Monges*, 1 Har. (Del.) 127; *Brackett v. Sears*, 15 Mich. 244.

In Pennsylvania the English rule was once in vogue. *Brackenridge v. McFarland*, Addis, 49. But has since been overruled. *Balsbaugh v. Frazer*, 19 Pa. St. 95.

In New Jersey the English rule has obtained, and also to some extent in the

federal courts as applied to counsel in the special sense of that term. *Seeley v. Crane*, 3 Greene (N. J.), 35; *Law v. Ewell*, 2 Cranch C. C. 144. But see *Hassel v. Van Houten*, 39 N. J. Eq. 105.

A counsellor at law may recover counsel-fees of a party who has agreed to pay him for his services in suits in the supreme court. *Zabriskie v. Woodruff*, 5 Cent. Rep. (N. J.) 329.

To support his claim to compensation for professional services, an attorney may prove either his original employment by the client or the performance of services with the knowledge of the client, and the recognition of the relation of the client during the progress of the cause. *Jackson v. Clopton*, 66 Ala. 29.

Even in those jurisdictions where a counsel cannot collect his fees by process of law, an action will lie upon a bill of exchange or promissory note given in consideration of his services. *Mowat v. Brown*, 19 Fed. Rep. 87.

2. *Wharton on Agency*, § 615; *Maynard v. Briggs*, 26 Vt. 44; *Bradin v. Kingland*, 4 Watts (Pa.), 420; *Hopping v. Quin*, 12 Wend. (N. Y.) 517; *Chatfield v. Simonson*, 92 N. Y. 209; *Andrews v. Tyng*, 94 N. Y. 16.

But negligence or ill faith in one matter will not affect him in another. Perhaps it may if pleaded as a set-off. *Currie v. Cowes*, 2 B. & S. 542; *Walsh v. Shumway*, 65 Ill. 471; *Weeks on Attys.* § 335.

The fact that one of the plaintiffs, an attorney at law, had, under a prior retainer, advocated views of the law and the facts different from those upon which his subsequent client, the defendant, rested its case, or had officially, as a judge or officer of the government, held a different view of the law and the rights of the parties, did not of itself disqualify him from accepting a retainer from the defendant, nor did it necessarily render his services less valuable to the defendant; and in an action against the defendant for the value of his services it was error to admit evidence of the advocacy of such former opinions for the purpose of showing bad faith, whereby to defeat his recovery. *Smith v. C. & N. W. R. Co.*, 60 Iowa, 515.

3. *Treat v. Jones*, 28 Conn. 334; *Hallet v. Oakes*, 1 Cush. (Mass.) 296; *Arring-*

lawyer recover for absolutely useless work.<sup>1</sup> Actions for attorneys' fees should be brought in the name of the person directly employed or retained.<sup>2</sup> The employment of an attorney to conduct a cause is a personal trust and confidence; it cannot be delegated except by consent of client.<sup>3</sup> If, however, he does so consent, the attorney whose services were contracted for may recover on the contract.<sup>4</sup> Withdrawal from a case with the client's consent does not operate as a waiver of the right to compensation for services already rendered;<sup>5</sup> nor does dismissal by the client without

ton v. Sneed, 18 Tex. 135; Frish v. Child, 27 Wall. (U. S.) 441.

1. Shaw v. Arden, 9 Bing. 287; Symes v. Pepper, 12 Ad. & E. 337.

He is entitled to compensation for bringing suit, although suit was unnecessary and attorney knew it, if the client has derived benefit therefrom. Murphy v. Shepardson, 60 Wis. 412.

When there is a dispute as to the amount of fees, and the attorney acted in good faith, his right to compensation is not forfeited should the jury find he was entitled to a less sum than he claimed. But if he fraudulently claimed the right to retain out of the money of his client a larger sum than the jury find to be just, he forfeits all claim to every compensation whatever. Shoemaker v. Stiles, 102 Pa. St. 549.

2. If the work was performed by a partnership, then all the plaintiffs should be duly qualified attorneys. Williams v. Jones, 5 Barn. & C. 108; Arden v. Tucker, 1 Moody & R. 191. But see Kell v. Nainby, 10 Barn. & C. 20.

A member of a firm may sue in his own name for a demand due the firm, if the business from which it arose was conducted in his name solely. Platt v. Halen, 23 Wend. (N. Y.) 456; Lansing v. McKillup, 7 Cowen (N. Y.), 416.

But recovery may be had by one member of the firm for services not embroiled in the business of the firm. Moshier v. Frost, 110 Ill. 206.

3. Hitchcock v. McGee, 7 Port.(Ala.) 556; Matter of Bleakley, 5 Paige (N. Y.), 311.

4. Allcorn v. Butler, 9 Tex. 56.

When one attorney does business for another, the attorney employed generally looks to the attorney who employs him and not to the client. Weeks on Attys. § 557.

To avoid liability, express notice must be given by the employing attorney that the business is to be done on client's credit; it is no defence that the business was known by the plaintiff to be done for the benefit of the client. Serace v. Whittington, 2 Barn. & C. 11.

*Indebitatus assumptit* will lie in favor

of an attorney who is retained by one person for another; but the employer must promise to pay, and the action is on the express promise against the person making it, and, under the Statute of Frauds, must be in writing. Stark, 270; Sands v. Trevillian, Cro. Car. 107; Weeks on Attys. § 335.

5. Coopwood v. Wallace, 12 Ala. 790; Tenney v. Berger, 93 N. Y. 524.

Attorneys employed under a special contract who abandon the cause before its termination are thereby deprived of any claim under the contract, and are left to recover such fees as they are reasonably entitled to on the basis of a *quantum meruit*. Weeks on Attys. § 365.

The client of a legal firm is entitled to the services of every member; and if one abandons the retainer with the assent of the others, express or implied, or they attempt to supply his place with another of equal or superior ability, it will be no performance of the contract. Morgan v. Roberts, 38 Ill. 65.

Non-payment of costs after repeated applications was held good ground for abandonment by Tenterden, C. J., in Rowson v. Earle, *Sittings in London*, 1829. *Contra*, 14 Ves. 196; Mordecai v. Solomon, Sayers, 172. See also Morange v. Kling, 93 N. Y. 381.

In case of such refusal it is within the power of the court to permit the substitution of a new attorney, and it is within its discretion to determine upon what terms it shall be done, and, among others, whether the judgment or order when obtained shall be chargeable with the fees of the original attorney. Morange v. Kling, 93 N. Y. 381.

The employment, however, by the client, without the consent of or consultation with the attorney, of a counsel with whom the attorney's relations are such that they cannot cordially co-operate, is a justifiable cause for his withdrawal from the case, and upon such withdrawal the client is liable for services rendered. Tenney v. Berger, 93 N. Y. 524. As to substitution of attorneys, see Wilkinson v. Tilden, 14 Fed. Rep. 778 and note.



any fault on his own part work a forfeiture.<sup>1</sup> It is the duty of the attorney to communicate to his client an offer of compromise made by the other side, and failure to do so with a view to obtaining further compensation precludes a recovery for the costs incurred.<sup>2</sup> If an attorney has reasonable and probable grounds for commencing an action, and does so, but afterwards discovers that the cause cannot be successfully prosecuted, and desists, he is entitled to recover his costs from his client.<sup>3</sup> The contract of an attorney retained to conduct an action is continuing, and, as a general rule, can be determined by him only on reasonable notice.<sup>4</sup> In the absence of express contract, an attorney can recover reasonable compensation for his services upon a *quantum meruit*.<sup>5</sup> The plaintiff, under the general issue, must clearly establish his retainer, the performance of the work, and that the charges are reasonable.<sup>6</sup>

1. In fact, in *Myers v. Crockett*, 14 Tex. 257, the court intimated that he might recover the whole fee contracted for, on the ground that the rule that a readiness or tender of performance is not equivalent to performance did not properly apply to such cases. To entitle him to compensation, the attorney must have kept himself in readiness to serve his client at any time during the conduct of the cause, and if he accept a retainer from the opposite side he can recover no fee on the contract. *Cantrell v. Chism*, 5 Sneed (Tenn.), 116.

If an attorney is prevented by his client from completing his employment, he will be entitled to recover his fees as if the contract was fully performed. *Kersey v. Garton*, 77 Mo. 645.

Counsel who have prepared for hearing are not deprived of their right to a full counsel fee by the fact, merely, that the case was disposed of on grounds not raised in the argument. *Bates v. Desenberg*, 47 Mich. 643.

2. *Weeks on Attys.* § 336; *Steel v. Thomas*, 8 Car. & P. 762.

3. *Lawrence v. Potts*, 6 Car. & P. 428.

4. *Nicholls v. Wilson*, 11 Mees. & W. 106; *Harris v. Oslom*, 2 Car. & M. 629.

He cannot sue for his bill until the termination of the suit; he may, however, give a reasonable notice to his clients to supply him with adequate funds, and in case of refusal may sue him for his costs. *Whitehead v. Lord*, 7 Ex. 691.

If a client repudiates his retainer, he may bring an action for his costs without waiting the completion of the suit. *Hawkins v. Cottrell*, 27 L. J. Ex. 369; *Weeks on Attys.* § 336.

5. *Weeks on Attys.* §§ 552, 563; *Phelps v. Hunt*, 40 Conn. 97.

When more than one attorney is employed, in the absence of proof to the

contrary the presumption is that they share the fee equally. *Hurst v. Durnell*, 1 Wash. 438.

Where the rate of compensation is fixed by statute, the law implies a promise to pay at least the statute rate of compensation; it rests with the client to prove that the attorney undertook to do the work for less. Such an agreement should be made out by evidence equal to a positive declaration. *Brady v. Mayor*, 1 Sandf. (N.Y.) 569; *Weeks on Attys.* § 553.

6. The service must be performed by virtue of the retainer. A trustee will not be entitled to recover costs for professional services performed in the character of trustee for a party, unless express provision to that effect is made in the trust deed. *In re Sherwood*, 3 Beav. 338; *Cochran v. Newton*, 5 Denio (N. Y.), 482.

But, services of counsel employed by a trustee to protect the income of a spendthrift trust from the creditors of the *cestui que trust* are necessary for the preservation of the trust, and should be compensated out of the income. The death or discharge of the trustee will not deprive counsel of payment for such services. *Manderson v. Guarantee Co.*, 5 Cent. Repr. (Pa.) 214.

That an attorney is employed as an agent to negotiate loans does not preclude him from rendering professional services, if requested by his principal, and if so rendered he is entitled to recover the reasonable value thereof upon the implied contract. *Insurance Co. v. Buchanan*, 100 Ind. 63.

An attorney may recover for services rendered to a corporation though he be a stockholder, and the presumption is that his services were legal. *Reynolds v. McMillan*, 63 Ill. 46. See also *Ward v. Craig*, 87 N. Y. 550.

Upon a *quantum meruit* for professional services, the professional standing of the attorney is a proper subject of inquiry.<sup>1</sup> The measure of compensation is said to be the exercise of legal knowledge, the responsibility incurred, and the labor bestowed, and sometimes the amount involved is also considered.<sup>2</sup>

**12. Express Contract.**—So long as it is neither oppressive nor champertous,<sup>3</sup> an attorney may make any manner of contract with

Brokers who were also attorneys were held not entitled to charge counsel fees for services about the business of their employer in relation to lands in their hands as such brokers. *Walker v. American Nat. Bank*, 49 N. Y. 659; *Dyer v. Sutherland*, 75 Ill. 583.

Nor can a receiver act as his own counsel so as to charge the estate for his services. *Bank of Niagara Case*, 6 Paige (N. Y.). 213; *McGourky v. Downs*, MS. N. J. Chan. May Term, 1880. See *Adams v. Woods*, 8 Cal. 306.

Nor can one member of a partnership who is an attorney charge the others for professional services about the firm's affairs, either before or after dissolution. *Milburn v. Codd*, 7 B. & C. 419; *Van Duzer v. McMillan*, 37 Ga. 299; *McCrary v. Ruddick*, 33 Iowa, 521.

Nor can an attorney who is a mortgagee recover his costs on his own foreclosure. *Sclater v. Cottam*, 3 Jur. (N. S.) 630; *Patterson v. Donner*, 48 Cal. 369.

Nor can a solicitor who has an interest in attending to a cause charge for his services without an express agreement. *Martin v. Campbell*, 11 Rich. Eq. S. Car. 205. See *Deere v. Robinson*, 7 Hare, 283.

But he would be liable for costs. *Voorhees v. McCartney*, 51 N. Y. 387; *Cone v. Donaldson*, 47 Pa. St. 363.

A director of a corporation who brought suit as an attorney against such corporation, was held entitled to costs. *Christie v. Sawyer*, 44 N. H. 298.

As to a stockholder sustaining such relation, see *Spence v. Whitaker*, 3 Port. (Ala.) 297.

An attorney can recover ordinary witness fees when he offers himself as a witness in his own case. *Leaver v. Whalley*, 2 Dowl. 80; *Taaks v. Schmidt*, 25 How. Pr. (N. Y.) 340. Or is called in another's case during his regular attendance at that term. *Parks v. Brewer*, 14 Pick. (Mass.) 192; *Marshall v. Parsons*, 4 Jur. 1017; *Abbott v. Johnson*, 47 Wis. 239.

But fees when so in attendance were refused in *McWilliams v. Hopkins*, 1 Whart. (Pa.) 276; *Crummer v. Huff*, 1 Wend. (N. Y.) 25; *Jones v. Botsford*, 1 Pug. & Bur. 581. See *Reynolds v. Warner*, 7 Hill (N. Y.), 144.

1. *Weeks on Attys.* § 563.

The amount of his professional business may be inquired into as tending to show his professional standing. *Phelps v. Hunt*, 40 Conn. 97.

An attorney called as an expert as to the value of professional services cannot be asked as to the income derived by himself in the practice of his profession. *Harland v. Lilienthal*, 53 N. Y. 438.

2. *Succession of Virgin*, 18 La. Ann. 42.

As to reasonable compensation in the absence of express contract, see *Webb v. Browning*, 14 Mo. 354; *Smith v. Davis*, 45 N. H. 566.

The loss of other business may be taken into consideration. *Quint v. Ophir*, 4 Nev. 304.

On implied *assumpsit* for professional services the rate of compensation is in proportion to the labor expended, independent of the benefit received. *Weeks on Attys.* § 577; *Foster v. Jack*, 4 Watts (Pa.), 339.

The court should not receive testimony of the value of such services for administering an estate; it should fix the value of them on its own responsibility. *Dorsey v. Creditors*, 5 Martin (La.), 399; *Baldwin v. Carleton*, 15 La. 395.

The attorney may, by express undertaking, limit the costs to a certain amount, and cannot then recover more. *Moore v. Hall*, 17 Com. B. N. S. 760.

On a *quantum meruit* he is limited to the valuation he himself attached to his services in the special agreement. *Morgan v. Roberts*, 38 Ill. 65.

3. Champerty is a bargain with a plaintiff or defendant, *campum partiri*, to divide the land or other matter sued for between them, if they prevail at law. Whereupon the champertor is to carry on the suit at his own expense. 4 Bl. Com. 135\*; 2 Bouv. Dict. (15th Ed.) 299; 2 Chit. Crim. Law, 284, n. (2).

Under this definition, to render a contract champertous the suit must be carried on at the expense of the champertor. This view is taken in *Allard v. Lami-rande*, 29 Wis. 502; *Bayard v. McLane*, 3 Harr. (N. J.) 139; *Moses v. Bagley*, 55 Ga. 283; *Duke v. Harper*, 66 Mo. 51; *Orr v. Tanner*, 12 R. I. 94; *Coleman v. Billings*, 89 Ill. 183.

In *Lathrop v. Amherst Bank*, 9 Metc.

his client,<sup>1</sup> and take his client's bond, note, or other obligation for the amount of his stipulated fee;<sup>2</sup> he may take assignments of debt,<sup>3</sup> choses in action,<sup>4</sup> conveyances, mortgages, and all manner of securities.<sup>5</sup> He may agree that his compensation shall be contingent on the success of the litigation.<sup>6</sup> Such an agreement operates as an equitable assignment to the extent of the sum contained in the agreement, of the funds recovered in the action, and the attorney's right is superior to that of a subsequently attaching creditor,<sup>7</sup> and being in no sense a "promise to answer for the debt, default, or miscarriage of another," is not within the provisions of the statute of frauds.<sup>8</sup> An attorney's claim to compensation out of a judgment rendered in a suit in which he has been employed will be protected against a fraudulent assignment of the chose in action, if the assignee has notice of the attorney's claim. And if, while the suit is yet in progress, the assignee should compromise the claim and receive the money, he will be held liable for the attorney's bill.<sup>9</sup> If an attorney's fee is contingent on success, and

(Mass.) 489; *Scobey v. Ross*, 13 Ind. 117; *Backus v. Byson*, 4 Mich. 535; *Rust v. Larue*, 4 Litt. (Ky.) 419, followed by *Davis v. Sharron*, 15 B. Mon. (Ky.) 64 (decided, however, under a local statute), it was held that it was not necessary that the champertor carry on the suit at his own expense, provided he was to receive part of the subject-matter of the controversy. These decisions are founded on Coke's definition, Co. Litt. 368 b, followed by Sir William Grant in *Stevens v. Bagwell*, 15 Ves. 139.

For the English rule see *Hilton v. Woods*, L. R. 4 Eq. 432.

*Thurston v. Percival*, 1 Pick. (Mass.), 415, is perhaps the leading case in America. See also *Martin v. Clarke*, 8 R. I. 389; *Coquillard v. Bears*, 21 Ind. 479; *Elliott v. McClelland*, 17 Ala. 206; *Weakley v. Hall*, 13 Ohio, 167; *Broadman v. Brown*, 25 Iowa, 487.

The rule does not grow out of the relation of attorney and client. *Spryce v. Porter*, 7 E. & B. 58.

It has been repudiated in California, Arkansas, and New York. *Hoffman v. Vallejo*, 45 Cal. 564; *Lytle v. The State*, 17 Ark. 609; *Voorhees v. Dorr*, 51 Barb. (N. Y.) 585. See also *Richardson v. Rowland*, 40 Conn. 572.

Courts of the United States allow the attorney to stipulate for a reasonable per cent of the amount recovered as compensation for services. *Wright v. Tebbetts*, 91 U. S. 252.

While as between the parties a champertous contract is void, and neither can enforce it, yet the defendant cannot set up as a defence the fact that a champertous contract had been entered into by the plaintiff's attorney. *Allison v. C. & W. R.*, 4 Iowa, 274; *Courtwright v.*

*Burns*, 14 Cent. L. J. 89. See for further discussion 13 Cent. L. J. 368, and 17 Am. L. R. 759.

Where the special agreement is void for champerty, recovery may be had on *quantum meruit*. *Weeks on Attys.* § 345.

1. *Yates v. Robinson*, 80 Va. 475; *Badger v. Gallaher*, 113 Ill. 662.

2. *Mooney v. Lloyd*, 5 S. & R. (Pa.) 412.

3. *Ripley v. Bull*, 19 Conn. 56; *Tapley v. Coffin*, 12 Gray (Mass.), 420; *Jeffres v. Cochrane*, 47 Barb. (N. Y.) 557.

4. *Walker v. Clay*, 21 Ala. 797; *McClain v. Williams*, 8 Yerg. (Tenn.) 230; *Pennington v. Nave*, 15 Ind. 323.

But such note is not collectible even when it has been assigned to an innocent transferee, if the attorney has failed to attend, either in person or by some other competent attorney, and properly conduct the cause. *Weed v. Bond*, 21 Ga. 195.

5. *Weeks on Attys.* § 346.

6. *Stanton v. Embry*, 93 U. S. 548; *Allard v. Lamirande*, 29 Wis. 502; *Newkirk v. Cone*, 18 Ill. 449; *Hitchings v. Van Brunt*, 38 N. Y. 335; *Broadman v. Brown*, 25 Iowa, 489; *McDonald v. Chicago, etc., R. Co.*, 29 Iowa, 171.

In England an agreement for contingent fees is champertous. *Prince v. Beattie*, 32 L. J. Ch. N. S. 734; *Earle v. Hopwood*, 10 C. B. N. S. 506.

7. *Patten v. Wilson*, 34 Pa. St. 299; *Weeks on Attorneys*, § 355.

But not if the agreement is to give a contingent fee out of a verdict to be recovered on an action for tort, a tort not being assignable. *Miller v. Haven*, 18 Cent. L. J. 97.

8. *Fitch v. Gardenier*, 2 Keyes (N. Y.), 516; *Weeks on Attys.* § 354.

9. *Weeks on Attys.* § 360; *Christie v. Sawyer*, 44 N. H. 298.

his client settles the suit without his consent, the attorney can recover what his services are worth on a *quantum meruit*.<sup>1</sup> A court of equity will not enforce in favor of a solicitor a security taken from his client pending a suit, for anything beyond the sum actually due.<sup>2</sup> An attorney cannot, during the existence of the relation between himself and his client, make a binding contract with his client to secure to himself greater compensation for his services than was agreed upon when the relation commenced.<sup>3</sup>

**13. Liens.**—An attorney has a general or retaining lien for a balance due him in his professional employment upon all papers and documents which come to him<sup>4</sup> by reason of his professional character. When papers come into the hands of an attorney for professional services, the particular object for which they were intrusted to him is immaterial, unless it is expressly agreed to the contrary, or unless there is something in the nature of the transaction which forbids the idea of a lien.<sup>5</sup> Where deeds are delivered for the purpose of conducting a suit, the general lien prevails, but when they are delivered for a specific purpose there can be no lien beyond that purpose.<sup>6</sup> The restricted and qualified possession excludes the idea of a general lien.<sup>7</sup> But if the property be allowed to remain in the attorney's hands, after the specific purpose for which it is left is fulfilled, the general lien will attach.<sup>8</sup> The lien which an attorney has is only commensurate with the rights which the party delivering the deeds has therein.<sup>9</sup> An attorney

1. *Quint v. Sawyer*, 4 Nev. 305.

2. *Saunderson v. Glass*, 2 Atk. 297.

No attorney can take anything from his client pending the suit save his demand. *Hylton v. Hylton*, 2 Ves., Sr. 259, 547; *Wood v. Donnes*, 13 Ves. 120; *Mott v. Harrington*, 12 Vt. 199; *Weeks on Attys.* § 363.

3. *Weeks on Attys.* § 364.

But an attorney is allowed to enter into contracts with his client upon any matter which is not the object of his concern as attorney. His employment in one suit does not deprive him, while it is pending, of his right to make a contract for compensation for services in another, or for any other professional business with the same client. *Lecatt v. Salle*, 3 Port. (Ala.) 115.

The remedy for compensation is by action, and not by summary application in the original suit. *Lannett v. R. Co.*, 11 West. L. Rep. 690.

4. *Stevenson v. Blacklock*, 1 Maule & S. 535; *St. John v. Diefendorf*, 12 Wend. (N. Y.) 261; *In re Broomhead*, 16 L. J. Q. B. 355; *Dennett v. Cutts*, 11 N. H. 163; *Walker v. Sargeant*, 14 Vt. 247; *Ward v. Craig*, 87 N. Y. 551; *Robinson v. Hawes*, 56 Mich. 135; *Weeks on Attys.* § 371.

Two things are requisite to entitle the attorney to this lien. (1) The balance must be due in his professional employment;

(2) the papers must be acquired in his professional character. It does not attach for money lent. *Walker v. Sargeant*, 14 Vt. 247.

Nor upon documents acquired as *prochein ami*. *Montague on Liens*, 1, 53.

Wharton divides attorney's liens into retaining and charging. *Wharton on Agency*, § 623, *et seq.*

5. *Ex parte Sterling*, 16 Ves. 258; *Stevenson v. Blacklock*, 1 Maule & S. 535; *Balch v. Symes*, 1 Turn. & R. 87; *Lawson v. Dickinson*, 8 Mod. 307.

6. If the writings were delivered for a special purpose, the attorney cannot detain them for another demand, as where they were delivered for the purpose of preparing a mortgage, the attorney has not as against the mortgagee a general lien for a demand against the mortgagor. *Lawson v. Dickinson*, 8 Mod. 306.

7. *Judson v. Etheridge*, 1 Cromp. & M. 473; *Jackson v. Cummings*, 5 Mees. & W. 542.

8. *Ex parte Pemberton*, 18 Ves. 382; *Ex parte Sterling*, 16 Ves. 258; *Weeks on Attys.* § 371.

9. *Hollis v. Claridge*, 4 Taun. 807.

A solicitor has no lien against a remainder man on deeds put into his hands by the tenant for life. *Ex parte Nesbitt*, 2 Shoales & L. 279.

The lien extends to a representative of

has also a retaining lien on funds in his hands for his fees and disbursements in the cause.<sup>1</sup>

**Charging Lien.**—The charging lien is a special lien to which an attorney or solicitor is entitled upon funds in court recovered through his exertions.<sup>2</sup> "The lien attaches on the fruits of a judgment or decree."<sup>3</sup> It attaches to the money payable to the client thereunder, or by virtue of an award,<sup>4</sup> and to money paid or payable into court in the course of an action or suit, or in any other way, if the proceeds of the labor and skill of an attorney."<sup>5</sup> The lien has been held to attach on sums received or payable by way of compromise to the client in a cause, even when the verdict and

a deceased solicitor. *Redfearn v. Sowerby*, 1 Swanst. 84.

1. *In re Paschel*, 10 Wall. (U. S.) 483; *In re Knapp*, 85 N. Y. 284.

The principle is said to apply to any suit or proceeding brought to recover other moneys covered by the same retainer. *In re Knapp*, 85 N. Y. 284. See also *Ins. Co. v. Buchanan*, 100 Ind. 63.

An attorney has a lien on money in his possession collected for his client, to secure a reasonable compensation for professional services and disbursements; and he can retain enough of the money to pay the general balance due him for such services and disbursements, although rendered in different suits; and when the client has deceased before the rendition of judgment, the lien secures charges for services performed for the intestate, as well as those performed for his administrator, who has entered to prosecute. *Hurlbert v. Brigham*, 56 Vt. 368.

The lien may be lost or waived by setting up an inconsistent claim, by parting with the possession, by bringing an action, or by taking other security. *Weeks on Attys.* § 375 and cases cited.

If an attorney refuse to proceed with his client's cause his lien is superseded, and he must allow the new attorney to see the papers detained in his possession until his bill is settled, at all reasonable times, and he must himself attend with them in court, or suffer the new attorney to have them for that purpose. *Creswell v. Byron*, 14 Ves. 271.

But where the attorney has expended costs, and the client discharges him, his lien extends to refusing the use of the papers to the client or his next solicitor. *Newton v. Harrington*, 4 Scott N. S. 766.

2. This lien has two characteristics: (1) It is special; (2) it exists independently of possession on the part of the holder. 20 Am. L. R. 822; *Wharton on Agency*, § 623.

The lien exists in both legal and equita-

ble proceedings. *Bartree v. Watson*, 2 Keen (Eng.), 713; *Jones v. Frost*, L. R. 7 Ch. 773.

The lien cannot be defeated by the insolvency of the client or by his assignment of the fund. His assignee in bankruptcy or by purchase takes subject to the lien. But a court of equity, before awarding any part of the fund in satisfaction of the attorney's lien, will inquire if the fee is reasonable. *McCain v. Portis*, 42 Ark. 402; *Central R. v. Pettus*, 113 U. S. 116.

An attorney has no lien upon his client's lands for services rendered in defending against an effort to charge them with the payment of the debt of another. *Shaw v. McNeale*, 6 H. L. Cas. 581; *McWilliams v. Jenkins*, 72 Ala. 480.

Nor for services in prosecuting a suit in equity to establish the title. *McCollough v. Flournoy*, 69 Ala. 189; *Hanger v. Fowler*, 20 Ark. 667; *Small v. Clark*, 22 Vt. 598; *Cozzens v. Whitney*, 3 R. I. 79; *Humphrey v. Browning*, 46 Ill. 476; *Martin v. Harrington*, 57 Miss. 208.

In Iowa the attorney's lien upon judgment does not attach upon land sold in satisfaction of the judgment and bought by the client. *Wishard v. Biddle*, 64 Iowa, 526.

In *Brown v. Bigley*, 3 Tenn. Ch. 618, and *Wilson v. Wright*, 72 Ga. 845; the lien was recognized.

To extend the lien to lands recovered in a suit, it has been urged, would be to create an equitable mortgage, and would be opposed to the registry system. 21 Am. L. R. 82.

Nevertheless it was so extended in England by 23 and 24 Vict. ch. 127, § 28.

3. *Ex parte Price*, 2 Ves., Sr. 407; *Mitchell v. Oldfield*, 4 T. R. 123; *May v. Sibley*, 69 Ga. 133; *Moseley v. Norman*, 74 Ala. 422.

4. *Tabian v. Horn*, Moody & R. 228; *Omerod v. Sate*, 1 East, 404.

5. *Irving v. Viana*, 2 Y. & Jer. 70; *Barnesby v. Powell*, Amb. (Eng.) 102.

judgment are against him, for the money is regarded as the fruit of the attorney's labor and skill.<sup>1</sup> It seems fairly well settled that the lien does not attach till judgment,<sup>2</sup> and until the lien attaches the parties can settle the suit regardless of the attorney's claim for costs.<sup>3</sup>

If the client settles the case so as to deprive the attorney of his costs, it is clear that the latter has redress against the former; and if the attorney notify the opposite party that he has an unsatisfied claim, he can recover from such party the amount of the claim where the settlement was collusive.<sup>4</sup> He has, however,

1. *Davis v. Loundes*, 3 Com. B. 827; *Hopewell v. Amwell*, 2 Halst. (N. J.) 4.

**Does the Lien cover Fees and Disbursements, or only Costs?**—In England an attorney or solicitor can recover his taxable costs only. *Weeks on Attys.* § 370, and cases.

In *Wylie v. Cox*, 15 How. 415, the United States Supreme Court decided that an attorney employed to prosecute a claim before a commission for a contingent fee of five per cent had a lien for this amount in the fund recovered, and such a one as the court could enforce by a bill in equity.

In several States the lien is held to cover costs, advances, and fees. *Stratton v. Hussey*, 62 Me. 286; *Benjamin v. Benjamin*, 17 Conn. 110; *Hutchinson v. Pettes*, 18 Vt. 616; *Martin v. Hawks*, 15 Johns. 405; *Bowling Green Bank v. Todd*, 52 N. Y. 489; *Waters v. Grace*, 23 Ark. 118; *Carter v. Davis*, 8 Fla. 183.

In some the lien is regulated by statute. *Baker v. Cook*, 11 Mass. 236; *Citizens' Bank v. Culver*, 54 N. H. 327.

In the other States the lien does not exist, and the attorney is remitted to his retaining lien against funds in his hands. *Hill v. Brinkley*, 10 Ind. 102; *Frissell v. Haile*, 18 Mo. 18; *Dubois' App.*, 38 Pa. St. 231; *Simmons v. Almy*, 103 Mass. 33.

In other courts the lien is limited in its extent to statutory costs and disbursements. *Wells v. Hatch*, 43 N. H. 246; *Cozzens v. Whitney*, 3 R. I. 79; *McDonald v. Napier*, 14 Ga. 89; *Humphrey v. Browning*, 46 Ill. 476; *Elwood v. Wilson*, 21 Iowa, 523; *Mansfield v. Dorland*, 2 Cal. 507; *Dodd v. Brott*, 1 Minn. 270. See also *Dennett v. Cutts*, 11 N. H. 163; *Citizens' Nat. Bank v. Culver*, 54 N. H. 327.

2. *Potter v. Mayo*, 3 Greene (N. J.), 34; *Hobson v. Watson*, 34 Me. 20; *Getchell v. Clarke*, 5 Mass. 309; *Hutchinson v. Pettes*, 18 Vt. 616; *Pinkerton v. Easton*, L. R. 16 Eq. 490; *Henchey v. Chicago*, 41 Ill. 136. See *Casey v. March*, 30 Tex. 180.

No lien exists in favor of attorneys of distributees on a fund brought into court for distribution to the parties entitled.

*McCa v. Grant*, 43 Ala. 262; *Dubois, App.*, 38 Pa. St. 231; *In re Lamberson*, 63 Barb. (N. Y.) 297.

3. 20 Am. L. R. 840 and cases; *Yoakley v. Hawley*, 5 Lea. (Tenn.) 670.

An order of court after verdict that judgment be entered on the verdict, is deemed to be a judgment so far as to give the attorney his lien, whether final judgment be entered or not. 20 Am. L. R. 842.

Where, however, the action is founded upon a negotiable instrument or a contract in writing, which is in the attorney's possession, the lien attaches to the contract before judgment, and his client can make no settlement or assignment of the action without discharging the attorney's fees. *Coughlin v. N. Y. C. & H. Riv. R.*, 71 N. Y. 443, 449; *Kusterer v. City of Beaver Dam*, 56 Wis. 471; *Dennett v. Cutts*, 11 N. H. 163.

The lien in such cases attaches from the time the contract is delivered to the attorney and he commences the action. In such case the lien attaches not only for the attorney's services rendered in that particular suit, but also for his general account for professional services rendered the client. The settlement or assignment is subject to the attorney's general lien. *Schwartz v. Jenney*, 21 Hun (N. Y.), 33.

In such cases the rule that a *bona-fide* settlement, payment, or assignment without notice of the attorney's lien prevails against the lien, has no application; neither has the rule that the attorney's lien upon judgment yields to the right of set-off of the opposite party. *Schwartz v. Jenney*, 21 Hun (N. Y.), 33.

4. *Wharton on Agency*, § 627; *Barker v. St. Quintin*, 12 Mees. & W. 440; *Foot v. Tewksbury*, 2 Vt. 97; *Currier v. R. Co.*, 37 N. H. 223; *McGregor v. Comstock*, 28 N. Y. 237; *McKenzie v. Wardwell*, 61 Me. 136; *Pleasants v. Kortrecht*, 5 Heisk. (Tenn.) 694.

The mere fact that the parties made the settlement after verdict, but before judgment entered, is not conclusive evidence

no such right if he give no such notice.<sup>1</sup> But the right exists though the notice be informal and constructive.<sup>2</sup> Where the judgment is for costs alone, the record is sufficient notice to all parties.<sup>3</sup> The lien of an attorney upon a judgment is upon the interest of his client in the judgment, and is subject to an existing right of set-off in the other party to the suit.<sup>4</sup> Where there has been a collusive settlement of the cause, and the settlement is of record, the attorney may move to set it aside, or if the settlement

of collusion; something more must be shown. *Wade v. Orton*, 12 Abb. Pr. N. S. (N. Y.) 444.

1. *Green v. Express Co.*, 39 Ga. 20; *McDowell v. R.*, 4 Bosw. (N. Y.) 670; *People v. Hardenburgh*, 8 T. R. 335; *Braden v. Ward*, 42 N. J. L. 518. See also *St. Louis & San Francisco R. R. v. Bennett*, 35 Kan. 395; *Boston & Colorado Smelting Co. v. Pless*, 10 Pac. Rep. 652.

But if the judgment debtor acts in collusion with the creditor, and pays with the intention of cheating the attorney out of his lien, the debtor is not protected in making such payment, though he has received no actual notice of the lien. *Heart v. Chipman*, 2 Aik. (Vt.) 162; *Heister v. Mount*, 17 N. J. 438; *Howard v. Osceola*, 22 Wis. 453; *Rosquin v. Knickerbocker Stage Co.*, 12 Abb. Pr. (N. Y.) 324.

2. *Abell v. Potts*, 3 Esp. (Eng.) 242; *Reed v. Dupper*, 6 Term Rep. 361; *Lake v. Ingham*, 3 Vt. 158; *Young v. Dearborn*, 27 N. H. 324.

But the mere fact that an attorney appears in a cause is not sufficient notice of his lien. 36 Ga. 629.

3. *Read v. Dupper*, 6 T. R. 361; *McGregor v. Comstock*, 28 N. Y. 237; *Marshall v. Meech*, 51 N. Y. 140; *Stratton v. Hussey*, 62 Me. 286.

When the judgment is for damages as well as for costs, the attorney should give notice of his lien to the judgment debtor, otherwise he will not be protected. *Read v. Dupper*, 6 T. R. 361; *Pulver v. Harris*, 52 N. Y. 73.

Where by statute the lien exists from time of giving notice, the parties acting in good faith may make a valid settlement at any time before the notice is given in the manner prescribed. *Cason v. Sargeant*, 7 Iowa, 317; *Green v. Express Co.*, 39 Ga. 20.

The notice should be given to the adverse party personally, and not to his attorney. *Boston & Colo. Smelting Co. v. Pless*, 10 Pac. Rep. 652.

4. 21 Am. L. R. 75.

The Court of Chancery will not interpose the lien further than upon the clear balance, which is the result of the equity between the parties. *Taylor v. Popham*, 15 Ves. 75; *Randall v. Fuller*, 6 Durn. &

E. 456; *Glaister v. Hewes*, 8 Durn. & E. 69; *Middleton v. Hill*, Maule & S. 240; *Aspinwall v. Stamp*, 4 Dowl. & R. 716; *Nunez v. Modigliani*, 1 H. Black. 217; *Hall v. Ody*, 2 Bos. & P. 28; *Mitchel v. Oldfield*, 4 Durn. & E. 123; *Stevens v. Weston*, 5 Dowl. & R. 399; *Howell v. Harding*, 8 East, 362; *Emdin v. Darlin*, 1 New Rep. 22; *Brown v. Sayce*, 4 Taunt. 320; *Tomes v. Miller*, 5 Moor. 95; *Moseley v. Norman*, 74 Ala. 422; *Watson v. Smith*, 63 Iowa, 228; *State v. Irons*, 54 Ind. 13; *People v. N. Y. C. P.* 13 Wend. (N. Y.) 649.

**Set-off.**—In Kentucky the lien of the attorney attaches at the commencement of the suit, and cannot be affected by subsequently acquired set-offs. *Robertson v. Shutt*, 9 Bush (Ky.), 660.

The following cases deny the right of set-off. *Stratton v. Hussey*, 62 Me. 288; *Currier v. R.*, 37 N. H. 223; *Johnson v. Ballard*, 44 Ind. 270; *Boyer v. Clark*, 3 Neb. 161; *Carter v. Davis*, 8 Fla. 183.

In England no set-off was allowed in the King's Bench to prejudice the attorney's lien for his costs. In Common Pleas and in the Court of Chancery the right of set-off was distinctly recognized. *Roberts v. Bull*, L. R. 8 Ch. D. 198.

In 1853 the rule in King's Bench was made applicable to all the courts. Rule 63, General Rules of Hil. T. 1853.

But in 1873 the equitable rule was established for all the courts under the Supreme Court Judicature Act, sec. 4. 21 Am. L. R. 74.

In America the equitable rule generally prevails. 21 Am. L. R. 75 and cases. See also *Fairbank v. Devereux*, 58 Vt. 359.

Even in equity a judgment for costs alone is not subject to set-off by another judgment for costs in a different matter, so as to interfere with the attorney's lien for costs. *Roberts v. Bull*, L. R. 8 Ch. D. 198.

Where a set off has been allowed by the court, the attorney cannot after delay interfere at a subsequent term of the court. *Holt v. Quainby*, 6 N. H. 79.

An assignment of a judgment by the judgment creditor to his attorney in payment of or as security for his fees in the

be before judgment, he may treat it as a nullity and proceed with the suit.<sup>1</sup>

suit is effectual to prevent a set-off against such judgment of another judgment previously received by the judgment debtor against the judgment creditor. *Benjamin v. Benjamin*, 17 Conn. 110; *Rumril v. Huntingdon*, 5 Day (Conn.), 163.

The attorney's claim in such case is not one of lien but of ownership, and the lien is merged in the ownership. *Dodd v. Brott*, 1 Minn. 270; *Naylor v. Lane*, 18 J. S. (N. Y.) 97; *Terney v. Wilson*, 16 Vt. 282; *Shapley v. Bellows*, 4 N. H. 347; *Dunkin v. Vandenberg*, 1 Paige (N. Y.), 622; *Gridley v. Garrison*, 4 Paige (N. Y.), 647 (but see *Nicoll v. Nicoll*, 16 Wend. (N. Y.) 446); *Zogbaum v. Parker*, 55 N. Y. 120; *Firmenich v. Bovee*, 1 Hun (N. Y.), 532; *Prouty v. Swift*, 10 Hun (N. Y.), 232; *Davidson v. Alfaro*, 16 Hun (N. Y.), 353; s. c., 80 N. Y. 660; *Eberhardt v. Schuster*, 10 Abb. N. C. (N. Y.) 374; *Currier v. Boston R.*, 37 N. H. 223; *Boyer v. Clark*, 3 Neb. 161.

An agreement between the client and attorney that the attorney shall have a lien for his services to a certain amount constitutes a valid equitable assignment of the judgment *pro tanto* which attaches to the judgment as soon as entered. 21 Am. L. R. 79. See also *Stewart v. Hilton*, 19 Blatchf. (U. S.) 290.

Such agreement may be by parol. *Williams v. Ingersoll*, 89 N. Y. 518; *Freeholders v. Bank*, 38 N. J. Eq. 36. See also *Langworth v. Hendy*, 2 Dis. (Ohio) 73; *Cunningham v. McGrady*, 2 Baxt. (Tenn.) 141.

But there can be no lien before judgment where the cause of action is not assignable. *Kusterer v. City of Beaver Dam*, 56 Wis. 471.

An attorney's lien is superior to that of a subsequent attaching creditor. *Ex parte Moule*, 5 Madd. 462; *Damron v. Robertson*, 12 Lea (Tenn.), 372; *Miller v. Newell*, 20 S. Car. 123; *Weed v. Bou-telle*, 56 Vt. 581.

Bankruptcy or insolvency does not discharge the lien. *Cook v. Tresher*, 51 Conn. 105.

The assignee takes the property subject to the lien. *In re Bailey*, 66 How. Pr. (N. Y.) 64.

But as against the judgment debtor the lien upon the judgment is discharged with the judgment, like any other debt, by a discharge in bankruptcy or insolvency. *Blumenthal v. Anderson*, 91 N. Y. 171.

**Waiver.**—The lien may be waived by any arrangement between the attorney and client which shows clearly and une-

quivocally an intention to rely upon some other security or mode of payment. *Renick v. Ludington*, 16 W. Va. 378.

The lien is waived by the attorney's procuring a transfer to his client of land attached in the suit in satisfaction of the judgment. The lien on the judgment does not follow the land when the title is perfected in the client. *Cowen v. Boone*, 48 Iowa, 350.

The lien upon a judgment is not discharged by delay in collecting it, though the delay be for several years. *Stone v. Hydes*, 22 Me. 318.

Nor though the claim be barred by the statute of limitations. *Higgins v. Scott*, 2 B. & Ad. 413.

Nor by allowing the claim to become dormant so that it has to be revived by other attorneys. *Jenkins v. Stephens*, 60 Ga. 216.

Nor by receiving or collecting a part of the judgment, and paying over the part so collected to his client without deducting his fees. He can enforce his lien upon the balance of the judgment. *Hooper v. Brundage*, 22 Me. 460.

1. *Jones v. Bonner*, 2 Ex. 229; *Rovney v. Railroad*, 18 N. Y. 368; *Swain v. Senate*, 5 Bosw. & P. 99; *Pabuck v. Leach*, 3 McCrary, 555; *Reynolds v. Reynolds*, 10 Neb. 574; *Wright v. Burroughs*, 3 C. B. 344. See *Quinnan v. Clapp*, 10 Abb. N. C. 394. See *Connor v. Boyd*, 73 Ala. 385.

As to *bona-fide* settlements before judgment and without notice, see *Simmons v. Almy*, 103 Mass. 33.

An application on the part of the attorney to vacate satisfaction of judgment should be promptly made. *Quimby v. Quimby*, 6 N. H. 79.

After the litigation has ended and the client has possessed himself of the entire fund recovered, the court has no power to give relief to the attorney. *Whittle v. Newman*, 34 Ga. 329.

An application to the court by an attorney to protect his lien upon a judgment is addressed to the sound discretion of the court. *Adams v. Fox*, 40 Barb. (N. Y.) 442.

In Indiana the complaint must allege the amount of fees due either by stating the contract with the client respecting the fees or by averring value of services. *Dunning v. Galloway*, 47 Ind. 182.

Under the present practice in New York the attorney is entitled to proceed with the action without first obtaining leave of court. *Forstman v. Schulting*, 35 Hun (N. Y.), 904.



**ATTORNEY-GENERAL.—1. Definition.**—In English law the attorney-general is a great officer under the king, created by letters-patent, whose office is to exhibit informations and prosecute for the crown in matters criminal; to file bills in the Exchequer in any matter concerning the king's revenue; others may file bills against the king's attorney.<sup>1</sup> In America in each State there is an attorney-general or similar officer who appears for the people, as in England the attorney-general appears for the crown.<sup>2</sup>

Formerly leave of court was necessary. *Goddard v. Trenbath*, 24 Hun (N.Y.), 182.

The court will not make an order practically enforcing the lien without notice or proper hearing of clients. *Atty.-Gen. v. N. Am. L. Ins. Co.*, 93 N. Y. 387.

1. Bouv. Dict. 206.

2. Bouv. Dict. 206.

It is generally made the duty of the attorney-general to represent the State in all suits in the Superior Court and to inquire into the charter rights of all private corporations, and when necessary or expedient to test their rights by *quo warranto* or by filing a bill for an injunction to restrain them from exceeding their powers or creating a public nuisance. Const. of Texas; *State v. Paris R.*, 55 Tex. 76.

The bringing of a *quo warranto*, or filing a bill of injunction against a corporation is a matter of discretion: *State v. Paris R.*, 55 Tex. 76; *People v. Fairchild*, 67 N. Y. 334. And therefore a statute authorizing county attorneys "to represent the State in all cases in the district and inferior courts in their respective counties" does not authorize them to bring suit at the relation of private parties against a corporation to enjoin it from exceeding its powers and committing a nuisance, except the suit be brought with the sanction and in the name of the attorney-general. *State v. Paris R.*, 55 Tex. 76.

Under section 1948 of New York Code of Civil Procedure, which applies to intrusion into an office or franchise, an action can only be brought without leave of court against persons assuming to act as a corporation in the State without being duly incorporated. If the action is brought under § 1798, which applies to the abuse of a franchise, leave is necessary. *People v. Boston, Hoosac Tunnel & Western R.*, 27 Hun (N. Y.), 528.

In Colorado an action for the usurpation of an office or franchise is a civil action under the Code of the State, and must be governed by the rules applicable thereto; must be instituted by filing a complaint and issuing a summons, and

proceeded with the same as any other action. *Atchison, etc., R. v. People*, 5 Colo. Rep. 6; s. c., 9 Am. & Eng. R. R. Cas. 542.

In matters not of discretion the attorney-general may employ associate counsel, 28 Miss. 906. And may entrust the whole case to their management. *State v. Anderson*, 29 La. Ann. 774.

But in New York it has been held that the employment of additional counsel is limited to the cases specified in the act, and hence where a statute authorizes the attorney-general to appear by special or local counsel at the General and Special Term, such appearance is unauthorized on the trial of a case at the Circuit Court. *People v. Met. Telephone & Telegraph Co.*, 64 How. Pr. (N. Y.) 66.

In Colorado section 1103 of the General Laws limits the duties of the attorney-general to State cases instituted or pending in the Supreme Court of the State. His duty to appear in State cases in inferior courts would be obligatory only when required to do so by the Governor or General Assembly. *Atchison, etc., R. v. People*, 5 Colo. 6; s. c., 9 Am. & Eng. R. R. Cas. 542.

**Attorney-General—Powers and Duties of—Legislative Power Over.**—Although the attorney-general is classed by the constitution as belonging to the executive department, and district and county attorneys are classed as belonging to the judicial department, the legislature, under the clause declaring that the attorney-general "shall perform such other duties as may be required by law," had the power to make that officer the adviser of district and county attorneys, and the representative of the State in suits for the recovery of money due the State in counties in which there are no district or county attorneys. *State v. Moore*, 57 Tex. 307.

The legislature, however, cannot empower the attorney-general to take control of cases in which the constitution makes the county or district attorneys the representative of the State, nor can it empower him to deprive those officers of the fees which are by law al-

2. **Attorney-General of the United States.**—The Act of Sept. 24, 1789, in organizing the judicial business of the United States, makes provision for an attorney-general to prosecute and conduct all suits in the Supreme Court, in which the United States shall be concerned, and to give his advice and opinion upon questions

lowed in such cases. *State v. Moore*, 57 Tex. 307.

The attorney-general has not authority of himself to settle tax-executions at less than their full amount; such authority must come from the State in order to bind it. *Georgia v. South-Western R.*, 66 Ga. 403.

In the *New Orleans & Carrollton R. v. New Orleans* the city brought suit against the company to have the franchise annulled, contending that by the terms of the charter the franchise had expired through lapse of time. The attorney-general intervened, and in the name of the State assented to the construction of contract contended for by the defendant, making the point that as the parties to the contract were agreed upon its construction, the city, being a stranger thereto, could not question it. It was held that the legislature alone could assent to such a construction, and that unless made by special legislative authority, the attorney-general exceeded his powers in making such admission, and the State was not bound thereby. 34 La. Ann. 429.

The attorney-general cannot bring the action where the defendant is a private stock corporation, and no violation of the provisions of its charter is alleged; and the only object of the proceeding is to determine who are entitled to vote at elections for trustees or at other corporate meetings of the stockholders. In such case the remedy is by private action of the parties aggrieved. *Attorney-General ex rel. Saunders v. Albion Academy & Normal Institute et al.*, 52 Wis. 469.

Under the Revised Statutes of Wisconsin, §§ 3237, 3239, the attorney-general has no right to intervene where the defendant is an incorporated academy or select school. *Attorney-General ex rel. Saunders v. Albion Academy & Normal Institute et al.*, 52 Wis. 469.

In all bills asking the advice or direction of a court of equity as to the administration of a public charity, and especially where waste or mismanagement is apprehended, or where the decree will affect the interests of the *cestuis que trust*, the attorney-general, or other public officer whose duty it may be to have a care in such matters, is a proper party, either as complainant or defendant. Courts not infrequently hesitate to

decree concerning a public charity, unless the general law officer representing the donees is a party in some way. Exceptional cases are, where the charity or bounty is in the hands of trustees charged by the donor specifically with its management for the *cestuis que trust*. A testator provided in his will that upon the happening of a certain contingency his entire estate should be divided into two equal portions by his executors, and one half thereof devoted to a public library, and the other half given to certain relatives, as his devisees, and a bill was filed by certain of his heirs, claiming to be the donees of one-half of the estate, for a division and distribution of their shares, and for a construction of the will as to the right to an immediate distribution, but not asking any advice of the court as to the management of the bounty to the public, and not intimating that the trustees who were specifically charged with its management were in any manner wasting or mismanaging the fund. *Held*, that there was no necessity to have made the attorney-general a party to the bill. Had it appeared the trustees were misappropriating the trust fund, it would no doubt have been the duty of the attorney-general to interpose for its preservation. It is only where the trustees having charge of the fund unite in an abuse of their trust, and there is no one having a right to sue in his own name concerning it, as is the case with regard to a public charity, that the suit must of necessity be instituted by the attorney-general. There is a distinction where trustees of a charity are appointed by the donor, and where none are appointed, but there is a devise immediately to charitable uses. In the latter case there can be no decree unless the attorney-general be made a party, but otherwise where trustees are appointed by the donor. *Newberry v. Blatchford*, 106 Ill. 584.

In determining whether or not an action shall be brought, the functions of the State's attorney are judicial, and hence it is highly improper for him to bring an action under a statute awarding the amount of the fine or penalty to the prosecutor; by so doing he is attempting to enforce the penal laws for his own gain. *People v. W. St. Louis & Pac. R.*, 12 Ill. App. 262.

of law, when required by the President or when requested by the heads of departments, touching any matter which concerns their departments.<sup>1</sup> In the discharge of second class of the above-mentioned duties the action of the attorney-general is *quasi* judicial. His opinions officially define the law, and his decision is in practice final and conclusive.<sup>2</sup> "The Supreme Court will not entertain an appeal from his decision, nor revise his judgment in any case where the law authorized him to exercise his discretion or judgment."<sup>3</sup> The attorney-general is under no obligation to render an award or determine a question of fact in cases referred to him; nor does an appeal lie to him from another department by any party assuming to be aggrieved by its action or seeking to have it reviewed; nor is he to give advice to the heads of departments in matters which do not concern their departments and in which the United States have no interest; nor is he authorized to give his official opinion in any case not falling within the scope of his duties, so as to connect the government with individual controversies in which it has no concern, and with which it ought not to interfere; nor is he in general to give his opinion to subordinate officials;<sup>4</sup> nor in cases not actually presented for the action of an executive department.<sup>5</sup> It is furthermore his duty to communicate, if required, to either House of Congress information on any matters within the scope of his authority;<sup>6</sup> to examine all titles of lands or sites purchased by United States for purposes of erecting public buildings,<sup>7</sup> and no money can be expended on land until the title has been approved;<sup>8</sup> to advise and direct the Solicitor

1. The constitution provides that "the executive power shall be vested in the President of the United States," who shall perform certain functions. But it does not specify the subordinate, ministerial, or administrative functionaries by whose agency or counsels the details of the public business are to be transacted. It recognizes the existence of such official agencies inferentially in saying that the President may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their departments; and again, in the clause which vests the appointment of certain inferior officers "in the heads of departments," but leaves the organization of these departments to Congress. With a view to carrying out such intention, the above act was passed. 6 Opp. Att.-Gen. 327.

2. This applies not only to the action of public officers in administrative matters who are thus relieved from the responsibility which would otherwise attach to their acts, but also in questions of private right; inasmuch as parties having concern with the government possess in general no means of bringing a contro-

verted matter before a court of law, and can obtain a purely legal decision of the controversy as distinguished from an administrative one only by reference to the attorney-general. 6 Opp. Att.-Gen. 333.

3. 6 Opp. Att.-Gen. 346.

The opinions of attorneys-general have authority the same in kind if not in degree with the decisions of courts of justice. 6 Opp. Att.-Gen. 333.

4. 10 Opp. Att.-Gen. 458; 6 Opp. Att.-Gen. 333 *et seq.*

The act of June 22, 1870, provides that the officers of the Department of Justice, under the direction of the attorney-general, shall render all services required by the President, heads of departments, heads of bureaus, and other officers in the departments.

5. 11 Opp. Att.-Gen. 189, 431; 10 Opp. Att.-Gen. 50.

6. 6 Opp. Att.-Gen. 335. This was denied by Mr. Wirt.

7. Act of Sept. 11, 1841.

8. Act of June 22, 1870. This act established the Department of Justice and created the offices of solicitor-general and assistant attorneys-general.

of the Treasury.<sup>1</sup> The attorney-general may retain associate counsel, and can refer at his discretion all questions not involving the construction of the Constitution to his subordinates.<sup>2</sup>

### AUCTIONS AND AUCTIONEERS.

1. *Definition*, 976.  
*Auctioneer's License*, 977.  
*Bonds*, 977.
2. *Authority of Auctioneer*, 978.  
*How Conferred*, 978.  
*Revocation*, 978.
3. *Relation of Auctioneer to Seller*, 978.  
*Must Obey Instructions*, 978.  
*Must Act Himself*, 979.  
*Liable for Gross Negligence*, 979.  
*Must Account for Money Received*, 979.  
*Care of Property*, 979.  
*Cannot Buy Himself*, 980.  
*Cannot Dispute Principal's Title*, 980.
4. *Power of Auctioneer*, 980.  
*To Warrant*, 980.  
*To Collect*, 980.  
*Termination of Power*, 981.  
*Compensation*, 981.
5. *Principal Bound by his Acts*, 982.
6. *When Agent of Purchaser*, 983.
7. *The Auction*, 983.  
*Conditions of Sale*, 983.  
*What Conditions may be Attached*, 984.  
*Particulars of Sale*, 985.  
*Description must be Certain*, 986.  
*Competition must be Fair*, 988.  
*Must Accept all Biddings*, 988.  
*Unconditional Sales*, 988.  
*Puffers*, 988.  
*Bidders Using Improper Influence*, 996.  
*Agreements not to Bid*, 996.  
*Manner of Bidding*, 997.  
*Bids may be Retracted*, 997.  
*The Deposit*, 997.  
*Completion of Contract*, 999.
8. *Statute of Frauds*, 999.  
*Memorandum of Sale*, 1000.  
*What Memorandum must Contain*, 1000.  
*May be Signed by Clerk*, 1001.  
*Auctioneer may not Sign where he Sells his own Goods*, 1001.

1. **Definition.**—An auction sale is a public competitive sale. The person who conducts such sale is an auctioneer.<sup>3</sup>

1. Act of May 29, 1830.  
2. Act of June 22, 1870. The duties of the attorney-general were purely administrative as well as legal, and he was a member of various boards and commissions. Acts of April 10, 1790, April 2, 1792, March 3, 1849.

The department has an official seal, and all copies of records properly authenticated are as good evidence as the original documents.

If the Supreme Court has jurisdiction of an original suit between different States, to which the United States is or should be a party, the attorney-general *virtute officii* has no authority to make the United States a party to such a suit. *Florida v. Georgia*, 17 How. (U. S.) 478.

If the attorney-general of the United States permit his appearance (which by uniform practice the clerk of the Supreme Court enters in all cases in which the United States is a party) to pass for one term, it is conclusive upon him, but he may withdraw such appearance at the first term. *Farrar v. U. S.*, 3 Pet. (U. S.) 459.

3. *Crandall v. State*, 28 Ohio St. 480; *Goshen v. Kern*, 63 Ind. 473.

It is immaterial whether the goods sold are the property of the auctioneer or belong to another party. *Goshen v. Kern*, 63 Ind. 468.

So is a constable who sells goods at auction for the pretended purpose of satisfying an execution liable as an auctioneer under a statute. *Jordan v. Smith*, 19 Pick. (Mass.) 287.

A tradesman who sells a portion of his goods at his store by public outcry, giving notice that he will sell such goods only at his regular retail price, is not, within the meaning of a statute providing that all property sold at auction shall in all cases be sold to the highest bidder, exercising the occupation of an auctioneer. *Crandall v. State*, 28 Ohio St. 479.

Selling by auction is said to have originated with the Romans, who gave it the descriptive name of *auctio*, an increase, because the offered property was sold to him who would offer the most for it. This method of sale was established by

**License.**—In England and in the various States of the Union statutes have been enacted requiring an auctioneer to be licensed. And many of the municipal corporations in the United States also require those acting as auctioneers to take out a license.<sup>1</sup>

**Bonds.**—In addition to the license most statutes require auctioneers to give bonds with sureties for the faithful performance of their duties; not only to secure whatever taxes may be due to the State, but also to protect the auctioneer's customers.<sup>2</sup>

the Romans for the disposal of military spoils, and was conducted *sub hasta*—that is, under the spear; on such occasions the spear was stuck in the ground. At a later day another mode of sale by auction came into practice, called the "sale by the candle" or "by the inch of candle." The origin of this expression arose from the use of candles as a means of measuring time. It was declared the goods could be continued to be offered to bidders for so long a time only as would suffice for the burning of one inch of candle. When the measure was wasted to that extent, the highest bidder was then declared to be the purchaser. Still another method of auction sale is practised in modern times. This one is called a Dutch auction, indicating the local origin of the practice. This method consists in the public offer of the property at a price beyond its value, and then gradually lowering the price until some one becomes the purchaser. Ashburn, J., in *Crandall v. State*, 28 Ohio St. 479; *Deposit v. Pitts*, 18 Hun (N. Y.), 475.

An action on the case lies for the disturbance of a sale at auction. *Furness v. Anderson*, 1 Pa. L. J. Rep. 324.

1. For statutes see Bateman on Auctions, Appendix; *Florence v. Richardson*, 2 La. Ann. 663; *Amite City v. Clementz*, 24 La. Ann. 27; *Jordan v. Smith*, 19 Pick. (Mass.) 287; *Sewall v. Jones*, 9 Pick. (Mass.) 412; *Clark v. Cushman*, 5 Mass. 505; *Deposit v. Pitts*, 18 Hun (N. Y.), 475; *Fretwell v. Troy*, 18 Kans. 271; *Wiggins v. Chicago*, 68 Ill. 372; *Wright v. Atlanta*, 54 Ga. 645; *Hunt v. Philadelphia*, 35 Pa. St. 277; *State v. Rucker*, 2 Mo. 557; *Oskaloosa v. Tullis*, 25 Iowa, 440; *Decorah v. Dunstan*, 38 Iowa, 96; *Waterhouse v. Dorr*, 4 Me. 333; *State v. Conkling*, 19 Cal. 501; *State v. Poulterer*, 16 Cal. 514.

The fact that an auctioneer is not licensed according to statute will not vitiate the sale nor prevent the auctioneer from collecting his compensation. *Williston v. Morse*, 10 Metc. (Mass.) 17; *Robinson v. Green*, 3 Metc. (Mass.) 159.

Nor affect his liability for selling goods, as tobacco, at auction in violation of other

statutory requirements. *Clark v. Cushman*, 5 Mass. 505.

A note given for goods bought at auction is valid although the auctioneer sold without a license as required by statute. *Gunnaldson v. Nyhus*, 27 Minn. 440.

Adjourning an auction sale from time to time may be done by one who is not licensed, although the sale is to be held by a licensed auctioneer. *Hosmer v. Sargent*, 8 Allen (Mass.), 97.

A statute imposing a duty on sales at auction does not extend to a lease by auction. *Sewall v. Jones*, 9 Pick. (Mass.) 412.

The license generally confines the authority of an auctioneer to a particular town or county, often to a particular salesroom. *Waterhouse v. Dorr*, 4 Greenl. (Me.) 333; *Robinson v. Green*, 3 Metc. (Mass.) 159; *Wood v. Com.* 12 S. & R. (Pa.) 213.

A licensed auctioneer in Philadelphia who advances money on consignments and charges a commission for such advances must also take out a pawnbroker's license. *Hunt v. Philadelphia*, 35 Pa. St. 277.

2. *State v. Poulterer*, 16 Cal. 514; *St. Louis Church v. Bonneval*, 13 La. Ann. 321; *State v. Girardey*, 34 La. Ann. 620; *Charity Hospital v. Girardey*, 36 La. Ann. 605; *Florence v. Richardson*, 2 La. Ann. 663; *McMechen v. Baltimore*, 3 Har. & J. (Md.) 534; *Commissioners v. Holloway*, 3 Hawks. (N. Car.) 234; *Charleston v. Paterson*, 2 Bailey (S. Car.), 165; *Daly v. Com.*, 75 Pa. St. 331; *Davis v. Com.*, 3 Watts (Pa.), 297; *Georgetown v. Baker*, 2 Cranch (U. S. C. C.), 291; *Dallas v. Chaloner*, 3 Dall. (U. S.) 500; *Lea v. Yard*, 4 Dall. (U. S.) 95.

And sureties on an auctioneer's bond are liable to all persons employing him as such during his continuance in office. *Florence v. Richardson*, 2 La. Ann. 663; *McMechen v. Baltimore*, 3 Har. & J. (Md.) 534.

But where goods had been sold by the auctioneer for cash and the owner accepts his notes in payment, the auctioneer's sureties are discharged. *Mouton v. Noble*, 1 La. Ann. 192.

**2. Authority of Auctioneer.—How Conferred.**—As the auctioneer is primarily the agent of the seller, his authority from the seller is conferred upon him in the same way as an agent is appointed by his principal, either under seal, in writing, by parol, or by implication.<sup>1</sup>

**Revocation of Authority.**—Like any other agency the authority of an auctioneer to sell goods at auction may be revoked unless coupled with an interest, or where the intervening rights of third parties would suffer by a revocation.<sup>2</sup>

**3. Relation of Auctioneer to Seller.**—An auctioneer when acting in his professional capacity is primarily, and until the fall of the hammer exclusively, the agent of the vendor.<sup>3</sup>

**Must Obey Instructions.**—He is bound to obey his instructions, and will be liable in damages to his principal when he does not.<sup>4</sup>

1. See APPOINTMENT OF AGENTS. *Florence v. Richardson*, 2 La. Ann. 663; *Cronan v. McDonogh*, 12 La. Ann. 269; *Smith v. East India Co.*, 16 Sim. 76; *Pike v. Wilson*, 1 Jur. N. S. 59.

The authority of an auctioneer to sell lands at auction may be conferred by parol. *Yourt v. Hopkins*, 24 Ill. 326; *Doty v. Wilder*, 15 Ill. 407; s. c., 60 Am. Dec. 756; *Cossitt v. Hobbs*, 56 Ill. 233.

The sending of goods to an auction room will imply the intention to give authority to sell, and if such goods are sold by the auctioneer a *bona-fide* purchaser will have a good title to them as against the former owner. *Morgan v. Darragh*, 39 Tex. 171; *Pickering v. Burk*, 15 East, 38.

A want of original authority may be supplied by the person whose authority was assumed by the auctioneer when he subsequently ratifies the authorized act. See Ratification, under Agency.

2. See REVOCATION OF AGENCY. *Chinnock v. Sainsbury*, 30 L. J. Ch. 409; *Creager v. Link*, 7 Md. 259; *Simonton v. Minneapolis Bk.*, 24 Minn. 216; *Gwathney v. Cason*, 74 N. Car. 5; *Reed v. Latham*, 40 Conn. 452; *Warlow v. Harrison*, 29 L. J. Q. B. 14.

The defendant, an auctioneer, advertised in the London papers that certain brewing materials, plant, and office furniture would be sold by him at Bury St. Edmunds on a certain day and two following days. The plaintiff, a commission broker in London, having a commission to buy the office furniture, went down to the sale; on the third day on which the furniture was advertised for sale all the lots of furniture were withdrawn, upon which the plaintiff brought an action against the defendant to recover for his loss of time and expenses. *Held*, that plaintiff could not maintain the action;

for that advertising the sale was a mere declaration and did not amount to a contract with any one who might act upon it, nor to a warranty that all the articles advertised would be put up for sale. *Harris v. Nickerson*, L. R. 8 Q. B. 286.

But after the acceptance of a bid by the fall of the hammer the sale is complete and cannot be retracted. *Kerr v. City*, 1 Pa. Leg. Gaz. R. 254.

An auctioneer employed under a parol agreement to sell goods has not such an interest as to make the license to enter upon the owner's premises for that purpose irrevocable. *Taplin v. Florence*, 10 C. B. 744.

3. *Bateman on Auctions*, 20; *Williams v. Poor*, 3 Cranch (U. S. C. C.), 251.

In an execution sale the sheriff is not the agent of the execution creditor but of the debtor, and the creditor will not be responsible for any misrepresentations of the sheriff at the sale unless he was specially directed by him. *Weidler v. Farmers' Bank*, 11 S. & R. (Pa.) 134; *Stetson v. O'Sullivan*, 8 Allen (Mass.), 321.

The purchaser at a sheriff's sale takes his title immediately from the debtor, as whose agent the sheriff sells and conveys. *McKnight v. Gordon*, 13 Rich. Eq. (S. Car.) 222.

4. *Wilkinson v. Campbell*, 1 Bay. (S. Car.) 169; *McMechen v. Baltimore*, 3 H. & J. (Md.) 534.

Where the auctioneer has instructions not to sell under a certain price and he disobeys such order he will be liable to the seller. *Warlow v. Harrison*, 29 L. J. (Q. B.) 14; *Wolfe v. Luyster*, 1 Hall (N. Y.), 146; *Steele v. Ellmaker*, 11 S. & R. (Pa.) 86; *Williams v. Poor*, 3 Cranch (C. C.), 251. See *Bush v. Cole*, 28 N. Y. 261.

*Must Act Himself.*—He cannot legally delegate his authority, but must sell the property himself.<sup>1</sup>

*Liable for Gross Negligence.*—An auctioneer is liable only for gross negligence. But he is liable to his principal for all damages resulting from gross negligence and lack of skill.<sup>2</sup>

*Must Account for Money Received.*—In common with other agents the auctioneer must account for and pay over all money which may come to his hands for goods sold for his principal,<sup>3</sup> but is not liable for interest unless there has been fraud or misconduct on his part, such as improperly withholding accounts and refusing to pay over the money when demanded.<sup>4</sup>

*Care of Property.*—He is bound to take the same care of the property sent him for sale that he would take of his own goods, and will be liable for any loss or damage caused by his default or negligence.<sup>5</sup>

An auctioneer who is authorized to sell goods on the condition that purchasers shall pay a deposit at once, and the remainder of the purchase-money to the auctioneer on or before delivery of the goods, has no authority to receive payment by a bill of exchange; and such payment will not discharge the purchaser. *Williams v. Evans*, L. R. 1 Q. B. 352.

Or where he has been instructed to sell for cash he may not take a check in payment. *Broughton v. Silloway*, 114 Mass. 71; s. c., 19 Am. Rep. 312; *Williams v. Evans*, 35 L. J. Q. B. 111.

1. *Com. v. Harnden*, 19 Pick. (Mass.) 482; *Stone v. State*, 12 Mo. 400; *Wolf v. Van Metre*, 27 Iowa, 348; *Singer Mfg. Co. v. Chalmers*, 2 Utah, 542.

But he may delegate mere ministerial acts. He may employ another person to use the hammer and make the outcry under his immediate direction and supervision, even though he should be himself occasionally absent during the sale. *Poree v. Bonneval*, 6 La. Ann. 386; *Com. v. Harnden*, 19 Pick. (Mass.) 482.

2. *Hicks v. Minturn*, 19 Wend. (N. Y.) 550; *Bodin v. McClosky*, 11 La. Ann. 46.

An auctioneer is bound to take care that the purchaser, where necessary, enters into a binding contract under the Statute of Frauds, and where he does not he will be guilty of such negligence as will make him liable in damages. So where an auctioneer who sold a horse at auction did not ask the name of the bidder but asked him to come to the desk, which he did not do, and he resold the horse at a lower price than previously offered, it was held that he must make up the difference to the owner. *Townsend v. Van Tassell*, 8 Daly (N. Y.), 261.

3. *Crosskey v. Mills*, 1 C. M. & R. 298; *Gray v. Haig*, 20 Beav. 219, 239; *Tripp v. Barton*, 13 R. 1. 130.

And it makes no difference that the principal is in embarrassed circumstances. *White v. Bartlett*, 9 Bing. 378.

Where auctioneers employed to sell goods, with discretion to sell on credit, took notes from certain buyers payable to themselves at a future day, and the makers of the notes failed before they became due, it was held that the principals and not the auctioneers should bear the loss unless it appeared that the auctioneers appropriated the notes to their own use. *Townes v. Birchett*, 12 Leigh (Va.), 173.

An auctioneer is in general liable only for money which he has actually received, unless he has exceeded his authority and by such excess failed to receive money which he should have received. *Andrew v. Robinson*, 3 Camp. 199; *Williams v. Millington*, 1 H. Bl. 81; *Earl of Ferrers v. Robins*, 2 C. M. & R. 152; *Nelson v. Aldridge*, 2 Stark, 435.

He is accountable only for the net proceeds of the sale, or what is left after paying commission and other expenses. *Williamson v. Baltimore*, 19 Md. 413.

The auctioneer is not obliged to pay over to his principal money received by him as a deposit, and which should be returned to the bidder if the sale is not completed. As to money so received, he is the stakeholder of both parties. *Hardingham v. Allen*, 17 L. J. C. P. 198; *Murray v. Mann*, 2 Exch. 538. See *Ellison v. Kerr*, 86 Ill. 427.

4. *Turner v. Burkinshaw*, L. R. 2 Ch. 488; — *v. Jolland*, 8 Ves. 72.

Or where he applies the money to his own use. *Rogers v. Boehm*, 2 Esp. 701.

5. *Davis v. Garrett*, 6 Bing. 716;

*Cannot Buy Himself.*—An auctioneer cannot buy the property of his principal at a sale conducted by himself; neither is he justified in selling to a firm in which he is a partner, nor to a company of which he is a member.<sup>1</sup>

*Cannot Dispute his Principal's Title.*—An auctioneer cannot dispute the title of a person for whom he sells goods in an action against him for the amount of the sales.<sup>2</sup>

**4. Power of Auctioneer.—To Warrant.**—The auctioneer has no implied authority to warrant the goods he sells, unless he be specially so instructed by his employer.<sup>3</sup> But he will be personally liable upon his personal warranty.<sup>4</sup>

*Power to Collect.*—An auctioneer employed to sell goods in his possession for ready money has, in general, authority to receive payment for them; but the conditions of the sale may be such as

Maltby v. Christie, 1 Esp. 340; Massey v. Banner, 1 J. & W. 241.

So long as property remains unsold in the hands of an auctioneer, or when he has wrongfully or unwarrantably disposed of it, the owner can maintain an action against him for the recovery of the goods or for conversion. Topham v. Braddick, 1 Taunt. 572; Powell v. Sadler, Paley P. & A. 80.

So where he undertakes to insure the goods he must obtain reasonable insurance in good companies or give notice to his principal that he can obtain no insurance. Callander v. Oelrichs, 5 Bing. N. Cas. 58; Shoenfeld v. Fleisher, 73 Ill. 404.

He will not be liable for any loss which he could not prevent. Johnson v. Campbell, 120 Mass. 449; Gettins v. Scudder, 71 Ill. 86.

An auctioneer to whom goods are intrusted for sale can maintain an action against a stranger who takes them out of his possession. Bateman on Auctions, 25, 113; Broom C. L. 816; Tyler v. Freeman, 3 Cush. (Mass.) 261.

And he can by virtue of his special property in them bring an action for the price in his own name. Robinson v. Rutter, 4 E. & B. 954.

But not where he himself has signed as agent for buyer. Wright v. Dannah, 2 Camp. 203; Farebrother v. Simmons, 5 B. & Ald. 333; Robinson v. Garth, 6 Ala. 204; Boardman v. Spooner, 13 Allen (Mass.), 353; Bailey v. Ogden, 3 Johns. (N. Y.) 399; Adams v. Scales, 1 Baxt. (Tenn.) 337.

1. Salomons v. Pender, 34 L. J. (Exch.) 95; Oliver v. Court, Dan. 301; Baskett v. Cafe, 4 De G. & Sm. 388; Swires v. Brotherline, 41 Pa. St. 135; s. c., 80 Am. Dec. 601; Brock v. Rice, 27 Gratt. (Va.) 812. Compare Brotherline v. Swires, 48

Pa. St. 68; Morse v. Royal, 12 Ves. 355.

He may, however, bid himself for a third party. Scott v. Mann, 36 Tex. 157. Compare Campbell v. Swan, 48 Barb. (N. Y.) 109; Coles v. Trecothick, 9 Ves. 234, 248.

And in some cases it has been held that at a sale without reserve he may make a *bona-fide* bidding for himself when it is done fairly and in good faith. R. v. Marsh, 1 C. & J. 406. See JUDICIAL SALES.

2. Hutchinson v. Gordon, 2 Har. (Del.) 179; Osgood v. Nichols, 5 Gray (Mass.), 420.

3. Blood v. French, 9 Gray (Mass.), 197; The Monte Allegro, 9 Wheat. (U. S.) 645; Worthy v. Johnson, 8 Ga. 236; Bashore v. Whisler, 3 Watts (Pa.), 490; Commissioner v. Thompson, 4 McC. (S. Car.) 434; Yates v. Bond, 2 McC. (S. Car.) 382; Davis v. Murray, 1 Mill. Const. (S. Car.) 143; Davis v. Hunt, 2 Bailey (S. Car.), 412; Robinson v. Cooper, 1 Hill (S. Car.), 286; Thayer v. Sheriff, 2 Bay. (S. Car.) 169; Stone v. Pointer, 5 Munf. (Va.) 287; Cameron v. Logan, 8 Iowa, 434; Dwight's Case, 15 Abb. Pr. (N. Y.) 259; Isley v. Stewart, 4 Dev. & B. (N. Car.) 160; Parker v. Partlow, 12 Rich. (S. Car.) 679; Hill v. Balls, 27 L. J. (Exch.) 45; Payne v. Leconfield, 51 L. J. (Q. B. Div.) 642. Compare Harrison v. Shanks, 13 Bush (Ky.), 620; Com. v. Dickinson, 5 B. Mon. (Ky.) 506; Forsythe v. Ellis, 4 J. J. Marsh. (Ky.) 298; Commissioner v. Macon, 2 Brev. (S. Car.) 105; Stoney v. Shultz, 1 Hill Ch. (S. Car.) 465.

4. Dent v. McGrath, 3 Bush (Ky.), 174; Schell v. Stephens, 50 Mo. 375.

As to what is a personal guarantee, see Woodward v. Boston, 115 Mass. 81; McGrew v. Forsythe, 31 Iowa, 179.



to show that the vendor intended payment to be made to himself, and in such a case payment to the auctioneer will not bind the vendor.<sup>1</sup>

**Termination of Power.**—The auctioneer's authority ceases as soon as the sale has taken place, and therefore after the sale, unless specially empowered, he cannot rescind or vary the contract, or deal with the purchaser as to the terms upon which the title is to be made.<sup>2</sup>

**Compensation.**—An auctioneer employed to conduct a sale is in general entitled to be remunerated for his trouble, and to be indemnified for any loss that he may have incurred in the proper discharge of his duty. The amount of his remuneration, which generally takes the form of a commission, is fixed sometimes by statute, but more commonly by express contract or by custom.<sup>3</sup>

1. *Sykes v. Giles*, 5 M. & W. 645; *Capel v. Thornton*, 3 C. & P. 352; *Broughton v. Silloway*, 114 Mass. 71; *Taylor v. Wilson*, 11 Metc. (Mass.) 44; *Tripp v. Barton*, 13 R. I. 130.

If the auctioneer acts as mere crier or broker for a principal who has retained the possession of the goods, the auctioneer has no authority to receive payments. *Offley v. Clay*, 2 M. & G. 172.

If the conditions provide merely for the deposit to be paid to the auctioneer, it seems that this excludes him from receiving the whole price. *Sykes v. Giles*, 5 M. & W. 645; *Thompson v. Kelly*, 101 Mass. 291.

2. *Bradford v. Bush*, 10 Ala. 386; *Smith v. Rice*, 1 Bailey (S. Car.), 648; *Boinest v. Leignez*, 2 Rich. (S. Car.) 464; *Stewart v. Garvin*, 33 Mo. 103.

3. *Macarty's Succession*, 32 La. Ann. 6; *Carpenter v. Count*, 93 N. Y. 562; *Russell v. Miner*, 5 Lans. (N. Y.) 537, 25 Hun (N. Y.), 114; *Maltby v. Christie*, 1 Esp. 340; *Ruckman v. Bergholz*, 38 N. J. L. 531.

Where an auctioneer sells several distinct lots his compensation will be earned on each separate lot sold unless there be a contract to the contrary. *Robinson v. Green*, 3 Metc. (Mass.) 159.

Under the N. Y. statutes prohibiting an auctioneer from demanding more than two and one half per cent commissions for his services on sales, "unless by a previous agreement in writing between him and the owner," to bring a case within the exception it is not essential that the written agreement should be signed by the auctioneer; if signed by the owner and carried into effect by the auctioneer he is entitled to the compensation fixed thereby. Plaintiff owned certain goods upon which A. had a mortgage. A written

agreement was executed between them which, among other things, authorized defendant to sell the goods at auction and to charge five per cent commissions, and directed as to the distribution of the proceeds. Defendant sold under the agreement and retained the commissions fixed. In an action to recover the excess over the statutory allowance, and the penalty fixed by the statute for a violation thereof, *held*, that the agreement was between the owner and the defendant within the meaning of the statute, as it conferred upon the latter his authority to sell; that said agreement was valid although not signed by defendant; and that he was entitled to retain the percentage agreed upon. *Carpenter v. Le Count*, 93 N. Y. 562.

He can maintain a suit in his own name for goods sold and delivered by him on which he holds a lien for his charges. *Flanigan v. Crull*, 53 Ill. 352; *Johnson v. Buck*, 35 N. J. L. 338.

In case of dispute about the compensation or indemnification, in the absence of express agreement or statutory provisions it will be a matter for the jury. *Marshall v. Parsons*, 9 C. & P. 656; *Eicke v. Meyer*, 3 Camp. 412; *Cohen v. Paget*, 4 Camp. 96; *Re Page*, 32 Beav. 487.

If the auctioneer in the proper performance of his duty to his principal does an act injurious to the rights of a third party, such as selling goods to which he has no title, and suffers damages in consequence, a contract to indemnify the auctioneer against the consequences of such act will be presumed against the principal, provided the auctioneer had no knowledge of the illegal or tortious character of the sale. *Dugdale v. Lovering*, L. R. 10 C. P. 196.

If through no fault of his own the auctioneer's sale is set aside and a new sale

**5. Principal Bound by Auctioneer's Acts and Representations.**—The auctioneer's agency is a general agency, and consequently subject as between him and his principal to his special instructions, and as regards third persons to their having notice of his special instructions. The auctioneer's principal is bound by all acts

ordered, the auctioneer will be entitled to commissions on both sales. *Benner's Estate*, 3 Brewst. (Pa.) 398. *Compare* *Succession of Navarro*, 24 La. Ann. 105.

But not when a bid he received has not been complied with. He must sell to earn his fees. *Cochran v. Johnson*, 2 McCord (S. Car.), 21; *Ward v. James*, 8 Hun (N. Y.), 526; *Cannon v. Kelly*, Hayes & J. 655.

Or where the principal sold the goods before he had made a sale. *Simpson v. Lamb*, 17 C. B. 603; *Girardey v. Stone*, 24 La. Ann. 286.

He can make no profits on his expenses. So where he advertises at reduced rates he can only recover such reduced rates. *Union Refining Co. v. Pentecost*, 79 Pa. St. 491.

He will not be entitled to be reimbursed for expenses which he could have prevented, or which have been occasioned through his own negligence or blunders, or which he has incurred in excess of his authority. *Capp v. Topham*, 6 East, 392; *Christie v. Atty.-Genl.*, 6 Bro. P. C. 520; *Grimshaw v. Atterwell*, 8 C. & P. 6.

He has a lien upon the goods intrusted to his care, or upon the proceeds after sale, as long as they are in his hands. *Williams v. Millington*, 1 H. Bl. 81; *Woolfe v. Horne*, L. J. 46 Q. B. 534; *Succession of Dowler*, 29 La. Ann. 437.

And the auctioneer may appropriate so much of the money produced by his sales as are due him for commissions and expenses, and allow a purchaser this amount as a set-off for an individual debt. *Harlow v. Sparr*, 15 Mo. 184. See *Townes v. Birchett*, 12 Leigh (Va.), 173.

The defendants were auctioneers and had sold for a customer a brewery, and part of the proceeds of the sale was in their hands, subject to their claim for charges incurred in connection with the sale; they had also in their hands the balance of the price of some furniture sold by them for the same customer. The plaintiff was a creditor of the defendants' customer, and he by letter charged the proceeds of the sale of the brewery in favor of the plaintiff. The defendants wrote to the plaintiff acknowledging the receipt of the letter of charge. The defendants afterwards paid their customer the balance of the price of the furniture, and appropriated the part of the proceeds

of the sale of the brewery in their hands to the payment of their charges. *Held*, first, that the letter of charge and the defendants' acknowledgment thereof amounted to a good equitable assignment in favor of the plaintiff; secondly, that the defendants, as auctioneers, had a lien for their charges upon the part of the proceeds of the sale of the brewery in their hands; thirdly, that the defendants were at liberty to appropriate the part of the proceeds of the sale of the brewery in their hands to the payment of their charges, and were not bound to take payment of their charges out of the price of the furniture in order to enable the plaintiff to obtain payment of his charge, and that the doctrine of marshalling did not apply. *Webb v. Smith*, L. R. 30 Ch. Div. 192.

It seems, however, that he cannot bind his principal by a warranty of their condition. *Blood v. French*, 9 Gray (Mass.), 197; *Dodd v. Farlow*, 11 Allen (Mass.), 426; *Bashore v. Whisler*, 3 Watts (Pa.), 490; *Yates v. Bond*, 2 McCord (S. Car.), 382; *Monte Allegro*, 9 Wheat. (U. S.) 645; *Alexander v. Gibson*, 2 Camp, 555; *Sandilands v. Marsh*, 2 B. & Ald. 673; *Dingle v. Hare*, 7 C. B. N. S. 29; *Payne v. Lord Leconfield*. For WARRANTY UNDER JUDICIAL SALES, see that title.

Where an auctioneer sells without disclosing the name of his principal, he will be held personally liable as the vendor. So where he undertakes to sell without reserve, but allows by-bidding. *Stahl v. Charles*, 5 Abb. Pr. (N. Y.) 348; *Towle v. Leavitt*, 23 N. H. 360; *Bush v. Cole*, 28 N. Y. 261; *Mills v. Hunt*, 20 Wend. (N. Y.) 431; *Mauri v. Heffernan*, 13 Johns. (N. Y.) 58; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Schell v. Stephens*, 50 Mo. 375; *Hanson v. Roberdean*, Peake, N. P. C. 163; *Warlow v. Harrison*, 28 L. J. (Q. B.) 18.

An auctioneer will be personally liable where he sells goods to which he knows that his principal has no title. *Hardacre v. Stewart*, 5 Esp. 104.

And even where he has no notice of the fact that his principal has no title, as when he sells stolen goods, he will be liable in trover. *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Williams v. Merle*, 11 Wend. (N. Y.) 80; *Hills v. Snell*, 104

and representations of the auctioneer when done within the scope of his employment and justified by usage and custom.<sup>1</sup>

**6. When Agent of Purchaser.**—Upon the descent of the hammer the auctioneer becomes also the agent of the purchaser to write down the name of the latter as purchaser, and his memorandum of the transaction will bind both parties as being a note in writing sufficiently signed within the Statute of Frauds. The memorandum of the auctioneer to bind the bidder must be contemporaneous with sale.<sup>2</sup>

**7. The Auction.**—*Conditions of Sale.*—Auction sales are always subject to conditions either express or implied, and refer to the manner of bidding, the deposit, the signing of the contract, the quantity or quality of the subject-matter of the sale, the title to be given by the vendor, the evidence of title, the completion of the purchase, misdescription in the particulars or catalogue, forfeiture of the deposit, and a resale of the property.<sup>3</sup>

Mass. 173; *Gilmore v. Newton*, 9 Allen (Mass.), 171; *Coles v. Clark*, 3 Cush. (Mass.), 399; *Courtis v. Cane*, 32 Vt. 232.

An auctioneer who receives and sells stolen property is liable for conversion to the same extent as any other merchant, and there is no principle of policy for the encouragement of trade or convenience of business under which he can explain an exemption. *Rogers v. Hine*, 1 Cal. 429; s. c., 54 Am. Dec. 300. *Compare* same case, 2 Cal. 571.

1. *Russell v. Palmer*, 2 Wils. 325; *Pitt v. Yalden*, 4 Burr. 2060; *Moore v. Mourgue*, Cowp. 480; *Ives v. Tregent*, 29 Mich. 390; *Langdon v. Summers*, 10 Ohio St. 77; *Requa v. Rea*, 2 Paige (N. Y.), 339; *Bottoms v. Mithvin*, 26 Ga. 481. *Compare* *Jones v. Thacker*, 61 Ga. 329; *Davis v. Irwin*, 8 Ga. 153; *Phillips v. Behn*, 19 Ga. 298; *Davis v. Hunt*, 2 Bailey (S. Car.), 412; *Coats v. Stewart*, 19 Johns. (N. Y.) 298.

2. *Walker v. Herring*, 21 Gratt. (Va.) 678; s. c., 8 Am. Rep. 617; *Brent v. Green*, 6 Leigh (Va.), 16; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Smith v. Arnold*, 5 Mason (U. S.), 414, 419; *Davis v. Rowell*, 2 Pick. (Mass.) 64; s. c., 13 Am. Dec. 398; *Gill v. Bicknell*, 2 Cush. (Mass.) 355; *Bent v. Cobb*, 9 Gray (Mass.), 397; *Morton v. Dean*, 13 Metc. (Mass.) 388; *Horton v. McCarty*, 53 Me. 394; *Cleaves v. Foss*, 4 Greenl. (Me.) 1; *Adams v. McMillan*, 7 Port. (Ala.) 73; *White v. Crew*, 16 Ga. 416; *Burke v. Haley*, 2 Gilm. (Ill.) 614; *Hart v. Woods*, 7 Blackf. (Ind.) 568; *Linn Boyd, etc., Co. v. Terrill*, 13 Bush (Ky.), 463; *Pugh v. Chesseldine*, 11 Ohio, 109; *Gordon v. Sims*, 2 McCord Ch. (S. Car.) 151; *Anderson v. Chick*, 1 Bailey Eq. (S. Car.)

118; *Harvey v. Stevens*, 43 Vt. 653; *White v. Watkins*, 23 Mo. 423; *Craig v. Godfrey*, 1 Cal. 415; s. c., 54 Am. Dec. 299; *Gwathney v. Cason*, 74 N. Car. 5; s. c., 21 Am. Rep. 484; *Mews v. Carr*, 1 Exch. 484; *Buckmaster v. Harrop*, 13 Ves. 456; *Entz v. Mills*, 1 McMull. 454; *Warlow v. Harrison*, 28 L. J. Q. B. 18; *Clarkson v. Noble*, 2 U. C. Q. B. 361. *Compare* *Bartlett v. Purnell*, 4 Ad. & E. 792.

An auctioneer's memorandum, entered in his book as early as practicable after the sale, from a pencil memorandum on a loose slip of paper made at the moment of the sale, is sufficient, and is to be regarded as the original entry. *Episcopal Church v. Wiley*, 2 Hill Ch. (S. Car.) 584; s. c., 30 Am. Dec. 386. And see *Price v. Durin*, 56 Barb. (N. Y.) 647; *Barclay v. Bates*, 2 Mo. App. 139.

3. *Bateman on Auctions*, 83.

These conditions are only binding on a purchaser when they fairly come to his knowledge. But where they have been printed and circulated before the sale, or posted up in the auction-room, a purchaser will generally be considered to have knowledge of them. *Fremer v. Wright*, 4 Madd. 364; *Torrance v. Bolton*, L. R. 14 Eq. 124; *Bywater v. Richardson*, 1 A. & E. 508.

Sometimes they are announced by the auctioneer immediately before the commencement of the sale, and if so announced in a clear and distinct manner they will be binding on the purchaser. *Wainwright v. Read*, 1 Desau. (S. Car.) 573; *Nat. Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Brubaker v. Jones*, 23 Kans. 411; *Trichel v. Myers*, 18 La. Ann. 567; *Backer v. Hamilton*, 18 La. Ann.

*What Conditions may be Attached.*—Any condition may be attached to an auction sale, but the language of restrictive conditions should be perfectly clear and not misleading, and sweeping general clauses in the conditions cannot be relied upon to cure the omission from the particulars of conditions of anything which ought to have been stated there.<sup>1</sup>

553; *Shields v. Harrison*, 77 N. Car. 115; *Pope v. Burrage*, 115 Mass. 282.

A sale by a mortgagee acting in good faith and under power of his mortgage is not invalid because he announced at the sale that a reasonable deposit would be required from purchasers, which condition was not embodied in the advertisement, and in consequence of which a person present was prevented from bidding. *Pope v. Burrage*, 115 Mass. 282.

Where the conditions of the sale have been published, and the auctioneer before the sale makes an announcement amounting to an alteration of the written or printed terms, such conditions as altered will be binding upon purchasers; but in case of dispute the vendor must clearly show that the purchaser had actual knowledge of the alterations. *Daniel v. Jackson*, 53 Ga. 87; *Satterfield v. Smith*, 11 Ired. L. (N. Car.) 60. See *Wright v. Deklyne*, Pet. (U. S. C. C.) 199; *McLellan v. Cumberland Bank*, 24 Me. 566; *Rankin v. Matthews*, 7 Ired. L. (N. Car.) 286; *Grantland v. Wight*, 2 Munf. (Va.) 179.

And it has even been held that the conditions of the sale may be changed by the vendor during the progress of the sale. *Morrison v. Morrison*, 6 Watts & S. (Pa.) 518.

Unless conditions are expressly stated, the interest offered for sale will be presumed to be accompanied by all the advantages legally and usually incidental to it, including the right to a clear title. *Ruggles v. Centerville Bank*, 43 Mich. 192; *Hotchkiss v. Clifton Air Cure*, 2 Abb. Dec. (N. Y.) 406; *McGown v. Wilkins*, 1 Paige (N. Y.), 120; *Gillett v. Balcom*, 6 Barb. N. Y. 370; *Parker v. Storts*, 15 Ohio St. 351; *Succession of Triche*, 29 La. Ann. 384; *Myers v. Raymond*, 5 Fla. 516; *Bradford v. McConihay*, 15 W. Va. 732; *Skull v. Glenister*, 16 C. B. N. S. 81; *Pope v. Garland*, 4 Yo. & C. 403; *Whittington v. Corder*, 16 Jur. 1034; *Stanton v. Tattershall*, 1 Sm. & G. 529.

In the absence of stated conditions of sale by the vendor the auctioneer is considered to have considerable discretion in prescribing such terms of sale as will exclude puffers and fraudulent bidders, and secure the confidence of honest purchasers

in offering their bids. *Nat. Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Blossom v. R. Co.* 3 Wallace (U. S.), 196; *Wright v. Yetts*, 30 Ind. 185; *Stead v. Course*, 4 Cranch (U. S.), 403. See *Ashcom v. Smith*, 2 Pen. & W. (Pa.) 211; s. c., 21 Am. Dec. 437.

It is the duty of the auctioneer to see that the conditions of the sale are complied with before he parts with the property. *McCall v. Elliott*, *Dudley* (S. Car.), 250; *Singleton v. Herriott*, *Dudley* (S. Car.), 254; *Moore v. Owsley*, 37 Tex. 603; *Williamson v. Berry*, 8 How. (U. S.) 495, 544; *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609; *Welch v. Louis*, 31 Ill. 446; *Langsdale v. Mills*, 32 Ind. 281.

1. *Chambers v. Tulane*, 9 N. J. Eq. 146. *Higgins v. Delaware*, etc., R. Co., 60 N. Y. 553; *Brown v. Haff*, 5 Paige (N. Y.), 235; *Brown v. Wallace*, 4 Gill & J. (Md.) 479; *McLean v. Green*, 2 McMull. (S. Car.) 17; *Waterman v. Spaulding*, 51 Ill. 425; *Laight v. Pell*, 1 Edw. Ch. (N. Y.) 577; *Gordon v. Sims*, 2 McCord Ch. (S. Car.) 151; *Lenihan v. Hamann*, 14 Abb. Pr. N. S. (N. Y.) 274; *Osborne v. Harney*, 7 Jur. 229; *Brownlie v. Campbell*, 5 App. Cas. 925; *Fremer v. Wright*, 4 Madd. 364; *Hanks v. Pulling*, 25 L. J. Q. B. 375; *Else v. Else*, L. R. 13 Eq. 196. *Compare Lallande v. Wentz*, 18 La. Ann. 289.

Goods consigned for sale to an auctioneer were sold with the condition that no allowance should be made for damage unless applied for within three days, when the bills were to be settled. *Held*, that this condition limited the liability of vendor and auctioneer to three days from the sale, although the damage was not discovered until after that time had elapsed. *Atkins v. Howe*, 18 Pick. (Mass.) 16.

Where there is an ambiguity or illegality in the terms of a sale the vendor cannot take advantage of it. *Gauche v. Trautman*, 7 La. Ann. 610; *Andrews v. Keith*, 34 Ala. 722; *Bottoms v. Mithvin*, 26 Ga. 481; *Hamill v. Gillespie*, 48 N. Y. 556.

In an action for the non-delivery of goods, it appeared that the defendants, who were auctioneers, issued printed catalogues, headed "Great Western Railway Company. Catalogue of unclaimed property, etc., which will be sold by auc-

*Particulars of Sale or Catalogue.*—A description of the property offered for sale, usually published before the sale takes place, should be clear and unambiguous, so as to leave no reasonable doubt in the mind of those who attend the auction about the identity or the character of the thing which is to be sold.<sup>1</sup>

tion by Messrs. H. & E. (the defendants), on Tuesday, November 7th, and following day. By order of the directors of the above company, etc." The catalogue contained, amongst others, the following conditions: "The lots to be cleared away within three days after the sale at the purchaser's expense, etc. If any deficiency shall arise, or from any cause the auctioneer shall be unable to deliver any lot or portion of a lot, then in such case the purchaser shall accept compensation. Upon failure of complying with the above conditions, the money deposited in part payment shall be forfeited. All lots unclaimed within the time aforesaid shall be resold by public or private sale without further notice, and the deficiency made good by the defaulter." The plaintiff attended the sale, received a catalogue, bought one of the lots and paid a deposit. He did not take the goods away on Saturday (the last of the three days for clearing), but went for them on the Monday following, when he was told by one of the defendants that the lot had been delivered to another person. There was evidence that the lot was seen on Saturday morning in the defendant's possession as if ready for delivery, and that it was usual to delay the delivery of large lots like it till the smaller lots had been delivered. The plaintiff having been nonsuited, *held*, first, that on the face of the catalogue and conditions there was evidence that the defendants contracted personally with the plaintiff for the delivery of the goods purchased by him. Secondly, that the condition as to clearing the lot within three days was not a condition precedent to the plaintiff's right to claim delivery. *Woolfe v. Horne*, L. R. 2 Q. B. D. 355.

The conditions of a sale provided that the buildings and the lots should be sold separately, the buildings to be removed within thirty days. *Held*, that a purchaser of a building who also bought the lot on which it stood was not bound to remove it. *Plume v. Small*, 5 N. J. Eq. 460.

Neither will the purchaser be allowed to take undue advantage of any omission of special conditions, or any unintentional mistake on the part of the auctioneer or vendor. *Lord v. Stephen*, 1 Y. & C. 222; *Harvey v. Harris*, 112 Mass. 32.

1. *State v. Keeler*, 49 Mo. 548; *Hoffman v. Anthony*, 6 R. I. 282; *Symons v. James*, 1 Y. & C. C. C. 487; *Rhodes v. Ibbetson*, 4 De G., M. & G. 787; *Smith v. Ellis*, 14 Jur. 682.

Such description, when it relates to real property or property of the nature of realty, is called the "particulars of sale," and when it refers to personal effects sold in lots, is designated a "catalogue." *Bateman on Auctions*, p. 44.

It has been held that it should be circulated before the sale, or at any rate, in the salesroom. *Tarrance v. Bolton*, L. R. 14 Eq. 124.

This description cannot be contradicted, varied, or added to by the auctioneer at the time of sale. *Wright v. Deklyne*, *Peters* (U. S. C. C.), 199; *Rodman v. Zilley*, 1 N. J. Eq. 320; *Cannon v. Mitchell*, 2 Desau. (S. Car.) 320; *Grantland v. Wight*, 2 Munf. (Va.) 179; *Layton v. Hennen*, 3 La. Ann. 1; *Davidson v. De Lallande*, 12 La. Ann. 826. *Compare Rankin v. Matthews*, 7 Ired. L. (N. Car.) 286; *Lee v. Hester*, 20 Ga. 588.

But although evidence of such declarations is inadmissible at law on behalf of either plaintiff or defendant, and in equity on behalf of the plaintiff, such evidence is admissible in equity on behalf of the defendant to an action for specific performance. The rule seems to be that if the variation is in favor of the vendor, the vendor cannot enforce specific performance with the variation, nor can the purchaser enforce specific performance without the variation. If the variation is in favor of the purchaser the purchaser cannot enforce specific performance with the variation, nor can the vendor enforce specific performance without the variation. *Woollam v. Hearn*, 7 Ves. 211; *Higginson v. Clowes*, 13 Ves. 516; *Winch v. Winchester*, 1 V. & B. 375; *Townshend v. Winchester*, 6 Ves. 328; *Price v. Ley*, 32 L. J. Ch. 530; *London, etc., R. Co. v. Winter*, 1 Cr. & Ph. 57; *Wood v. Scarth*, 2 Kay. & J. 33; *Martin v. Pycroft*, 22 L. J. Ch. 94; *Clowes v. Higginson*, 1 V. & B. 524; *Manser v. Back*, 6 Hare, 443; *Glass v. Hulbert*, 102 Mass. 24.

This rule does not refer to explanations by the auctioneer of written or printed "particulars" or "catalogues" when the explanations do not contradict the partic-

*Description must be Certain.*—The particulars should contain a faithful description of the property to be sold, with an exact account of its liabilities and incumbrances, and should be so framed as to convey clear information to the ordinary class of persons who frequent sales by auction.<sup>1</sup>

ulars or conditions. *Brett v. Clowser*, 5 C. P. D. 376.

Where the contract is by parol, and of such a character that it need not be in writing, verbal declarations of the auctioneer will be binding. *Eden v. Blake*, 14 L. J. (Exch.) 194.

1. *Dykes v. Blake*, 4 Bing. N. Cas. 463; *Tamplin v. James*, 15 Ch. D. 215; *Higginson v. Clowes*, 15 Ves. 516; *Swaishland v. Dearsley*, 29 Beav. 430; *Stevens v. Adamson*, 2 Stark, 422; *Flight v. Booth*, 1 Bing. N. Cas. 370; *Bonner v. Baker*, 8 La. Ann. 283; *Newman v. Jackson*, 12 Wheat. (U. S.) 570; *Bodin v. McClosky*, 11 La. Ann. 46; *Stephenson v. Jannary*, 49 Mo. 465; *Pemberton v. McRae*, 75 N. Car. 497; *Deloach v. State Bank*, 27 Ala. 437; *Shield v. Batts*, 5 J. J. Marsh. (Ky.) 12; *Mason v. Thomas*, 24 Ill. 285; *Sheldon v. Capron*, 3 R. I. 171; *Campbell v. Johnson*, 4 Dana (Ky.), 177; *Webster v. Haworth*, 8 Cal. 21; *Faulett v. Peabody*, 3 Nebr. 196.

Where the vendor or auctioneer makes statements regarding essential particulars which prove to be untrue, specific performance will not be enforced even if the vendor did not know that the representations were untrue. *Black v. Walton*, 32 Ark. 321.

A dwelling-house and offices were put up for sale by public auction, under a printed condition in a common form that the lot was sold subject to any existing rights and easements of whatever nature; and the printed particulars made no mention of any easement, or of any claim to an easement. As the result of evidence, it appeared that the house was subject to an easement belonging to the owner of a neighboring tenement to use the kitchen for particular purposes, and that the vendor's solicitor knew of the rumored existence of some such easement, but forbore to make inquiries. No grant of an easement appeared from the abstract, and its existence was, in fact, disputed on the pleadings. In the auction-room the plaintiff's solicitor said he had heard of some such claim, but had no definite information about it, and the auctioneer, in hearing of the plaintiff's solicitor, on being questioned, told the audience that they might dismiss the subject of the rumored claims from their minds, as nobody would probably ever

hear of them again. *Held*, that the conditions were misleading and the statements in the auction-room insufficient, and specific performance of the contract refused. *Heywood v. Mallalieu*, L. R. 25 Ch. Div. 357.

The particulars of sale described a farm, forming about a third of the estate sold, as late in the occupation of A B, at the rent of £290. A B had occupied the farm, which contained a good deal of grass land, as yearly tenant, at £290, but went in at midsummer, paying only £1 for the first quarter, and quitting at Michaelmas in the next year, thus paying £291 for a year and a quarter. Since this the plaintiff had agreed to let the farm at £225; but the agreement had been rescinded before taking possession, and the evidence showed that the farm would not let for nearly so much as £290. *Held*, that there was such substantial misrepresentation as entitled the purchaser to be discharged. *Dimmock v. Hallett*, L. R. 2 Ch. 21.

A slight mistake in the description of land on which corn was standing which was to be sold, but where the description was sufficient to apprise all persons what particular piece of corn was advertised, was held not to avoid the sale. *Pollard v. King*, 63 Ill. 36.

Trifling and unimportant variations in the description of an estate are not fatal to the sale if the transaction be fair, especially if there be the usual condition providing that errors and misdescriptions shall not annul the sale. *Chandler v. Cook*, 2 McArthur (Dist. of Columbia), 176; *Gray v. Shaw*, 14 Mo. 341; *Jensen v. Weinlander*, 25 Wis. 477; *Stephenson v. Jannary*, 49 Mo. 465; *Shields v. Thompson*, 4 Baxt. (Tenn.) 227; *Noble v. Goo-gins*, 99 Mass. 231; *Shaubhut v. Hilton*, 7 Minn. 506; *Ten Broeck v. Livingston*, 1 Johns. Ch. (N. Y.) 357; *Winne v. Reynolds*, 6 Paige (N. Y.), 407. *Compare Ware v. Johnson*, 55 Mo. 500; *Jennings v. Broughton*, 17 Beav. 324.

In such cases, however, specific performance may be refused although a performed contract could not be rescinded. *Cadman v. Horner*, 18 Ves. 10; *Clermont v. Tasburgh*, 1 Jac. & W. 112.

Mere loose and indefinite expressions such as ought to put a person on his

*Competition Must be Fair.*—It is the auctioneer's duty to see

guard are not necessarily fatal. *Wells v. Day*, 124 Mass. 38; *Scott v. Hanson*, 1 Russ. & M. 128; *Dimmock v. Hallett*, L. R. 2 Ch. 21.

At a commissioner's sale a map was exhibited representing a river as running through the land. At some place where the river was running through the land were obstructions to navigation, although it was navigable for boats above and below the obstructions. The land was sold by the acre. *Held*, that the purchaser was not entitled to a deduction for the land forming the bed of the river. *Shands v. Triplet*, 5 Rich. Eq. (S. Car.) 76.

Where a tract of land is sold in separate and independent lots a defect in the title to one parcel will not avoid or affect the sale of another parcel; but a defect in the title to any one of several lots put up and sold as one parcel avoids the sale of the whole parcel. *Mott v. Mott*, 68 N. Y. 246.

A misdescription will avoid a sale even if no fraud or wilful deception be proved. *Wall v. Stubbs*, 1 Madd. 80; *Dobell v. Hutchinson*, 3 A. & E. 355; *Robinson v. Musgrove*, 8 C. & P. 469; 2 Moo. & R. 92; *Denny v. Hancock*, L. R. 6 Ch. 1; *Mayer v. Adrian*, 77 N. Car. 83; *Taylor v. Fleet*, 4 Barb. (N. Y.) 105; *Millingar v. Daly*, 56 Pa. St. 245. See *Seymour v. Delancey*, 6 Johns. Ch. (N. Y.) 222; *King v. Bardeau*, 6 Johns. Ch. (N. Y.) 38.

Or the vendor will be ordered by the court to make a conveyance according to the description given at the sale. *Phillips v. Higgins*, 7 Lans. (N. Y.) 314.

To avoid the sale a purchaser must have been deceived. Where he had been informed of the misdescription, or where the ambiguity had been explained to him, he will be held to his contract. *Farebrother v. Gibson*, 1 DeG. & J. 602; *Gunnis v. Erhart*, 1 H. Bl. 290; *Bradshaw v. Bennett*, 5 C. & P. 48; *Jewett v. Miller*, 10 N. Y. 402; *Wood v. Martin*, 66 Barb. (N. Y.) 241.

And the deception must not have been occasioned by his own carelessness, as where a person by mistake purchased one of two lots offered for sale, thinking that he was bidding for the other. *Malins v. Freeman*, 2 Keen, 25. See *Thompson v. Kelly*, 101 Mass. 291; s. c., 3 Am. Rep. 353.

A mistake by which a purchaser is not prejudiced, or of which he is aware, will not avoid the sale. *Leach v. Mullett*, 3 C. & P. 115; *Wright v. Wilson*, 6 C. & P. 734; *Colby v. Gadsden*, 34 Beav. 416; *Davis v. Evans*, 62 Ala. 401.

Where the mistake in the description is of such a character that the particulars on which the agreement was indorsed included property which the vendor never intended to sell, specific performance was refused. *Manser v. Back*, 6 Hare, 443. See *Day v. Wells*, 30 Beav. 220; *Griffiths v. Jones*, L. R. 15 Eq. 279.

Where the vendor or auctioneer discovers mistakes, omissions, misdescriptions, or ambiguity before the sale, notice should be distinctly given to the bidders, and the ambiguity clearly explained in order to bind him. *Manser v. Back*, 6 Hare, 443; *Shelton v. Livius*, 1 L. J. Exch. 139; *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127.

As a general rule mere expressions of praise, or affirmations of value, provided that they do not amount to an actual misstatement of facts, will not render the contract voidable by the purchaser, although their tendency would doubtless be to indispose the court to enforce specific performance at the suit of the vendor. *Fenton v. Browne*, 14 Ves. 144; *Magennis v. Fallon*, 2 Mal. 561; *Scott v. Hanson*, 1 Russ. & M. 128; *Dimmock v. Hallett*, L. R. 2 Ch. 21.

Qualifying expressions, such as "containing by estimation," "more or less," or "thereabouts," have been held to import that the precise quantity is not warranted; but although they will cover small and unintentional errors and inaccuracies, they will not cover careless and reckless statements, especially where the vendor knew the exact quantity. *Winch v. Winchester*, 1 V. & B. 375; *Stevens v. Giddings*, 45 Conn. 507; *Coons v. North*, 27 Mo. 73; *Lawrence v. Staigg*, 8 R. I. 256; *Glover v. Smith*, 1 Desau. (S. Car.) 433; *Veeder v. Fonda*, 3 Paige (N. Y.), 94; *Russell v. Houston*, 5 Ind. 180; *Jennings v. Monks*, 4 Met. (Ky.) 103; *Slothower v. Gordon*, 23 Md. 1; *Jones v. Tatum*, 19 Gratt. (Va.) 720; *Foley v. Keon*, 4 Leigh (Va.), 627; *Galbraith v. Galbraith*, 6 Watts (Pa.), 117; *Carmody v. Brooks*, 40 Md. 240; *Ellis v. Hill*, 6 Rich. (S. Car.) 37; *Horn v. Denton*, 2 Sneed (Tenn.), 125; *Davis v. Evans*, 62 Ala. 401; *Marbury v. Stone-street*, 1 Md. 147; *Brown v. Wallace*, 4 Gill & J. (Md.) 479; *Long v. Weller*, 29 Gratt. (Va.) 347; *Williams v. Bradley*, 7 Heisk. (Tenn.) 54.

And where land is sold by the acre, the parcel containing a certain number of acres "more or less," to be ascertained by measurement, the purchaser is bound to take it though the quantity

that the goods are sold under a fair competition and for the best price which they may bring under competition.<sup>1</sup>

*Must Accept all Biddings.*—He cannot without good and sufficient reason refuse to accept biddings, but he may refuse to accept the bids of incompetent persons, as infants, lunatics, drunkards, or other irresponsible parties.<sup>2</sup>

*Unconditional Sales.*—Where the sale is without reserve it is illegal for the auctioneer to accept a bid from his principal or from any one acting in his behalf. A sale without reserve means in all cases, both at law and in equity, not merely that the property will be peremptorily sold, but that neither the vendor nor any one on his behalf will bid at the auction.<sup>3</sup>

*Puffers.*—A puffer in the strictest meaning of the word is a person who without having any intention to purchase is employed by the vendor at an auction to raise the price by fictitious bids, thereby increasing competition among the bidders, while he himself is secured from risk by a secret understanding with the vendor that he shall not be bound by his bids.<sup>4</sup>

should be considerably more than advertised. *Ashcom v. Smith*, 2 Pen. & W. (Pa.) 211; s. c., 21 Am. Dec. 437.

1. *Fairfax v. Hopkins*, 2 Cranch C. C. 134; *Johnston v. Eason*, 3 Ired. Eq. (N. Car.) 330; *Myers v. Sanders*, 7 Dana (Ky.), 506.

The highest bidder must become the purchaser, but the auctioneer may, after knocking down the property, reopen the sale when there is sufficient evidence that there was a higher bid. *Pike v. Bach*, 38 Me. 302; s. c., 61 Am. Dec. 248.

Where an auctioneer who was selling mortgaged property saw a purchaser under the mortgagor approaching the place of sale while the premises were under the hammer, and immediately knocked down the premises to his own brother for half the sum due under the mortgage so as to prevent competition, the sale was held to be fraudulent and void. *Jackson v. Crafts*, 18 Johns. (N. Y.) 110.

Where there is a doubt in the minds of some of those present at an auction sale about the title to the property, the auctioneer will be justified in postponing the sale until such doubt may be removed to prevent a sacrifice of the property. *Roberts v. Roberts*, 13 Gratt. (Va.) 639; s. c., 70 Am. Dec. 435.

2. *Kinney v. Showdey*, 1 Hill (N. Y.), 544; *Den v. Zellers*, 7 N. J. L. 153; *Holder v. Jackson*, 11 N. C. C. P. 543.

3. *Thornett v. Haines*, 15 M. & W. 367; *Warlow v. Harrison*, 25 L. J. (Q. B.) 14; *Meadows v. Tanner*, 5 Madd. 34; *Robinson v. Wall*, 10 Beav. 61.

A sale at which the owner secretly becomes a bidder is fraudulent and void.

*Baham v. Bach*, 13 La. 287; s. c., 33 Am. Dec. 561.

If upon a sale stated to be without reserve, or rather perhaps not stated to be subject to a reserve, a bidding should be made on the part of the seller, the auctioneer ought in self-defence not to take such bidding where the principal is undisclosed; and he will be justified in any case in rejecting such a bidding when made *mala fide*. *Warlow v. Harrison*, 29 L. J. (Q. B.) 14; *Bexwell v. Christie*, 1 Cowp. 395.

But where any sale by auction is declared either in the particulars of sale or the conditions to be subject to a right for the seller to bid, it shall be lawful for the seller or any one person on his behalf to bid at such auction in such manner as he may think proper. *Bowles v. Round*, 5 Ves. 508; *Jervise v. Clarke*, 1 J. & W. 389; *Shaw v. Simpson*, 1 J. & W. 392; *Malins v. Freeman*, 2 Keen, 25; *Delves v. Delves*, L. R. 20 Eq. 77; *Howard v. Castle*, 6 T. R. 642; *Patterson v. Preston*, 51 Md. 190.

There appears to be no objection to the auctioneer disclosing the amount of the reserve when his doing so is likely to benefit his principal. *Else v. Barnard*, 28 Beav. 228.

An execution sale will not be vitiated where the creditor procures a third party to bid an amount not less than the amount of the debt and expenses. *Dexter v. Shepard*, 117 Mass. 480.

4. *Peck v. List*, 23 W. Va. 338; s. c., 48 Am. Rep. 398.

The leading English case on this subject is *Bexwell v. Christie*, 1 Cowp. 395. In that case it was decided that an ac-



tion does not lie against an auctioneer for selling a horse at the highest price bid for him, contrary to the owner's express directions not to let him go under a larger sum named; otherwise, if the owner had directed the auctioneer to set the horse up at a particular price and not lower. Lord Mansfield, in pronouncing the opinion of the entire court, says in substance: "The matter in question is in itself of small value; but in respect to the principles by which it must be governed it is a question of great importance. Since the trial I have mooted the point with many who are not lawyers upon the morality and rectitude of the transaction. The question is whether a bidding by the owner of goods at a sale under the condition that the highest bidder should be the purchaser is a bidding within the meaning of such conditions of sale? It is not a direction that there should be no bidding under the price named by the owner, in that case fifteen pounds; but the direction is not to let the horse go under fifteen pounds, which implies that there might be a bidding under that sum. This is equivalent to a private bid of that sum by the owner. The question is whether the owner can privately employ another person to bid for him. The basis of all dealings ought to be good faith; so more especially in these transactions, when the public are brought together upon a confidence that the articles set up at a sale are to be disposed of to the highest bidder; which could never be the case if the owner might privately and secretly enhance the price by a person employed for the purpose; yet tricks and practices of this kind daily increase and grow so frequent that good men give in to the ways of the bad and are dishonest in their own defence. But such a practice was never openly avowed. An owner of goods set up for sale at an auction never yet bid in the room for himself. If such a practice was allowed, no one would bid. It is a fraud upon the sale and upon the public. The disallowing of it is no hardship upon the owner. If he is unwilling that his goods should go at an under price, he may order them to be set up at his own price and not lower; such a direction would be fair; or he might do as was done by Lord Ashburton, who sold a large estate by auction: he had it inserted in the conditions of sale that he himself might bid once in the course of the sale, and he did bid once fifteen or twenty thousand pounds. Such a condition is fair, because the public are then apprised upon what terms they bid.

The question then is, is a private bidding by the owner fair? If not, it is no argument to say it is a frequent custom; gaming, stock-jobbing, and swindling are frequent, but the law forbids them all. Suppose there was an agreement privately with a particular person that if he was the highest bidder, so much would be abated; frequently abatements from the price fixed by the vendor are made on a private sale, and of course legitimately; sometimes ten or fifteen per cent is thus abated. But a private agreement of this sort between the owner and the bidder at a sale by auction would be a gross fraud. What is the nature of such a sale by auction? It is that the goods shall go to the highest real bidder. But there would be an end of that if the owner might privately bid upon his own goods. There is no contract with the auctioneer. He is only an agent between the buyer and the seller. He may fairly bid for a third person who employs him, but not for the owner. Therefore upon full consideration I am of opinion that a bidding by the owner privately or its equivalent, a direction given to the auctioneer privately not to let the property go under a certain sum, would be a fraud upon the sale; and consequently that this action against the auctioneer for knocking off the horse to the highest bidder below the price fixed by the owner privately cannot be maintained."

The principles laid down in this case prevail in the courts generally in England and in this country to a much larger extent than they did fifty years ago.

In *Howard v. Castle*, 6 T. R. 643, it was decided that if the owner of goods or an estate put up to sale at auction employ puffers to bid for him without declaring it, it is a fraud on the real bidders, and the highest bidder cannot be compelled to complete the contract. In that case Lord Kenyon says: "The parties did not meet on equal terms; several other persons besides the defendant bid, who by so doing represented themselves as embarking on their own judgment, but it afterwards turned out that this was false, and that it was an imposition practised by the plaintiff on the defendant, for all these other persons were authorized by the plaintiff to bid for him. I will not go into the general reasoning on the subject, because it is very ably stated by Lord Mansfield in *Bexwell v. Christie*, 1 Cowp. 395. The reasoning in that case is founded on the noblest principles of morality and justice, principles that are calculated to preserve honesty be-

tween man and man." All the other judges concurred with Lord Kenyon, Ch. J.; Grove, J., saying, "nothing can be more true than the doctrine of *Bexwell v. Christie*, 1 Cowp. 395. If the owner of goods put up to sale at auction wishes that they shall not be sold under a particular price, he may declare so before the auction begins, or he may reserve one bidding for himself, or declare that he has appointed a particular person to bid for him; in either of these cases the parties meet on fair terms. But the whole of this was a secret transaction unknown to the defendant, and it was a fraud and imposition upon him."

In *Wheeler v. Collier*, 1 Moo. & M. 123, it was decided: "If the owner of an estate put up for sale by auction employ a person to bid for him, the sale is void, although only one such person be employed, unless it is announced at the time that there is a person bidding for the owner." Lord Tenterden, Ch. J., said: "I am clearly of opinion this sale is void in point of law. I am not called upon to decide the case of one person only being employed to bid; here are two, and it certainly makes a material difference whether a person wishing to purchase sees one or two persons bidding against him. But I may not be understood to decide that case on that ground; I will add that the strong inclination of my opinion is that if only one person be employed to bid, the sale is void; unless it is announced that there is a person bidding for the owner, the act itself is fraudulent. This was obviously implied in the case of *Bexwell v. Christie*, 1 Cowp. 395; for the telling of the auctioneer by the owner privately not to let the property be sold for less than a certain price was obviously the equivalent of privately employing a single person to make a single bid for the owner. And this Lord Mansfield in that case held rendered the sale fraudulent."

In *Crowder v. Austin*, 3 Bing. 368, the vendor of a house stationed his servant to join in the bidding at a public auction, and the servant bid up to twenty-three pounds after a *bona-fide* bidder had bid twelve pounds. *Held*, that the sale could not be enforced against a subsequent bidder. The judges expressly approved the opinion of Lord Mansfield in *Bexwell v. Christie*, though it had then been disapproved by the Lord Chancellor in *Conolly v. Parsons*, 3 Ves. Jr. 625. In this case it may be noted that there was but one by-bidder, but obviously some of the judges regarded this as not making the least difference.

In the case of *Rex v. Marsh*, 3 You. & Jer. 331, it was decided "that the employment of a puffer at a sale by auction of property seized under an execution by an agent of the crown, to whom a bidding is reserved by a condition of sale, vitiates the sale. And further, the misconduct of the purchaser does not preclude him from objecting to the employment of a puffer at a sale by auction." In that case one of the conditions of the sale was "on the part of the crown, D. to be at liberty to make one bidding but no more, and if the highest bidder, the sale to be void." It was argued that if this was allowed it would be injurious to the interest of the crown, as in that case no purchaser would be found. The court refused to confirm the sale, though this bid was reserved, and though it was shown that the purchaser had acted improperly, and that the biddings of the puffer did not exceed the value of the property.

In *Thornett v. Haines*, 15 Mee. & W. 367, it was decided that "when a sale by auction is advertised or stated by the auctioneer to be without reserve, the employment by a vendor of a puffer to bid for him without notice renders the sale void and entitles the purchaser to recover back his deposit from the auctioneer. Pollock, C. B., says: "I adopt the law as laid down by Lords Mansfield, Kenyon, and Tenterden. I think, however, the decisions in the courts of law and equity may be reconciled. There is no distinction between a puffer bidding up to the buyer, or bidding by him at a different stage of the sale; but if there were, it would not apply to this case, as here Robinson was a puffer and bid immediately before the plaintiff. The only distinction between the cases in equity and law is this, that in the former there may be a reserved bidding without notice, but that does not apply to the present case when the sale was distinctly stated and understood to be without reserve; and it matters not whether the announcement is made by the particulars of sale or by the auctioneer by parol." This decision accords with the decisions of Lords Mansfield, Kenyon, and Tenterden, but the court has thought proper to base the decisions in part on the announcement by the auctioneer that the sale was "without reserve." because when based on that ground in part it would accord with the decisions in the chancery court with which these judges did not agree, but with which they did not want unnecessarily to come in conflict.

In *Green v. Baverstock*, 14 C. B. N. S., it was decided that "upon a sale of goods by auction where the highest bidder is the purchaser, the secret employment of a puffer on behalf of the vendor is a fraudulent act and vitiates the transaction." In this case there was no announcement that the sale was "without reserve." But as it was a sale at auction to the highest bidder, it was regarded by the court to be without reserve. Byles, J., says, "What may be the practice in the courts of chancery I do not profess to understand, but the rule of common law, I apprehend, is plain. At a sale by auction when the highest bidder is to be the purchaser, the secret employment of a puffer by a vendor is a fraudulent act. The sale is vitiated by the fraud and void, unless the vendee with knowledge of the fact has acted upon it, so as to deprive himself of the right to complain. This has been the law of England and indeed of the whole of Europe for a very long time. It was a law of universal application even before the Christian era."

In the case of *Warlow v. Harrison*, 1 Ell. & Ell., the plaintiff at an auction of a horse, advertised by the auctioneer to be sold without reserve, bid for the horse a certain amount; the owner by a puffer bid higher. The plaintiff having found out that it was a puffer's bid would bid no more, and the auctioneer knocked the horse down to the puffer, not knowing he was a puffer. The plaintiff tendered the amount of his own bid to the auctioneer and demanded of him the horse, which he refused to deliver to him. Thereupon the plaintiff brought a common-law action against the auctioneer. The court of exchequer chamber decided he was not entitled to recover, because, though the bid of the owner through the puffer was fraudulent, and the auctioneer, had he known the fact, ought to have refused the bid and knocked the horse down to the plaintiff, yet till it was knocked down to him he had no right to demand the horse, and till the horse was knocked down to the plaintiff the auctioneer was not the plaintiff's agent, but only the agent of the vendor, and therefore not liable to a suit of this character, though he might have been liable to the plaintiff on a declaration complaining that the auctioneer had undertaken to sell the horse without reserve and had not done so.

In *Hopkins v. Tanqueray*, 15 Com. Bench. 130, Crowder, J., says: "It is a grave question whether a contract made privately with one individual, that the plaintiff would warrant the soundness of

a horse which was being sold publicly at auction would be enforced, as all have at an auction sale a right to suppose they are bidding on equal terms."

In *Mainprice v. Westley*, 6 B. & S., Q. B. 427, it was questioned whether such an action would lie against an auctioneer as was suggested would lie in *Warlow v. Harrison*, 1 Ell. & Ell. 309.

These cases show that the common-law courts of England have always maintained the views laid down by Lord Mansfield in *Bexwell v. Christie*, 1 Cowp. 395; and they have conscientiously carried them out, not permitting them to be frittered away by nice distinctions.

But it was far otherwise in the English chancery courts. In the case of *Conolly v. Parsons*, reported in a note in 3 Vesey, 625, 626, 627, Lord Chancellor Loughborough expressed his dissatisfaction with the opinion of Lord Mansfield, pronounced about twenty years before, and says (3 Vesey, 627): "I should wish it to undergo a reconsideration; for if it is law it will reduce everything to a Dutch auction by bidding downwards. I feel vast difficulty to compass the reasoning that a person does not follow his own judgment because other persons bid; that the judgment of one person is deluded and influenced by the bidding of others, when it is publicly known that persons are employed to bid, it would be very foolish in anyone to let himself be so influenced." His idea evidently was that puffers ought to be permitted in all cases to bid, and if this was settled as the law, that then certainly no harm could result from it, as no real bidder would then be influenced by the bidding of puffers. But it seems, as has been frequently said by the common-law judges, that the effect of authorizing by law the bidding of puffers would be to prevent bidders from attending auctions, and auction sales would practically cease. This would certainly be a public evil. The idea that one bidder at a public auction is not influenced by the bids of others, expressed by Lord Loughborough, is a very strange one. If there was truth in it no one would ever employ puffers to attend a public auction; yet Lord Loughborough in another part of the same opinion says: "It is not doubted at any sale, except where there is an express stipulation to sell without reserve, that there is somebody for the seller. The buyer goes to the sale with this knowledge, that he shall not get the article under the price the seller thinks to be a reasonable price. There are several articles sold almost always by auction that would

not probably be sold so if the vendor was not allowed somebody to look after his interest. There are not above three or four purchasers of scarce and valuable books; they would divide them if the person selling had not some means of guarding against that." Lord Loughborough in this opinion also says that some acts of Parliament exempting from auction duty upon certain conditions sales, when the owner or his agent bought in the property, recognized the right of an owner to employ puffers. He says: "These acts of Parliament go upon its being a usual thing and a fair thing for the owner to bid." But the common law courts held that these acts of Parliament did not in the least touch this question, and that they intended only to exempt from auction duties when the owner or his agent could legally bid, that is, when he expressly reserved the right to bid. Thus Justice Grove says in *Howard v. Castle*, 6 T. R. 643: "Nothing can be more wise than the doctrine laid down in the case of *Bexwell v. Christie*, 1 Cowp. 395, which is not in the least impeached by the acts of Parliament in reference to the exemption from auction duties upon certain conditions where the owner or his agent buys in the property." In the case in which Lord Loughborough expressed these views no decision was rendered, the cause being compromised by the parties.

The views thus expressed by Lord Loughborough were in direct conflict with the law which had been settled by the unanimous decision of the court some twenty years before in the case of *Bexwell v. Christie*, 1 Cowp. 395. It would seem therefore impossible that it could really be true, as stated by Lord Loughborough: "It is not doubted at any sale, except where there is an express stipulation to sell without reserve, that there is somebody there for the seller." This is to say that in his time all who attended auction sales expected as a matter of course that there would be puffers there employed by the seller in direct violation of what was then the undisputed law of the land as settled by the courts.

As showing the influences of the views of Lord Loughborough, we need but review the decisions of the English chancery courts on this subject.

In *Smith v. Clarke*, 12 Ves. 477, it was decided: "The circumstance that a person bid at an auction, under the private direction of the vendor, for the purpose of preventing a sale at a sum specified as the value, is no objection to a specific performance." The master of the rolls,

Sir William Grant, says: "I do not mean to state a proposition so general as that there can be no fraud through the medium of persons employed by the vendor." Lord Loughborough, in *Connally v. Parsons*, 3 Ves. 625, note, appears to doubt whether there can be that species of fraud; whether in any case the purchaser can be said to be defrauded as being drawn in through eagerness of zeal and competition with others. "I do not go that length, for if the person is employed not for the defensive precaution with a view to prevent a sale at an under-value, but to screw up the price, I am not ready to say that is such a transaction as can be justified in a court of equity. Neither do I say if several bidders are employed by the vendor, in that case a court of equity would compel the purchaser to carry the agreement into execution, for that must be done merely to enhance the price. It is not necessary for the defensive purpose of protection against a sale at an under-value."

Here we see a part of Lord Loughborough's reasoning in *Connally v. Parsons*, 3 Ves. 625, note, repudiated, and a part of it adopted, that part, namely, which holds that one puffer but no more than one, can be employed, if he is privately instructed not to go beyond a value fixed by the vendor, for this adoption of the views of Lord Loughborough is regarded as necessary in order to furnish the vendor "a protection against a sale at an under-value."

In *Flint v. Woodin*, 8 Hare, 618, it was held: "Though a puffer ought not to be employed to screw up the price, or take advantage of the ignorance of other bidders, yet a progressive bidding to a fixed or reserved bidding by a person employed by the vendor, without the knowledge of the other bidders, will not necessarily be deemed to be taking advantage of their ignorance." In that case the purchaser at the auction had some days before the sale indicated to the vendor that he might give seven hundred pounds sterling for certain real estate, and the vendor employed a puffer secretly with instructions to run the property up to six hundred and ninety-five pounds sterling, and he bid upon the property through a long series of biddings to their final closing, when it was knocked down to the purchaser at seven hundred pounds sterling, he being the one who had indicated he might give that price. There might have been, under the circumstances of this case, no taking advantage of the purchaser; but if the action of this puffer was not screwing up the price, which the vice-chancellor

said ought not in any case to be allowed, then what is the meaning of this phrase "screwing up the price"?

In *Woodward v. Miller*, 2 Col. Ch. 279, a puffer was employed to bid real estate to be sold at auction up to a certain price. At the sale the auctioneer declared that "it was a *bona-fide* sale, and if there were any puffers in the room he should hate himself." This was regarded as not equivalent to a representation that the sale was to be without reserve, and though the puffer made repeated bids, the sale was specifically enforced.

In the case of *Mortimer v. Bell*, 1 L. R. Ch. 10, it was decided that a vendor could not employ more puffers than one, though they were limited to the same price, unless he expressly stipulated that he might, and Lord Cransworth, chancellor, from his opinion obviously disapproved of the chancery rule permitting the employment of one puffer. He says: "The conditions of sale in this case contained the usual provision, that the highest bidder should be the purchaser. Courts of law have held such a condition prevents the vendor from interposing any reservation. . . . It is not disputed that the vendor may stipulate for the power of buying in the property, if it is going at a sum below what he considers a fair price; but in the absence of such stipulation courts of law hold that it is a fraud in the vendor to interpose any bidder to prevent property going to the person who offers the highest price. This is certainly the rule established in courts of law; but it is said a different rule prevails in equity, and that without an express stipulation a vendor may always fix a reserved price, and authorize a person to bid for him, so as to prevent the property going under that price. That such a rule to some extent prevails I cannot doubt. Its existence has been recognized by many judges of the highest reputation. Sir William Grant, in *Smith v. Clarke*, 12 Ves. 477, 481, not only recognized, but apparently approves the rule. He seems to think it fair and just that persons putting up property for sale by auction should be at liberty to employ a person to bid for them up to a stipulated price to prevent its being sold at an undervalue. When such a right is stipulated for there is no fraud, no deception. It is said that even without express stipulation such a right is understood to exist. I confess I think it much better that it should be notified. If it be not notified, there is a difference between the language expressed and that which is understood to be its import. The question in such

case may always arise, whether persons bidding were aware of the rule. The practice of the court of chancery in modern times at all events is to stipulate expressly for the right not to sell under a fixed price, and so by implication to employ a person to bid up to that price."

This decision was rendered in 1865, and we may gather from it that the rules with reference to puffing, which had been laid down formerly by the chancery court, were found to work badly, and that the courts of chancery, to avoid the difficulties which arose in their application, had in modern times constantly stipulated in their decrees that any property ordered to be sold by the court should not be sold at less than a fixed price, proclaimed before the auction commenced, which was in effect adopting a rule which for eighty years had prevailed in the common-law courts, when a seller of lands or other property decided to protect himself against a sacrifice of the property. The lord chancellor also expressed his disapprobation of the rules of the equity courts in reference to puffing, and his preference of the rules of the courts of common law, because in his judgment the rules which had been adopted by the courts of equity tended to deceive bidders at auction. It is obvious that there never should have been different rules on this subject prevailing in the courts of common law and of chancery; and while the courts of chancery in modern times, as appears from their decisions, admitted the propriety of the rules laid down on the subject of puffing by the common-law courts, yet they were obviously embarrassed by the decisions of the chancery courts, which were binding on them as precedents.

To remove this trouble in 1867 an act of Parliament was passed entitled "the sale of land by auction act," the fourth section of which recites that "there is at present a conflict between her Majesty's courts of law and equity in respect to the validity of sales by auction of land, when a puffer has bid, although no right of bidding on behalf of the owner was reserved, the courts of law holding that all such sales are absolutely illegal, and the courts of equity under some circumstances giving effect to them; but even in the courts of equity the rule is unsettled, and that it is expedient that an end should be put to such conflicting and unsettled opinions," and it provides that after the passage of the act "whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer the same shall be deemed invalid

in equity as well as at law." The fifth section after reciting that "as sales of land by auction are now conducted, many of such sales are illegal and could not be enforced against an unwilling purchaser, and it is expedient for the safety of both seller and purchaser that such sale should be so conducted as to be binding on both parties," enacts "that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale or for the auctioneer to take knowingly any bidding from any such person." By the sixth section it is enacted that "where any sale by auction of land is declared, either in the particulars or conditions of such sale, to be subject to a right for the seller to bid, it shall be lawful for the seller, or any one person on his behalf, to bid at such auction in such manner as he may think proper."

As might naturally be expected, the courts in the United States have to a considerable extent rendered conflicting decisions on the effect on a sale at auction of puffing, some following the rule of the common-law courts of England more or less modified, and others following the rules of the chancery courts of England more or less modified. Sometimes the decisions of the same court have been inconsistent, as for instance in *Steel v. Ellmaker*, 11 S. & R. (Pa.) 80, the case of *Bexwell v. Christie*, *supra*, and Lord Mansfield's opinion therein, were criticised and disapproved. Subsequently this same court, in *Pennock's Appeal*, 14 Pa. St. 449, overruled their previous decision and highly commended the decision in *Bexwell v. Christie*, *supra*. Chief-Justice Gibson delivering the opinion of the court says: "It is impossible to doubt the principle of the civil law adopted by Lord Mansfield in *Bexwell v. Christie*, *supra*. Good faith is an indispensable ingredient of fair dealing; and it is impossible to imagine a purpose consistent with it, for which sham-bidding is necessarily employed. The vendor may so prescribe conditions of sale which will enable him to return the property should it not come up to his price; and if he do not produce the effect openly, why should he do it covertly? Common honesty requires that all should be fair and above-board. To screw up the price, as it has been aptly

termed, by secret machinery, can be no less than a fraud; and a sham-bidder can be used for no other purpose. The decisions on the subject have fluctuated; but the largest license allowed in any of them has been to employ a single puffer; yet whether there be one or whether there be twenty, the mischief is the same, except as to the degree of it. It has been said the employment of a plurality discloses too clearly to be mistaken, not a design to protect the property from being sacrificed, but to give an artificial impulse to the sale of it. That touches the honesty of the vendor's motive; but what have the bidders to do with it? Should he actually think that not less than twenty could protect it, the sale would still be, according to all the cases, fraudulent and void. It is not his motive but his acts by which they are affected; and these present a question not of actual but of legal fraud." He also says: "The weight of authority is now, as it was at first, in favor of the true principle. Whatever may have been the state of the balance when Mr. Sugden collected the cases in his treatise on 'vendors' his own opinion evidently coincided with that of Lord Mansfield; and Chancellor Kent expressly adhered to it. I concurred in the decision of *Steel v. Ellmaker*, 11 S. & R. (Pa.) 80, exclusively on the foundation of precedent; but the balance of authority is conclusively the other way, and that case has neither principle nor precedent to support it."

In *Staines v. Shore*, 16 Pa. St. 203; s. c., 55 Am. Dec. 492, the court said: "In the present case the ruling judge instructed the jury that if the horse was actually worth the sum paid for him, the buyer got the value of his money and could not have been defrauded. The fallacy of the principle is assuming that there is a standard of value independent of the wishes and wants of the bidders and every man is willing to buy by it. What is the worth of anything? The apophthegm of *Hudibras* answers truly 'just so much money as it will bring.' A man is defrauded, whenever he is incited by artful means to bid more than he otherwise would; for no fair purpose is the employment of a puffer necessary, and it must vitiate every sale in which recourse is had to it."

The English common-law cases are fully sustained by the case of *Towle v. Levitt*, 23 N. H. 367.

In *Baham v. Buche*, 13 La. 287; s. c., 33 Am. Dec. 561, it was held, that the owner of property may withdraw it, before the highest bid is accepted by the

auctioneer, but has no right to bid himself, unless he publicly reserves this right.

In delivering the opinion of the court Eastis, J., adopts the principles of Bexwell v. Christie, *supra*, and remarks: "The doctrine in that case has not been followed in all cases, but we apprehend that time and scrutiny will re-establish its force, whenever the principles of law and public morals are coincident." To the same effect is *Correjoller v. Mossy*, 2 La. 607.

In *McDowell v. Simms*, 6 Ired. Eq. 278 (N. Car.), Pearson, J., after reviewing a number of English cases and saying that he inclined to the opinions expressed by Lords Mansfield and Kenyon says: "It is impossible, as Lord Loughborough and Sir William Grant attempted to do, to run a dividing line so as to say when this by-bidding is intended for puffing and when merely to prevent property being sacrificed. In the nature of things any by-bid tends to inflate the price more or less, except it be announced to be a bid for the owners of the land."

In the *National Bank of Metropolis v. Sprague*, 20 N. J. Eq., it was decided: "That the employment of puffers by creditors, in whose behalf property is offered for sale at public auction, for the purpose of increasing the price by fictitious bids, is a fraud upon honest bidders; and a buyer at such sale can be relieved from his purchase."

In the case of *Reynolds v. Dechaums*, 24 Tex. 174, the spirit of the English cases on the subject of puffing appears to be approved.

In *Veazie v. Williams*, 8 How. (U. S.) 153, the rule of the English common-law courts as to the effect of puffers on a sale at auction was approved by the Supreme Court of the United States.

In *Hinde v. Pendleton*, Wythe Rep. (Va.) 145, Chancellor Wythe says: "The act of by-bidding is a *dolus malus*: 1. The by-bidder offering a price for the thing proclaimed to be sold professeth a wish to buy it; which profession is false, for he not only doth not wish to buy the thing but wishes another man to buy it and tempteth him to bid for it. 2. The by-bidder instead of being one who would be a buyer is in truth the seller disguised." The chancellor set aside the sale in that case because a puffer bid at it.

In *Peck v. List*, 23 W. Va. 338; s. c., 48 Am. Rep. 398, the court said: "It appears that the weight of the authorities in the United States sustain the rules in reference to the effect of puffing laid down by the Eng-

lish common-law courts rather than those laid down by the English chancery courts. And in view of the fact that after nearly a hundred years of experience and a vigorous pressing of their respective advocates of these opposing rules with reference to the effect of puffing there has been an abandonment in England of the rules laid down by the chancery courts and a candid admission by its advocates of the superior excellence of the rules laid down by the common-law courts, it seems we cannot hesitate to adopt them, especially as they are based on better reason and are more definite and easy of application and tend to the promotion of honesty in the dealings of mankind. It will be observed, that most of the cases, where there have been by-bidders, they were employed by the owners of the property about to be sold at auction, that is, were puffers in the strict sense of the word. But it is obviously unimportant whether the by-bidder is employed by the owner of the land or by some one else having a pecuniary interest in the auction about to be made, and who stands in such a relation to it, that he can make good his assurance to the by-bidder, that he shall not be held responsible for his bid, if it happen to be the highest bid made. The real essence of the fraud is not that the owner is bidding for the property, but it consists in the fact, that a by-bidder pretending to be a *bona-fide* bidder deceives honest bidders, raises the price of the property by fictitious bids, increasing competition, while he himself has good reason to believe, and does believe, that he is secure from any risk of being held personally liable for his bids. It is immaterial from whom he derives this assurance of immunity, provided the party giving the assurance expressly or impliedly has the power either legally or practically to make good the assurance."

See *Miller v. Barnard*, 2 Houst. (Del.) 559; *Moncrief v. Goldsborough*, 4 H. & McH. (Md.) 281; s. c., 1 Am. Dec. 407; *Curtis v. Aspinwall*, 114 Mass. 187; s. c., 19 Am. Rep. 332; *Towle v. Leavitt*, 23 N. H. 360; s. c., 55 Am. Dec. 195; *Nat. Ins. Co. v. Loomis*, 11 Paige (N. Y.), 431; *Fisher v. Hersey*, 17 Hun (N. Y.), 370; *Trust v. Delaplaine*, 3 E. D. Smith (N. Y.), 219; *Wolfe v. Luyster*, 1 Hall (N. Y.), 146; *Morehead v. Hunt*, 1 Dev. Eq. (N. Car.) 35; *Smith v. Greenlee*, 2 Dev. L. (N. Car.) 126; s. c., 18 Am. Dec. 564; *Woods v. Hall*, 1 Dev. Eq. (N. Car.) 411; *Pennock's Appeal*, 14 Pa. St. 446; *Donaldson v. McRoy*, 1 Browne (Pa.), 346; *Goode v. Hawkins*, 2 Dev. Eq. (N. Car.)

*Bidder using Improper Influences.*—A sale will be set aside where a person desirous of purchasing prevents others by his improper conduct from bidding against him, as where the purchaser had chilled the sale by an appeal upon the sympathies of those present, or where he engaged a well-known agent of the vendor to bid for him, the bidder being mistaken for a puffer. The fraud must, however, be clearly shown.<sup>1</sup>

*Agreements not to Bid.*—Agreements not to bid at public auction are in general void, as against public policy, and tending to fraud, and vitiate the sale; but this rule extends only to combinations having for their object to stifle fair competition, with the design of purchasing at a price less than the fair value of the property.<sup>2</sup>

393; *Bailey v. Morgan*, Busb. L. (N. Car.) 352; *Whitaker v. Bond*, 63 N. Car. 290; *Darst v. Thomas*, 87 Ill. 222.

Where at a sale of several lots at auction puffers had been employed, evidence that they had bid as such upon some lots is admissible to show that their bids upon other lots were *mala fide*. *Yerkes v. Wilson*, 81\* Pa. St. 9.

A mock auction with sham bidders who pretend to be real bidders for the purpose of selling goods above their value is an offence at common law, and transactions at such auctions cannot be supported against a purchaser either at law or in equity. *Musgrove v. Robinson*, 8 C. & P. 469; *R. v. Lewis*, 11 Cox C. C. 404.

To avoid a sale on account of the biddings of puffers the purchaser must object as soon as he receives knowledge of such bidding. *Latham v. Morrow*, 6 B. Monr. (Ky.) 630; *McDowell v. Simms*, 6 Ired. Eq. (N. Car.) 278; s. c., 57\* Am. Dec. 595; *Tomlinson v. Savage*, 6 Ired. Eq. (N. Car.) 430; *Backenstoss v. Stahler*, 33 Pa. St. 251; *Stains v. Shore*, 16 Pa. St. 200.

And he must show that he was prejudiced by it. *Veazie v. Williams*, 8 How. (U. S.) 134; *Tomlinson v. Savage*, 6 Ired. Eq. (N. Car.) 430; *Curtis v. Aspinwall*, 114 Mass. 187. See *Buchaz v. Walker*, 19 Mich. 224; *East v. Wood*, 62 Ala. 313.

Where a by-bidder under an agreement with the owner runs up the price of property and it is knocked down to him, he shall hold the property against such owner, because the agreement is fraudulent, and a party to a fraudulent agreement cannot allege that it was fraudulent to avoid its effect. *Traughton v. Johnston*, 2 Hayw. (N. Car.) 328; s. c., 2 Am. Dec. 626.

The vendor cannot himself avoid a sale where he has employed the puffers. *Small v. Boudinet*, 9 N. J. Eq. 381.

Where one who was insolvent and un-

able to comply with the terms of a sale bid only to operate upon the known desire of the purchaser to obtain the property, the court refused to give the purchaser relief. *Williams v. Bradley*, 7 Heisk. (Tenn.) 54. *Compare Ex parte Whitaker*, L. R. 10 Ch. 446.

1. *Abbey v. Dewey*, 25 Pa. St. 413; *Sharp v. Long*, 28 Pa. St. 433; *Dick v. Lindsay*, 2 Grant Cases (Pa.), 431; *Hamilton v. Hamilton*, 2 Rich. Eq. (S. Car.) 355; *Crutchfield v. Thurman*, 4 Bush. (Ky.) 498; *Foster v. Pugh*, 12 Sm. & M. (Miss.) 416; *The Sparkle*, 7 Benedict (C. C.), 528; *Mapps v. Sharpe*, 32 Ill. 13; *Benz v. Hines*, 3 Kans. 390; *Dale v. Shirley*, 5 B. Monr. (Ky.) 492; *Griffith v. Judge*, 49 Mo. 536; *Swofford v. Garmon*, 51 Miss. 348; *Barrett v. Bath Paper Co.*, 13 S. Car. 128; *Underwood v. McVeigh*, 23 Gratt. (Va.) 409; *Baents v. Cole*, 7 Blackf. (Ind.) 265; s. c., 41 Am. Dec. 226; *Plaster v. Burger*, 5 Ind. 234; *Gilbert v. Carter*, 10 Ind. 17; *Martin v. Rallett*, 5 Rich. (S. Car.), 541; *Bethel v. Sharp*, 25 Ill. 173; *Vantrees v. Hyatt*, 5 Ind. 487; *Mills v. Rogers*, 2 Litt. Ky. 217; *Walter v. Gernant*, 13 Pa. St. 515; *Hogg v. Wilkins*, 1 Grant (Pa.), 67; *Twining v. Morrice*, 2 Bro. Ch. 326.

2. *James v. Fulcro*, 5 Tex. 512; s. c., 55 Am. Dec. 743; *Hawley v. Cramer*, 4 Cow. (N. Y.) 718; *Jones v. Caswell*, 3 Johns. Cas. (N. Y.) 29; s. c., 2 Am. Dec. 134; *Doolin v. Ward*, 6 Johns. (N. Y.) 194; *Wilbur v. Howe*, 8 Johns. (N. Y.) 444; *Troup v. Wood*, 4 Johns. Ch. (N. Y.) 228; *Thompson v. Davies*, 13 Johns. (N. Y.) 112; *Piatt v. Oliver*, 1 McLean (U. S.), 295; *Hamilton v. Hamilton*, 2 Rich. Eq. (S. Car.) 355; s. c., 46 Am. Dec. 58; *Smith v. Greenlee*, 2 Dev. L. (N. Car.) 128; s. c., 18 Am. Dec. 564; *Hannay v. Eve*, 3 Cranch (C. C.), 242; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258; *Mitchell v. Smith*, 4 Dall. (Pa.) 269; s. c., 2 Am. Dec. 417; *Bolt v. Rogers*, 3 Paige (N. Y.) 154; *Hunt v. Knickerbacker*, 5 Johns. (N. Y.)



*Manner of Bidding.*—The biddings should be made in an open and undisguised manner. No secret signs between the bidder and the auctioneer should be allowed, for the effect of this would be to give that bidder an advantage over the others.<sup>1</sup>

*Bids may be Retracted.*—Before the fall of the hammer either party may revoke the auctioneer's authority. Every bidding is but an offer on one side, which is binding on neither until it receives assent. A bidder may retract his bidding, although the conditions of the sale provide that no person shall retract his bidding.<sup>2</sup>

*The Deposit.*—It is usual at auction sales to require part of the purchase-money to be paid down as a guarantee for the fulfilment of the contract. Payment of the deposit is considered as a payment of part of the purchase-money, and not as a mere pledge.<sup>3</sup>

327; *Bartle v. Nutt*, 4 Pet. (U. S.) 184; *Crozier v. Carr*, 11 Tex. 376; *Allen v. Stephanus*, 18 Tex. 670; *Farr v. Sims*, Rich. Eq. Cas. (S. Car.) 122; s. c., 24 Am. Dec. 396; *Dudley v. Little*, 2 Ohio, 504; s. c., 15 Am. Dec. 575; *Gardiner v. Morse*, 25 Me. 140; *Hook v. Turner*, 22 Mo. 333; *Gulick v. Ward*, 5 Halst. (N. J.) 87; *Mills v. Mills*, 40 N. Y. 546; *Swan v. Chorpennig*, 20 Cal. 182; *Kerwer v. Allen*, 31 Iowa, 578; *Loyd v. Malone*, 23 Ill. 43; s. c., 74 Am. Dec. 179; *Brown v. Hogle*, 30 Ill. 119; *Slater v. Maxwell*, 6 Wall. (U. S.) 268; *Nat. Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Carlington v. Callor*, 2 Stew. 175; *Fuller v. Abrahams*, 3 Brod. & B. 116; *Levi v. Levi*, 25 Eng. L. & Eq. 377.

Where at the public sale of the personal property of an intestate the widow purchased many articles at a nominal price, the bystanders refusing to bid against her, the sale will not be void if the auctioneer conducted the sale fairly, after due notice, and without connivance with the widow. *Woody v. Smith*, 65 N. Car. 116.

The attempt to prevent competition must be successful to avoid the sale. The attempt alone will not be sufficient. *Haynes v. Crutchfield*, 7 Ala. 189; *Gilbert v. Carter*, 10 Ind. 16; *Buckley v. Briggs*, 30 Mo. 452.

But an agreement to unite in a bid at auction sale for the joint benefit of the parties thereto is not void if not dishonest in its motive or injurious in its consequence. *James v. Fulcro*, 5 Tex. 512; s. c., 55 Am. Dec. 743; *Phippen v. Stickney*, 3 Metc. (Mass.) 385; *Goode v. Hawkins*, 2 Dev. Eq. (N. Car.) 393; *Smull v. Jones*, 6 Watts & S. (Pa.) 122; *Piatt v. Oliver*, 1 McLean (U. S.), 301; *Smith v. Greenlee*, 2 Dev. (N. Car.) 121; s. c., 18 Am. Dec. 564; *Switzer v. Skiles*, 3 Gil. (Ill.) 529; s. c., 44 Am. Dec. 723;

*Hunt v. Elliott*, 80 Ind. 245; *Nat. Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159.

An auction sale will not be set aside because the purchaser who was bidding for a third person agreed with another agent of the same person that the latter should not also bid. *Allen v. Stephanus*, 18 Tex. 658.

1. *Conover v. Walling*, 15 N. J. Eq. 173.

But a valid bid may be made by letter. So where a testator by his will directed that his estate should be sold at auction, and the sale was advertised accordingly, A. offered by letter a certain sum. No other person bid as much, and the land was conveyed to A. *Held*, to be a valid sale by auction within the terms of the will. *Tyree v. Williams*, 3 Bibb. (Ky.) 368; s. c., 6 Am. Dec. 663.

Where the sale is subject to certain conditions, a bid coupled with other conditions need not be received by the auctioneer. *Moore v. Owsley*, 37 Tex. 603.

An agent may be empowered to bid at an auction sale in behalf of a principal. *Brown v. Johnson*, 12 S. & M. 398; s. c., 51 Am. Dec. 118.

2. *Payne v. Cave*, 3 T. R. 148; *Manser v. Back*, 6 Hare, 443; *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Crotenkemper v. Achtermeyer*, 11 Bush (Ky.), 222.

The retraction should be loud enough to be heard by the auctioneer, otherwise it amounts to nothing. *Jones v. Nanney*, McCle. 39.

In cases where a written contract is necessary, it seems that a purchaser may retract his bidding after the lot has been knocked down to him, but before the auctioneer has actually made the entry. 3 Stark. Ev. 3d Ed. 1196; *Gwathney v. Cason*, 74 N. Car. 5; s. c., 21 Am. Rep. 484.

3. *Palmer v. Temple*, 9 A. & E. 508;

*Completion of Contract.*—A purchaser who, after his bid has been received, refuses to comply with the conditions of the sale, is

Thompson *v.* Kelly, 101 Mass. 291; Curtis *v.* Aspinwall, 114 Mass. 187; Pope *v.* Burrage, 115 Mass. 282; Bleeker *v.* Graham, 2 Edw. Ch. (N. Y.) 647; Hewlett *v.* Davis, 3 Edw. Ch. (N. Y.) 338; Wood *v.* Mann, 2 Sumner (C. C.), 316; Maryland, etc., Building Soc. *v.* Smith, 41 Md. 516; Marshall *v.* Rose, 86 Ill. 374.

The terms of the sale usually provide for the time and mode of payment of deposit, and where this is the case the purchaser cannot safely pay it at any other time or in any other mode, except to the vendor himself or by his direction. Young *v.* Guy, 8 Beav. 147. See Pinckney *v.* Hagadorn, 1 Duer (N. Y.), 89.

Where the deposit is paid to the auctioneer as agent of the seller, it is his duty to pay it over to his principal on demand. Edgell *v.* Day, L. R. 1 C. P. 80; Hancock *v.* Gomez, 58 Barb. (N. Y.) 490; Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140. See Minor *v.* Barker, 26 La. Ann. 160.

But where he receives it merely as a stakeholder until the title has been perfected, or some other condition of the sale has been complied with, he will be liable to the one who ultimately becomes entitled to it: Bleeker *v.* Graham, 2 Edw. Ch. (N. Y.) 647; Carew *v.* Otis, 1 Johns. (N. Y.) 418; Prevost *v.* Gratz, 1 Pet. (C. C.) 364; Burrough *v.* Skinner, 5 Burr. 2639. Unless the party claiming the deposit has by his acts induced him to pay it over to the other party. Ellison *v.* Kerr, 86 Ill. 427.

A purchaser at an auction sale of real estate, who, in accordance with the terms of sale, has paid to the auctioneer a portion of the purchase-price, may, upon failure of the vendor to convey a perfect title as agreed, maintain an action to recover his deposit, either against the auctioneer or the vendor, or both, and is entitled to interest from the time of a demand for the money and a refusal to pay. He is entitled, however, to but one satisfaction; and a recovery and satisfaction of the judgment against either the vendor or auctioneer will discharge the other. Where, therefore, in an action against the vendor, plaintiff failed to prove a demand, and so was refused interest, *held*, that the satisfaction of said judgment was a bar to an action against the auctioneer, although in the latter action proof was given of a demand and refusal. Cockcroft *v.* Muller, 71 N. Y. 367.

Where the contract is rescinded and

the deposit recovered by the purchaser on the ground of fraud on the part of the auctioneer, the vendor, though innocent of the fraud, cannot recover the amount of the auctioneer as money had and received to his use. Murray *v.* Mann, 2 Exch. 558.

The vendor becomes entitled to the deposit on the completion of the contract. Harrington *v.* Hoggart, 1 B. & Ad. 577.

Or where the purchaser fails or refuses to complete the contract according to the terms of the sale. Thomas *v.* Brown, 1 Q. B. D. 714; Bleeker *v.* Graham, 2 Edw. Ch. (N. Y.) 647.

The purchaser becomes entitled to the deposit when the contract is rescinded on the ground of fraud or misrepresentation on the part of the vendor or the auctioneer. Thornett *v.* Haines, 15 M. & W. 367; Aberaman Iron Works *v.* Wickens, L. R. 4 Ch. 101.

Or if the vendor refuses or is unable to perform it. Boyman *v.* Gutch, 7 Bing. 379; Wilson *v.* Wilson, 14 C. B. 616.

Where the purchaser becomes entitled to the deposit he may sue either the principal or the auctioneer for it. Teaffe *v.* Simmons, 11 Allen (Mass.), 342.

Although it is the law that an auctioneer holding the deposit on a purchase may be made a defendant in an action for specific performance, yet, as a general rule, the proper practice is not to make him a defendant when the deposit is of small amount, unless he refuses to pay it into court when required; but where the deposit is of large amount, he may be properly made a defendant, unless he has paid it into court before action brought. Earl of Egmont *v.* Smith; Smith *v.* Earl of Egmont, L. R. 6 Ch. D. 469.

The plaintiff, who had bought property at an auction and paid a deposit to the auctioneers, brought an action against the vendors and the auctioneers to have the contract rescinded, the deposit repaid with interest, the costs of the action paid, and for damages. The statement of claim alleged that all, or nearly all, of the biddings previous to that of the plaintiff were fictitious, and were either biddings by the vendors or their agents, or were announced by the auctioneer without any bidding having in fact been made. The auctioneers applied for liberty to pay the deposit into court, and to have the action dismissed against them on such payment being made. The Master of the Rolls made an order that,

liable in damages to the vendor, and the measure of damages will be the difference in price on a resale, the vendor acting *bona fide* and with reasonable care.<sup>1</sup>

**8. Statute of Frauds.**—It was formerly doubted whether sales by auction were within the meaning of the statute, as it was thought that the publicity of such sales ought to be sufficient to guard against fraud. It is now, however, clearly settled that auction sales, with the exception of such as are held by order of the court, are within the statute, and that they, therefore, require compliance

the vendors undertaking to pay the auctioneers their costs of the action without prejudice to how they should ultimately be borne, and to pay any interest and damages to which the plaintiff might be held entitled, and the auctioneers undertaking, in the event of the vendors not carrying out their undertaking, to pay to the plaintiff interest on the deposit up to the time of payment into court, and the costs of the action up to and including that application in the event of the court holding the plaintiff entitled to such interest and costs, the auctioneers should be at liberty to pay the deposit into court, and that all further proceedings against them should be stayed. *Held*, on appeal, that the order must be discharged, the auctioneers not having submitted to give the plaintiff all the relief which he could in any event be entitled to against them, for that if the allegations in the statement of claim were established the plaintiff would be entitled to have judgment against them for the deposit with interest, and to have an order for costs of the action against all the defendants. *Heatley v. Newton*, L. R. 19 Ch. D. 326.

And he has a lien upon the estate for the amount. *Wythes v. Lee*, 3 Drew, 396; *Turner v. Marriott*, L. R. 3 Eq. 744; *Torrance v. Bolton*, L. R. 14 Eq. 124.

1. *Ashcom v. Smith*, 2 P. & W. (Pa.) 211; s. c., 21 Am. Dec. 437; *Tompkins v. Haas*, 2 Pa. St. 75; *Coffman v. Hampton*, 2 W. & S. (Pa.) 377; s. c., 37 Am. Dec. 511.

But the jury are not bound by this mode of estimation if they can discover any other more agreeable to the truth. *Coffman v. Hampton*, 2 W. & S. (Pa.) 377; s. c., 37 Am. Dec. 511.

Where a purchaser of land at a public sale fails to comply with the conditions of sale, he can only be held liable for the deficiency in price caused by a second sale when the conditions of the second sale are the same, or are not more onerous than those of the first sale. The fact that the court prescribed the terms of the second sale has no bearing upon the

question of the purchaser's liability. *Weast v. Derrick*, 100 Pa. St. 509.

At a public sale on the 13th day of August, 1878, a carriage was sold to plaintiff upon a credit of six months without interest, the purchaser to give notes with approved security. With this condition he did not comply, but left the carriage upon an understanding that it was not to be taken away until paid for. On the 9th day of October, 1878, the vendor sold the carriage to the defendant; and about the 1st day of February, 1879, the plaintiff called to pay for and take away the carriage. *Held*, that neither the right of property nor the right of possession passed to plaintiff in virtue of his having bid off the carriage at the sale, and that, under the understanding, he could only have acquired such right by paying for the carriage within a reasonable time. *Matthews v. McElroy*, 79 Mo. 202.

Where a mare was sold at auction on six months' credit, the purchaser being required to execute his note drawing interest at six per cent, it was held that he was not entitled to the mare until he had tendered the note or a sum of money equal to the principal and interest due upon the note at its maturity. *Wainscott v. Smith*, 68 Ind. 312. See *Wade v. Moffett*, 21 Ill. 110; s. c., 74 Am. Dec. 79.

On a sale of goods on credit by a licensed auctioneer, where the vendee refuses to take them the owner may bring an action for damages in his own name before the expiration of the term of credit, though he cannot sue for the price till the credit expires. The proper measure of damages in such a case is the difference in price obtained at a resale. *Girard v. Taggard*, 5 S. & R. (Pa.) 19; s. c., 9 Am. Dec. 325.

Where upon a sale at auction of numerous articles of personal property the purchaser is given the option of choosing from a quantity, the privilege being sold as successive choices, he must make his choice forthwith. *Coffman v. Hampton*, 2 W. & S. (Pa.) 377; s. c., 37 Am. Dec. 511.

with the formalities imposed by it as much as do sales of less publicity.<sup>1</sup>

*Memorandum of Sale.*—A memorandum signed by the auctioneer for both parties is sufficient within the statute to validate a sale, the auctioneer being deemed the agent of both parties.<sup>2</sup>

*What the Memorandum must Contain.*—The auctioneer's memorandum must contain, although not necessarily in a detailed man-

1. *Davis v. Rowell*, 2 Pick. (Mass.) 64; s. c., 13 Am. Dec. 398; *Bent v. Cubb*, 9 Gray (Mass.), 397; *People v. White*, 6 Cal. 75; *Bozza v. Rowe*, 30 Ill. 198; *Baker v. Jameson*, 2 J. J. Marsh. (Ky.) 547; *Brock v. Jones*, 8 Tex. 78; *Bleecker v. Franklin*, 2 E. D. Smith (N. Y.), 93; *Ruckle v. Barbour*, 48 Ind. 274; *Sanderlin v. Roman Cath. Church*, R. M. Charl. (Ga.) 551; *Bell v. Owen*, 8 Ala. 312; *Burke v. Haley*, 2 Gilm. (Ill.) 614; *Gossard v. Ferguson*, 54 Ind. 519; *Hadden v. Johnson*, 7 Ind. 394; *Ennis v. Walker*, 3 Blackf. (Ind.) 472; *Brent v. Green*, 6 Leigh (Va.), 16; *Davis v. Robertson*, 1 Mill Const. (S. Car.) 71; s. c., 12 Am. Dec. 611; *Christie v. Simpson*, 1 Rich. (S. Car.) 407; *Meadows v. Meadows*, 3 McCord (S. Car.), 458; s. c., 15 Am. Dec. 645; *Elfe v. Gadsdin*, 2 Rich. (S. Car.) 373; *Jackson v. Catlin*, 2 Johns. (N. Y.) 248; *Bicknell v. Byrnes*, 23 How. Pr. (N. Y.) 486; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399; s. c., 3 Am. Dec. 509; *Evans v. Ashley*, 8 Mo. 177; *Hart v. Rector*, 13 Mo. 497; *Alexander v. Merry*, 9 Mo. 510; *Dewall v. Peach*, 1 Gill (Md.), 272; *Singstack v. Harding*, 4 H. & J. (Md.) 186; s. c., 7 Am. Dec. 669; *Spencer v. Pearce*, 10 Gill & J. (Md.) 294; *Pike v. Balch*, 38 Me. 302; s. c., 61 Am. Dec. 248.

Where several separate lots of goods are sold at auction to one purchaser on separate bids, the contract is an entirety, in regard to the Statute of Frauds. *Jenness v. Wendell*, 51 N. H. 63; s. c., 12 Am. Rep. 48; *Coffman v. Hampton*, 2 W. & S. (Pa.) 377; s. c., 37 Am. Dec. 511. *Compare Messer v. Woodman*, 22 N. H. 172; s. c., 53 Am. Dec. 241.

2. *O'Donnell v. Leeman*, 43 Me. 158; s. c., 69 Am. Dec. 54; *Alna v. Plummer*, 4 Greenl. (Me.) 258; *Cleaves v. Foss*, 4 Greenl. (Me.) 1; *Pike v. Balch*, 38 Me. 302; *Episcopal Church v. Wiley*, 2 Hill Ch. (S. Car.) 584; s. c., 30 Am. Dec. 386; *Meadows v. Meadows*, 3 McCord (S. Car.), 458; s. c., 15 Am. Dec. 645; *Gordon v. Sims*, 2 McC. Ch. (S. Car.) 151; *Anderson v. Chick*, 1 Bailey Eq. (S. Car.) 118; *Doty v. Wilder*, 15 Ill. 410; s. c., 60 Am. Dec. 756; *Lake v. Campbell*, 18 Ill. 106; *Burke v. Haley*, 2 Gilm. Ill. 614; *Bent v. Cobb*, 9 Gray (Mass.), 397; *San-*

*born v. Chamberlin*, 101 Mass. 409; *Morton v. Dean*, 13 Metc. (Mass.) 385; *Pugh v. Chesseldine*, 11 Ohio, 109; *Craig v. Godfroy*, 1 Cal. 415; s. c., 54 Am. Dec. 299; *White v. Crew*, 16 Ga. 416; *Dawson v. Miller*, 20 Tex. 171; s. c., 70 Am. Dec. 380; *Harvey v. Stevens*, 43 Vt. 653; *Tallman v. Franklin*, 14 N. Y. 584; *Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Lewis v. Wells*, 50 Ala. 198; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Brent v. Green*, 6 Leigh (Va.), 16; *Hunt v. Gregg*, 8 Blackf. (Ind.) 105; *Hart v. Woods*, 7 Blackf. (Ind.) 568; *Gill v. Hewett*, 7 Bush (Ky.), 10; *Linn Boyd, etc., Co. v. Terrill*, 13 Bush (Ky.), 463; *Smith v. Arnold*, 5 Mason (C. C.), 414. *Compare Bamber v. Savage*, 52 Wis. 110; s. c., 38 Am. Rep. 723; *Adams v. Scales*, 1 Baxt. (Tenn.) 337; s. c., 25 Am. Rep. 772; *Ruckle v. Barbour*, 48 Ind. 274; *Baltzen v. Nicolay*, 53 N. Y. 467.

In *Tennessee and New York* the contract for the sale of land must in all cases be signed by the vendor. *Frazer v. Ford*, 2 Head (Tenn.), 464; *Burrell v. Root*, 40 N. Y. 498; *Worrall v. Munn*, 5 N. Y. 229; *Nat. Ins. Co. v. Loomis*, 11 Paige (N. Y.), 431; *Champlin v. Parish*, 11 Paige (N. Y.), 465; *Coles v. Bowne*, 10 Paige (N. Y.), 526; *McWhorter v. McMahon*, 10 Paige (N. Y.), 386; *Miller v. Pelletier*, 4 Edw. Ch. (N. Y.) 102.

It would seem that a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under the statute. *Benjamin on Sales* (4th Ed.), § 268; *Beer v. London, etc., Co.*, L. R. 20 Eq. 412.

Upon a sale by auction of real estate in lots, the particulars stated that the sale was by direction of the proprietor; but the name of the vendor did not appear. A memorandum indorsed on a copy of the particulars was signed by the purchaser of one of the lots, and by the auctioneer on behalf of the vendor. *Held*, that the vendor was sufficiently described, and that the memorandum was sufficient to satisfy the requirements of the Statute of Frauds; and specific performance of the agreement decreed at the suit of the purchaser. *Sale v. Lambert*, L. R. 18 Eq. 1.

ner, the parties, the subject-matter, the promises on both sides, the price, and, under the original and ordinary language of the statutory provision, the consideration.<sup>1</sup>

*May be Signed by Clerk.*—The clerk of the auctioneer is clothed with the same authority as his master, and an entry by him under the direction of the auctioneer is sufficient.<sup>2</sup>

*Signature of Auctioneer not sufficient when he Sells his own Goods.*

1. *Pomeroy on Contracts*, § 87; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399; s. c., 3 Am. Dec. 509; *Price v. Durin*, 56 Barb. (N. Y.) 647; *Meadows v. Meadows*, 3 McCord (S. Car.), 458; s. c., 15 Am. Dec. 645; *O'Donnell v. Leeman*, 43 Me. 158; s. c., 69 Am. Dec. 54; *Ridgway v. Ingram*, 50 Ind. 148; *Norris v. Blair*, 39 Ind. 90; s. c., 10 Am. Rep. 135; *Johnson v. Buck*, 35 N. J. L. 338; *Soles v. Hickman*, 20 Pa. St. 180; *McFarrow's Appeal*, 11 Pa. St. 503; *Morton v. Dean*, 13 Metc. (Mass.) 385; *Doty v. Wilder*, 15 Ill. 407; s. c., 60 Am. Dec. 756; *Gwathney v. Cason*, 74 N. Car. 5; *Lewis v. Wells*, 50 Ala. 198.

The plaintiff sent a mare to be sold by auction at the defendant's repository. The defendant advertised the mare for sale by auction on the 25th of March, 1872, and circulated a printed catalogue of the horses to be sold at his sale, with conditions of sale annexed, in which the plaintiff's mare was described as lot 49. The defendant had a sales ledger, which was headed, "Sales by auction, 28 March, 1872," in which the plaintiff's mare was also numbered 49; but neither the catalogue nor the conditions of sale were annexed to the sales ledger, nor were they referred to therein. On the 28th of March, 1872, the lots described in the catalogue were put up by the defendant for sale under the conditions. The plaintiff's mare was put up for sale and knocked down to M. for £33, and thereupon the defendant's clerk wrote in the columns of the sales ledger left blank for this purpose, the name of M. as purchaser, and the price. M. afterwards refused to take the mare. *Held*, that the catalogue and the conditions of sale were not sufficiently connected with the entries in the sales ledger to make a note or memorandum in writing of a contract by M. to satisfy the Statute of Frauds. *Pierce v. Corf*, L. R. 9 Q. B. 210.

At a sale by auction subject to conditions, the auctioneer entered in his sale-book the names of the vendor and purchaser, the subject-matter of the sale, and the amount of the purchase-money, but omitted, in the entry, to embody or make any reference to the conditions

of sale. There was no other memorandum or contract in writing. *Held*, that there was no sufficient contract in writing within the Statute of Frauds, and specific performance was refused as against the purchaser. *Rishton v. Whatmore*, L. R. 8 Ch. D. 467.

All the essentials of a memorandum need not be contained in one single paper. They may be gathered from two or more detached papers if the signed memorandum contains such reference to them as to make them a part of it. But parol evidence is not allowable to show the connection between the different papers. *Gowen v. Klous*, 101 Mass. 449; *Johnson v. Buck*, 35 N. J. L. 338; *Adams v. McMillin*, 7 Port. (Ala.) 73; *Price v. Durin*, 56 Barb. (N. Y.) 647; *Horton v. McCarty*, 53 Me. 394; *Tallman v. Franklin*, 14 N. Y. 584; 3 Duer (N. Y.), 395; *Hinde v. Gale*, 7 East, 538. *Compare* *Hobby v. Finch*, Kirby (Conn.), 14, and *White v. Watkins*, 23 Mo. 423.

A mistake made by the auctioneer in making out the memorandum as in the name of the vendor may be corrected in equity. *Pugh v. Chesseldine*, 11 Ohio, 109; s. c., 37 Am. Dec. 414. See *Hallock v. Guy*, 9 Cal. 181; s. c., 70 Am. Dec. 643.

2. *Smith v. Jones*, 7 Leigh (Va.), 165; s. c., 30 Am. Dec. 493; *Brent v. Green*, 6 Leigh (Va.), 16; *Baptist Church v. Rigelow*, 16 Wend. (N. Y.) 28; *Frost v. Hill*, 3 Wend. (N. Y.) 386; *Johnson v. Buck*, 35 N. J. L. 338; *Harvey v. Stevens*, 43 Vt. 653; *Green v. Merrian*, 28 Vt. 801; *Norris v. Blair*, 39 Ind. 90; *Hart v. Woods*, 7 Blackf. (Ind.) 568; *Doty v. Wilder*, 15 Ill. 407; s. c., 60 Am. Dec. 756; *Alna v. Plummer*, 4 Greenleaf (Me.), 258; *Simpson v. Pettus*, 7 Ala. 543; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Gill v. Bicknell*, 2 Cush. (Mass.) 355; *Cherry v. Long*, Phill. L. (N. Car.) 466. *Compare* *Carmack v. Masterson*, 3 Stew. & P. (Ala.) 411; *Meadows v. Meadows*, 3 McCord (S. Car.), 458; s. c., 15 Am. Dec. 645; *Pope v. Chafee*, 14 Rich. Eq. (S. Car.) 69; *Entz v. Mills*, 1 McMull. (S. Car.) 453; *Christie v. Simpson*, 1 Rich. (S. Car.) 407; *Cathcart v. Kiernaghan*, 5 Strobb. (S. Car.) 129.

—If the auctioneer is himself the vendor, or if he has himself an interest in the contract of sale, besides being a nominal party to it, he cannot bind the purchaser by signing a memorandum in writing to take the case out of the Statute of Frauds.<sup>1</sup>

Parties alone can take advantage of defects in memorandum, and if they complete the sale without objection, a third party cannot object.<sup>2</sup>

### AUDITA QUERELA.

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|--------------------------------|--|
| 1. Definition.                 | 6. What Grounds will sustain the Action. |
| 2. Nature of the Proceeding.   | 7. Cases where the Writ will not Lie.    |
| 3. Parties.                    | 8. Substitutes for the Writ.             |
| 4. Pleadings and Evidence.     | 9. Concurrent Remedies.                  |
| 5. Judgment and its Incidents. |  |

1. **Definition.**—*Audita querela* is the name of a writ constituting the initial process in an action brought by a judgment defendant to obtain relief against the consequences of the judgment, on account of some matter of defence or discharge, arising since its rendition, and which could not be taken advantage of otherwise.<sup>3</sup>

2. **Nature of the Proceeding.**—*Audita querela* is a regular suit, with its usual incidents, pleadings, issues of law and fact, trial, judgment, and error.<sup>4</sup> The writ is directed to the court where the judgment was rendered and where the record remains.<sup>5</sup> It is a writ of common right.<sup>6</sup> And even where authorized by statute,

1. Tull v. David, 45 Mo. 446; Johnson v. Buck, 35 N. J. L. 338; Smith v. Arnold, 5 Mason (C. C.), 414; Bent v. Cobb, 9 Gray (Mass.), 397; s. c., 69 Am. Dec. 295; Wright v. Dannah, 2 Campb. 205.

A guardian acting as auctioneer in selling land of his ward under authority of the court is not authorized as such to sign for the purchaser a memorandum to take the sale out of the Statute of Frauds. Bent v. Cobb, 9 Gray (Mass.), 397; s. c., 69 Am. Dec. 295.

2. Lewis v. Wells, 50 Ala. 198.

3. Bouvier's Law Dict.; Rapalye & Lawrence's Law Dict.; Bac. Abr. tit. *Audita Querela*; 2 Broom & Had. Com. (Wait's Ed.) 270; 3 Blackst. Com. 405.

The meaning of the phrase is thus explained: "It is a writ directed to the court, stating that the complaint of the defendant hath been heard, *audita querela defendantis*." 3 Blackst. Com. 406.

It is said to have been first introduced into the English practice about the tenth year of Edward III. See Young v. Collet, T. Raym. 89.

4. Brooks v. Hunt, 17 Johns. (N. Y.) 484.

It is also said to be in the nature of an equitable suit, in which the equitable

rights of the parties will be regarded. Lovejoy v. Webber, 10 Mass. 103; Wadlington v. Vredenbergh, 2 Johns. Cas. (N. Y.) 227; 3 Blackst. Com. 406. Compare Williams v. Roberts, 8 Hare, 315.

*Audita querela* is a remedial process which bears solely upon the wrongful acts of the opposite party, and not upon the erroneous judgments or acts of the court. It is a writ in which the plaintiff sounds in tort. Little v. Cook, 1 Aik. (Vt.) 363; Lovejoy v. Webber, 10 Mass. 103; Brackett v. Winslow, 17 Mass. 159. Compare Tittlemore v. Wainwright, 16 Vt. 173.

5. Harper v. Kean, 11 Serg. & R. (Pa.) 299; Poultney v. Treasurer, 25 Vt. 168.

A county court has no jurisdiction of a writ of *audita querela* which is brought to vacate or in any way affect a judgment rendered by the supreme court. Warner v. Crane, 16 Vt. 79.

6. Nathan v. Giles, 5 Taunt. 558; Lister v. Mundell, 1 Bos. & P. 427; Emery v. Patton, 9 Phila. (Pa.) 125.

But two cases hold that the writ is not one of right, and that it cannot be issued upon an *ex parte* application. Troop v. Ricardo, 9 Jur. N. S. 887; 33 Beav. 122; Newhart v. Wolfe, 102 Pa. St. 561.

its applicability and incidents must be governed by common-law principles.<sup>1</sup>

**3. Parties.**—All the parties to the judgment complained of must join in the writ of *audita querela* or be regularly served.<sup>2</sup> It is, in general, only available in behalf of one who was prejudiced by the judgment at its rendition.<sup>3</sup> And when the basis of the writ is altogether personal, it will die with the person and not survive to his representatives.<sup>4</sup>

**4. Pleadings and Evidence.**—The writ of *audita querela* must be served upon the parties made defendants to it.<sup>5</sup> A declaration should then be filed. This must recite the whole record of the recovery, and show a sufficient *gravamen* or cause of complaint.<sup>6</sup>

1. *Stanford v. Barry*, 1 Aik. (Vt.) 321; *Johnson v. Plimpton*, 30 Vt. 420; *Lovejoy v. Webber*, 10 Mass. 101.

2. *Melton v. Howard*, 7 How. (Miss.) 103; *Herrick v. Bank*, 1 Williams (Vt.), 554; *Gleason v. Peck*, 12 Vt. 56; *Tittlemore v. Wainwright*, 16 Vt. 173; *Starbird v. Moore*, 21 Vt. 529.

Nor is the rule altered by the fact that one of the defendants was a party to the fraud which vitiates the judgment; he must still join in the writ. *Tittlemore v. Wainwright*, 16 Vt. 173.

But a joint action of *audita querela* cannot be maintained by a principal defendant and a trustee, to vacate the judgments rendered against them respectively in a suit brought by way of the trustee process, when their grounds of complaint are wholly different, and the judgments, if vacated, must be vacated on different grounds. *Johnson v. Plimpton*, 30 Vt. 420.

If a judgment against several persons be vacated as to one, upon *audita querela*, it must be vacated as to all. *Starbird v. Moore*, 21 Vt. 529.

**Against the State.**—This writ does not lie against the commonwealth. *Commonwealth v. Berger*, 8 Phila. (Pa.) 237. And since it is a regular suit, it cannot, in any case, be used against the United States, as in England it could not against the Crown. *Avery v. United States*, 12 Wall. (U. S.) 304.

3. *Beard v. Ketchum*, 8 U. C. Q. B. 523.

A trustee against whom, upon judgment rendered on the trustee process, a void execution has issued, may sustain *audita querela* to set aside such execution. *Wilson v. Fleming*, 16 Vt. 649.

**Attaching Creditors.**—Under the Vermont statute, giving to subsequent attaching creditors a right to prosecute *audita querela*, only to contest a demand on which a previous demand is founded, such creditors cannot maintain this writ,

using the name of the judgment debtor against his consent, to vacate a judgment, execution, and levy in favor of a prior attaching creditor, without showing a legal right to the property levied upon paramount to the right of such creditor. *Essex Mining Co. v. Bullard*, 43 Vt. 238.

While an erroneous judgment against an infant remains in force, this process will not lie in favor of an officer against whom judgment has been recovered for neglecting to serve execution on the infant. *Solace v. Downing*, Brayt. (Vt.) 27.

4. Conn., etc., *R. v. Bliss*, 24 Vt. 411.

But when the writ goes to the foundation of the judgment, it may be prosecuted by the executor or administrator. Conn., etc., *R. v. Bliss*, 24 Vt. 411.

5. *Commonwealth v. Berger*, 8 Phila. (Pa.) 237; *King v. Jeffrey*, 77 Me. 106.

The writ must be served on a corporation like any other process. *Clark v. Hydraulic Co.*, 12 Vt. 435.

A judgment for default of appearance cannot be taken in *audita querela*. *Commonwealth v. Berger*, 8 Phila. (Pa.) 237.

**Verification of Writ.**—An affidavit to the truth of the facts set forth in the writ is generally required. It should be annexed to the writ or become part of the process. *Hinman v. Swift*, 18 Vt. 315.

It may be made by any other competent person as well as by the defendant. *Job v. Walker*, 3 Md. 129.

**Filing the Process.**—The duty imposed upon the judge allowing a writ of *audita querela* (Vt. Comp. Stats. 292, § 8), to take a copy of the whole process and recognizance, "and file the same in the office of the county clerk, in the county in which such writ is allowed," is directory in its character, and if any injury results from the neglect of the judge to so leave a copy, it should not be visited upon those upon whom no duty was imposed or obligation rested for its performance. *Kidder v. Hadley*, 25 Vt. 544.

6. *Oakes v. School District*, 33 Vt. 156;

The proper plea is "not guilty."<sup>1</sup> The particular judgment complained of cannot be regarded as an estoppel upon the inquiry, but the whole subject is necessarily open to examination as a mere matter *in pais*.<sup>2</sup>

**5. Judgment and its Incidents.**—The judgment in *audita querela* cannot include affirmative relief to the defendant.<sup>3</sup> It is conclusive only as between parties and privies.<sup>4</sup> It is the proper subject of an appeal or writ of error.<sup>5</sup> Costs will follow the judgment as an incident.<sup>6</sup> The writ of *audita querela* does not, *per se*, stay proceedings on the execution during its pendency, nor will it operate as a *supersedeas*.<sup>7</sup>

**6. What Grounds will Sustain the Action.**—Injury, or danger of injury, is essential to the maintenance of *audita querela*; but it lies as well *quia timet* as for one actually in execution.<sup>8</sup> The writ may be brought to annul an execution issued irregularly or with-

Puttenham v. Puttenham, 3 Dyer, 297, pl. 25.

Matters not alleged in the declaration as a substantive ground of complaint will be regarded as outside the issue and will not be noticed. Underwood v. Hart, 23 Vt. 120; Oakes v. School District, 33 Vt. 156.

**Amendment.**—A writ of *audita querela*, improperly called in the declaration an action of tort, may be amended by striking out those words. Stone v. Chamberlain, 7 Gray (Mass.), 206.

Where the complaint in an *audita querela* is traversed, and a verdict found for the complainant, the court cannot render judgment for the defendant *non obstante veredicto*. In such case, if the complaint is defective, a motion in arrest should be made to test its sufficiency. French v. Steele, 14 Vt. 479.

1. Little v. Cook, 1 Aik. (Vt.) 363; Lovejoy v. Webber, 10 Mass. 103; Brackett v. Winslow, 17 Mass. 159.

In an action of *audita querela* a former judgment may be given in evidence under a plea of not guilty. Mussey v. White, 4 Eastern Repr. (Vt.) 459.

It is no defence to an *audita querela* that the execution complained of issued by the mistake of the clerk or attorney. Phelps v. Slade, 13 Vt. 195.

Matters which were proper subjects of inquiry and adjudication for the trial court cannot generally be made available in defence to this writ. Griswold v. Rutland, 23 Vt. 324.

If the defendant in the writ claims that the execution complained of, which was prohibited by a statute, was still lawful, as coming within a *proviso* to the statute, he must prove the fact affirmatively. Sawyer v. Vilas, 19 Vt. 43.

2. Paddleford v. Bancroft, 22 Vt. 529.

As this is a direct proceeding to set aside a judgment, the rule against attacking judgments collaterally has no application here. Hill v. Warren, 54 Vt. 73.

3. The defendant in the writ is not an actor in the suit, and no proceedings are to be had in it for his benefit. Either the plaintiff prevails in whole or in part, and recovers judgment to the extent to which he is entitled to it, or there is a judgment for the defendant, and this is the whole scope and effect of the suit. Hence it is improper, on reversing the judgment complained of, to make an order to bring forward the original action on the docket. Foss v. Witham, 9 Allen (Mass.), 572.

But in Vermont double costs and interest may be allowed, in some cases, to a successful defendant. Perry v. Ward, 20 Vt. 92.

4. Stevens v. Curtiss, 3 Conn. 260.

5. Fitch v. Scovel, 1 Root (Conn.), 56; White v. Clapp, 8 Allen (Mass.), 283; Gordonier v. Billings, 77 Pa. St. 498.

6. Shrewsbury v. Strong, 10 Vt. 591.

The plaintiff will be compelled to give security for costs where such security would be required in an ordinary action. Holmes v. Pemberton, 1 El. & El. 369.

**Double Costs.**—In Vermont, by statute, where the court adjudge that a writ of *audita querela* was brought merely for the purpose of delay, they may award double costs and twelve per cent interest to the defendant in the writ. Perry v. Ward, 18 Vt. 120; s. c., 20 Vt. 92.

7. Nuby v. Jenkins, 1 Sid. 351; Langston v. Grant, 1 Salk. 92; Anonymous, 12 Mod. 105; Emery v. Patton, 9 Phila. (Pa.) 125; Waddington v. Vredenberg, 2 Johns. Cas. (N. Y.) 227; Hunt v. Brooks, 18 Johns. (N. Y.) 5. Compare Phelps v. Slade, 13 Vt. 195.

8. Bryant v. Johnson, 24 Me. 304.



out authority of law.<sup>1</sup> Or to supersede an *alias* execution when satisfaction has been made, wholly or in part, on a prior execution.<sup>2</sup> Or to enforce a tender or compromise.<sup>3</sup> Or to vacate a judgment rendered against a non-resident, on constructive service, in violation of statutory requirements.<sup>4</sup> Or to set aside a judgment irregularly entered after a discontinuance, or entered in contravention of an agreement for a continuance.<sup>5</sup> It will also lie to vacate a judgment rendered against an infant who was not repre-

Glover v. Chase, 1 Williams (Vt.), 533; Phelps v. Slade, 13 Vt. 195; Lothrop v. Bennett, Kirby (Conn.), 187.

If the matter complained of is simply nugatory and void, the party can have no need of this process. Bryant v. Johnson, 24 Me. 304; Dane's Abr. 186, art. 1.

It does not lie to prevent the enforcement of a judgment for nominal damages and costs, made after an arbitration *in pais* wherein the award did not purport to dispose of the pending suit. Merritt v. Marshall, 100 Mass. 244.

1. **Irregular Execution.**—Where there is a regular judgment, or a regular award of execution, and an execution is afterwards irregularly issued, the remedy is *audita querela*, not a writ of error. Johnson v. Harvey, 4 Mass. 485.

An execution which misdescribes the judgment as to sums is irregular, and may be set aside in this manner. Wilson v. Fleming, 16 Vt. 649.

The same is true of an execution issued by a justice of the peace and made returnable in a shorter time than the law allows. Hovey v. Niles, 26 Vt. 541.

**Wrongful Levy.**—The writ of *audita querela* will also lie to vacate and set aside a levy of execution on land irregularly or fraudulently made. Hurlbut v. Mayo, 1 D. Chip. (Vt.) 387; Hopkins v. Haywood, 34 Vt. 474; s. c., 36 Vt. 318.

**Unauthorized Execution.**—An execution issued against the body of the debtor, in a case not allowed by statute, will be set aside on *audita querela*. Stanley v. McClure, 17 Vt. 253; Sawyer v. Vilas, 19 Vt. 43.

Where an execution issues against an administrator, after a year and a day from the date of the judgment against the intestate, and without revival by *scire facias*, the irregularity may be corrected by *audita querela*. Hicks v. Murphy, Walker (Mich.), 66.

Where referees make a conditional report, and the creditor sues out execution, contrary to the manifest intent of the referees, *audita querela* will lie. Skillings v. Coolidge, 14 Mass. 48.

An award of execution upon a return of *scire feci* forever concludes the defend-

ant from any plea or defence; but when an execution is awarded upon two returns of *nihil*, the defendant may present his defence by *audita querela*. Barrow v. Bailey, 5 Florida, 9.

2. Fairbanks v. Devereaux, 47 Vt. 550; Luddington v. Peck, 2 Conn. 700; McRae v. Davis, 5 Jones Eq. (N. Car.) 140; Parker v. Jones 5 Jones Eq. (N. Car.) 276.

3. Perry v. Ward, 20 Vt. 92; Keen v. Vaughan, 48 Pa. St. 477.

But a tender cannot avail the debtor for this purpose unless it is kept good and the money brought into court, and the fact that the money is so brought into court must appear affirmatively by the declaration in the *audita querela*, or it will be open to demurrer. Perry v. Ward, 20 Vt. 92.

4. Where the defendant in an action, a non-resident, had no actual notice of the pendency of the suit, and judgment is rendered against him by default, without any security being given, by bond or recognizance, for the repayment of such sum as may be recovered on review, this being made by statute a condition precedent to the issuing of execution, the defendant may have his remedy by *audita querela*. Folan v. Folan, 59 Me. 566; Dingman v. Myers, 13 Gray (Mass.), 1; Marvin v. Wilkins, 1 Aik. (Vt.) 107; Alexander v. Abbott, 21 Vt. 476; Whitney v. Silver, 22 Vt. 634; Eastman v. Waterman, 26 Vt. 494; Harmon v. Martin, 52 Vt. 255. Compare Witherell v. Goss, 26 Vt. 748; Hamilton v. Wilder, 31 Vt. 695.

But not where an attorney (though unauthorized) has entered an appearance for him. Spaulding v. Swift, 18 Vt. 214.

5. **Judgment after Discontinuance.**—Where a suit has been discontinued, either by agreement of parties or by operation of law in consequence of irregularities, and the plaintiff, without the defendant's consent, afterwards proceeds and takes judgment by default, the proceedings will be set aside on *audita querela*. Crawford v. Cheney, 12 Vt. 567; Pike v. Hill, 15 Vt. 183; Paddleford v. Bancroft, 22 Vt. 529 (see the doctrine of this case explained and limited in Aldrich

sented by a guardian;<sup>1</sup> and to obtain relief against a judgment in a secondary or collateral action when the original judgment has been barred, reversed, or set aside;<sup>2</sup> or to set aside a judgment from which an appeal was wrongfully denied by the inferior court.<sup>3</sup> It is also a proper method of obtaining relief in consequence of a discharge in bankruptcy subsequent to the judgment.<sup>4</sup> Where the legality of a debtor's imprisonment is affected by matter of discharge occurring after the judgment, it may be tested on *audita querela*.<sup>5</sup>

**7. Cases where the Writ will not Lie.**—A party is not entitled to relief by *audita querela* when he has had a legal opportunity to avail himself of the matters of defence set forth in his complaint, or when the injury of which he complains is attributable to his

*v. Bonett*, 33 Vt. 202; *Hawley v. Mead*, 52 Vt. 343; *Kimball v. Randall*, 56 Vt. 558. Compare *Sisco v. Parkhurst*, 23 Vt. 537.

The judgment of a justice of the peace cannot be set aside on *audita querela* because he refused to continue a case for the sickness of a party. *Amidon v. Aiken*, 28 Vt. 440.

In an action *ex contractu* against co-defendants, one defendant and the plaintiff agreed to a continuance, and the justice accordingly entered a continuance, without going to the place appointed for trial. Held, that neither party could avoid the proceedings by *audita querela*. *Scott v. Larkin*, 13 Vt. 112.

1. *Judd v. Downing*, Brayt. (Vt.) 27; *Starbird v. Moore*, 21 Vt. 529. Compare *Chase v. Scott*, 14 Vt. 77; *Barber v. Graves*, 18 Vt. 290.

**Lunatic.**—A judgment rendered against an insane person, who had a guardian, but whose guardian was not notified of the suit, and who has no guardian appointed for him by the court, will be vacated upon *audita querela*. *Lincoln v. Flint*, 18 Vt. 247.

2. *Barnes v. Warlich*, Yelv. 59 (it lies for bail if the judgment against the principal is reversed); *Wilson v. Watson*, Pet. C. C. (U. S.) 269.

**Surety.**—If a sheriff recovers judgment against a surety for an escape of a debtor, and the creditor is barred by the statute of limitations of his remedy against the sheriff, the surety may be relieved from the execution by an *audita querela*. *Hall v. Fitch*, 1 Root (Conn.), 151.

**Foreign Judgment.**—When a foreign judgment against the defendant has been reversed by the foreign appellate tribunal, but in the meantime he has been sued here on that judgment, he may have redress by *audita querela*. *Merchants' Ins. Co. v. De Wolf*, 33 Pa. St. 45.

**Concurrent Suits.**—Where two suits are brought at the same time for the same cause of action, and proceed *pari passu* to judgment and execution, a satisfaction of either judgment may be shown, upon *audita querela*, in discharge of the other. *Browne v. Joy*, 9 Johns. (N. Y.) 221.

3. *Edwards v. Osgood*, 33 Vt. 224; *Harriman v. Swift*, 31 Vt. 385. Compare *Bradish v. Redway*, 35 Vt. 424.

But in order to use the writ for this purpose, it is necessary that the party should have fully complied with all the requirements of the law in regard to the perfecting of his appeal. *Finney v. Hill*, 13 Vt. 255; *Harriman v. Swift*, 31 Vt. 385.

A party appellant against whom an affirmance of the judgment has been obtained by the appellee, without notice, and in violation of an agreement to arbitrate the matter and not carry up the appeal, will be relieved on *audita querela*, though he does not aver in his complaint that he had a good defence to the original action. *Eddy v. Cochran*, 1 Aik. (Vt.) 359.

Where the statute takes away the appeal from a justice's judgment, *audita querela* will not lie to set aside an erroneous judgment in malicious prosecution by reason of the pendency of the alleged malicious action. *Perry v. Morse*, 57 Vt. 509.

4. *Petit v. Seaman*, 2 Root (Conn.), 178; *Williams v. Butcher*, 1 Weekly Notes (Pa.), 304; *Baker v. Judges*, 4 Johns. (N. Y.) 191.

5. *Commonwealth v. Whitney*, 10 Pick. (Mass.) 439; *Comstock v. Grout*, 17 Vt. 512. But see *Gould v. Mathewson*, 18 Vt. 65.

If a prisoner on execution procure his liberation, under an agreement to surrender himself upon certain terms, and he executes such agreement, and is committed again on the execution, he cannot

own neglect.<sup>1</sup> It will not lie where the matter of the complaint is a proper subject for a writ of error;<sup>2</sup> nor for mere irregularities not going to the absolute validity of process or the substantive merits of the controversy;<sup>3</sup> nor upon matters which constitute a mere equitable defence, such as would not be cognizable at law;<sup>4</sup> nor to correct an erroneous taxation of costs or an allowance of greater interest than the law allows.<sup>5</sup> The defendant may be estopped to apply for this writ.<sup>6</sup>

**8. Substitutes for the Writ.**—The proceeding by writ of *audita querela* is now superseded in a majority of the States by the more summary method of application for relief by motion, upon notice to the adverse party.<sup>7</sup> And, generally, wherever this form of proceeding would lie at common law, the courts may now grant relief on motion.<sup>8</sup> In England it fell into disuse a century ago, but

have relief by *audita querela*. Little v. Newburyport Bank, 14 Mass. 443; Coffin v. Ewer, 5 Metc. (Mass.) 228.

1. Avery v. United States, 12 Wall. (U. S.) 304; Lovejoy v. Webber, 10 Mass. 101; Barker v. Walsh, 14 Allen (Mass.), 175; Faxon v. Baxter, 11 Cush. (Mass.) 35; Barrett v. Vaughan, 6 Vt. 243; Griswold v. Rutland, 23 Vt. 324.

On this principle, if an insolvent debtor neglects to plead proceedings in insolvency and his subsequent discharge therein, in defence to a suit pending against him, but allows judgment by default, and is arrested and committed to jail, he has no remedy by *audita querela*. Faxon v. Baxter, 11 Cush. (Mass.) 35.

So where the plaintiff, having obtained judgment against the defendant, releases it, and afterwards brings a *scire facias*, and the sheriff returns *scire feci*, but the defendant does not appear, and there is judgment upon it, he cannot have an *audita querela*, for he had time to plead the release upon the return of the *scire facias*, and having neglected it, the law will not relieve him; and if in truth he was not warned, he has his remedy against the sheriff for a false return. Wicket v. Creamer, 1 Salk. 264; 1 Ld. Raym. 439; Day v. Guilford, T. Raym. 19; Cooke v. Berry, 1 Wils. 98. See Thatcher v. Gammon, 12 Mass. 270.

2. Weeks v. Lawrence, 1 Vt. 433; Dodge v. Hubbell, 1 Vt. 491; School District v. Rood, 1 Williams (Vt.), 214; Sutton v. Tyrrell, 10 Vt. 87.

Nor is the rule affected by the fact that the writ of error is taken away by statute. Tuttle v. Burlington, Brayt. (Vt.) 27; Dodge v. Hubbell, 1 Vt. 491; Spear v. Flint, 17 Vt. 497.

3. Sawyer v. Doane, 19 Vt. 598; Lamson v. Bradley, 42 Vt. 165. Compare Ball v. Sleeper, 23 Vt. 573.

4. Schott v. McFarland, 1 Phila. (Pa.) 58; Garfield v. University, 10 Vt. 536.

**Remedy in Equity.**—Upon a demurrer to a writ of *audita querela* it was held, that where an execution has been issued from a court of law, this writ cannot be sustained to vacate the same, or suspend its operation, on the ground that it has been enjoined by a court of chancery, for the remedy is by application to that court. Porter v. Vaughn, 24 Vt. 211.

5. Goodrich v. Willard, 11 Gray (Mass.), 380; Edmondson v. King, 1 Overt. (Tenn.) 425; Perry v. Ward, 18 Vt. 120; Clough v. Brown, 38 Vt. 179; Johnson v. Roberts, 3 Eastern Repr. (Vt.) 871. The case last cited criticises and distinguishes Weed v. Nutting, Brayt. (Vt.) 28.

**6. Estoppel.**—In an action of trover, the plaintiff, upon default, entered up judgment for the alleged value of the property without an inquiry or assessment; execution issued, and the money was paid by the defendant. Held, that after payment of the money *audita querela* would not lie to set aside the judgment and execution. Hadlock v. Clement, 12 N. H. 68.

7. Job v. Walker, 3 Md. 129; Huston v. Ditto, 20 Md. 305; Smock v. Dade, 5 Rand. (Va.) 639; Longworth v. Screven, 2 Hill (S. Car.), 298; Dunlap v. Clements, 18 Ala. 778; Chambers v. Neal, 13 B. Mon. (Ky.) 256; Marsh v. Haywood, 6 Humph. (Tenn.) 210; McMillan v. Baker, 20 Kans. 50; McDonald v. Falvey, 18 Wis. 571.

In Daly v. Derringer, 1 Phila. (Pa.) 324, without denying that *audita querela* might issue in Pennsylvania, the court said: "It is expedient to give relief summarily on motion, rather than to put the parties to that writ."

8. Share v. Becker, 8 Serg. & R. (Pa.) 239; Witherow v. Keller, 11 Serg. & R. (Pa.) 274; Baker v. Judges, 4 Johns. (N. Y.) 191.

has been revived in later times, and is now used with more frequency.<sup>1</sup>

**9. Concurrent Remedies.**—The proceeding by *audita querela*, being a common-law remedy, is not taken away or abolished by the mere establishment of a concurrent remedy suitable to the particular case.<sup>2</sup> And the writ may issue after a refusal of summary relief on motion, and conversely.<sup>3</sup>

#### AUDITORS. (See also REFEREES.)

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| 1. Definition.                             | 10. Estoppel by Acquiescence in Order of Reference. |
| 2. Appointment and Qualification.          | 11. Report, its Form and Contents.                  |
| 3. What Cases may be Referred to Auditors. | 12. Exceptions to Report.                           |
| 4. Notice of Meeting.                      | 13. Correction and Confirmation of Report.          |
| 5. Action by Majority.                     | 14. Effect of Report as Evidence.                   |
| 6. What Matters may be Examined.           | 15. Impeaching and Setting aside Report.            |
| 7. Witnesses and Evidence.                 | 16. Recommitment.                                   |
| 8. Adjournments.                           | 17. Compensation of Auditors.                       |
| 9. Power to allow Amendments.              |   |

**1. Definition.**—In practice, auditors are agents or officers of a court, either of law or equity, appointed to examine and digest accounts for decision, and to prepare materials on which an order, judgment, or decree may be made.<sup>4</sup>

**Vermont and Massachusetts.**—The only States where the writ of *audita querela* is to day used with any frequency are Vermont and Massachusetts. For instances of its recent application in those States, see the citations, generally, throughout this article.

**1. England.**—"The indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of *audita querela* and driven it quite out of practice." 3 Blackst. Com. 406. And see remarks of Eyre, C. J., in 1 Bos. 428. It is spoken of in *Sutton v. Bishop*, 4 Burr. 2286, as an "old legal remedy, long disused and expensive." But in *Baker v. Ridgway*, 2 Bing. 47, it is said to be neither an obsolete nor difficult proceeding; and see *Emery v. Patton*, 9 Phila. (Pa.) 125; *Williams v. Roberts*, 8 Hare, 315; *Nathan v. Giles*, 5 Taunt. 558; *Lister v. Mundell*, 1 Bos. & P. 427; *Troop v. Ricardo*, 33 Beav. 122.

**2. Lovejoy v. Webber**, 10 Mass. 101; *Brckett v. Winslow*, 17 Mass. 158; *Alexander v. Abbott*, 21 Vt. 476; *Porter v. Vaughn*, 24 Vt. 211; *Edwards v. Osgood*, 33 Vt. 224. Compare *Young v. Collet*, T. Raym. 89.

**3. Emery v. Patton**, 9 Phila. (Pa.) 125. Although *audita querela* is said to be in the nature of an equitable action, yet the

defendant is not precluded, either by the existence of that remedy or by having unsuccessfully resorted to it, from bringing an original bill in equity against the plaintiff, for relief, in a case where a court of law has set aside the writ in a summary proceeding. *Williams v. Roberts*, 8 Hare, 315.

**Advantages of the Writ.**—"With regard to this writ, however, there is a peculiarity worthy of notice, which involves an advantage which does not appear to attend on the remedy by motion in lieu of it. In England, an *audita querela* is a commission to the judges to examine the cause, and is in the nature of an action of trespass, and damages are given if the execution be without right. Now, in the case of a motion for relief, it is very clear that the judges would not award damages to the defendant, however they might protect him from the plaintiff's unjust oppression, and it is equally clear that if an issue were directed to try the matter of fact, the jury could not assess damages, but would be confined to passing upon the fact; but in *audita querela*, if the issue be to the country, damages may be assessed." *Troubat & Haly's Practice* (Brightly's Ed.), § 1481.

**Authorities for Audita Querela.**—Bacon's Abr.; Broom & Hadley's Com. (Wait's Ed.); *Troubat & Haly's Practice*.

**4. Bouvier's Law Dict.; Field v. Hol-**

**2. Appointment and Qualification.**—Auditors may be appointed by courts either of law or equity, and where such appointment can be made without consent of parties, it rests entirely in the discretion of the court, whose order is not appealable.<sup>1</sup> An auditor appointed by order of court need not have a formal or written notice of his appointment.<sup>2</sup> He should in general be sworn before entering upon the duties of his appointment;<sup>3</sup> but the objection that no oath was taken will be waived if the parties, with knowledge, appear before him and proceed with the trial.<sup>4</sup> A person will be debarred from acting as an auditor by the disqualification of interest or relationship.<sup>5</sup>

land, 6 Cranch (U. S.) 8; *Whitwell v. Willard*, 1 Metc. (Mass.) 216; *Read v. Barlow*, 1 Aik. (Vt.) 145.

**Public Officers.**—There are certain administrative officers, connected with State and municipal governments, whose principal duty is to examine and pass upon the accounts of receiving and disbursing officers, and who are therefore called "auditors." But we are not here concerned with the legal relations of these officers.

**Referees, etc.**—In many of the States persons invested with powers and duties analogous to those of auditors at common law, and called "referees," "masters," "commissioners," or "committees," may be appointed for special purposes, *e.g.*, to hear evidence in chancery proceedings, to take testimony on a rule to open a judgment, to examine witnesses on a libel in divorce, to examine debtors on supplementary proceedings. For the law and practice in relation to these matters, so far as either differs from that pertinent to auditors, the reader is referred to the various appropriate titles of this work, or, if the practice be entirely local, to the statutes of his own State.

Calling the person named an "auditor" instead of a "referee" will not vitiate the order of reference. *Buchan v. Rintoul*, 70 N. Y. 1.

1. *Field v. Holland*, 6 Cranch (U. S.), 8; *Pomeroy v. Winship*, 12 Mass. 525; *Pierce v. Thompson*, 6 Pick. (Mass.) 193; *Ubsdell v. Root*, 1 Hilt. (N. Y.) 174; *Robinson v. Jones*, 33 Tex. 324. See *Bac. Abr. Account*, F. Compare *Vanduzer v. McMillan*, 37 Ga. 299; *Dougherty v. Jones*, 37 Ga. 348.

In Rhode Island the supreme court has the same discretion on appeal as the court below in the appointment of auditors. *Campbell v. Crout*, 3 R. I. 60.

2. *Allison v. Bryson*, 65 N. C. 44.

An irregularity in the appointment of an auditor is waived by the appearance of a party before him and proceeding

with the reference for several days without objection. *Quinn v. Lloyd*, 7 Rob. (N. Y.) 157. See *Heard v. Russell*, 59 Ga. 25.

3. *In re Vilmar*, 10 Daly (N. Y.), 15. Compare *Daggy v. Cronnelly*, 20 Ind. 474; *Benoit v. Brill*, 24 Miss. 83.

It need not appear of record that an auditor was sworn; it will be presumed that he was unless the contrary appears. *Putnam v. Dutton*, 8 Vt. 396; *Reed v. Talford*, 10 Vt. 568; *Leyde v. Martin*, 16 Minn. 38.

4. *Newcomb v. Wood*, 97 U. S. 581; *Kelsey v. Darrow*, 22 Hun (N. Y.), 125; *Nason v. Ludington*, 8 Daly (N. Y.), 149; *Milwaukee Co. v. Ehlers*, 45 Wis. 281. Compare *Hepburn v. Jones*, 4 Colo. 98.

**Special Oath.**—Where, at the commencement of a hearing before a committee appointed upon a petition in equity to establish lost boundaries, the counsel on both sides were ignorant that a special oath had been prescribed by statute for such committees, and the counsel for respondents presented the general oath for committees in chancery, and inquired of the opposing counsel whether that was not the proper oath, to which the latter replied that it was, and it was at once administered by a magistrate present, it was held that after the hearing and a report by the committee the respondents were estopped from claiming that the proper oath had not been administered. *Post v. Williams*, 33 Conn. 147.

5. **Disqualification.**—An account should not be referred to the attorney of one of the parties, as auditor, without the consent of the other party, and an order granting such reference should be set aside as of course. *Eason v. Billups*, 65 N. Car. 216.

Where the auditor is an attorney, and accepts a retainer for other business from one of the parties, pending the reference, this fact will of itself avoid his report. *Stebbins v. Brown*, 65 Barb. (N. Y.) 272.

**3. What Cases may be Referred to Auditors.**—The cases in which the appointment of an auditor is proper are largely regulated by local statutes; but the general rule is that an auditor should only be appointed in a case which requires an examination of accounts or an investigation of vouchers.<sup>1</sup>

**4. Notice of Meeting.**—On a hearing before auditors both parties must have reasonable notice of the time and place of hearing to enable them to come prepared with their evidence.<sup>2</sup> But appearance of parties at the time and place fixed for hearing, without objection, waives any defect in giving notice.<sup>3</sup>

**5. Action by Majority.**—Where two or more auditors are appointed all must act in the hearing;<sup>4</sup> but the parties may consent

One is disqualified to sit as an auditor in the trial of an action of book account whose wife is first cousin to the wife of one of the parties. *Clapp v. Foster*, 34 Vt. 580.

An alleged disqualification of an auditor, by reason of his relations with one of the parties, is a question for the discretion of the court and not reviewable on appeal. *Baird v. Mayor*, 74 N. Y. 382.

1. *Brewster v. Ederly*, 13 N. H. 275; *Brewer v. Hyndman*, 18 N. H. 9; *Putnam v. Goodall*, 31 N. H. 419; *Ford v. Porter*, 32 N. H. 376; *Cozzens v. Hodges*, 1 R. I. 491; *Whitaker v. Desfosse*, 7 Bosw. (N. Y.) 678; *Townshend v. Duncan*, 2 Bland Ch. (Md.) 45; *Martin v. Hall*, 26 Mo. 386.

In California it is held that an ordinary suit at law cannot be sent to a referee against the objection of a party who wishes a trial by jury, and this even though the trial involves the examination of a long account. *Grim v. Norris*, 19 Cal. 140.

**Objection Waived.**—The objection that a case is not one which may be referred to an auditor, under the statutes, must be raised before the case is so referred, or at the latest before proceeding with the examination of the case before the auditor, and cannot be taken for the first time when the auditor's report is offered in evidence on the trial. *Kimball v. Baptist Society*, 2 Gray (Mass.), 517. Compare *Turner v. Taylor*, 2 Daly (N. Y.), 278.

2. *Parsons v. Able*, 19 Tex. 447; *Strang v. Allen*, 44 Ill. 428; *Whiton v. Wiggins*, 34 N. H. 215.

It is no ground of exception to an auditor's report that he appointed a time and place for the hearing which were not convenient to the counsel for the party excepting, as the other counsel knew. *Cheshire v. Howland*, 13 Gray (Mass.), 321.

**Reasonable Notice.**—A notice to the attorney, sent by letter, mailed three days prior to the time fixed, was held insufficient when it appeared that the attorney could no more than have reached the auditor's office if there had been no delay in the mail or otherwise, and if he had been at home and left at once to attend. *Strang v. Allen*, 44 Ill. 428. And see *Parsons v. Able*, 19 Tex. 447.

**Special Notice.**—Where the personal attendance of a party is required before the auditor to answer interrogatories, or he is called on to produce books and papers, a special notice of what is required must be served on him a sufficient time before the hearing, or he is not bound to attend. *Stetson v. Godfrey*, 20 N. H. 227; *Whiton v. Wiggins*, 34 N. H. 215.

**Notice, when unnecessary.**—An auditor to whom a report is recommitted for amendment in matter of form need not give notice to or hear the parties. *Webber v. Orne*, 15 Gray (Mass.), 351.

So where he is appointed to state an account from proofs already in the cause, and where further evidence would be inadmissible. *Calvert v. Carter*, 18 Md. 73.

3. *Pike v. Stallings*, 71 Ga. 860.

4. *Crone v. Daniels*, 20 Conn. 331; *The Nineveh*, 1 Low. (U. S.) 400; *Townsend v. Ins. Co.*, 33 N. Y. Superior Ct. 130.

It is not necessary that all the auditors should convene either to give notice to the parties or to adjourn. The chairman may give the notice, and if one of the parties does not appear a majority of the auditors may adjourn the hearing. *Swin-ton v. Erwin*, 8 Vt. 282.

Where an account is referred to three auditors by name, or a majority of them, it is no objection to a report of a majority of them that one of them was not notified to attend. *Davis v. Foley, Wal-ker* (Mich.), 43.

Where a report of the majority of referees is recommitted for the specific purpose of having them certify that the

that a part act for all,<sup>1</sup> and the major part of a board of auditors may make a report, provided the report shows that all of them sat in the cause and participated in the deliberations.<sup>2</sup>

**6. What Matters may be Examined.**—The investigations of an auditor must be strictly confined to the questions and matters specifically committed to him by the court, and he has no authority to examine any extraneous matters.<sup>3</sup> But he may rightfully consider and decide all questions incidental to or involved in an examination of the particular issues submitted to him.<sup>4</sup> And the parties, by agreement, may enlarge the scope and extent of his powers.<sup>5</sup>

**7. Witnesses and Evidence.**—Auditors, as a general rule, have authority to hear testimony, but an auditor cannot receive, in a hearing had before him, any but legal evidence.<sup>6</sup> He is bound by a former adjudication, and by any other evidence that would be conclusive upon a court.<sup>7</sup> Depositions, certified as taken to be

disagreeing referee acted with them in the trial of the case, but refused to sign the report, they may thus amend their report without the knowledge or presence of their dissenting associate. *Brown v. Vassalborough*, 50 Me. 64.

1. *Booth v. Tousey*, 1 Tyler (Vt.), 407; *Crone v. Daniels*, 20 Conn. 331.

2. *Newel v. Keith*, 11 Vt. 214.

3. *Flint v. Hubbard*, 1 Allen (Mass.), 252; *Merrill v. Russell*, 12 N. H. 74; *Wright v. Cobleigh*, 21 N. H. 339; *Aiken v. Smith*, 21 Vt. 172; *Okie's Appeal*, 9 W. & S. (Pa.) 156; *Gaston's Appeal*, 1 Pittsb. (Pa.) 48; *Henderson v. Huey*, 45 Ala. 275.

If a referee hears and determines other matters than those embraced in the issue formed in the case referred to him, it is not error provided the other matters are such as might be brought into the case under any amendment which the trial court could legally have allowed the party to make in his pleadings. *Summer v. Brown*, 34 Vt. 194.

**Foreign Matter—How Eliminated.**—If the report includes extraneous matters, it is the proper practice, upon motion, to recommit the report, with instructions to the auditor to strike out the incompetent matter. *Bartlett v. Trefethen*, 14 N. H. 427; *Green v. Pickering*, 28 N. H. 360.

4. *Moulton v. Parker*, 35 N. H. 92; *Jones v. Stevens*, 5 Metc. (Mass.) 373.

He may consider and determine whether a particular individual was the authorized agent of one of the parties to purchase on his behalf the goods charged in the account against him. *Locke v. Bennett*, 7 Cush. (Mass.) 445.

5. *Wright v. Cobleigh*, 21 N. H. 339;

*Willis v. Willis*, 12 Pa. St. 159; *Aiken v. Smith*, 21 Vt. 172.

But an agreement of parties that the auditor may consider matters not specifically committed to him is revocable before the report is made. *Wright v. Cobleigh*, 21 N. H. 339.

6. *Paine v. Ins. Co.*, 69 Me. 568. *Compare Sanborn v. Paul*, 60 Me. 325.

A referee cannot receive evidence against the objection and exception of a party, and reserve to himself the question as to its admissibility and the right of retaining or rejecting it at the conclusion of the case. *Peck v. Yorks*, 47 Barb. (N. Y.) 131.

An objection to the report of an auditor that a portion of the evidence upon which his conclusion is based was inadmissible, should be taken by a motion to recommit the report, and cannot be taken for the first time at the trial as a ground for rejecting the whole report. *Briggs v. Gilman*, 127 Mass. 530.

The admission of evidence of unimportant facts, not prejudicial to the objecting party, and admissible for another purpose, is no ground for setting aside the auditor's report. *Kendrick v. Tarbell*, 27 Vt. 512.

**7. Bound by Judgment.**—An auditor appointed to distribute money cannot inquire into the validity of a judgment rendered in a court, but must take it as conclusive. *Matter of Dyott*, 2 W. & S. (Pa.) 557; *Leeds v. Bender*, 6 W. & S. (Pa.) 315.

But he may disregard a void judgment. *Brunner's Appeal*, 47 Pa. St. 67.

**Former Accounting.**—In an action of account the auditors are not bound by any previous accounting between the

used in the original cause, may be read in evidence before an auditor if otherwise competent.<sup>1</sup> In some jurisdictions, by special statute, the parties to the action may appear as witnesses before the auditor.<sup>2</sup> He may open the cause for further hearing.<sup>3</sup>

**8. Adjournments.**—An auditor may, in his discretion, adjourn the hearing, not only from day to day, but for a longer period upon cause shown; as to enable a party to apply to the court to open a judgment involved in the reference.<sup>4</sup>

**9. Power to allow Amendments.**—An auditor has the same power to allow amendments to any pleadings as the court, upon trial, upon the same terms and with like effect.<sup>5</sup> But he cannot allow an amendment which introduces a new cause of action or sets up a new defence.<sup>6</sup>

**10. Estoppel by Acquiescence in Order of Reference.**—In the action of *account*, any matter which might have been pleaded in bar before the judgment to account, cannot be pleaded before the

parties, though if parties had agreed upon particular items, or if rests had been made in a running account, and balances struck, but no final accounting had taken place, the auditors would be concluded by the balances as struck by the parties, and bound to carry unpaid balances into the future accounts. *Lee v. Abrams*, 12 Ill. 111.

1. *Cross v. Haskins*, 13 Vt. 536. Compare *Pike v. Blake*, 8 Vt. 400.

2. **Parties as Witnesses.**—Under the statutes of New Hampshire it is in the discretion of an auditor to admit or exclude the testimony of parties to the suit, and a report will not be set aside for such admission or exclusion of testimony, unless it appear to the court that injustice has been done. *Mann v. Locke*, 11 N. H. 246; *Ramsay v. Bachelder*, 18 N. H. 135; *Hoyt v. French*, 24 N. H. 198; *Smith v. Smith*, 27 N. H. 244; *Chapin v. School District*, 30 N. H. 25; *Ford v. Porter*, 32 N. H. 376; *Tuttle v. Robinson*, 33 N. H. 104; *Palmer v. Palmer*, 38 N. H. 418.

If one party be ill and unable to testify at a hearing before an auditor, a refusal by the auditor to permit the other party to testify will be a proper exercise of his discretionary power, and will not be a cause for rejecting or recommitting the report. *Lovering v. Lovering*, 13 N. H. 513.

But an auditor has no authority under the statute to examine as a witness the wife of a party. *Randlet v. Herren*, 20 N. H. 538.

Nor his ball. *Newton v. Higgins*, 2 Vt. 366; *McConnell v. Pike*, 3 Vt. 595.

And although such a statute authorizes an auditor to examine parties on oath, and makes his report evidence on trial before a jury, yet it does not make the

parties themselves competent witnesses on such trial. *Stevens v. Hall*, 6 N. H. 508; *Delaware v. Staunton*, 8 Vt. 48; *Fassett v. Vincent*, 8 Vt. 73.

If a party before an auditor refuses to answer interrogatories concerning a claim which he seeks to establish, the claim may for that cause be disallowed by the auditor. *Stetson v. Godfrey*, 20 N. H. 227.

Before an auditor neither party is entitled to fees as a witness, whether testifying in his own favor or for his adversary. *Whitney v. Pierce*, 40 N. H. 114.

**3. Opening for Further Hearing.**—An auditor has power and discretion, after the hearing of a case is closed and he has made up his report, but before he has returned it to the court, to open the case and grant a further hearing for newly-discovered evidence or other good cause. *Welles v. Harris*, 31 Conn. 365; *Chase v. Spencer*, 1 Williams (Vt.), 412; *Cooper v. Stinson*, 5 Minn. 201; *Marziou v. Pioche*, 10 Cal. 545.

4. *Matter of Dyott*, 2 W. & S. (Pa.) 557; *Hickok v. Ridley*, 15 Vt. 42.

5. *Oregon Steamship Co. v. Otis*, 59 How. Pr. (N. Y.) 254; *Mason v. Johnson*, 13 S. Car. 20; *Morse v. Beers*, 51 Vt. 359.

Where a referee allowed the plaintiff to amend his declaration by adding the common counts, *held*, that the error was harmless, the referee having found that the plaintiff was entitled to recover only upon the original count in the declaration. *Morse v. Beers*, 51 Vt. 359.

In New Hampshire an auditor has no power to allow amendments. *Child v. Eureka Works*, 44 N. H. 354.

6 *Price v. Brown*, 98 N. Y. 388; *Woodruff v. Hurson*, 32 Barb. (N. Y.)



auditors.<sup>1</sup> Again, matters which should have been taken advantage of before the auditors cannot be set up in defence after their report is made.<sup>2</sup>

**11. Report, its Form and Contents.**—The auditor's report to the court must be made within the time limited by the order of reference; if afterwards returned, it is a mere volunteer report and has no validity.<sup>3</sup> The report, like an award of arbitrators, must be certain and definite.<sup>4</sup> It should state a special account between the parties.<sup>5</sup> The auditor should set out the facts in the form of

557; *Ford v. Ford*, 53 Barb. (N. Y.) 525.

1. *Day v. Lockwood*, 24 Conn. 185; *Baxter v. Thompson*, 26 Vt. 559; *Porter v. Wheeler*, 37 Vt. 281.

Thus no matter can be pleaded before the auditors which shows the defendant under no obligation to account; it should have been specially pleaded in bar before the judgment to account. *Baxter v. Thompson*, 26 Vt. 559.

In the action of account the objection that such action was prematurely brought cannot be made after the case is referred. *Day v. Lockwood*, 24 Conn. 185.

It is also a settled rule of practice in this action that nothing can be pleaded before the auditors contrary to what has been previously pleaded and found by the verdict. *Spear v. Newall*, 2 Paine (U. S.) 267.

After a judgment to account, it cannot be insisted in defence that the facts found by the auditor are not sufficient to support the action of account. *Porter v. Wheeler*, 37 Vt. 281.

**Tender.**—A tender made before the commencement of the action need not be pleaded in the trial court, but may be proved and insisted on at the trial before the auditor, and if the money is paid to the auditor, and sent by him to the court with his report, it is sufficient. *Woodcock v. Clark*, 18 Vt. 333.

**Non-joinder of Parties.**—In an action on book account the non-joinder, as defendant, of one of the contracting parties is not waived by the omission to plead it in abatement before the judgment to account, but may be taken advantage of at the hearing before the auditor, and if the fact of such non-joinder is found by the auditor, judgment will be rendered upon the report in favor of the defendant. *Smith v. Watson*, 14 Vt. 332; *Bailey v. Hodges*, 19 Vt. 618; *Hagar v. Stone*, 20 Vt. 106; *Benton v. Chamberlain*, 23 Vt. 711.

2. The Statute of Limitations cannot be insisted upon by way of objection to a report of auditors, if not insisted upon

at the time of the audit. *Newell v. Keith*, 11 Vt. 214; *Graves v. Weeks*, 19 Vt. 178.

The erroneous joinder of counts in book debt and *assumpsit* is cured by the report of the auditor and its acceptance. *Phelps v. Hurd*, 31 Conn. 444.

After the report of auditors it is too late to file pleas and form an issue for a jury. *Closson v. Means*, 40 Me. 337.

3. *De Long v. Stahl*, 13 Kan. 558; *Robinson v. O'Conner*, 12 Neb. 405. *Compare Deitrichs v. Railroad*, 13 Neb. 43.

When no time is fixed an auditor's report may be filed at any time before trial. *Green v. Frank*, 63 Ga. 78.

**4. Report must be Certain.**—A report of auditors that the defendant should pay a sum to the plaintiff, without finding how much he owed, is bad. *Thomas v. Alsop*, 2 Root (Conn.), 12.

So of a report that the defendant had fully accounted; they ought to find that he was nothing in arrear. *Spencer v. Usher*, 2 Day (Conn.), 116.

But a report that the plaintiff has no legal demand "at present" is not bad for uncertainty. *Couscher v. Tulam*, 4 Mass. 442.

Auditors may report in the alternative, leaving the court to render judgment as it may judge the law to be. *May v. Corlew*, 4 Vt. 12.

5. *Bartlett v. Trefethen*, 14 N. H. 427; *Thomas v. Alsop*, 2 Root (Conn.), 12; *Finney v. Harbeson*, 4 Yeates (Pa.), 514; *Tutton v. Adams*, 45 Pa. St. 67; *Hill v. Hogaboom*, 13 Vt. 141.

Where the auditor inquired, in the presence of the defendant, whether it was necessary to report copies of the accounts of the parties, and the plaintiff's counsel replied that it was not, under the statutes, and the defendant said nothing, this was held no waiver on the part of the defendant of his right to have the copies returned with the report. *Flower Brook Mfg. Co. v. Buck*, 16 Vt. 290.

**Specification of Items.**—The auditor's report should show the particular items allowed and disallowed. *Macks v. Brush*,

a special verdict, specifically stating his conclusions of law and of fact, but not detailing the evidence.<sup>1</sup> It is not within his province to award concerning costs.<sup>2</sup> He may report a balance in favor of the defendant.<sup>3</sup> The jurisdiction of the auditor is determined upon the delivery of his report, and he cannot thereafter file a new or supplemental report, sustaining, contradicting, or correcting his former report.<sup>4</sup>

**12. Exceptions to Report.**—Exceptions to the auditor's report must be taken before the auditor and certified by him to the court, and cannot be presented for the first time after the report is accepted and filed.<sup>5</sup> General exceptions are not sufficient; a

5 Vt. 70; *Crocker v. Goodnow*, 42 Vt. 682; *Whitehead v. Perie*, 15 Tex. 7. Compare *Bent v. Manning*, 10 Vt. 225.

The auditor is not required to specify his reasons for allowing or disallowing each particular item of the account, but if he refuses to do so upon being thereto requested, and this is shown in the exceptions, it tends to show unfairness and deserves consideration. *Macks v. Brush*, 5 Vt. 70.

The report, in showing the items allowed and disallowed, is sufficient if it refers to the account. *Wilson v. Wilson*, 2 South. (N. J.) 791.

**1. Evidence not to be set out.**—*Skinner v. Conant*, 2 Vt. 453; *Fry v. Slyfield*, 3 Vt. 246; *Munroe v. Hine*, 3 Vt. 389; *Shaw v. Shaw*, 6 Vt. 69; *Strong v. McConnell*, 5 Vt. 338; *Goodrich v. Drew*, 10 Vt. 137; *Hitt v. Slocum*, 37 Vt. 524; *Stevens v. Thompson*, 17 N. H. 103; *Newell v. Chesley*, 122 Mass. 522; *Allison v. Bryson*, 65 N. Car. 44; *Vaughan v. Smith*, 69 Ala. 92.

It is the duty of the auditor to find all the facts which are necessary to found a judgment upon, and he should not leave it for the trial court to investigate the evidence and deduce inferences of fact therefrom, or draw its own conclusions as to what is proved. *Walsh v. Pierce*, 11 Vt. 32; *Swift v. Raymond*, 11 Vt. 317; *Stoddard v. Chapin*, 15 Vt. 443; *Abbott v. Camp*, 23 Vt. 650.

**Conclusions of Law.**—The auditor's report must separately and distinctly state his conclusions of law. *Harris v. Hey*, 4 Atlant. Repr. (Pa.) 715; *McConnell v. Pike*, 3 Vt. 595; *Thompson v. Arms*, 5 Vt. 546.

When the facts which constitute a transaction are stated in detail in a referee's report, his finding as to their effect is a conclusion of law. *Hotchkiss v. Mosher*, 48 N. Y. 478.

But such questions as actual fraud and collusion are in general conclusions of fact, not of law, and should be determined

by the auditor upon the evidence. *Edson v. Sprout*, 33 Vt. 77.

**2.** *Lyman v. Warren*, 12 Mass. 412; *Calvert v. Carter*, 18 Md. 73; *Pitts v. Langsdale*, 32 Ind. 218.

**3.** *Dickerson v. Whittlesay*, 2 Root (Conn.), 121.

**4.** *Voorhis v. Voorhis*, 50 Barb. (N. Y.) 119; *Benson's Appeal*, 48 Pa. St. 159; *Conklin v. Morton*, 40 Ind. 76.

But it seems that the auditor may make an additional statement explanatory of his views, after having signed and filed his report. *May v. Corlew*, 4 Vt. 12.

**Amendment of Report.**—After the report is filed the auditor cannot amend it without order of court. *Ann v. Coleman*, 11 Kan. 460.

But it is competent for the auditor, by permission of the court, to amend his report in matter of form so as to make its meaning plain, after it has been filed in court, and this without a formal order of recommendation for that purpose. *Fales v. Hemenway*, 64 Me. 373.

Or to show that the auditor had been duly sworn. *Quick v. Cox*, 38 Iowa, 568.

**5.** *Chappedelaine v. Dechenaux*, 4 Cranch (U. S.), 308; *Thompson v. Arms*, 5 Vt. 546; *Curtiss v. Greenbanks*, 24 Vt. 536; *Crousillat v. McCall*, 5 Binn. (Pa.) 433; *Moore v. Hunter*, 4 Yeates (Pa.), 358; *Wilson v. Wilson*, 2 South. (N. J.) 791; *Anderson v. Usher*, 59 Ga. 567; *Kinsey v. Kinsey*, 37 Ala. 394; *Whitehead v. Perie*, 15 Tex. 7; *Davis v. Foley*, *Walker* (Mich.), 43. Compare *Calvert v. Carter*, 18 Md. 73; *Benoit v. Brill*, 24 Miss. 83.

In Maryland, it appears, the auditor's report may be excepted to in the court of appeals, and the whole accounts gone into, whether general or special exceptions, or none at all, had been taken in the trial court. *Ringgold v. Ringgold*, 1 Har. & Gill (Md.), 11. Compare *Calvert v. Carter*, 18 Md. 73.

**Errors on the Face of the Report.**—An important exception to the rule above

party excepting to the report must designate particularly the erroneous action excepted to, and refer the court distinctly and clearly to the ground of his exception.<sup>1</sup>

**13. Correction and Confirmation of Report.**—In some jurisdictions the auditor's report is of no effect until sanctioned by the court.<sup>2</sup> In others, where the report is defective, it may be corrected or amended by the court and made to conform to the evidence.<sup>3</sup>

**14. Effect of Report as Evidence.**—In some jurisdictions the report of the auditor is final and conclusive as to all questions of fact, unless plain and palpable error be shown.<sup>4</sup> In other States it is merely *prima-facie* evidence for the jury, and liable to be controlled or overthrown by other evidence.<sup>5</sup> But the report is

stated as follows: If errors appear on the face of the report the exception need not be taken before the auditor, but the report may be corrected or set aside in the trial court, notwithstanding such omission. *Murray v. Betsey*, 2 Cranch (U. S.), 124; *Chappedelaine v. Deche-naux*, 4 Cranch (U. S.), 308; *Himely v. Rose*, 5 Cranch (U. S.), 313; *Whipple v. Whipple*, 13 R. I. 534.

**Evidence to Sustain Exceptions.**—Exceptions to an auditor's report need not set forth any of the evidence, more especially where the auditor himself has reported all the evidence, and thus made it part of the record. *White v. Reviere*, 57 Ga. 386.

Where, on the trial of exceptions to an auditor's report upon questions of fact, no evidence is introduced to support the exceptions, the report will be sustained; but the rule is otherwise where the exceptions are upon questions of law. *Brinson v. Wessolowski*, 57 Ga. 142. And see *Benoit v. Brill*, 24 Miss. 83.

1. *Wood v. Barney*, 2 Vt. 369; *Newell v. Doty*, 33 N. Y. 83; *Moyer v. Railroad*, 88 N. Y. 351; *Scrivener v. Scrivener*, 1 Har. & J. (Md.) 743; *Allison v. Bryson*, 65 N. Car. 44; *State v. Foy*, 71 N. Car. 527; *Cincinnati v. Cameron*, 33 Ohio St. 336.

It seems that an exception to the finding of a referee in general terms, that "the plaintiff excepts to each and every one of the decisions and rulings of the referee against the plaintiff on the trial of this action, severally, separately, and distinctively," amounts to nothing. *Newell v. Doty*, 33 N. Y. 83.

An exception to a report that it is contrary to law is too indefinite. *Allison v. Bryson*, 65 N. Car. 44.

Or that it is against the evidence. *Scrivener v. Scrivener*, 1 Har. & J. (Md.) 743.

2. *Dorsey v. Hammond*, 1 Bland Ch. (Md.) 463.

3. *Davis v. Roberts*, 1 Sm. & Mar. Ch. (Miss.) 543; *Bannister v. Patty*, 35 Wis. 215; *Dorr v. Hammond*, 7 Colo. 79.

Where auditors reject certain distinct claims of the defendant, and report a balance in the plaintiff's favor, and the court decide that such claims ought to be allowed, the plaintiff may remit the amount erroneously rejected and have the report confirmed for the rest. *Smith v. Brush*, 11 Conn. 359.

**4. Report Conclusive.**—*Ludlam's Estate*, 13 Pa. St. 188; *Whiteside's Appeal*, 23 Pa. St. 114; *Burrough's Appeal*, 26 Pa. St. 264; *White's Appeal*, 36 Pa. St. 134; *Stewart v. Bowen*, 49 Pa. St. 245; *Brua's Appeal*, 55 Pa. St. 294; *Clendaniel's Estate*, 12 Phila. (Pa.) 53; *Hoxie v. Lincoln*, 25 Vt. 206; *Bacon v. Vaughn*, 34 Vt. 73; *Mitchell v. Dockray*, 63 Me. 82; *White v. Anderson*, 13 La. An. 577; *Farley v. Ward*, 1 Tex. 646; *Hoyt v. Clark*, 8 Mo. App. 566.

But when error is shown to exist the report is subject to correction by the court. *Chew's Appeal*, 45 Pa. St. 228.

If an auditor decides a question of fact, and it appears from his report that there was any testimony before him tending to prove the fact found by him, his decision is conclusive; but if he reports all the evidence on which he based his findings, and that evidence has no tendency to prove the fact, his finding may be corrected by the court. *Hodges v. Hosford*, 17 Vt. 615; *Cottrill v. Vanduzen*, 22 Vt. 511.

**5. Report Prima-facie Evidence.**—*Lyman v. Warren*, 12 Mass. 412; *Taunton Iron Co. v. Richmond*, 8 Metc. (Mass.) 434; *Rich v. Jones*, 9 Cush. (Mass.) 329; *Gould v. Norfolk Lead Co.*, 9 Cush. (Mass.) 338; *Leathe v. Bullard*, 8 Gray (Mass.), 545; *Phillips v. Cornell*, 133 Mass. 546; *Bellows v. Woods*, 18 N. H. 305; *Mathes v. Bennett*, 21 N. H. 188; *Shouter v. Swindles*, 37 N. H. 559; *Knowlton v. Tilton*, 38 N. H. 257; *Drew*

always subject to an examination of the principles of law upon which the auditor proceeded, and his conclusions of law are not binding on the court.<sup>1</sup> On trial before a jury either party may introduce the report of an auditor previously made in the same cause as evidence of such facts as he may desire to prove by it.<sup>2</sup> In the appellate court the auditor's findings of fact are to be regarded as having the same weight and effect as the verdict of a jury, and will only be reversed on such principles as would warrant the court in setting aside a verdict and granting a new trial.<sup>3</sup>

*v. Claggett*, 39 N. H. 431; *Lull v. Cass*, 43 N. H. 62. Compare *Harland's Case*, 5 Rawle (Pa.), 323.

In Massachusetts it is held that the auditor's report is *prima facie* evidence, but does not change the burden of proof. *Morgan v. Morse*, 13 Gray (Mass.), 150; *Crafts v. Crafts*, 13 Gray (Mass.), 360. Compare *Taunton Iron Co. v. Richmond*, 8 Metc. (Mass.) 434.

Where the auditor's report is only *prima facie* evidence before the jury, either party may impeach it by evidence tending to show its incorrectness. *Kendall v. Weaver*, 1 Allen (Mass.), 277; *Tourne v. Riviere*, 1 La. An. 380.

An auditor's report is competent evidence of facts stated in it which were objected to before him as inadmissible under the answer, if the answer, after the return of the report and before trial, is amended by leave of court so as to meet the objection. *Washington Ins. Co. v. Dawes*, 6 Gray (Mass.), 376.

In a suit for the conversion of chattels the plaintiff is not precluded from putting in evidence of their value by the fact that he offered no evidence on this point before the auditor. *Fletcher v. Powers*, 131 Mass. 333.

**Auditor may Testify.**—The auditor himself is a competent witness to establish what matters entered into his decision, in order to determine what questions are concluded by the award, or whether the award is in itself binding on the parties. *Evans v. Clapp*, 123 Mass. 165; *Stone v. Aldrich*, 43 N. H. 52. Compare *Monk v. Beal*, 2 Allen (Mass.), 585.

The facts found by an auditor and stated in his report may be used as evidence for the purpose of attacking his conclusions thereon. *Keaton v. Mayo*, 71 Ga. 649.

1. *Parker v. Avery*, Kirby (Conn.), 553; *State v. Worthington*, 1 Root (Conn.), 137; *Spalding v. Dunlap*, 1 Root (Conn.), 413; *Read v. Barlow*, 1 Aik. (Vt.) 145; *Fay v. Green*, 1 Aik. (Vt.) 71; *Wood v. Barney*, 2 Vt. 369; *Brua's Appeal*, 55 Pa. St. 294; *Morrill v. Keyes*,

14 Allen (Mass.), 222; *Meserve v. Andrews*, 104 Mass. 360; *Moniteau Bank v. Miller*, 73 Mo. 187.

Hence the court may accept the facts found by the auditor, but derive a different conclusion from them, and render such judgment as is applicable. *Meserve v. Andrews*, 104 Mass. 360; *Moniteau Bank v. Miller*, 73 Mo. 187.

2. *Conner v. New England Co.*, 40 N. H. 537; *Lull v. Cass*, 43 N. H. 62.

But the party so introducing the report as evidence is not thereby estopped to deny its correctness in any other particular nor precluded from impeaching it. *Conner v. New England Co.*, 40 N. H. 537.

The trial court has authority to require an auditor's report to be read at the trial, although neither party relies on it or desires to offer it in evidence. *Clark v. Fletcher*, 1 Allen (Mass.), 53; *Lull v. Cass*, 43 N. H. 62.

One who asks that his cause may be referred, waives his right to object to the constitutionality of the law making the auditor's report evidence upon a trial. *Deverson v. Railroad*, 58 N. H. 129.

3. *Landis v. Scott*, 32 Pa. St. 495; *Robb's Appeal*, 41 Pa. St. 45; *Adleman v. Steel*, 13 Phila. (Pa.) 529; *Harris's Appeal*, 2 Grant (Pa.), 304; *Bolton's Appeal*, 3 Grant (Pa.), 204; *Kerr v. McGuire*, 28 N. Y. 446; *Thompson v. Wood*, 1 Hilt. (N. Y.) 93; *Grube v. Schultheiss*, 4 Daly (N. Y.), 207; *Hodges v. Parker*, 17 Vt. 242; *Harrington v. Edson*, 24 Vt. 555; *Perry v. Sullivan Mfg. Co.*, 6 Rich. (S. Car.) 310; *McClenny v. Hubbard*, 20 Fla. 541; *Whicher v. Steamboat Ewing*, 21 Iowa, 240; *Winona v. Huff*, 11 Minn. 119; *Botsford v. Sweet*, 49 Mich. 120; *Noonan v. Hood*, 49 Cal. 293.

But where the facts found by an auditor are not materially disputed, but his conclusions from them are based wholly upon inferences drawn from those facts, the appellate court will reverse a decree of the court below confirming the auditor's report, if in their opinion the con-

**15. Impeaching and Setting Aside Report.**—The report of the auditor—even where, by statute, it is made final as to the facts—may be impeached for fraud, misconduct, or very evident error.<sup>1</sup> Thus the report will be set aside where its conclusions of fact are not supported by any evidence, or are opposed to such a great preponderance of testimony as to furnish obvious error.<sup>2</sup> Or by reason of the misconduct of the auditors, or the informality or irregularity of their proceedings.<sup>3</sup> But not generally for alleged error in the inclusion or omission of a disputed item of account.<sup>4</sup> Nor on the ground of newly-discovered evidence.<sup>5</sup> In a remonstrance against a report of auditors it is necessary to state with reasonable certainty a good and sufficient cause for setting aside the award.<sup>6</sup>

clusions are not warranted by the facts. *Milligan's Appeal*, 97 Pa. St. 525.

1. *Stehman's Appeal*, 5 Pa. St. 413; *Closson v. Means*, 40 Me. 337.

The report of an auditor differs from an award by arbitrators in this, that the former may be set aside by the court, although neither fraud, corruption, nor gross misconduct on the part of the auditor be proved. *Field v. Holland*, 6 Cranch (U. S.), 8.

2. *Putnam v. Dutton*, 8 Vt. 396; *Bickling's Appeal*, 2 Brewst. (Pa.) 202; *Thompson's Appeal*, 103 Pa. St. 603. Compare *Wood v. Barney*, 2 Vt. 369; *Parker v. Avery*, Kirby (Conn.) 353; *Colgrove v. Rockwell*, 24 Conn. 584.

Where the party's claim rests upon two grounds, and the auditor reports the facts in regard to each point and decides the cause generally for such party without specifying upon which ground he decides it, this furnishes no reason for setting aside the report, provided it shows that testimony was given before him tending to support his decision upon both grounds. *Cahill v. Patterson*, 30 Vt. 592.

A report of a referee will not be set aside upon a bare preponderance of evidence against some of his findings, when there is material evidence to sustain each one of his findings. *Ruth v. Ford*, 9 Kans. 17.

An auditor's report is not to be set aside if he comes to the result by inferring a fact which he might legitimately infer from the evidence before him. *Kent v. Hancock*, 13 Vt. 519.

3. *Closson v. Means*, 40 Me. 337; *Gulley v. Macy*, 89 N. Car. 343. See *Blodgett v. Cummings*, 60 N. H. 115.

If an auditor expresses an opinion upon the facts in the case before his appointment, unknown to the party at the time of his appointment, it is cause for

setting aside the report; but otherwise of his expressing an opinion upon a question of law arising in the case. *Fay v. Green*, 2 Aik. (Vt.) 386.

But the mere fact that the report of a referee is different from the conclusion reached by him upon the trial and orally announced, is no ground for setting it aside; until he makes his report the case is with him for decision and he can change his view. *Gray v. Fisk*, 12 Abb. Pr. N. S. (N. Y.) 213.

**Death of Party.**—Where the action of book-debt is brought against two defendants, and one dies after the accounts are submitted to an auditor, he may still proceed to adjust the accounts; and the party's death being suggested on the record in the court where the suit is pending, judgment may be rendered on the report. *Newton v. Higgins*, 2 Vt. 366.

4. It is no objection to an auditor's report that items of account, existing prior to a settlement between the parties, are allowed by the auditor, provided it is found that those items were not included in the settlement; and whether included or not is a fact for the auditor to find. *Newell v. Keith*, 11 Vt. 214; and see *Wheelock v. Moultons*, 13 Vt. 430.

If a report of auditors allows a specific item which ought to have been rejected, it may, nevertheless, be accepted under a rule that such item be deducted. *Sargeant v. Pettibone*, 1 Aik. (Vt.) 355.

5. *Williams v. Welles*, 1 Root (Conn.), 261.

6. *Maples v. Avery*, 6 Conn. 20.

And very clear and satisfactory proof of the errors of which the party excepting complains is necessary to set aside the report of an auditor; unless the errors appear on the face of the report itself. *Stehman's Appeal*, 5 Pa. St. 413.

In order to show sufficient ground to set aside the report of an auditor, who

**16. Recommitment.**—When the auditor's report is set aside, in whole or in part, for indefiniteness, omissions, errors of calculation, or similar reasons, it may be referred back to him for such further action as justice may require.<sup>1</sup> The obtaining new evidence by either party is not necessarily a sufficient cause for the rejection or recommitment of an auditor's report.<sup>2</sup> When the report is recommitted to the auditor generally, it rests in his discretion whether to require the parties to go over the whole trial anew or not; but if the justice of the case plainly requires it, he should hear any new evidence.<sup>3</sup>

simply states that the account is disallowed, the facts or grounds on which the disallowance proceeded must be stated, or it must appear that the auditor was requested to state the facts found by him in reference to the account. *Wait v. Johnson*, 24 Vt. 112.

1. *Shearman v. Akens*, 4 Pick. (Mass.) 283; *Leach v. Shepard*, 5 Vt. 363; *Woodbridge v. Addison*, 6 Vt. 204; *Warden v. Johnson*, 11 Vt. 455; *Mason v. Potter*, 26 Vt. 722; *Bolware v. Bolware*, 1 Litt. (Ky.) 124; *Turner v. Houghton*, 71 N. Car. 370; *Lee v. Abrams*, 12 Ill. 111; *Bazille v. Ullman*, 2 Minn. 134; *Mast v. Lockwood*, 59 Wis. 48. Compare *Gardiner v. Schwab*, 34 Hun (N. Y.), 582. See *Huntington v. Rumrill*, 3 Day (Conn.), 390.

Where, by comparing the auditor's report with the evidence contained in the record, it appears that the adjustment made by him was not perfectly correct, and there is not evidence enough before the court to make a just decree, the report should be recommitted and the auditor required to make a new adjustment and report the evidence. *Bolware v. Bolware*, 1 Litt. (Ky.) 124; *Mast v. Lockwood*, 59 Wis. 48.

**Extraneous Matter.**—If the report includes extraneous matters, it is the proper practice, upon motion, to recommit the report with instructions to the auditor to strike out such foreign matter. *Bartlett v. Trefethen*, 14 N. H. 427; *Green v. Pickering*, 28 N. H. 360.

**After Use on Trial.**—Where an auditor's report has been used as evidence on a trial, another auditor will not be appointed on review until the first appointment has been discharged and the report vacated. *Pollard v. Verbeck*, 16 N. H. 435.

But it is not error to recommit a report to an auditor, although it has been accepted and used at a trial, if the verdict has been set aside and a new trial granted. *Phillips v. Gerry*, 75 Me. 277.

If the re-hearing is ordered for reasons that are personal to the auditor, then an-

other may be substituted in his place. *Mengas's Appeal*, 19 Pa. St. 222.

**No Appeal.**—No exception lies to the action of the trial court in recommitting or refusing to recommit the case to the auditor for the correction of errors or irregularities; the appellate court will not interfere with its discretion in this respect. *Monk v. Beal*, 2 Allen (Mass.), 585; *Packard v. Reynolds*, 100 Mass. 153; *Jewell v. Reddington*, 57 Iowa, 92; *State v. Magnin*, 85 N. Car. 114. Compare *Sloan v. McMahon*, 85 N. Car. 296.

2. *Nutter v. De Rochemont*, 46 N. H. 80. Compare *Camac v. Francis*, 3 Wash. (U. S. C. C.) 108.

Where the report of the auditor is referred back to him he may properly include in it a demand of the creditor not exhibited to him until after the report had been recommitted. *Taylor v. Woodward*, 5 Halst. (N. J.) 1.

3. *Leach v. Shepard*, 5 Vt. 363; *Mason v. Potter*, 26 Vt. 722.

If an action in which an auditor has made a report is referred to him again to reconsider and revise his report upon evidence or arguments to be offered by the defendant, he may hear evidence and arguments on the plaintiff's part, in respect to errors in his first report. *Shearman v. Akens*, 4 Pick. (Mass.) 283.

But where a case is referred back to an auditor merely to take additional testimony pertinent to a particular issue, he will exceed his powers in hearing evidence on other points. *O'Neil v. Cappelletti*, 62 Mo. 202.

And where the report is recommitted for an error of calculation, the auditor has no power to re-hear the parties, and his report on such re-hearing will be set aside and the original report confirmed. *Stewart v. Bowen*, 49 Pa. St. 245; *Donnelly's Estate*, 3 Phila. (Pa.) 18.

**Auditor's Discretion.**—In cases where it lies in the discretion of the auditor to re-examine the merits of the controversy on a recommitment of his report, his refusal to do so will not furnish ground for re-

**17. Compensation of Auditors.**—In some jurisdictions the courts possess the power to fix the compensation of auditors, and the amount rests in their discretion.<sup>1</sup> In others it may be fixed by agreement of parties.<sup>2</sup>

**AUTHENTICATION.**—1. **Definition.**—To authenticate a writing is to perform certain acts upon it for the purpose of rendering it admissible in evidence as being what it purports to be without proof by witnesses that it is such.<sup>3</sup>

**2. Public Documents or Records.**—Authentication of writings is confined for the most part to copies of public documents or records which, in the nature of things, cannot be removed from their place of deposit for use in evidence. Such documents or records, when relevant, are ordinarily proved by authenticated copies.<sup>4</sup>

**3. Modes of Authentication at Common Law.**—*Office or Certified Copy.*—At common law there were two modes of authenticating a copy of a public record or document: one by certificate of the officer having the custody of such record or document.<sup>5</sup>

jecting the second report. *Leach v. Shepard*, 5 Vt. 363.

1. *Porter's Appeal*, 30 Pa. St. 496; *Fitzsimmon's Appeal*, 4 Pa. St. 248.

The compensation of auditors is regulated not only by the labor which they bestow, but also by the amount of money to be distributed, and it is not to be diminished on the ground that the counsel did not argue the case before the auditor, and desired merely a *pro forma* decree. *Lombard v. Bayard*, 1 Wall. Jr. (U. S.) 196.

Where a statute provides for a referee's fee for each day occupied in a hearing, a fee is not chargeable for days on which there was an adjournment only. *In re Clark*, 36 Hun (N. Y.), 301.

If an auditor is entitled to his fees before filing his report, the party interested in it cannot compel the adverse party to advance the money by making affidavit of his own inability to pay the fees. *King v. Whiton*, 15 Wis. 690.

2. *Brown v. Windmuller*, 36 N. Y. Superior Ct. 76; *Bradley's Estate*, 11 Phila. (Pa.) 87.

Where the statute provides that the parties to a reference may agree as to the referee's compensation, he may recover from both jointly the amount agreed on. *Malone v. Roby*, 62 Wis. 459.

**Authorities on Auditors.**—*Troubat & Haly's Practice* (Pa.) Fish's Ed. ii. 181, *et seq.*; *Bacon's Abr. tit. Account, F.*; *Hoffman on Referees*, Ed. 1875; *Morse on Arbitration and Award*, Ed. 1872.

3. *Bouvier Law Dict.*; *Burrill Law Dict.*

4. 1 Greenl. Evid. §§ 501, 502.

5. 1 Greenl. Ev. §§ 503, 507.

According to the American doctrine, any officer having the custody of public documents or records, may certify copies of the same. *Lane v. Bommelmann*, 17 Ill. 95; *Simmons v. Spratt*, 20 Fla. 495; *Floyd v. Ricks*, 14 Ark. 286. In England such officer cannot certify unless required by law to furnish copies on request. *Black v. Lord Braybrook*, 2 Stark. 7. In *State v. Cake*, 24 N. J. L. 516, it was held he could not certify unless expressly authorized by law to give copies. See, *accord*, *Strother v. Christy*, 2 Mo. 119; *Rowland v. McGee*, 4 Bibbs. (Ky.) 439.

A certified copy proves itself. The court requires no proof of the signature of the certifying officer. *Snyder v. Bowman*, 4 Watts (Pa.), 132; *Bryan v. Wear*, 4 Mo. 106; *Prather v. Johnson*, 3 Harr. & J. (Md.) 487; *Floyd v. Ricks*, 14 Ark. 286; *Bixby v. Carskaddon*, 55 Iowa, 533; *Barrett v. Godshaw*, 12 Bush (Ky.), 592. (This applies only to copies of domestic documents or records. As to certification of copies of foreign documents, see n. 2, p. 1021.)

But the signature may be proved false. *Prather v. Johnson*, 3 Harr. & J. (Md.) 487; *Bryan v. Wear*, 4 Mo. 106.

The keeper of records can only certify copies of documents properly on record. *Hatchett v. Conner*, 30 Tex. 104.

The records must be public. *Hallowell, etc., Bank v. Hamlin*, 14 Mass. 178.

A deputy of the legal custodian may certify in his principal's name. *Grant v. Levan*, 4 Pa. St. 393; *Hague v. Porter*, 45 Ill. 318; *Greasons v. Davies*, 9 Iowa,

**Exemplification.**—The other is by exemplification, that is, by affixing the great seal of state to the copy.<sup>1</sup>

**4. Foreign Records.**—Copies of foreign documents and records including foreign statutes may be fully authenticated by exemplification under the great seal.<sup>2</sup>

Office copies are probably also admissible on proof of the handwriting of the certifying officer, and that he is official custodian.<sup>3</sup>

219; Triplett v. Gill, 7 J. J. Marsh. (Ky.) 433.

But not in his own. Snyder v. Brown, 4 Watts (Pa.). 132. But see Moore v. Farrow, 3 A. K. Marsh. (Ky.) 41. And see p. 1023 (note), ATTESTATION.

**Court Records.**—A copy of a court record, certified by the clerk under the seal of the court, is universally held to be sufficiently authenticated for admission in evidence in other courts within the same State. Commonwealth v. Phillips, 11 Pick. (Mass.) 28; De Sobry v. De Laistre, 2 Har. & J. (Md.) 191, 218.

It has been held that the seal of the court is not necessary. Chamberlin v. Ball, 15 Gray (Mass.), 352; Rowland v. McGee, 4 Bibb. (Ky.) 439. *Contra*, see Lansing v. Russell, 3 Barb. Ch. (N. Y.) 325.

1. Henthorn v. Doe, 1 Blackf. (Ind.) 157; State v. Carr, 5 N. H. 367; United States v. Amedy, 11 Wheat. 392; United States v. Johns, 4 Dall. 412; Lee v. Getty, 26 Ill. 76; Barton v. Murrain, 27 Mo. 235.

Exemplification is not usual except to authenticate copies of foreign records. Copies of domestic records are usually certified.

2. Griswold v. Pitcairn, 2 Conn. 85; Black v. Lord Braybrook, 2 Stark. 7; Gunn v. Peakes, 30 N. W. Rep. 466.

A court will take judicial notice of the great seals of all governments recognized by its own government. Hence such a seal of itself sufficiently authenticates copies of foreign records or laws. Henthorn v. Doe, 1 Blackf. (Ind.) 157; State v. Carr, 5 N. H. 367; United States v. Amedy, 11 Wheat. 392; United States v. Johns, 4 Dall. 412; Black v. Lord Braybrook, 2 Stark. 7.

It is said that the bare seal, without any certificate, is sufficient authentication. Griswold v. Pitcairn, 2 Conn. 85. But see Wilson v. Walker, 3 Stew. (Ala.) 211. But the seal must be affixed to the copy itself, and not to a certificate to the copy. Black v. Lord Braybrook, 2 Stark. 7.

Where a foreign government is not recognized by the government to which the court belongs, its seal must be proved. United States v. Palmer, 3 Wheat. 610;

The Estrella, 4 Wheat. 298; United States v. Hutchings, 1 Bald. (U. S. C. Ct.) 616.

Where an island, belonging to a foreign government, was in a state of revolution, it was held that an exemplification could be made under the private seal of its governor. Hadfield v. Jameson, 2 Munf. (Va.) 53. This decision seems of doubtful authority.

3. Las Caygas v. Larionda's Syndics, 4 Mart. (La.) 283; Mauri v. Hefferman, 13 Johns. (N. Y.) 58; Packard v. Hill, 7 Cow. (N. Y.) 434; Buttrick v. Allen, 8 Mass. 273; Capling v. Herman, 17 Mich. 524. In Petermans v. Laws, 6 Leigh. (Va.) 523, it was said that a foreign record could not be proven by an office copy. See also Silver Lake Bank v. Hardin, 1 Wright (Ohio), 430.

It is admitted that a certificate purporting to be signed by the custodian of the record is not sufficient to authenticate the copy. Such certificate must itself be authenticated. Church v. Hubbard, 2 Cranch. 187, 238; Catlett v. Pacific Ins. Co., 1 Paine (U. S. C. Ct.), 594. A certificate by a U. S. minister under his official seal will not authenticate such certificate. Stein v. Bowman, 13 Pet. 209.

In the case of foreign judicial records the seal of the court must be attached if there is any. Cavan v. Stewart, 1 Stark. 525. But such seal will not be judicially noticed, and must therefore be proved in order to authenticate the copy. Delafield v. Hand, 3 Johns. (N. Y.) 310.

It seems that both the seal of court and the clerk's signature must be proved. Pickard v. Bailey, 26 N. H. 152; Gardner v. Columbian Ins. Co., 7 Johns. (N. Y.) 511; Packard v. Hill, 7 Cow. (N. Y.) 434; Thompson v. Mason, 4 Brad. (Ill.) 452; Capling v. Herman, 17 Mich. 524. But see Delafield v. Hand, 3 Johns. (N. Y.) 310, which seems to hold that proof of the seal is enough.

Where the copy is not sealed, it is authenticated by proof that there was no seal, and that the clerk's signature is genuine. Packard v. Hill, 7 Cow. (N. Y.) 434.

A court of admiralty being a court of the law of nations, its seal will be every-



**5. Book of Foreign Laws.**—A book of foreign laws purporting to be printed by printers proved to be the printers authorized by the government to print its laws is sufficiently authenticated as a copy of such laws.<sup>1</sup>

**6. Judicial Records of Other States.**—*Acts of Congress.*—The authentication of copies of the laws and judicial records of one State for admission in evidence in any other has been regulated by act of Congress passed May 26, 1790.<sup>2</sup>

where judicially noticed, and hence, of itself, sufficiently authenticates copies of the records of such court, without proof of the seal or the clerk's signature. *Gardere v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 511; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 484; *Yeaton v. Fry*, 5 Cranch. 335, 343; *Thompson v. Stewart*, 3 Conn. 171; *Green v. Waller*, 2 Ld. Raym. 893. *Contra*, *Callett v. Pacific Ins. Co.*, 1 Paine (U. S. C. Ct.), 594.

1. A book purporting to be an edition of the French code, and to be printed at the royal printing-office, was held admissible to prove the laws of France, a witness (the French vice-consul) having testified that the said royal printing-office was the establishment authorized by the government to print its laws. *Lacon v. Higgins*, 3 Stark. 178. A printed volume of the laws of a British province, of an edition proved to have received the sanction of the executive and judicial officers of the province, is admissible in evidence to prove such laws in a State court. *Owen v. Boyle*, 15 Me. 147. The edition must be proved to have been authorized or recognized by authority. The certificate of an American consul to this effect under his seal of office is not sufficient. *Church v. Hubbard*, 2 Cranch, 187, 236.

A book purporting to be an edition of the statutes of a sister State, and to have been printed by authority, is admissible without further authentication to prove such laws. *Mullen v. Morris*, 2 Pa. St. 85; *Greasons v. Davis*, 9 Iowa, 219; *Beddis v. James*, 6 Binn. (Pa.) 321; *Kean v. Rice*, 12 S. & R. (Pa.) 203; *Allen v. Watson*, 2 Hill (S. Car.), 319; *Young v. Bank of Alexandria*, 4 Cranch, 384; *Raynham v. Canton*, 3 Pick. (Mass.) 293. *Contra*, *Packard v. Hill*, 2 Wend. (N. Y.) 411; *Comparet v. Jernegan*, 5 Blackf. (Ind.) 375.

So a book purporting to be a copy of private laws published by authority is admissible to prove such laws. *Beddis v. James*, 6 Binn. (Pa.) 321; *Kean v. Rice*, 12 S. & R. 203; *Allen v. Watson*, 2 Hill (S. Car.), 319; *Young v. Bank of Alexandria*, 4 Cranch. 384; *Raynham v. Canton*, 3 Pick. (Mass.) 293.

In most States there are statutes making books of statutes of other States purporting to be printed by authority, evidence of such statutes. 1 Greenl. Ev. (13th Ed.) § 489, n. 3.

2. This act, as subsequently amended, provides that "the acts of the Legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form, and the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." U. S. R. S. 1878, tit. 13, ch. 17, § 905.

**Other Proof Not Excluded.**—This act does not abrogate common-law proof of foreign records. *Goodwyn v. Goodwyn*, 25 Ga. 203; *Karr v. Jackson*, 28 Mo. 316. The States may pass laws for the authentication of foreign records not inconsistent with the act of Congress. *Ordway v. Conroe*, 4 Wis. 45.

**Federal and State Courts.**—The Federal and State governments are not foreign to each other, and hence the act of Congress does not apply to the authentication of copies of records of the courts of the one in the courts of the other. *Bennett v. Bennett*, Deady (U. S. C. Ct.), 299; *Turnbull v. Payson*, 95 U. S. 418; *Mewster v. Spalding*, 6 McL. (U. S. C. Ct.), 24; *Adams v. Way*, 33 Conn. 419. *Contra*, *Grant v. Levan*, 4 Pa. St. 393.

Certification by the clerk under seal of the court is all that is necessary. *Mewster v. Spalding*, 6 McL. (U. S. C. Ct.), 24; *Bennett v. Bennett*, Deady (U. S. C. Ct.), 299; *Turnbull v. Payson*, 95 U. S. 418.

## 7. Non-Judicial Records.—*Act of Congress.*—The authentication of copies of non-judicial records for admission in evidence in

The Federal courts are of course not foreign to each other. *Mason's Admr. v. Lawrason*, 1 Cranch (U. S. C. Ct.), 190.

**Justices' Judgments.**—The act does not apply to the authentication of judgments or proceedings of justices of the peace of other States. *Blackwell v. Glass*, 43 Ark. 209; *Lawrence v. Gaultney*, 1 Cheeves (S. Car.), 7; *Gay v. Lloyd*, 1 Greene (Ia.), 78; *Robinson v. Prescott*, 4 N. H. 450; *Mahurin v. Bickford*, 6 N. H. 567. Unless the justice's court be a court of record. *Bissell v. Edwards*, 5 Day (Conn.), 363; *Scott v. Cleveland*, 3 T. B. Mon. (Ky.) 62.

**Confederate States.**—The records of judicial proceedings of a court of one of the Confederate States may, since the close of the war, be authenticated under the act of Congress by the clerk and judge of the court where they are preserved. *Steere v. Tenney*, 50 N. H. 461.

**Attestation.**—The attestation must conform to the laws of the State where the record is copied. *Simons v. Cook*, 29 Iowa, 324. It must, in general, be made by the clerk of the court before which the proceedings took place. *Kirkland v. Smith*, 2 Mart. (La. R.) N. S. 497, 498; *Thomas v. Tanner*, 6 T. B. Mon. (Ky.) 52, 53, 54. But where the records have been transferred into another court, the clerk of the latter must attest. *Danals v. Watson*, 36 Iowa, 116; *Kirkland v. Smith*, 2 Mart. (La. R.) N. S. 497, 498; *Thomas v. Tanner*, 6 T. B. Mon. (Ky.) 52, 53, 54.

The clerk must himself sign his name to the attestation. An attestation appearing on its face to have been signed in the name of the clerk, by a deputy, is defective, and the judge's certificate that the attestation is in due form does not cure the defect. *Morris v. Patchin*, 24 N. Y. 394. *Contra*, *Young v. Glinzer*, 1 Greene (Iowa), 196.

**The Judge's Certificate.**—The certificate must state that the attestation is in due form. *Ordway v. Conroe*, 4 Wis. 45; *Wilburn's Admr. v. Hall*, 16 Mo. 426; *Shown v. Barr*, 11 Ired. L. (N. Car.) 296.

The certificate must state that the person attesting as clerk was such at the date of his attestation. *Johnson v. Howe's Admr.*, 2 Stew. (Ala.) 27.

The certificate that the attestation is in due form, is conclusive, and where the attestation does not on its face show that the transcript is of the entire record the certificate cures this defect. *Lee v. Gause*, 2 Ired. L. (N. Car.) 440; *Ferguson v.*

*Harwood*, 7 Cranch. 408; *Coffee v. Neely*, 2 Heisk. (Tenn.) 304. The certificate as to due attestation cannot be contradicted by evidence. *Ferguson v. Harwood*, 7 Cranch. 408, 412.

The certificate must show that the judge is the sole, or chief, or presiding judge. *Morris v. Patchin*, 24 N. Y. 394; *Pratt v. King*, 1 Oreg. 49; *Stephenson v. Bannister*, 3 Bibb. (Ky.) 369.

In *Central Bank v. Veasey*, 14 Ark. 671, it was held that a certificate by a judge not stated to be the sole, or chief, or presiding judge, was sufficient, when it did not appear from the record that there was more than one judge. *Accord*, see *Keyes v. Mooney*, 9 Pac. R. (Oreg.) 400. *Aliter*, where the record shows that there were more judges than one. *Van Storch v. Griffin*, 71 Pa. St. 240.

Where there is no chief or presiding judge, a certificate signed by all the judges is valid. *Arnold v. Frazier*, 5 Strobb. (S. Car.) 33.

Where the chancellors preside in turn, a certificate signed "I. J. J.", one of the chancellors of the court of said State, and in turn presiding chancellor for G. district," purports to be by the chancellor presiding in the district at the time of the certificate, and is sufficient. *Taylor v. Kilgore*, 33 Ala. 214.

A certificate by a judge designating himself "first justice, etc.," is insufficient without proof that by the laws of the State the first or oldest justice was chief or presiding justice. *Hudson v. Daily*, 13 Ala. 722.

The certificate must show that the judge certifying is judge of the court from whose records the transcript is taken. *Brown v. Johnson*, 42 Ala. 208; *Elliott v. McClelland*, 17 Ala. 206; *Geron v. Felder*, 15 Ala. 304; *Randall v. Burtis*, 57 Tex. 362. Thus, where the record is of a circuit court for a given county, and the certificate is signed by the judge as presiding judge of the circuit court for a given district, but it does not appear whether the district includes the given county, the certificate is insufficient. *Elliott v. McClelland*, 17 Ala. 206. *Aliter*, where it appears that the district includes the county. *Geron v. Felder*, 15 Ala. 304.

Copies of the records of a court where the offices of judge and clerk are held by the same person may be authenticated under the act of Congress. *State of Ohio v. Hinchman*, 27 Pa. St. 479; *Sally v. Gunter*, 13 Rich. L. (S. Car.) 72.

But such person must attest as clerk

courts of other States has also been provided for by act of Congress.<sup>1</sup>

**8. Justice of the Peace.**—A justice of the peace may, at common law, certify copies of documents and proceedings on file in his office.<sup>2</sup>

**9. Private Documents.—Deeds.**—By the laws of most States an acknowledgment, properly certified, sufficiently authenticates a deed.<sup>3</sup>

**Notarial Protest**—The seal of the notary sufficiently authenticates a notarial protest.<sup>4</sup>

and certify as judge in conformity to the provisions of the act. *Melius v. Houston*, 41 Miss. 59; *Spencer v. Langdon*, 21 Ill. 192; *Stewart v. Swazey*, 23 Miss. 502; *Low v. Burrows*, 12 Cal. 181. The certificate or attestation must show that the offices of judge and clerk are held by one person. *Low v. Burrows*, 12 Cal. 181; *Stewart v. Swazey*, 23 Miss. 502; *Spencer v. Langdon*, 21 Ill. 192.

**Seal.**—Where there is a seal of court it must be affixed. *Allen v. Thaxter*, 1 Blackf. (Ind.) 399. It must be affixed to the copy of the record, not to the judge's certificate. *Turner v. Waddington*, 3 Wash. (U. S. C. Ct.) 126.

If the court have no seal, this should appear from the attestation or certificate. *Alston v. Taylor*, 1 Hayw. (N. Car.) 395, note —; *Craig v. Brown*, 1 Pet. (U. S. C. Ct.) 352, 353. The private seal of the clerk is sufficient where there is no seal of the court. *Strode v. Churchill*, 2 Litt. (Ky.) 75.

1. U. S. R. S. 1878, tit. 13, ch. 17, § 906.

2. *Tillotson v. Warner*, 3 Gray (Mass.), 574; 1 Greenl. Ev. § 501. *Contra*, *Magee v. Scott*, 32 Pa. St. 539. There are generally statutes allowing justices to certify such copies. *McDermott v. Barnum*, 19 Mo. 204; *Steel v. Pope*, 6 Blackf. (Ind.) 176.

As to the authentication of copies of foreign judgments of justices, in *Dragoo v. Graham*, 9 Ind. 212, it was said that "the certificate of the justice to the transcript (of a foreign justice's judgment) and of the clerk (of the Court of Common Pleas) to the official character of such justice may perhaps in the absence of a statutory requirement be sufficient to authenticate the judgment."

A certificate of a clerk of court as to the capacity of the justice of the peace, will not authenticate a copy of a foreign judgment of a justice of the peace, certified by the justice, unless it be proved that the clerk was authorized by law to certify the capacity of justices. *Trader v. McKee*, 2 Ill. 558. But where the clerk is so authorized, his certificate of

capacity sufficiently authenticates it. *Kuhn v. Miller's Admrs.*, 1 Wright (Ohio), 127; *Belton v. Fisher*, 44 Ill. 32.

A copy of a foreign justice's judgment, certified by the justice rendering it, and having custody of the papers, supported by a sworn deposition of the justice that he was justice of the peace and rendered the judgment in question, is not sufficiently authenticated. *Silver Lake Bank v. Hardin*, 1 Wright (Ohio), 430.

The authentication of copies of documents and proceedings on file in justice courts, either domestic or foreign, is generally regulated by statute. 1 Greenl. Ev. § 501.

Where a State law makes a copy of a foreign justice's judgment, certified by the justice rendering it, legal evidence when accompanied by a certificate of the county clerk to the justice's capacity, a certificate of capacity by the clerk of Common Pleas for the county does not sufficiently authenticate a copy of a foreign justice's judgment without proof that the clerk of Common Pleas is or corresponds to the county clerk. *Gay v. Lloyd*, 1 Greene (Iowa), 78.

Under the Iowa statute admitting copies of a foreign justice's judgments certified by the justice rendering them, copies certified by the successor in office of such justice are admissible. *Railroad Bank v. Evans*, 32 Iowa, 202.

Foreign justices' judgments are provable under § 371, Kansas Code. If the justice has no clerk he may himself attest as such and certify as justice. *Case v. Huey*, 26 Kan. 553.

3. See title ACKNOWLEDGMENTS. See also *Stimson Am. Stat. Law*, § 1572.

Foreign acknowledgments generally require for their authentication a certificate of magistracy authenticating the signature and capacity of the notary or other officer certifying the acknowledgment. *Stimson Am. Stat. Law*, § 1583.

4. *Ross v. Bedell*, 5 Duer (N. Y.), 462; *Nicholls v. Webb*, 8 Wheat. 333; *Townsend v. Sumrall*, 2 Pet. 179; *Chanoine v.*

**AUTHORITY.** (See also AGENCY.)

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| 1. <i>Definition.</i>  | 14. <i>General Authority.</i>                                 |
| 2. <i>How Conferred.</i>                                     | 15. <i>Implied Authority of Particular Classes of Agents.</i> |
| 3. <i>Determination of Agent's Authority.</i>                | 16. <i>Implied Authority in Particular Agencies.</i>          |
| 4. <i>Revocation.</i>  | <i>Agent to Sell.</i>   |
| 5. <i>Determination by Operation of Law.</i>                 | <i>Agent to Collect.</i>                                      |
| 6. <i>Express Authority.</i>                                 | <i>Agent to Buy.</i>  |
| 7. <i>Implied Authority.</i>                                 | <i>Agent to Borrow Money.</i>                                 |
| 8. <i>Custom or Usage.</i>                                   | <i>Agent to Loan Money.</i>                                   |
| 9. <i>Substitution.</i>                                      | <i>Agent to Sue.</i>  |
| 10. <i>Sudden Emergency.</i>                                 | <i>Agent to Manage Real Property.</i>                         |
| 11. <i>Actual Authority.</i>                                 |   |
| 12. <i>Declaration of Alleged Agent as to his Authority.</i> | 17. <i>Construction.</i>                                      |
| 13. <i>Special Authority.</i>                                | 18. <i>Ambiguity in Instruction.</i>                          |
|  | 19. <i>Public Agents.</i>                                     |

1. **Definition.**—In the law of agency, authority is the power conferred upon the agent by the principal to act for him or represent him.<sup>1</sup>

2. **How Conferred.**—In general, there are no formal requisites to the delegation of an authority.<sup>2</sup>

Authority may be delegated by a written instrument or by parol.<sup>3</sup>

Fowler, 3 Wend. (N. Y.) 173; Bank v. Pursley, 3 T. B. Mon. (Ky.) 238; Bryden v. Taylor, 2 Harr. & J. (Md.) 399; Spengill v. Perkins, 2 Root (Conn.), 274.

But it seems that it is only in the cases of notices of protest that a notarial seal proves itself. In other cases it must be proven. Haggitt v. Ineff, 5 De G. M. & G. 910; *In re Earl's Trust*, 4 K. & J. 300. But see Cole v. Sherard, 11 Exch. 482.

1. Evans Agency (Ewell's Ed.), 35.

The word "authority" is used to denote existence of a power, to act for or represent another; also the nature or extent of such power. It is sometimes used to denote the instrument or arrangement conferring or giving rise to the power.

2. Story Agency (9th Ed.), §§ 46 and 47; Evans Agency (Ewell's Ed.), 16 *et seq.*

Authority to execute a sealed instrument must be delegated by an instrument under seal. Story Agency (9th Ed.), § 48; Evans Agency (Ewell's Ed.), p. 17.

Under the English statute of frauds an authority to create any estate or interest in lands other than a leasehold interest for less than three years must be by instrument in writing. Story Agency (9th Ed.), § 50, n. 5.

But where the statute requires an instrument to be in writing to bind the party he may nevertheless appoint an agent to sign for him by parol. Story Agency (9th Ed.), § 50; Coles v. Tre-

cothick, 9 Ves. 250; 2 Kent Comm. pp. 613, 614; Newton v. Bronson, 13 N. Y. 587.

At one time it was held that authority of an agent of a corporation must be under the corporate seal. Story Agency (9th Ed.), § 52; Evans Agency (Ewell's Ed.), 18 *et seq.*

But this rule has been changed, and now it is held that corporate agents may be appointed in the same manner as any other agents. Story Agency, § 52; Smith v. Birmingham Gas Co., 1 Ad. & E. 526; Osborn v. Bank of United States, 9 Wheat. (U. S.) 738; Franklin v. Globe Mut. Life Ins. Co., 52 Mo. 461; Warren v. Ocean Ins. Co., 15 Me. 409; Olcott v. Tioga R. Co., 27 N. Y. 546; Dent v. North American S. S. Co., 49 N. Y. 390.

An authority to sign an unsealed writing need not be in writing. Story Agency, § 50; Riley v. Minor, 29 Mo. 439; Lawrence v. Taylor, 5 Hill (N. Y.), 107; McWhorter v. McMahan, 10 Paige (N. Y.), 386; Worrall v. Munn, 5 N. Y. 229; Newton v. Bronson, 13 N. Y. 587.

3. Story Agency (9th Ed.), § 47; Evans Agency (Ewell's Ed.), p. 16; Kent Comm. p. 612; Rann v. Hughes, 7 T. R. 350; Howe Machine Co. v. Clark, 15 Kan. 492.

"Parol" includes verbal declarations, acts, and implications. Story Agency (9th Ed.), § 47.

In whichever way delegated, the authority will be limited to that expressly conferred, and such implied authority as is necessarily or ordinarily incident thereto.<sup>1</sup>

**3. Determination of Agent's Authority.**—An agent's authority may be determined by agreement of the parties, by revocation, or by operation of law.<sup>2</sup>

**4. Revocation.**—The authority of an agent may be revoked unless it is coupled with an interest.<sup>3</sup>

**5. Determination by Operation of Law.**—The authority is determined by operation of law in case of the death of the principal,<sup>4</sup>

An agency may exist even without any verbal agreement or arrangement. It may be implied from the conduct or relation of the parties. *Commercial Bank of Buffalo v. Warren*, 15 N. Y. 577; *Sweetser v. French*, 2 Cush. (Mass.) 309; *Bank of Ky. v. Brooking*, 2 Litt. (Ky.) 41; *Gulick v. Grover*, 33 N. J. L. 463; *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 125, 145; *Kiley v. Forsee*, 57 Mo. 390; *Kelsey v. National Bank*, 69 Pa. St. 426; *Weaver v. Ogletree*, 39 Ga. 586.

1. *Evans Agency* (Ewell's Ed.), book 2, ch. 2 (especially p. 120); *Story Agency* (9th Ed.), §§ 58, 60, 76 *et seq.*; *Martin v. Farnsworth*, 49 N. Y. 555; *Cougar v. Galena, etc., R. Co.*, 17 Wis. 477; *Holloway v. Stephens*, 2 Th. & C. (N. Y.) 562; *Stoddart's Case*, 4 Ct. of Cl. 511; *Fletcher v. Evans*, 140 Mass. 241; *Banes v. Hannibal*, 71 Mo. 449. See *infra*, p. 1028, n. 2.

2. *Evans Agency* (Ewell's Ed.), 76.

3. *Evans Agency* (Ewell's Ed.), p. 83; *Story Agency* (9th Ed.), § 477.

An authority is "coupled with interest" when the existence or continuance of the authority is of advantage to the person upon whom such authority is conferred. An authority coupled with an interest is irrevocable only when a contract not to revoke, founded on a valuable consideration, can be implied from the circumstances, or was expressly entered into. *Smart v. Sanders*, 5 C. B. 895; *De Comas v. Prost*, 3 Moo. P. C. N. S. 158. See *Viser v. Bertrand*, 16 Ark. 296.

A power of sale given to a factor to secure advances is an authority coupled with an interest, but it is revocable unless given for a valuable consideration, as in consideration of advances to be made. *Smart v. Sanders*, 5 C. B. 895; and *De Comas v. Prost*, 3 Moo. P. C. N. S. 158.

A power of attorney to confer judgment is not revocable. *Kindig v. March*, 15 Ind. 248.

The special rights which certain classes of agents possess by reason of the very existence of the agency, such as a factor's

or auctioneer's right of lien, do not constitute "an interest." But an authority to sell and apply the proceeds in payment of a debt due the agent is an authority coupled with an interest. *Gausson v. Morton*, 10 B. & C. 731. See *Kindig v. March*, 15 Ind. 248; *Drinkwater v. Goodwin*, Cowp. 251.

A power of attorney given to secure a previously existing debt is said to be irrevocable. *Gilbert v. Holmes*, 64 Ill. 548, 559; *Walsh v. Whitcomb*, 2 Esp. 565.

An authority to sell on commission is not an authority coupled with an interest. *Walker v. Denison*, 86 Ill. 142. See also *Gilbert v. Holmes*, 64 Ill. 549; *Bonney v. Smith*, 17 Ill. 531; *Chambers v. Seay*, 73 Ala. 372; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Coffin v. Landis*, 46 Pa. St. 426.

The fact that an authority is expressed to be irrevocable will not make it so when not "coupled with an interest." *Chambers v. Seay*, 73 Ala. 372; *McGregor v. Gardner*, 14 Iowa, 326; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Walker v. Denison*, 86 Ill. 142.

In order to make the authority irrevocable, the consideration must be given for the agreement not to revoke. It must be independent of the compensation for the services to be performed. *Blackstone v. Buttermore*, 53 Pa. St. 266.

4. *Evans Agency* (Ewell's Ed.), p. 88; *Story Agency* (9th Ed.), §§ 349, 488; *Clayton v. Merrett*, 52 Miss. 353; *Galt v. Galloway*, 4 Pet. (U. S.) 332; *Gale v. Tappan*, 12 N. H. 145; *Farrow v. Wilson*, L. R. 4 C. P. 744; *Davis v. Windsor Sav. Bank*, 46 Vt. 728; *Travers v. Crane*, 15 Cal. 12; *Rigs v. Cage*, 2 Humph. (Tenn.) 350; *Lewis v. Kerr*, 17 Iowa, 73; *Saltmarsh v. Smith*, 32 Ala. 404; *Marlett v. Jackman*, 3 Allen (Mass.) 287; *Johnson v. Wilcox*, 25 Ind. 182. Compare *Bank of New York v. Vanderhorst*, 32 N. Y. 553; *Cassidy v. McKenzie*, 4 W. & S. (Pa.) 282; *Dick v. Page*, 17 Mo. 234; *Ish v. Crane*, 8 Ohio St. 520.

Authorities, although coupled with an

or by his bankruptcy,<sup>1</sup> or by the insanity of the principal.<sup>2</sup>

**6. Express Authority.**—Express authority is such authority as is conferred upon the agent in express terms.<sup>3</sup>

Third persons having notice of the extent of the authority expressly conferred are not justified in assuming powers in the agent in excess of such authority.<sup>4</sup>

interest such as would make them irrevocable by the act of the donor, are determined by his death. This is because an authority, being merely a power to represent a principal and act in his name and stead when the principal dies, and thus becomes incapable of acting, the power to act for him necessarily determines. *Hunt v. Rousmanier's Admrs.*, 8 Wheat. 174; *Houghtaling v. Marvin*, 7 Barb. (N. Y.) 412; *McGriff v. Porter*, 5 Fla. 373.

But where the authority relates to the disposition of property, and the authority is coupled with an estate or special property in such property, the death of the donor of the authority will not determine the authority. *Knapp v. Alvord*, 10 Paige (N. Y.), 205; *Hunt v. Rousmanier's Admrs.*, 8 Wheat. (U. S.) 174; *McGriff v. Porter*, 5 Fla. 373; *Frink v. Roe*, 11 Pac. R. (Cal.) 820; *Bonney v. Smith*, 17 Ill. 531; *Gilbert v. Holmes*, 64 Ill. 549; *Burr v. Schroeder*, 32 Cal. 609; *Tharp v. Brenneman*, 41 Iowa, 251.

In this class of cases the estate which the agent possesses enables him to act in his own name, and hence the technical reason why the death of the principal should operate to determine the agency does not exist. *Hunt v. Rousmanier's Admrs.*, 8 Wheat. (U. S.) 174; *McGriff v. Porter*, 5 Fla. 373; *Knapp v. Alvord*, 10 Paige (N. Y.), 205.

In the case of *Knapp v. Alvord* the transaction appears to have been a pledge to secure a debt with a power of sale. It is difficult to see how the lien gave the agent power to transfer title by his own act. The title never having been divested from the donor of the power was in him, and it is hard to see how it could be transferred except by his act. If so, the existence of the pledge did not obviate the technical difficulties above adverted to in the way of a sale of the property after the death of the donor of the power.

The following cases illustrate the distinction between powers of attorney determinable by the principal's death, and those not thus determinable:

*Moore v. Hall*, 48 Mich. 143. Here a note was indorsed to an agent to collect so as to pass title to him, and it was held that his authority to collect was not determined by the death of his principal.

But it was held otherwise where the agent was merely given possession of the notes in order to collect them. *Darr v. Darr*, 59 Iowa, 81.

The distinction between powers irrevocable by the act of the principal and those irrevocable by death is often overlooked. See *Chambers v. Seay*, 73 Ala. 377; *Walker v. Dennison*, 86 Ill. 142.

1. *Evans Agency* (Ewell's Ed.), p. 88; *Story Agency* (9th Ed.), § 349; *Minett v. Forrester*, 4 Taunt. 541; *Drinkwater v. Goodwin*, Cowp. 251; *Parker v. Smith*, 16 East, 382; *Ex parte Snowball*; *In re Douglas*, L. R. 7 Ch 534.

2. *Story Agency* (9th Ed.), § 481.

As a general rule the insanity of the principal operates *per se* to determine or suspend the agency. *Matthiessen, etc., Co. v. McMahon*, 38 N. J. L. 536.

But see *dictum* of Bramwell, J., in *Drew v. Nunn*, L. R. 4 Q. B. D. 661, 669, that insanity must amount to *dementia* in order to determine agency.

There is some authority in favor of the view that the agency is not revoked until the insanity is found by inquisition. 2 Kent Comm. 645; *Story Agency* (9th Ed.), § 481, n. 3; *Wallis v. Manhattan Bank*, 2 Hall (N. Y.), 495.

It has been held that where one who has held out another as his agent subsequently becomes insane, and, during his insanity, the agent buys goods in his name, of one who has no notice of the insanity, the principal is liable for the contract price. And it was said that the same principle would apply in case of the determination of the agency by death. *Drew v. Nunn*, L. R. 4 Q. B. D. 661. See *Story Agency* (9th Ed.), § 481, n. 3, citing 1 Bell. Comm. (5th Ed.), § 413, pp. 488-490; *Matthiessen, etc., Co. v. McMahon's Admr.*, 38 N. J. L. 536.

3. *Evans Agency* (Ewell's Ed.), 101; *Story's Agency* (9th Ed.), §§ 45, 58.

4. *Evans Agency* (Ewell's Ed.), 62; *Story Agency* (9th Ed.), § 72; *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. (N. Y.) 592; *People v. Bostwick*, 43 Barb. (N. Y.) 9; *Eaton v. Delaware, etc., R. Co.*, 57 N. Y. 382; *Craighead v. Peterson*, 72 N. Y. 279; *Delafield v. Illinois*, 26 Wend. (N. Y.) 193; s. c., 2 Hill (N. Y.), 159; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Stainer v. Tysen*, 3 Hill (N.

**7. Implied Authority.**—Such authority as an agent possesses as is not express, but is inferred from the surrounding circumstances, such as the acts of the principal, the nature of the business delegated, usages, etc., is implied authority.<sup>1</sup>

An agent has implied authority to do such acts as are necessarily involved in the performance of the acts which he is delegated to perform.<sup>2</sup>

Y.), 279; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44; s. c., 8 Am. Dec. 219; *Hovey v. Brown*, 59 N. H. 114; *Towle v. Leavitt*, 23 N. H. 360; s. c., 55 Am. Dec. 195; *Hatch v. Taylor*, 10 N. H. 538; *Jeffrey v. Hursh*, 49 Mich. 31; *Weaver v. Bechtel*, 53 Mich. 516; *Brown v. Johnson*, 12 Sm. & M. (Miss.) 398; s. c., 51 Am. Dec. 118; *Fox v. Fisk*, 6 How. (Miss.) 345; *Carter v. Taylor*, 6 Sm. & M. (Miss.) 367; *Roberts v. Rumley*, 58 Iowa, 301; *Loddell v. Baker*, 1 Metc. (Mass.) 193; s. c., 35 Am. Dec. 358; *Jackson v. Badger*, 26 N. W. Rep. (Minn.) 908; *Thomas v. Joslin*, 30 Minn. 388; *Siebold v. Davis*, 25 N. W. Rep. (Iowa) 778; *Hampton v. Moorhead*, 62 Iowa, 91; *Veeder v. McMurray*, 23 N. W. Rep. (Iowa) 285; *Rountree v. Davidson*, 18 N. W. Rep. (Wis.) 518; *Campbell v. Campbell*, 57 Wis. 288; *Snow v. Perry*, 9 Pick. (Mass.) 539; *Wood v. Goodridge*, 6 Cush. (Mass.) 123; s. c., 52 Am. Dec. 771; *Bliss v. Clark*, 16 Gray (Mass.), 60; *Fisher v. Campbell*, 9 Port. (Ala.) 210; *Powell v. Henry*, 27 Ala. 612; *Baring v. Pierce*, 5 Watts & S. (Pa.) 548; s. c., 40 Am. Dec. 534; *Johnson v. Wingate*, 29 Me. 404; *Thompson v. Stewart*, 3 Conn. 171; s. c., 8 Am. Dec. 168; *Equitable Life Ass. Soc. v. Poe*, 53 Md. 28; *Bryden v. Taylor*, 2 Harr. & J. (Md.) 596; s. c., 3 Am. Dec. 554; *Blane v. Proudfit*, 3 Call. (Va.) 207; s. c., 2 Am. Dec. 546; *Gordon v. Buchanan*, 5 Yerg. (Tenn.) 71; *Huntington v. Wilder*, 6 Vt. 334; *Brown v. Frantum*, 6 La. 39; *Bank of Hamburg v. Johnson*, 3 Rich. (S. Car.) 42; *Tomlinson v. Collett*, 3 Blackf. (Ind.) 436; *Walker v. Skipwith*, Meig (Tenn.), 502; s. c., 33 Am. Dec. 161; *Schimmelpennich v. Bayard*, 1 Pet. (U. S.) 264; *Parsons v. Armor*, 3 Pet. (U. S.) 413; *United States v. Williams*, 1 Ware (U. S.), 175; *Waters v. Brogden*, 1 You. & Jerv. 457.

If the power of the agent is created by a written instrument, and that known to the party with whom the contract is made, it cannot be enlarged by evidence of usage. *Delafield v. Illinois*, 26 Wend. (N. Y.) 192. *Compare Le Roy v. Beard*, 8 How. (U. S.) 451.

1. Story Agency (9th Ed.). §§ 47, 58,

97; *Evans' Agency* (Ewell's Ed.), p. 101; *Higgins v. Armstrong*, 10 Pac. Repr. (Colo.) 232.

2. An authority to sell lands for cash confers on the agent the implied authority to receive the purchase-money. *Alexander v. Jones*, 64 Iowa, 207; *Peck v. Harriott*, 6 S. & R. (Pa.) 146; s. c., 9 Am. Dec. 415; *Yerbey v. Grigsby*, 9 Leigh. (Va.) 387; *Johnson v. McGruder*, 15 Mo. 365; *Hackney v. Jones*, 3 Humph. (Tenn.) 612; *Higgins v. Moore*, 6 Bosw. (N. Y.) 344; *Goodale v. Wheeler*, 11 N. H. 424; *Hoskins v. Johnson*, 5 Sneed (Tenn.), 469; *Mann v. Robinson*, 19 West Va. 49; s. c., 42 Am. Rep. 771.

But authority to sell land on credit does not imply authority to receive payment for it. *Mann v. Robinson*, 19 W. Va. 49; s. c., 42 Am. Rep. 771.

Authority to sell land for cash gives no implied authority to receive merchandise in payment. *Lumpkin v. Wilson*, 5 Heisk. (Tenn.) 555. See *Rhine v. Blake*, 59 Tex. 240; *Reese v. Medlock*, 27 Tex. 120; *Taylor v. Starkey*, 59 N. H. 142.

An agent to sell lands has authority to execute all instruments necessary to complete the sale. *Valentine v. Piper*, 22 Pick. (Mass.) 85; s. c., 33 Am. Dec. 715; *Yale v. Eames*, 1 Metc. (Mass.) 486; *People v. Boring*, 8 Cal. 407; s. c., 68 Am. Dec. 331; *Fogarty v. Sawyer*, 17 Cal. 589; *Plummer v. Buck*, 16 Neb. 322; *Hemstreet v. Burdick*, 90 Ill. 444.

But not to license a purchaser to enter and cut timber prior to a conveyance. *Hubbard v. Elmer*, 7 Wend. (N. Y.) 446; s. c., 22 Am. Dec. 590.

Or to sell at auction. *Towle v. Leavitt*, 23 N. H. 360; s. c., 55 Am. Dec. 195.

An authority to give orders as to delivery is implied from an authority to purchase grain. *Owen v. Brockschmidt*, 54 Mo. 285.

So an authority to purchase goods where the principal does not furnish the money, implies an authority to purchase on credit. *Sprague v. Gillett*, 9 Metc. (Mass.) 91; *Perrotin v. Cucullu*, 6 La. 587.

But not to borrow money for such pur-

An agent has also implied authority to do such acts as are naturally or usually incident to the execution of the agency.<sup>1</sup>

**8. Custom or Usage.**—An agent possesses by implication such powers as by established usage or custom pertain to the agency.<sup>2</sup>

chase. *Bank of Indiana v. Bugbee*, 3 Keyes (N. Y.), 461.

An agent to buy who is furnished with funds has ordinarily no authority to buy on credit. *Komorowski v. Krumdick*, 56 Wis. 23; *Jaques v. Todd*, 3 Wend. (N. Y.) 83; *Fraser v. McPherson*, 3 Desau. (S. Car.) 393. Compare *Adams v. Boies*, 24 Iowa, 96; *Paine v. Tillinghast*, 52 Conn. 532.

An agent to purchase goods has in general no authority to sign his principal's name to a note for the goods. But if a note is necessary to transacting the business he has implied authority to sign. *Temple v. Pomroy*, 4 Gray (Mass.), 128.

Authority to investigate the accounts of a corporation implies power to employ expert assistance. *Star Line v. Van Vliet*, 43 Mich. 364.

Authority to carry out a contract implies no power to change it. *Gerrish v. Maher*, 70 Ill. 470; *Goodman v. Meixel*, 53 Ind. 11.

An agent furnished with funds has no implied authority to borrow. *Proctor v. Tows*, 3 N. E. Rep. (Ill.) 569.

1. *Story Agency* (9th Ed.), § 58; *Evans Agency* (Ewell's Ed.), 107; *Benjamin v. Sales* (Bennett's Ed.), § 624; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Anderson v. Coonley*, 21 Wend. (N. Y.) 279; *Peck v. Harriott*, 6 S. & R. (Pa.) 146; s. c., 9 Am. Dec. 415; *Benjamin v. Benjamin*, 15 Conn. 347; s. c., 39 Am. Dec. 384; *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285; s. c., 19 Am. Dec. 92; *Shackman v. Little*, 87 Ind. 181; *Star Line v. Van Vliet*, 43 Mich. 364; *Earnest v. Stoller*, 2 McCrary (U. S.), 380; *State v. Gates*, 67 Mo. 139; *Taylor v. Hudgins*, 42 Tex. 244; *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Gaines v. McKinley*, 1 Ala. 446; *Williamson v. Canaday*, 3 Ired. L. (N. Car.) 349; *Woodford v. McClenahan*, 4 Gilm. (Ill.) 85; *Peters v. Farnsworth*, 15 Vt. 155; s. c., 40 Am. Dec. 671; *Lane v. Dudley*, 2 Murph. (N. Car.) 119; s. c., 5 Am. Dec. 523; *Ala. Gt. So. R. v. Hill*, 76 Ala. 303.

One employed to ship goods may make a reasonable contract limiting carrier's liability. *Illinois Cent. R. Co. v. Jonte*, 13 Ill. App. 424; *Shelton v. Merch. Des. Co.*, 59 N. Y. 258; *Nelson v. Hud-*

*son River R. Co.*, 48 N. Y. 498; *Redfield v. Carriers*, § 52.

But authority to procure a cargo in a foreign port does not imply authority to modify or cancel the charter party. *Ye Seng Co. v. Corbitt*, 7 Sawy. (U. S. C. Ct.) 368; s. c., 9 Fed. Rep. 423.

Authority to hire includes authority to fix compensation. *Alabama Great Southern R. Co. v. Hill*, 76 Ala. 303.

As to the length of the engagement. *Williams v. Getty*, 31 Pa. St. 461; s. c., 72 Am. Dec. 757. Compare *Pasco v. Smith*, 49 Conn. 576.

But does not include the power to allow an employé to engage in other business antagonistic to the interests of the principal. *Adams Exp. Co. v. Trego*, 35 Md. 47.

Authority to canvass for the sale of a sewing-machine implies no authority to hire a horse and buggy for use in carrying on the agency. *Howe Machine Co. v. Ashley*, 60 Ala. 496. Compare *Bentley v. Doggett*, 51 Wis. 224; s. c., 37 Am. Rep. 827. See *Sampson v. Singer Sew. Mach. Co.*, 5 S. Car. 465; *Huntley v. Mathias*, 90 N. Car. 101; s. c., 47 Am. Rep. 516.

**Admissions, Etc.**—An agent has implied authority to make such admissions and declarations as are necessarily or naturally incident to the business he is entrusted with. *American Fur Co. v. United States*, 2 Pet. (U. S.) 358; *City Bank v. Bateman*, 7 Har. & J. (Md.) 104; *Sharp v. New York*, 40 Barb. (N. Y.) 256; *Stewartson v. Watts*, 8 Watts (Pa.), 392; *Chorpenning v. Royce*, 58 Pa. St. 476.

2. *Story Agency* (9th Ed.), § 60; *Evans Agency* (Ewell's Ed.), 108; *Sutton v. Tatham*, 10 Ad. & E. 27; *Smith v. Lindo*, 5 C. B. N. S. 587.

One employing a broker to act for him will be bound by the customs of brokers, even though ignorant of them. *Pollock v. Stables*, 12 Q. B. 765; *Bayliffe v. Butterworth*, 1 Exch. 425; *Sutton v. Tatham*, 10 Ad. & El. 27; *Northern, etc., R. Co. v. Bastiun*, 15 Md. 494; *Whitehouse v. Moore*, 13 Abb. Pr. (N. Y.) 142; *Coles v. Bristowe*, L. R. 4 Ch. App. 3; *Griswell v. Bristowe*, L. R. 4 C. P. 36.

But a usage or custom will not be allowed to overthrow or change the entire



9. **Substitution.**—An agent has, in general, no implied authority to delegate his authority to another.<sup>1</sup>

10. **Sudden Emergency.**—In case of a sudden emergency, an agent has implied authority to depart from his instructions in order to take such measures as the special circumstances may seem to require.<sup>2</sup>

11. **Actual Authority.**—Authorities may also be classified into actual and ostensible, actual authority being the authority, express and implied, actually conferred upon the agent;<sup>3</sup> while ostensible authority is such authority as third persons are justified by the acts or representations of the principal in assuming the agent to possess.<sup>4</sup>

On the principle of estoppel, acts of an agent within the scope of his ostensible, but in excess of his real, authority are binding upon his principal as to third persons who have relied upon the agent's possessing such authority as he appears to possess.<sup>5</sup>

character of the agency. *Robinson v. Mollett*, L. R. 7 H. of L. 802.

1. *Tippets v. Walker*, 4 Mass. 596; *Brewster v. Hobart*, 15 Pick. (Mass.) 302; *Stoughton v. Baker*, 4 Mass. 522; s. c., 3 Am. Dec. 236; *Connor v. Parker*, 114 Mass. 331; *Lewis v. Ingersoll*, 3 Abb. App. Dec. (N. Y.) 55; *Commercial Bank v. Norton*, 1 Hill (N. Y.), 501; *Hawley v. James*, 5 Paige (N. Y.), 318; *Lyon v. Jerome*, 26 Wend. (N. Y.), 485; s. c., 37 Am. Dec. 271; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; *Bocock v. Pavey*, 8 Ohio St. 270; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520; *Warner v. Martin*, 11 How. (U. S.) 209, 223; *Expr. Winsor*, 3 Story (U. S.), 411; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; *Gillis v. Bailey*, 1 Fost. (N. H.) 149; *Andover v. Grafton*, 7 N. H. 304; *Mayer v. McLure*, 36 Miss. 389; s. c., 72 Am. Dec. 190; *Bissell v. Roden*, 34 Mo. 63; *McClure v. Miss. Valley Ins. Co.*, 4 Mo. App. 148; *Crozier v. Reins*, 4 Ill. App. 564; *Mason v. Waite*, 4 Scam. (Ill.) 127; *Locke's Appeal*, 72 Pa. St. 491; *McCormick v. Bush*, 38 Tex. 314; *Smith v. Sublett*, 28 Tex. 163; *Entz v. Mills*, 1 McM. (S. Car.) 453; *Wilson v. York*, etc., R. Co., 11 Gill & J. (Md.) 58, 74; *Hunt v. Douglass*, 22 Vt. 128; *Loomis v. Simpson*, 13 Iowa, 532; *Furnas v. Frankman*, 6 Nebr. 429.

Merely ministerial acts may, however, be delegated by the agent. *Williams v. Woods*, 16 Md. 220; *Bodine v. Ins. Co.*, 51 N. Y. 117; *Commercial Bank v. Norton*, 1 Hill (N. Y.), 501; *Com. v. Harneden*, 19 Pick. (Mass.) 482; *Poree v. Bonneval*, 6 La. Ann. 386; *Norwich University v. Denny*, 47 Vt. 13; *Grady v. Am. Cent. Ins. Co.*, 60 Mo. 116; *Newell v.*

*Smith*, 49 Vt. 255; *Star Line v. Van Vliet*, 43 Mich. 364.

2. *Lawlor v. Keaquick*, 1 Johns. Cas. (N. Y.) 175, 179, n.; *Judson v. Sturges*, 5 Day (Conn.), 556, 560; *Forrester v. Boardman*, 1 Story (U. S. C. Ct.), 43; *Williams v. Shackleford*, 16 Ala. 318; *Greenleaf v. Moody*, 13 Allen (Mass.), 363.

3. *Evans Agency* (Ewell's Ed.) pp. 101, 452.

4. *Evans Agency* (Ewell's Ed.) pp. 101, 452.

An agent's actual and ostensible authority may be the same.

An agent's ostensible authority will include all his implied authority, in the absence of notice that it is less. Thus an agent to sell harvesters has ostensible authority to warrant. *McCormick v. Kelly*, 28 Minn. 135. So a power to sell confers an apparent power to receive payment. *Collins v. Newton*, 7 Baxt. (Tenn.) 269.

5. *Evans Agency* (Ewell's Ed.), 136, 137; *Story Agency* (9th Ed.), §§ 130, 133; *Gallinger v. Lake Shore, etc., Co.*, 30 N. W. R. (Wis.) 790; *Griggs v. Selden*, 5 Alt. R. (Vt.) 504; *Dewar v. Bank of Montreal*, 3 N. E. R. (Ill.) 746; *Story Agency* (9th Ed.), § 133; *Anderson v. Cooley*, 21 Wend. (N. Y.) 279; *Delafield Illinois*, 26 Wend. (N. Y.) 192; *Putnam v. French*, 53 Vt. 402; s. c., 38 Am. Rep. 682; *Cutler v. Boyd*, 124 Mass. 181; *Hatch v. Taylor*, 10 N. H. 538; *Fox v. Fisk*, 6 How. (Miss.) 345; *Johnson v. Wingate*, 29 Me. 404; *Lake Shore, etc., R. Co. v. Foster*, 104 Ind. 293; *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 447; *Union, etc., Ins. Co. v. Masten*, 3 Fed. Repr. 881; *Schimmelpennich v. Bayard*, 1 Pet. (U. S.) 264; *Continental Bank v. National Bank*, 50 N. Y. 575; *Cooke v.*

Third persons are not concluded by secret instructions to the agent limiting or controlling his apparent authority.<sup>1</sup>

State Nat. Bank, 52 N. Y. 96; Banks v. Everest, 35 Kan. 687; Fouque v. Burgess, 71 Mo. 389.

When one holds another out to the world as his agent, in determining the liability of the principal the question is, not what authority was intended to be given to the agent, but what authority was a third person dealing with him justified from the acts of the principal in believing was given to him. Griggs v. Selden, 58 Vt. 561; Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5.

An agent cannot bind his principal by acts in excess of his ostensible authority. Citizens' Savings Bank v. Hart, 32 La. Ann. 22; Fouque v. Burgess, 71 Mo. 389.

The agent of a county to contract for repairs on county buildings, has no ostensible authority to bind the county to pay more in county warrants than the cash value of the labor and materials in United States currency. Barton v. Sweptston, 44 Ark. 437.

<sup>1</sup> Story Agency (9th Ed.), § 73; Evans Agency (Ewell's Ed.), p. 143; Cross v. Haskins, 13 Vt. 536; Davenport v. Peoria Mar. & Fire Ins. Co., 17 Iowa, 276; Cruzan v. Smith, 41 Ind. 288; Munn v. Commission Co., 15 Johns. (N. Y.) 44; Bridenbecker v. Lowell, 32 Barb. (N. Y.) 9; Kinealy v. Burd, 9 Mo. App. 359; Farrar v. Duncan, 29 La. Ann. 126; Higgins v. Armstrong, 10 Pac. R. (Colo.) 232; Hatch v. Taylor, 10 N. H. 538; Towle v. Leavitt, 23 N. H. 360; s. c., 55 Am. Dec. 195; State v. Foster, 23 N. H. 348; s. c., 55 Am. Dec. 191; Commercial Bank v. Kortright, 22 Wend. (N. Y.) 348; s. c., 34 Am. Dec. 317; Johnson v. Jones, 4 Barb. (N. Y.) 369; Dows v. Greene, 16 Barb. (N. Y.) 72; Angell v. Hartford Ins. Co., 59 N. Y. 171; Barber v. Britton, 26 Vt. 112; Walsh v. Pierce, 12 Vt. 130; Lobdell v. Baker, 1 Metc. (Mass.) 193; s. c., 35 Am. Dec. 358; Williams v. Mitchell, 17 Mass. 98; Wilkins v. Commercial Bank, 6 How. (Miss.) 217; Planters' Bank v. Cameron, 3 Sm. & M. (Miss.) 609; St. John v. Redmond, 9 Port. (Ala.) 428; Talmage v. Bierhause, 103 Ind. 270; Robbins v. Magee, 76 Ind. 381; Stothard v. Aull, 7 Mo. 318; Minter v. Pac. R. Co., 41 Mo. 503; Eagle Bank v. Smith, 5 Conn. 71; s. c., 13 Am. Dec. 37; Swazey v. Un. Man. Co., 42 Conn. 556; Woodbury Sav. Bank v. Charter Oak Ins. Co., 31 Conn. 529; Lyell v. Sanbourn, 2 Mich. 109; Bell v. Offutt, 10 Bush (Ky.), 632; Palmer v. Cheney,

35 Iowa, 281; Nussbaum v. Heilbron, 63 Ga. 312; Thompson v. Douglass, 64 Ga. 57; City Bank of Macon v. Kent, 57 Ga. 283; Carmichael v. Buck, 10 Rich. (S. Car.) 332; s. c., 70 Am. Dec. 226; Sterling Bridge Co. v. Baker, 75 Ill. 139; Aetna Ins. Co. v. Maguire, 51 Ill. 342; Hartford Ins. Co. v. Farrish, 73 Ill. 166; Rockford Ins. Co. v. Nelson, 65 Ill. 415; Union M. L. Ins. Co. v. White, 106 Ill. 67; Houghton v. First Nat. Bank, 26 Wis. 663; Planters' Mut. Ins. Co. v. Lyons, 38 Tex. 253; Continental Ins. Co. v. Kasey, 25 Gratt. (Va.) 268; Georgia, etc., Ins. Co. v. Kinnier, 28 Gratt. (Va.) 88; Walker v. Skipwith, Meigs (Tenn.) 502; s. c., 33 Am. Dec. 161; Kinealy v. Burd, 9 Mo. App. 359; Chouteaux v. Leech, 18 Pa. St. 224; s. c., 57 Am. Dec. 602; Bryant v. Moore, 26 Me. 84; s. c., 45 Am. Dec. 96; Allen v. Ogden, 1 Wash. (U. S.) 174; U. S. v. Howard, 7 Biss. (U. S.) 56.

Where a third party has notice of such instructions, the principal will, of course, not be bound. Stainer v. Tysen, 3 Hill (N. Y.), 279; Barnard v. Wheeler, 24 Me. 412; Bryant v. Moore, 26 Me. 84; s. c., 45 Am. Dec. 96; Longworth v. Conwell, 2 Blackf. (Ind.) 469; Leathers v. Springfield, 65 Mo. 507; Lake Shore & M. S. R. Co. v. Foster, 4 N. East. Repr. (Ind.) 20.

An agreement between principal and agent that the latter shall sell only to responsible parties, furnishes no defence to the principal in an action by a third person. Byrne v. Massasoit Packing Co., 137 Mass. 313.

Where an agent is appointed by writing, persons affected with notice of the existence of the writing are also affected with notice of the scope of the agent's authority as set forth therein, whether they actually see such writing or not. Story Agency (9th Ed.), § 72; Evans Agency (Ewell's Ed.), 143; Attwood v. Munnings, 7 B. & C. 278, 283-285; Withington v. Herring, 5 Bing. 442; Stainer v. Tysen, 3 Hill, 279; North River Bank v. Aymar, 3 Hill, 262; Munn v. Commission Co., 15 Johns. (N. Y.) 44; Rossiter v. Rossiter, 8 Wend. (N. Y.) 498, 499.

Under a contract of agency for the sale of pianos, it was required that all orders should be sent to the principal to be filled by him. The agent had possession of a piano under a special contract of bailment, which he sold. Held, the purchaser, having knowledge of agency, was chargeable with notice of its terms, and

**12. Declarations of Alleged Agent as to his Authority.**—Third persons are not justified in relying upon the declarations of one holding himself out as agent, as to the existence<sup>1</sup> or extent<sup>2</sup> of his authority.

**13. Special Authority.**—A special authority is an authority to do a particular act or acts.<sup>3</sup>

**14. General Authority.**—A general authority is an authority to act in a certain character or capacity.<sup>4</sup>

acquired no title as against the principal. *Cummins v. Beaumont*, 68 Ala. 204.

1. *Winch v. Baldwin*, 28 N. W. Repr. (Iowa) 62; *Wood Mowing, etc., Co. v. Crow*, 30 N. W. Repr. (Iowa) 609; *French v. Wade*, 35 Kans. 391; *Bacon v. Johnson*, 56 Mich. 182; *McDonough v. Heyman*, 38 Mich. 334; *Grover & B. S. M. Co. v. Polhemus*, 34 Mich. 247; *Haughton v. Maurer*, 55 Mich. 323.

2. *Brigham v. Peters*, 1 Gray (Mass.), 139; *Stollenwerck v. Thacher*, 115 Mass. 224; *Carter v. Burnham*, 31 Ark. 212; *Howe Mach. Co. v. Clark*, 15 Kans. 492; *Dawson v. Landreaux*, 29 La. Ann. 363; *Peck v. Ritchey*, 66 Mo. 114; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Grover & Baker S. Mach. Co. v. Polhemus*, 34 Mich. 247; *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. App. Dec. (N. Y.) 315; *Mapp v. Phillips*, 32 Ga. 72; *Galbreath v. Cole*, 61 Ala. 139. *Compare Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 125; s. c., 69 Am. Dec. 678.

In *Mussey v. Beecher*, 3 Cush. (Mass.) 511, an agent was by instrument in writing authorized to contract debts, but not in excess of two thousand dollars. It was held that the principal was not bound by a debt contracted by the agent with an innocent third person in excess of the limit. *Compare North River Bank v. Aymar*, 3 Hill, 262; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30, 66, 68, 70; *Griswold v. Haven*, 25 N. Y. 595; *Withington v. Herring*, 5 Bing. 442.

In *New York, etc., R. Co. v. Schuyler*, it was said by Selden, J., "that where the authority of the agent depends upon some fact outside the terms of his power, and which from its nature rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact."

In such a case the fact that the agent assumes to act is a representation that the state of facts is such as to warrant his acting. *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30, 70.

3. *Evans Agency* (Ewell's Ed.), p. 101; *Story Agency* (9th Ed.), §§ 17, 19.

A principal is not bound by the act of a special agent when done in disregard of his instructions, unless perhaps where the principal's own negligence has enabled the agent to perpetrate a fraud thereby. *Saginaw, etc., R. Co. v. Chappell*, 56 Mich. 190.

The depositary of an *escrow* is a special and not a general agent, and the person dealing with him is bound to know the extent of his powers. *Land Co. v. Peck*, 112 Ill. 408.

4. *Evans Agency* (Ewell's Ed.), p. 101; *Story Agency* (9th Ed.), §§ 17, 19, 126 *et seq.*

The term "general authority" is used to include two dissimilar things: First, an authority to represent the principal in the transaction of a business, or in some matter involving the performance of a large number of acts and a continuation of the agency for a considerable time. *Evans Agency* (Ewell's Ed.), 102. Second, an authority conferred upon an agent belonging to some one of the well-recognized classes of agents, such as brokers, factors, etc., no matter how limited the subject-matter of the agency may be. *Evans Agency* (Ewell's Ed.), 102; *Russell Merc. Agents*, 62.

The distinction between special and general agents is of little value (*Evans Agency* (Ewell's Ed.), 2, 452; *Story Agency* (9th Ed.), § 133), for the reason that questions whether an agent is special or general is never material of itself, and is only important in so far as it bears upon the ulterior questions of an agent's implied or ostensible authority. *Evans Agency* (Ewell's Ed.), 452; 2 Kent Comm. (13th Ed.) 620, n. y.

A general agency, it is submitted, is merely one of the ordinary well-recognized kinds of agencies, the powers, duties, and incidents of which are well known, such, for instance, as the agency of a factor or broker. Undoubtedly a principal employing a broker or factor is, in the absence of express restrictions, assumed to delegate to such agent all the powers customarily exercised by such agents, and the fact that the agency is "general" will have an important bear-

**15. Implied Authority of Particular Classes of Agents.**—In nearly every agency the authority of the agent is, to some extent, implied. It is rare that the agent's instructions are explicit upon every point.

ing upon the nature and extent of the agent's implied powers. Still it must be remembered that the real question to be determined is the nature and extent of such implied powers, as inferred from the nature of the matter delegated, and the customs and usages of business, and that the classification into general and special agencies is, as to this, of little or no help. So as to the question of an agent's apparent authority also the classification is unimportant. A third person is entitled to assume that an agent possesses what power his principal has held him out to possess, whether the agent is general or special. Where an agent is employed whose ordinary powers and duties are well recognized, third persons are entitled to assume that the principal expressly or impliedly conferred such ordinary powers upon the agent; but it does not help us to fix the extent of the apparent powers of such an agent to call him a general agent. *Story Agency* (9th Ed.), § 133, and note.

A general agent to manage or conduct a business has authority to do everything necessary and proper or usual in the ordinary course of the business. *Cummings v. Sargent*, 9 Metc. (Mass.) 172; *Taylor v. Labeaume*, 14 Mo. 572, 17 Mo. 338; *Baltimore, etc., Co. v. Brown*, 54 Pa. St. 77; *Bailey v. Rawley*, 1 Swan (Tenn.), 295; *Shepherd v. Milwaukee Gas Co.*, 11 Wis. 234; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Sentell v. Kennedy*, 29 La. Ann. 679; *German Ins. Co. v. Grunert*, 112 Ill. 68.

He may not sign or indorse notes. *Sewanee Mining Co. v. McCall*, 3 Head (Tenn.), 619; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494; s. c., 24 Am. Dec. 62; *Holtsinger v. Nat., etc., Bank*, 1 Sweeney (N. Y.), 64. Compare *Bailey v. Rawley*, 1 Swan (Tenn.), 295; *White v. Westport Mfg. Co.*, 1 Pick. (Mass.) 215.

He may settle claims morally though not legally binding on his principal. *Bergenthal v. Fiebrantz*, 48 Wis. 435.

An agent to manage a hotel has no implied authority to contract with a livery-stable keeper for the return and safe keeping of carriages furnished guests of the hotel. *Brockway v. Mullin*, 46 N. J. L. 448; s. c., 50 Am. Rep. 442.

A husband employed by a wife to manage a business for her is a general agent, and third persons are not bound by secret instructions limiting his apparent au-

thority. *Louisville Coffin Co. v. Stokes*, 78 Ala. 372.

A clerk managing his principal's business during his absence, has no power to bind his principal for the debt of a third party. *Ruppe v. Edwards*, 52 Mich. 411; *New York Iron Mine v. Negaunee Bank*, 39 Mich. 644; *Carter v. Burnham*, 31 Ark. 212; *Gulick v. Grover*, 33 N. J. L. 463; *Bank v. Johnson*, 3 Rich. (S. Car.) 42.

Power to represent all the interests of the principal's business does not imply power to engage in a new and different business. *Campbell v. Hastings*, 29 Ark. 512. Nor to sell the principal's land. *Smith v. Stephenson*, 45 Iowa, 645.

An authority given by an administratrix of an estate to manage her own affairs, does not extend to the affairs of the estate. *Succession of Pipes*, 26 La. Ann. 203.

A general agent to sell all the product of a manufactory, has implied authority to bind his principals by a contract for the sale and future delivery of goods to be produced. *National Furnace Co. v. Keystone Manuf. Co.*, 110 Ill. 427.

A manager of a railroad, empowered, in case of accident, to clear the road, has implied authority to put into a farm-yard swine let loose by an accident. *Hawks v. Locke*, 139 Mass. 205.

A general manager of a railroad has implied authority to employ surgical aid for an injured employee. *Walker v. Great Western R. Co.*, L. R. 2 Ex. 228. (As to the power of a general manager of a manufacturing corporation in this regard, see *Swazey v. Union Mfg. Co.*, 42 Conn. 556.) Also a sub-inspector of railway police. *Langan v. Great Western R. Co.*, 30 L. T. N. S. 173. Also a general superintendent. *Atchison, etc., R. Co. v. Reecher*, 1 Am. & Eng. R. R. Cas. 343; s. c., 24 Kan. 228. Compare *Stephenson v. New York, etc., R. Co.*, 2 Duer (N. Y.), 341. A division superintendent also has implied authority to engage surgical aid for injured employees. *Pacific R. Co. v. Thomas*, 19 Kan. 236; *Union Pacific R. Co. v. Beatty*, 10 Pac. R. (Kan.) 845; *Brown v. Missouri, etc., R. Co.*, 67 Mo. 122. But not for injured passengers. *Union Pacific R. Co. v. Beatty*, 10 Pac. R. (Kan.) 845. A general superintendent may authorize a station-master to employ surgical aid. *Atchison, etc., R. Co. v. Reecher*, 1 Am. & Eng. R. R. Cas. 343; s. c., 24 Kan. 228.

A station-agent has no implied author-

In the case of certain well-recognized classes of agents, such as brokers, factors, auctioneers, etc., settled customs and usages of business have given rise to well-established implied powers.<sup>1</sup>

ity to hire medical aid for injured employee. *Tucker v. St. Louis, etc., R. Co.*, 54 Mo. 177; *Cox v. Midland Counties R. Co.*, 3 Exch. 268. Nor has a physician. *Mayberry v. Chicago, etc., R. Co.*, 11 Am. & Eng. R. R. Cas. 29; s. c., 75 Mo. 492. Or a conductor. *Tucker v. St. Louis, etc., R. Co.*, 54 Mo. 177. But where a brakeman is injured in the discharge of his duty, at a point distant from the chief offices of the company, and is in need of immediate surgical attendance, the conductor has implied power to employ a surgeon, if there is no superior agent of the company present. *Terre Haute, etc., R. Co. v. McMurray*, 22 Am. & Eng. R. R. Cas. 371; s. c., 98 Ind. 358; 49 Am. Rep. 752.

Authority to care for an injured employee implies a power to arrange for his board and care. *Atchison, etc., R. Co. v. Reeher*, 1 Am. & Eng. R. R. Cas. 343; s. c., 24 Kan. 228. But authority to purchase medicines on credit does not imply power to contract for board and nursing. *Mayberry v. Chicago, etc., R. Co.*, 11 Am. & Eng. R. R. Cas. 29; s. c., 75 Mo. 492. Nor does authority to employ surgical aid for a passenger authorize its employment for an injured employee. *Shriver v. Stephens*, 12 Pa. St. 258.

Text writers speak of universal agencies as distinguished from general agencies. A universal agency is one where the agent has authority to represent the principal in all acts that the principal can delegate. The agent is the *alter ego* of the principal. Such an agency, although theoretically possible, never actually exists. *Story Agency* (9th Ed.), § 21.

1. *Story Agency* (9th Ed.), § 106; *Evans Agency* (Ewell's Ed.), book 2, ch. 3.

The following note contains some implied powers of certain of the more important classes of agents:

**Auctioneers.**—An auctioneer has implied authority to prescribe the rules of bidding and the terms of the sale. *Evans Agency* (Ewell's Ed.), 121; *Story Agency* (9th Ed.), § 107. To bind his principal by declarations made at the time of sale. *Evans Agency* (Ewell's Ed.), 121; *Story Agency* (9th Ed.), § 107. To sue the buyer in his own name. *Story Agency* (9th Ed.), § 107; *Evans Agency* (Ewell's Ed.), 121. He has no implied authority to receive the purchase-money for land sold by him. *Evans Agency*, p. 122; *Sykes v. Giles*, 5 M. & W. 645. Or

to employ another person to sell the property. *Evans Agency* (Ewell's Ed.), 122; *Coles v. Trecothick*, 9 Ves., Jr. 254. Or to sell on credit. *Evans Agency* (Ewell's Ed.), 122; *Williams v. Millington*, 1 H. Blk. 81. Or to allow rescission of contract of sale. *Evans Agency* (Ewell's Ed.), 122; *Nelson v. Aldridge*, 2 Stark. 435. Or to sell by private contract. *Evans Agency* (Ewell's Ed.), 122; *Daniels v. Adams*, 1 Ambl. 495.

An auctioneer cannot warrant the quality of the goods sold. He has only power to sell, not to warrant. *The Monte Allegre*, 9 Wheat. (U. S.) 616, 647; *Blood v. French*, 9 Gray (Mass.), 197. Nor can he delegate his authority. *Stone v. State*, 12 Mo. 400.

**Brokers.**—A broker has implied authority to sign the contract of sale (bought and sold note) so as to bind both parties. *Parton v. Crofts*, 16 C. B. N. S. 11.

A broker to sell goods has implied authority to sell by sample or with warranty. *Story Agency* (9th Ed.), § 109; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *The Monte Allegre*, 9 Wheat. 643, 644.

Ordinarily he has no authority by virtue of his office to contract in his own name. *Story Agency* (9th Ed.), § 109. Or to buy or sell on credit, unless by special usage of trade. *Story Agency* (9th Ed.), § 109. Or to receive payment for property sold by him. *Baring v. Corrie*, 2 B. & Ald. 137; *Campbell v. Hassell*, 1 Stark. 233. (Insurance brokers have by usage an authority to adjust and receive payment of losses. *Story Agency*, § 103; *Todd v. Reid*, 4 B. & Ald. 210; *Scott v. Irving*, 1 B. & Ald. 605; *Bonsfield v. Cresswell*, 1 Campb. 43, note.) Or to delegate his authority. *Story Agency* (9th Ed.), § 109; *Henderson v. Barnwell*, 1 Y. & Jerv. 387.

A broker employed to enter into a charter-party for his principal has no authority to make the freight payable to himself. *Walshe v. Provan*, 8 Exch. 843.

A broker to sell has no power to submit his principal's case to arbitration. *Ingraham v. Whitmore*, 75 Ill. 24.

**Factors.**—Factors have implied authority to buy and sell in their own names. *Story Agency* (9th Ed.), § 110. And to sell on credit. *Story Agency*, § 110; *Greely v. Bartlett*, 1 Greenl. (Me.) 172; *Forestier v. Badman*, 1 Story, 43; *Byrne v. Schwing*, 6 B. Mon. (Ky.) 199; *Daylight Burner Co. v. Odlin*, 51 N. H. 56.

**16. Implied Authority in Particular Agencies.—Agent to Sell.**—An agent to sell has implied authority to warrant.<sup>1</sup>

(The factor is held to a very close examination of the credit of the parties he trusts. *Foster v. Waller*, 75 Ill. 464.) And to insure. *Story Agency* (9th Ed.), § 111.

Factors may sue in their own names. *White v. Choutcau*, 10 Barb. (N. Y.) 202; *Story Agency* (9th Ed.), § 112.

Factors have no implied authority to barter goods. *Story Agency* (9th Ed.), § 113; *Guerreiro v. Peile*, 3 B. & Ald. 616; *Wheeler, etc., Mfg. Co. v. Givan*, 65 Mo. 89. Or to pledge them, except for duties or other charges due thereon. *Story Agency* (9th Ed.), § 113. (This has been changed in many jurisdictions by statutes known as Factors' Acts. This is the case in England, and in New York, Pennsylvania, Rhode Island, and other States.) Or to delegate their authority. *Loomis v. Simpson*, 13 Iowa, 532; *Warner v. Martin*, 11 How. (N. Y.) 209.

**Partners.**—A partner is the general agent for the firm in the transaction of all ordinary firm business. *Story Agency* (9th Ed.), § 124. Hence the extent of his authority will depend upon the nature of the business in which the firm is engaged. *Story Agency* (9th Ed.), § 124.

For the implied authority of other general classes of agents, see separate titles, such as ATTORNEY, MASTER OF A SHIP, etc.

**Railroad Engineer.**—A railroad engineer has no implied authority to bind the company by contracts. *Gardner v. Boston, etc., R. Co.*, 70 Me. 181.

**Railroad Ticket Agent.**—A railroad ticket-agent has no implied authority to delegate. *Frank v. Ingalls*, 41 Ohio St. 560.

**Passenger Agent.**—A railroad passenger agent has no implied authority to solicit freight. *Taylor v. Chicago, etc., R. Co.*, 74 Ill. 86.

**Station Agent.**—A station-agent has implied authority to contract to furnish cattle cars at his station on a particular date. *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364; *Wood v. Chicago, M. & St. P. R. Co.*, 27 N. W. R. (Iowa) 473. But only at his own station. *Voorhees v. Chicago, R. & P. R. Co.*, 30 N. W. Repr. (Iowa) 29.

**Telegraph Operator.**—A telegraph-operator has no implied authority to pass upon a claim for damages against the company. *Young v. Telegraph Co.*, 65 N. Y. 163; *Western Union Tel. Co. v. Rains*, 63 Tex. 27.

1. *Woodford v. McClenahan*, 4 Gilm. (Ill.) 85; *McCormick v. Kelly*, 28 Minn.

135; *Deering v. Thom*, 29 Minn. 120; *Randall v. Kehler*, 60 Me. 37; s. c., 11 Am. Rep. 169; *Bryant v. Moore*, 26 Me. 84; s. c., 45 Am. Dec. 96; *Nelson v. Cowing*, 6 Hill (N. Y.), 336; *Tice v. Gallup*, 2 Hun (N. Y.), 446; *Murray v. Brooks*, 41 Iowa, 45; *Boothby v. Scales*, 27 Wis. 626; *Huguley v. Morris*, 65 Ga. 666; *Dayton v. Hooglund*, 39 Ohio St. 671; *Palmer v. Hatch*, 46 Mo. 585; *Victor, etc., Co. v. Rheinschild*, 25 Kan. 534; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Croom v. Shaw*, 1 Fla. 211; *Applegate v. Moffitt*, 60 Ind. 104; *Hunter v. Jameson*, 6 Ired. (N. C.) 252; *Ezell v. Franklin*, 2 Sneed (Tenn.), 236; *Bradford v. Bush*, 10 Ala. 386; *Dingle v. Hare*, 7 C. B. N. S. 145; *Udell v. Atherton*, 7 H. & N. 172; *Hunter v. Jameson*, 6 Ired. L. (N. Car.) 252. *Compare* *Perrine v. Cooley*, 42 N. J. L. 623; s. c., 32 Am. Rep. 210; *Scott v. McGrath*, 7 Barb. (N. Y.) 53; *Decker v. Fredericks*, 47 N. J. L. 469; *Brady v. Todd*, 9 C. B. N. S. 592; *Gibson v. Colt*, 7 Johns. (N. Y.) 390; *Smith v. Tracy*, 36 N. Y. 79; *Howard v. Sheward*, L. R. 2 C. P. 148.

An agent authorized to sell a claim due by judgment on execution has no implied power to authorize a guaranty of the validity of the claims proposed for sale. *Lipscomb v. Kittell*, 11 Humph. (Tenn.) 256.

A broker has no implied power to warrant bank-stock sold by him. *Smith v. Tracy*, 36 N. Y. 79. He cannot warrant that it will be paid at maturity. *Graul v. Strutzel*, 53 Iowa, 712.

The power of an agent to warrant depends largely upon custom. *Upton v. Suffolk Co. Mills*, 11 Cush. (Mass.) 586; *Herring v. Skaggs*, 73 Ala. 446.

An agent with authority to sell land may warrant against the lawful claims of all persons claiming under the principal. *Ward v. Bartholomew*, 6 Pick. (Mass.) 409; *Blackman v. Charlestown*, 42 N. H. 125. But he may not warrant the quality and quantity of the land. *Nat. Iron Co. v. Bruner*, 4 C. E. Green (N. J.), 331.

An authority to sell goods not in the agent's possession generally implies a power to warrant. *Talmage v. Bierhaue*, 103 Ind. 270.

One selling by sample has authority to warrant the goods shall be like sample. *Murray v. Smith*, 4 Daly (N. Y.), 277; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Dayton v. Hooglund*, 39 Ohio St. 671.

An agent to sell has implied authority

An agent to sell goods has an implied power to receive payment.<sup>1</sup>

For a collection of special cases bearing upon the implied powers of an agent to sell, see note.<sup>2</sup>

*Agent to Collect.*—An agent to collect a debt has no implied authority to compromise or release,<sup>3</sup> or to receive anything but

to bind his principal by stipulations, usual and customary in effecting a sale. *Herring v. Skaggs*, 62 Ala. 180.

An agent to sell harvesters has implied authority to make sales conditional upon their working well. *Deering v. Thom*, 23 Minn. 120; *Murray v. Brooks*, 41 Iowa, 45; *Boothby v. Scales*, 27 Wis. 626. But an agent to sell notes has no authority to guarantee them. *Graul v. Struzel*, 53 Iowa, 712.

An agent for the sale of a horse has implied authority to warrant. *Tice v. Gallup*, 2 Hun (N. Y.), 446. *Compare Decker v. Fredericks*, 47 N. J. L. 469.

1. *Hatch v. Taylor*, 10 N. H. 538; *Cross v. Haskins*, 13 Vt. 536; *Hoskins v. Johnson*, 5 Sneed (Tenn.), 469. *Compare Harris v. Simmerman*, 81 Ill. 413, and *Clark v. Smith*, 88 Ill. 298. Especially when the agent has possession of the goods sold. *Seiple v. Irwin*, 30 Pa. St. 513.

But an agent to take orders for goods has no implied authority to receive payment for them. *Janney v. Boyd*, 30 Minn. 319; *Chambers v. Short*, 79 Mo. 204; *Greenhood v. Keator*, 9 Bradw. (Ill.) 183; *Kornemann v. Monaghan*, 24 Mich. 36; *Butler v. Dorman*, 68 Mo. 298; s. c., 30 Am. Rep. 795; *McKindly v. Dunham*, 55 Wis. 515; s. c., 42 Am. Rep. 740; *Clark v. Smith*, 88 Ill. 298; *Abrahams v. Weiller*, 87 Ill. 179; *Higgins v. Moore*, 34 N. Y. 417; *Greenleaf v. Egan*, 30 Minn. 316; *Kohn v. Washer*, 64 Tex. 131.

Nor has a broker. *Higgins v. Moore*, 34 N. Y. 417; *Crosby v. Hill*, 39 Ohio St. 100; *Graham v. Duckwall*, 8 Bush (Ky.), 12. Or salesman on commission, who has not possession of the goods. *Seiple v. Irwin*, 30 Pa. St. 513.

2. An agent to sell may rescind a rule. *Scott v. Wells*, 6 Watts & S. (Pa.) 357; s. c., 40 Am. Dec. 568; *Anderson v. Conley*, 21 Wend. (N. Y.) 279; *Victor*, etc., *Co. v. Rheinschild*, 25 Kan. 534; *Bloomer v. Denman*, 12 Ill. 240.

He has no authority to barter. *Holbrook v. McCarthy*, 61 Cal. 216; *Taylor v. Starkey*, 59 N. H. 142.

An agent had authority to sell only for cash. He did sell on credit, and the goods were sent marked C. O. D. The

carrier delivered the goods without receiving the cash, on the written order of the agent. *Held*, that the carrier, who knew of the authority of the agent to sell, was not affected by the limitation of which he had no notice, and that the mark C. O. D. did not put him on inquiry as a matter of law. *Daylight Burner Co. v. Odlin*, 51 N. H. 56; s. c., 12 Am. Rep. 45.

An agent selling goods only by sample, and forbidden to receive payment, sold goods on a credit of four months. Six days thereafter he drew in his own name for part of the price, which was paid. The money not being paid to the principal, *held*, that the payment did not protect the purchaser. *Butler v. Dorman*, 68 Mo. 298; s. c., 30 Am. Rep. 795.

An agent to sell and receive payment has no implied authority to set off a debt owned by him to the purchaser, against the price of the goods. *Belton Compress Co. v. Belton Brick Mfg. Co.*, 64 Tex. 337.

An agent to sell on credit must not give unreasonable credit. *Brown v. Central Land Co.*, 42 Cal. 257.

An agent to sell negotiable paper has implied authority to indorse. *Merchants' Bank v. Central Bank*, 1 Ga. 418; s. c., 44 Am. Dec. 665.

Authority to sell may imply power to employ a broker. *Northern*, etc., *R. Co. v. Bastian*, 15 Md. 494.

Authority to sell and convey land does not imply authority to dedicate a part of it to the public. *Wirt v. McEnery*, 21 Fed. R. 233; *Gosselin v. Chicago*, 103 Ill. 623. But authority to subdivide and lay out land implies power to dedicate land for streets. *Wirt v. McEnery*, 21 Fed. R. 233; *Bartreau v. West*, 23 Wis. 416; *State v. Atherton*, 16 N. H. 203.

3. *McHany v. Schenk*, 88 Ill. 357; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; *Herring v. Farrell*, 74 N. Car. 588.

A power to collect a mortgage does not authorize an extension of the time of payment. *Ritch v. Smith*, 82 N. Y. 627; *Hutchings v. Munger*, 41 N. Y. 155. See *Gerrish v. Maher*, 70 Ill. 470; *Chappel v. Raymond*, 20 La. Ann. 277.

A power to cancel a mortgage and the notes secured thereby, and to take new

cash.<sup>1</sup> He has implied authority to resort to all necessary legal proceedings to enforce collection.<sup>2</sup>

*Agent to Buy.*—An agent to purchase has implied authority to purchase on credit.<sup>3</sup>

*Agent to Borrow Money.*—A power to borrow includes a power to give the ordinary securities.<sup>4</sup>

*Agent to Loan Money.*—A general power to invest money implies a power to grant an extension of time.<sup>5</sup>

*Agent to Sue.*—An agent to prosecute suits has no implied authority to assign a cause of action.<sup>6</sup>

*Agent to Manage Real Property.*—An agent to rent and care for real property has no implied authority to sue for possession in his own name.<sup>7</sup> But a general power of control and supervision over lands extends to after-acquired lands,<sup>8</sup> and includes an authority to bring a suit to restrain a trespass and to execute the necessary injunction bond in the principal's name.<sup>9</sup>

**17. Construction.**—The construction of the written instrument conferring authority is for the court.<sup>10</sup>

In construing written authorities, the rule that writings cannot be

notes and a new mortgage, does not authorize the cancellation without taking the renewals. *Foster v. Paine*, 56 Iowa, 622.

1. *Padfield v. Green*, 85 Ill. 529; *Reynolds v. Ferree*, 86 Ill. 570; *Rhine v. Blake*, 59 Tex. 240; *Rodgers v. Bass*, 46 Tex. 505; *Aultman v. Lee*, 43 Iowa, 404; *Drain v. Doggett*, 41 Iowa, 682; *Taylor v. Robinson*, 14 Cal. 396; *Kirk v. Hiatt*, 2 Ind. 322; *Wiley v. Mahood*, 10 W. Va. 206; *McCulloch v. McKee*, 16 Pa. St. 289; *Woodbury v. Larned*, 5 Minn. 339; *Robinson v. Anderson*, 106 Ind. 152; *McCormick v. Wood*, 72 Ind. 518. See *Williams v. Johnson*, 92 N. Car. 532.

Where a bank is an agent to collect, it may receive its certificates of deposit in payment. *British, etc., Co. v. Tibballs*, 63 Iowa, 468.

An agent to collect a debt payable in a particular sort of currency has no power to receive payment in any other kind of currency; and if loss ensues he will be liable, even where the currency he receives is the only currency circulating at the time and place of collection. *Mangum v. Ball*, 43 Miss. 288.

An agent to collect a note has no power to sell it. *Smith v. Johnson*, 71 Mo. 382. See *Hannon v. Houston*, 18 Kans. 561.

An agent to settle an account has implied authority to take personal property in settlement. *Oliver v. Sterling*, 20 Ohio St. 391.

Power to receive certain chattels is no proof of authority to dispense with their

delivery. *Boyett v. Braswell*, 72 N. Car. 260.

Authority to receive the whole of a debt implies power to receive part. *Whelan v. Reilley*, 61 Mo. 565.

2. *Trowbridge v. Weir*, 6 La. Ann. 706; *McMinn v. Richtmyer*, 3 Hill (N. Y.), 236; *Scott v. Elmendorf*, 12 Johns. (N. Y.) 317; *Weille v. U. S.*, 7 Ct. of Cl. 535; *Joyce v. Duplessis*, 15 La. Ann. 242; s. c., 77 Am. Dec. 185; *De Poret v. Gusman*, 30 La. Ann. pt. 2, p. 930.

3. *Sprague v. Gillett*, 9 Metc. (Mass.) 91. See *Ruffin v. Mebane*, 6 Ired. Eq. (N. Car.) 507.

4. *Hatch v. Coddington*, 95 U. S. 48.

A power to mortgage does not include a power to give a note in the principal's name. *Mylius v. Copes*, 23 Kans. 617. Or to insert a clause for the payment of attorney's fees. *Pacific, etc., Co. v. Dayton, etc., R. Co.*, 7 Sawy. (U. S. C. Ct.) 61; s. c., 5 Fed. Rep. 582. Or to execute a second mortgage. *Skaggs v. Murchison*, 63 Tex. 348.

5. *Hurt v. Marple*, 2 Ill. App. 402. See *Kane v. Cortisy*, 100 N. Y. 132.

Power to take a mortgage does not include authority to foreclose it. *Aultman v. Jones*, 1 Woolw. (U. S. Ct. Ct.) 99.

6. *Geiger v. Bolles*, 1 Th. & C. (N. Y.) 129.

7. *McHenry v. Painter*, 58 Iowa, 365.

A power to collect rent implies no authority to employ an engineer. *Crozier v. Reins*, 4 Ill. App. 564.

8. *Berkey v. Judd*, 22 Minn. 287.

9. *State v. Banks*, 48 Md. 513.

10. *Story Agency* (9th Ed.), § 63, n. 1.



varied or contradicted by contemporaneous or prior agreements or transactions prevails.<sup>1</sup>

Consequently parol evidence of prior agreements or understandings between the parties,<sup>2</sup> or of customs or usages,<sup>3</sup> is inadmissible to contradict or vary the express terms of the writing.

Evidence of customs or usages is, however, admissible to explain or interpret such terms.<sup>4</sup> Written authorities should be construed in the light of surrounding circumstances.<sup>5</sup> General words in the written instrument will be restricted by the context.<sup>6</sup>

**18. Ambiguity in Instructions.**—Where an agent's instructions are ambiguous, and reasonably susceptible of two meanings, an agent will be protected if he adopts one of them in good faith, and acts upon it.<sup>7</sup>

**19. Public Agents.**—For authority of public agents, see titles PUBLIC AGENTS; MUNICIPAL CORPORATIONS.

**AUTRE FOIS ACQUIT.** See JEOPARDY.

**AUTRE FOIS CONVICT.** See JEOPARDY.

**AVAILABLE.**—Capable of being put in execution.<sup>8</sup>

1. Story Agency (9th Ed.), § 76; Frink v. Roe, 11 Pac. Repr. (Cal.) 820.

2. Story Agency (9th Ed.), § 76; Logan v. Farmers' Bank, 1 Houst. (Del.) 35; Peckham v. Lyon, 4 McL. (U.S. C.Ct.) 45.

3. Robinson v. Mallet, L. R. 7 H. of L. 802; Foley v. Bell, 6 La. Ann. 760; Ware v. Hayward Rubber Co., 3 Allen (Mass.), 84; Allen v. Dykers, 3 Hill (N. Y.), 593; Taylor v. Keitchum, 5 Robt. (N. Y.) 507; Barksdale v. Brown, 1 Nott & McC. (S. Car.) 517; Catlin v. Smith, 24 Vt. 85; Boogher v. Maryland Life Ins. Co., 6 Mo. App. 592; Boardman v. Spooner, 13 Allen (Mass.), 353; Dickinson v. Gay, 7 Allen (Mass.), 29; Dodd v. Farlow, 11 Allen (Mass.), 426; Haskins v. Warren, 115 Mass. 514; Story Agency (9th Ed.), § 76. See also note on p. 1028, "If the power," etc.

4. Story Agency (9th Ed.) §§ 77, 78; Wallace v. Bradshaw, 6 Dana (Ky.), 382. See also note on p. 1028, "If the power," etc.

5. Brantley v. Southern Life Ins. Co., 53 Ala. 554; Maynard v. Mercer, 10 Nev. 33; Bissell v. Terry, 69 Ill. 184; Wood v. Goodbridge, 6 Cush. (Mass.) 117, 123.

6. Evans Agency (Ewell's Ed.), pp. 145 *et seq.*; Story Agency (9th Ed.), §§ 62 *et seq.*

Where a power of attorney is given for a particular purpose, general words are not to be construed at large, but merely as giving general powers for carrying into effect such particular purpose. Rountree v. Denson, 59 Wis. 522.

*Accord* see Craighead v. Peterson, 72 N. Y. 279; Bissell v. Terry, 69 Ill.

184; Neal v. Patten, 40 Ga. 363; Geiger v. Bolles, 1 Thomp. & C. (N. Y.) 129; Bosseau v. O'Brien, 4 Biss. (U.S. C. Ct.) 395; Billings v. Morrow, 7 Cal. 171; Meade v. Brothers, 28 Wis. 689; Berry v. Harnage, 39 Tex. 638; Coquillard v. French, 19 Ind. 274.

A power of attorney "to buy and sell real estate, and receive and execute all necessary contracts and conveyances," held not to authorize a sale of land belonging to the principal at the date of execution of the power. Greve v. Coffin, 14 Minn. 345.

A general authority to "bargain, sell," etc., not specifying any particular property, authorizes the agent to sell any real property the principal may own. Marr v. Given, 23 Me. 55; s. c., 39 Am. Dec. 600; Roper v. McFadden, 48 Cal. 346; Berkey v. Judd, 22 Minn. 287.

7. Evans Agency (Ewell's Ed.), p. 149; Story Agency (9th Ed.), § 74; Winne v. Niagara Ins. Co., 91 N. Y. 185; Bessent v. Harris, 63 N. Car. 542; Mattocks v. Young, 66 Me. 459; Minnesota, etc., Co. v. Montague, 65 Iowa, 67; Mann v. Laws, 117 Mass. 293; Mech. Bank v. Merch. Bank, 6 Metc. (Mass.) 13; Ireland v. Livingstone, L. R. 2 Q. B. 99; L. R. 5 Q. B. 516; 5 H. L. 395.

8. Marks v. Hall, 7 B. & L. 841.

**Available Capital.**—This is not a true, but a deceptive, description of capital which may be raised under the borrowing powers conferred upon directors. Venezuela Co. v. Kisch, L. R. 2 H. L. 99.

**Available for Adjudication,** in statute —

**AVAILS.**—This word seems to have been construed only in reference to wills, and in them it means the *corpus* or proceeds of the estate after the payment of the debts.<sup>1</sup>

**AVERMENT.** See PLEADING.

**AVOCATION.**—A pursuit or calling as the selling of liquors on Sunday, is an avocation for which an information will lie.<sup>2</sup>

**BACK.** (See also ENDORSEMENT.)—In the rear; remote; again.<sup>3</sup> To endorse; write on the back.<sup>4</sup>

These words were inserted to introduce this limitation—that the act of bankruptcy must be one which would have been available for the making of the particular adjudication. *In re Bedell*, L. R. 7 Ch. Div. 123.

**Available Means** includes all that numerous class of securities which are known in the mercantile world as representatives of value easily convertible into money, but not money. *Brigham v. Tillinghast*, 13 N. Y. 218; *Benedict v. Huntington*, 32 N. Y. 224.

1. *Allen v. De Witt*, 3 N. Y. 276; *McNaughton v. McNaughton*, 34 N. Y. 201.

2. *Voglesong v. The State*, 9 Ind. 112.

But gaming is not an avocation within the prohibition of the Sunday law. *State v. Conger*, 14 Ind. 396.

3. **Back Lands.**—Used as a nickname, or name by reputation, to denote lands in a remote part of the State. A testator made a devise of all his "back lands." In an action of ejectment to recover certain lands under this devise it was held that parol evidence was admissible to designate the premises by showing that certain lands owned by him (the devisee) were called and known by that designation by him, his family, and neighbors. "The term 'back lands,'" say the court, "was, it is true, insufficient of itself to designate any particular class of lands owned by the testator. It was uncertain; and might refer to different objects, or to none upon which any distinctive character could be fastened by extrinsic proof. But *id certum est, quod certum reddi potest*. You must in the most accurate description go out of the instrument in order to apply it to the subject-matter of the devise or grant; and so far as we are able to collect from the evidence, that was effectually done in this case. The premises in question and other lands in the same vicinity were known and called by the testator during his lifetime, and by his family and neighborhood, 'back lands.' This is like a man's making a map of his lands on which he designates certain parcels by certain names, and then devises or conveys them accordingly. A nickname, or name by reputation,

given by the testator, and current in his family and neighborhood, is sufficient to designate the devisee, and why not the subject-matter devised?" *Ryerss v. Wheeler*, 22 Wend. (N. Y.) 148; s. c., *Lawson's Usages and Customs*, 351.

**Back Again.**—Where a stallion was advertised to make his season on the following terms, "with the privilege of breeding back next season should the mare not prove with foal, the money due at the time of service, or before the mare is removed," it was held that while the customer had the right to repute his mare the next season if she did not prove in foal the first one, it was only provided the horse and mare both lived until next season. The stallion's terms did not amount to a warranty upon the part of his owner that he would live to the next one; and the owner of the mare not proving with foal is liable for the price of the season, although he is deprived of the privilege of breeding back the next season by the death of the horse. *Price v. Pepper*, 13 Bush (Ky.), 42.

**Backwards.**—A policy of insurance on an India voyage out and home containing these words, "forwards and backwards," until the ship's arrival at her last station of discharge, though it purported literally to be from a foreign port of loading until the ship's arrival in London, beginning the adventure upon the said goods from the loading thereof at the foreign port of loading, must by necessary implication apply to all goods put on board in the course of the voyage. For "forwards and backwards" means from port to port in the course of the voyage, not from Europe to Asia and from Asia to Europe. But were these words omitted, though the insurance was to all or any ports and places whatsoever beyond the Cape of Good Hope, in port and at sea, in all places, at all times, and in all services, with liberty to proceed to, touch, and stay at any ports or places whatsoever for any purpose whatsoever, the policy will attach only on the particular cargo taken in at the first place of loading. *Grant v. Paxton*, 1 Taunton. 463.

4. **Backing.**—In England, where a war-

**BAD.**—Wanting good qualities; opposed to good; injurious; vicious; wicked.<sup>1</sup>

rant of a justice of the peace in one county is to be executed in another, it must first be endorsed by the justice in such other county, which is termed "backing the warrant." 4 Bl. Com. 291.

It prevails also in some of the United States, though the term "backing" is rarely used. See *Seabury v. Hungerford*, 2 Hill (N.Y.), 80, where the endorsement reads "John H. Hungerford, backer."

1. In an action for slander, where the slanderous words charged are that the plaintiff, a married woman, is a "bad woman," a "bitch," and "whore," it is for the jury to determine the sense in which the word "bad" is used; and an instruction that for that purpose "the jury may take into account the accompanying words and surrounding facts" is not open to exception. In this case the court said: "In itself the word 'bad' imports no crime, and is not actionable. But the moral and legal quality of the word 'bad' may be made entirely clear by its context and the connection in which it is used. If one speaks of a prostitute, and calls her such, and therefore pronounces her a bad woman, or if he says 'she is a bad woman because she is a prostitute,' there can be no doubt of the sense in which the word 'bad' is used, any more than there can be a doubt of the sense in which it is used if a party says of another, 'she is a bad woman, she does not go to church,' or, 'she is a bad woman because she does not go to church.' The party is responsible for the ordinary and natural meaning of language as it would commonly be understood. If the subject of discourse in relation to a female is chastity, the use of the word 'bad' might import the want of conjugal fidelity, if the woman were a married woman; and when the charge against a married woman is that she is a bad woman, a bitch, and a whore, the court cannot say, as matter of law, that the word 'bad' does not import a want of chastity, but it is for the jury to determine the sense in which the word was used. And we see no objection to the construction as given by the presiding judge; when he uses the phrase, 'the jury may take into account the accompanying words and the surrounding facts,' he is not to be understood as referring to those unexpressed but understood circumstances which give character to the language used, but simply to those facts and circumstances which attend the uttering,

such as time, place, and words uttered. In setting out the words uttered as 'bad woman,' 'bitch,' and 'whore,' there is no necessity for introducing any colloquium that these words were used in reference to her chastity, because the jury might be warranted without such colloquium in finding that the words used, in the connection in which they were used, did of their own force import to the ordinary hearer the charge of want of chastity, or of the crime of adultery." *Riddell v. Thayer*, 127 Mass. 487.

Where a declaration, in an action for slander, alleged that the defendant falsely and maliciously said of the plaintiff, "She is a bad girl, a very bad girl, and unworthy to be employed by any company in Lowell," meaning thereby that the plaintiff was a prostitute and had been guilty of fornication, lewdness, lasciviousness, and wantonness, it was held that the declaration was insufficient for want of averments and a colloquium that would warrant the innuendo; the court saying: "The words set forth in all the counts were, 'she is a bad girl' or 'a very bad girl.' There was no averment of other conversation which took place at the same times, nor any averments of other exterior facts which, if true, would give a peculiar force and effect to the words used, or show that, though in their natural meaning they did not impute unchaste conduct to the plaintiff, yet in the connection in which they were used and applied to the plaintiff, they would have that effect. It is true that these words are greatly enlarged and expanded by the innuendoes, but these cannot aid the declaration and make it good." *Shell v. Snow*, 13 Metc. (Mass.) 278.

So an action of slander will not lie for saying that a particular article made by another is not a good article, or that it is a "bad" article, or that goods manufactured by him are "bad" or are not as good as articles manufactured by his neighbor; for example, Tobias watches are bad. They are inferior watches; this watch purchased of them is a bad watch. For said the court: "The words do not directly impeach the integrity, knowledge, skill, diligence, or credit of the plaintiff. They only relate to the quality of the article which he manufactures or in which he deals." *Tobias v. Harland*, 4 Wend. (N. Y.) 537; s. c., 8 Wheeler Am. C. L. 115.

The general character and standing of

**BADGE**.—A sign or mark; used in the expression "badge of fraud."<sup>1</sup>

a witness as a good or bad man, without reference to his character for truth, is not admissible for the purpose of impeaching him. "The term 'bad character' applied to man or woman is used, by very common acceptation, to designate loose, immoral, or lascivious deportment; but who, properly regarding the weight of authorities, will contend that proof of such deportment is admissible to impeach a witness?" *Greene, J., in Carter v. Cavenugh, 1 G. Greene (Iowa), 171.*

In an information under a statute which forbid a person licensed to sell excisable liquors by retail to permit and suffer persons of notoriously bad character to assemble and meet together in his house and premises, it was held that prostitutes, as such, are "persons of notoriously bad character" within the meaning of the statute. *Parker v. Green, 2 B. & S. 299.*

**Bad upon the face of it.**—"The rule of law is established, that if there be a conviction good on the face of it, the justice is protected; if the conviction is bad on the face of it, then he is not protected. By the term 'bad upon the face of it' I mean any conviction which shows a want of jurisdiction, or directs an imprisonment of a party, which the magistrate is not entitled to award." Therefore for a conviction "bad upon the face of it" the magistrate is liable to an action of trespass. *Griffith v. Harries, 2 M. & W. 335, 344.*

**Bad English.**—Bad English will not vitiate a bond. Thus in an action of debt upon a bill, the words were, "I promise to pay £100 if the plaintiff mare such a widow." The defendant demurred for false English, viz., "promose" and "mare," and judgment on the demurrer for the plaintiff. *Call v. Semaine, 1 Freeman, 541.*

So "Bad Latin" is cured by an *Anglicè*. *Dunvell v. Bullock, 1 Freeman, 446.*

1. Among other circumstances relied on to show fraud in the sale under which the plaintiffs claimed was the fact that the sale was upon a long and unusual mercantile credit. The counsel for the defendant asked the court to instruct the jury that if such was the fact "it was a badge of fraud." This was refused, but the court at the same time told them that it was a circumstance to be considered by them in arriving at the question of fraud,

but was not of itself a badge of fraud. As we understand the meaning of the word "badge" this was error. It does not mean that the evidence must be conclusive, nor that it must require the jury to find fraud, but only that it is one of the signs or marks of fraud, and has a tendency to show it. There may be great difference in the weight to which different facts, constituting badges of fraud, are entitled as evidence. One may be almost conclusive, another furnish merely a reasonable inference of fraud. Yet both would be badges of fraud, and either might be so explained by other evidence as to destroy its effect. The books accordingly speak of "strong badges" and "slight badges" of fraud, of "conclusive badges" and "badges not conclusive," meaning by the word "badge" nothing more than that the fact relied on has a tendency to show fraud, but leaving its greater or less effect to depend on its intrinsic character.

Thus in the celebrated *Gwynne's Case* referred to in *Roberts on Fraudulent Conveyances, 545*, the fact that the conveyance contained an express statement that it was made in good faith was held to be a "badge" or sign of fraud. And the reason given is, "that unusual clauses always induce suspicion," showing that circumstances which induce a suspicion of fraud are signs, marks, or, what is the same thing, "badges" of fraud. When, therefore, the court told the jury that the fact that the sale was upon a long and unusual mercantile credit was a circumstance proper to be considered by them, but was not a "badge" of fraud, it was equivalent to telling them that it had no tendency to show fraud. So that, although they considered it, they could give it no effect. It might well be that an honest sale might be made upon a long and unusual credit. But it is equally true that it might be with any of the usual "badges" of fraud, such as a retention of possession by the vendor, etc. Any sale may be sustained by explanatory proof overcoming the inference of fraud which certain facts taken alone would warrant. And the court should in all cases submit the evidence of fraud to the jury with proper suggestions upon this point. But this would not warrant it in instructing them that certain facts which, taken alone, had a tendency to show fraud had no such tendency. *Pilling v. Otis, 13 Wis. 495.*

**BAGGAGE.** (See also CARRIERS; INNKEEPERS.)—Whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to his immediate necessities or to the ultimate purpose of his journey, must be considered as personal baggage.<sup>1</sup>

1. *Macrow v. Great Western Ry. Co.*, L. R. 6 Q. B. 612; *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.), 453; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; s. c., 51 Am. Dec. 44; *Bomar v. Maxwell*, 9 Humph. (Tenn.) 620; s. c., 51 Am. Dec. 682; *Coward v. East. Tenn. R. Co.*, 16 Lea (Tenn.), 225; *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69; *Railroad Co. v. Fraloff*, 10 Otto (U. S.), 24.

In *Hutchinson on Carriers*, § 679, it is said: "It is impossible to define with accuracy what will be considered baggage within the rule of the carrier's liability. It may be said, generally, that by baggage we are to understand such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not, however, designed for any such use, but for other purposes, such as sale and the like. But it is evident that that which may be convenient or necessary for one person might not be for another, or that which might appropriately and properly be classed as baggage upon one journey and for one purpose might not be so for another journey and for another purpose. That which might be necessary for the convenience of a female passenger might not be so for one of the other sex. That which might be a convenience and almost a necessity for a traveller in one condition of life might be superfluous and wholly useless in the case of another whose habits and condition in life were wholly different."

In *Bomar v. Maxwell*, 9 Humph. (Tenn.) 622; s. c., 51 Am. Dec. 682, the court said: "It is obviously impracticable to prescribe any uniform or very definite rule in respect to what shall be deemed baggage. This must be left to the jury to determine in each particular case, from the habits, rank, and condition of the party, the extent and reasonable expenses of the journey, together with all the circumstances relevant to the inquiry."

In *Johnson v. Stone*, 11 Humph. (Tenn.) the court said: "It is not practicable to state with precise accuracy what shall be included by the term baggage. It certainly includes articles of necessity and personal convenience usually carried

by passengers for their personal use; and what these may be will very much depend upon the habits, tastes, and resources of the passenger."

In *Railroad Co. v. Fraloff*, 10 Otto (U. S.), 24, the defendant in error had brought with her to the United States six trunks, containing a large quantity of wearing apparel, including many elegant, costly dresses and rare and valuable laces, which she had been accustomed to wear when on visits, and to theatres, dinners, balls, and receptions. On her railroad passage from Albany to Niagara Falls one of the trunks was broken and more than two hundred yards of dress lace, valued at \$75,000, abstracted. She sued the company and obtained judgment for \$10,000. The Supreme Court of the U. S., affirming the judgment, said: "In *Hannibal R. Co. v. Swift*, 12 Wall. (U. S.) 262, this court, speaking through Mr. Justice Field, said that the contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travellers for personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations."

In *Mauritz v. N. Y., etc., R. Co.*, 21 Am. & Eng. R. R. Cas. 286, Dyer, J., said: "The question is, what is baggage? The rule on this subject can only be stated in general terms. The question what articles come within the rule is to be determined by the jury according to the circumstances of the case. Baggage, of course, includes wearing-apparel, and this is not limited to such apparel only as the traveller must necessarily use on his journey. Regard being had to the condition in life of these parties, the plaintiff may recover—if entitled to recover all—for the loss of all such wearing-apparel as these people had provided for their personal use, and as it would be necessary or reasonable for them to use after their arrival and settlement in this country. And so I think that cloth not yet made into garments, but which they may have procured for manufacture into wearing-apparel, and which they intended to make such use of, to a reasonable amount, may properly be included as

A passenger is bound to call for, claim, and take away his

part and parcel of their wearing-apparel. So, too, these parties had the right to carry as baggage such jewelry and personal ornaments as were appropriate to their wardrobe, rank, and social position, but no further. As to bedding and bed-furnishings not intended for use on the journey,—curtains, table-cloths, and covers, books, pictures, and albums,—they come under the head of household goods, and not personal baggage, and cannot be recovered for, and must be excluded from your consideration, unless you find that the agent of the defendant company, when he sold the tickets, was informed or understood that the baggage which was to be carried with the passengers included articles of this character. Of course, if the defendant was informed that this box contained household goods as well as wearing-apparel, or had good reason to understand and know that such was the fact, and then consented to accept the property as baggage under check, if liable at all, it is liable therefor the same as for wearing-apparel, otherwise not. So, too, the painter's utensils and drawings and the tailor's utensils enumerated in the list of articles lost cannot be included as baggage; and for the loss of this property the plaintiff is not entitled to recover unless it is made to appear that the defendant knew or understood that such articles were in the box and accepted them as baggage."

Where the duly authorized agent of a railroad company receives personal property to be transported as baggage, the railroad company must account for such property as baggage, although in strict language it might not be baggage. *Chicago, etc., R. Co. v. Conklin*, 32 *Kans.* 55; *Lake Shore, etc., R. Co. v. Foster*, 104 *Ind.* 293.

**Obligation to Carry.**—Railroad company is not obliged to receive as baggage the trunk of one who does not go by the same train. *Graffam v. Boston & Me. R. Co.*, 67 *Me.* 234; *s. c.*, 15 *Am. Ry. Rep.* 372.

**What Constitutes Baggage.**—The following articles have been held to be properly comprised in the term baggage:

**CLOTHING.**—*Duffy v. Thompson*, 4 *E. D. Smith* (N. Y.), 178; *Dexter v. Syracuse, etc., R. Co.*, 42 *N. Y.* 326; *s. c.*, 1 *Am. Rep.* 527; *Toledo, etc., R. Co. v. Hammond*, 33 *Ind.* 379; *s. c.*, 5 *Am. Rep.* 221; *Dibble v. Brown*, 12 *Ga.* 217; *Baltimore, etc., Co. v. Smith*, 23 *Md.* 402; *Munster v. South Eastern R. Co.*, 4 *C. B.* (N. S.) 676.

**CLOTH** and materials intended for clothing. *Van Horn v. Kermit*, 4 *E. D. Smith* (N. Y.), 453; *Duffy v. Thompson*, 4 *E. D. Smith* (N. Y.), 178; *Mauritz v. N. Y., etc., R. Co.*, 21 *Am. & Eng. R. R. Cas.* 286. *Compare Dexter v. Syracuse, etc., R. Co.*, 42 *N. Y.* 326; *s. c.*, 1 *Am. Rep.* 527.

**RIFLE**, a revolver, two gold chains, two gold rings, and a silver pencil case held baggage. *Bruty v. Grand Trunk R. Co.*, 32 *Up. Can.*, Q. B. 66.

**ONE PISTOL.**—*Woods v. Devin*, 13 *Ill.* 746; *Davis v. Michigan R. Co.*, 22 *Ill.* 278. Two pistols are not. *Chicago, etc., R. Co. v. Collins*, 56 *Ill.* 212.

**GUNS.**—When for sporting purposes. *Van Horn v. Kermit*, 4 *E. D. Smith* (N. Y.) 454; and see *Davis v. Cayuga, etc., R. Co.*, 10 *How. Pr.* (N. Y.) 330; *Hawkins v. Hoffman*, 6 *Hill* (N. Y.), 506; *s. c.*, 51 *Am. Dec.* 44.

**BEDDING**, where passenger is required to provide it. *Hirschsohn v. Hamburg Am. Packet Co.*, 2 *Jones & Sp.* (N. Y.) 521.

**DRESSING-CASE.**—*Cadwallader v. Grand Trunk R. Co.*, 9 *Low. Can.* 169.

**TOOLS.**—In reasonable quantity for a mechanic. *Davis v. Cayuga, etc., R. Co.*, 10 *How. Pr.* (N. Y.) 330; *Porter v. Hildebrand*, 14 *Pa. St.* 129; *Kansas City, etc., R. Co. v. Morrison*, 23 *Am. & Eng. R. R. Cas.* 481.

**OPERA-GLASS OR TELESCOPE.**—*Cadwallader v. Grand Trunk R. Co.*, 9 *Low. Can.* 169; *Toledo, etc., R. Co. v. Hammond*, 33 *Ind.* 379; *s. c.*, 5 *Am. Rep.* 221.

**PRICE-BOOK** used by a drummer. *Gleason v. Goodrich, Trans. Co.*, 32 *Wis.* 85; *s. c.*, 14 *Am. Rep.* 716.

**BOOKS AND MANUSCRIPTS.**—*Hopkins v. Westcott*, 6 *Blatchf.* (C. C.) 64; *Doyle v. Kiser*, 6 *Ind.* 242; *Gleason v. Goodrich, Trans. Co.*, 32 *Wis.* 85; *s. c.*, 14 *Am. Rep.* 716. *Compare Hannibal, etc., R. Co. v. Swift*, 12 *Wall.* (U. S.) 262.

**SURGICAL INSTRUMENTS.**—*Hannibal, etc., R. Co. v. Swift*, 12 *Wall.* (U. S.) 262.

**WATCHES AND JEWELRY.**—When intended to be worn on the person. *McGill v. Rowland*, 3 *Pa. St.* 451; *Torpey v. Williams*, 3 *Daly* (N. Y.), 162; *McCormick v. Hudson River R. Co.*, 4 *E. D. Smith* (N. Y.), 181; *N. Y., etc., R. Co. v. Fraloff*, 10 *Otto* (U. S.), 24; *Jones v. Voorhees*, 10 *Ohio*, 145; *Amer. Contract Co. v. Cross*, 8 *Bush* (Ky.), 472; *s. c.*, 8 *Am. Rep.* 471; *Coward v. East Tenn. R. Co.*, 16 *Lea* (Tenn.), 225; *McDougall v. Allan*, 12 *Low. Can.* 321. *Compare Mich. Cent. R. Co. v. Carrow*, 73 *Ill.* 348.

**MERCHANDISE.**—If the fact is disclosed

baggage within a reasonable time; if he fails so to do, the carrier

or articles are so packed that their nature is obvious. *Minter v. Pacific R. Co.*, 41 Mo. 503; *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *Hellman v. Holladay*, 1 Woolw. (C. C.) 365. See *Sloman v. Railroad*, 67 N. Y. 208.

A CARPET.—*Minter v. Pacific R. Co.*, 41 Mo. 503.

MONEY FOR EXPENSES.—*Dunlap v. International S. Co.*, 98 Mass. 371; *Merrill v. Grinnell*, 30 N. Y. 594; *Weed v. Saratoga R. Co.*, 19 Wend. (N. Y.) 534; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85; s. c., 24 Am. Dec. 129; *Mad River R. Co. v. Fulton*, 20 Ohio, 318; *Jones v. Voorhees*, 10 Ohio, 180; *Toledo, etc., R. Co. v. Hammond*, 33 Ind. 379; s. c., 5 Am. Rep. 221; *Doyle v. Kiser*, 6 Ind. 242; *Davis v. Michigan Cent. R. Co.*, 22 Ill. 278; *Bomar v. Maxwell*, 9 Humph. (Tenn.) 621; s. c., 51 Am. Dec. 682; *Hutchings v. Western R. Co.*, 25 Ga. 61.

A reasonable amount of bank bills may be carried in a trunk as baggage. *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332.

What does not constitute baggage.—The following articles have been held not to be included in the term "baggage:"

BULLION, PLATE, WATCHES, JEWELRY, and the like, unless intended to be worn on the person. *Steers v. Liverpool, etc., R. Co.*, 57 N. Y. 1; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225; *Michigan, etc., R. Co. v. Carrow*, 73 Ill. 348; *Cadwallader v. Grand Trunk R. Co.*, 9 Low. Can. 169; *Cincinnati, etc., R. Co. v. Marcus*, 38 Ill. 219; *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671; *The Ionic*, 5 Blatchf. (C. C.) 538. Compare *Amer. Contract Co. v. Cross*, 8 Bush (Ky.), 472; s. c., 8 Am. Rep. 471; *Coward v. East Tenn. R. Co.*, 16 Lea (Tenn.), 225.

WATCHES to a large value, packed in a travelling case. *Belfast, etc., R. Co. v. Keyes*, 9 H. L. 556.

SAMPLES OF TRAVELLING SALESMEN.—*Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; s. c., 41 Am. Dec. 767; *Scovill v. Griffith*, 12 N. Y. 509; *Alling v. Boston, etc., R. Co.*, 126 Mass. 121; s. c., 30 Am. Rep. 667; *Stimson v. Connecticut River R. Co.*, 98 Mass. 83; *Pennsylvania Co. v. Miller*, 35 Ohio St. 541; s. c., 35 Am. Rep. 620.

Although samples carried by a passenger are not personal baggage, yet if the baggage master, knowing the character of the articles carried, accepts them as baggage, the carrier is estopped to deny that they were baggage in an action for

their loss. *Texas, etc., R. Co. v. Capps*, 16 Am. & Eng. R. R. Cas. 120.

Merchandise, if its character is not disclosed. *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322; s. c., 34 Am. Rep. 376; *Connolly v. Warren*, 106 Mass. 146; s. c., 8 Am. Rep. 300; *Stimson v. Connecticut River R. Co.*, 98 Mass. 83; *Davis v. Cayuga, etc., R. Co.*, 10 How. Pr. (N. Y.) 332; *Chamberlain v. Western Trans. Co.*, 45 Barb. (N. Y.) 218; *Great Northern Co. v. Shepherd*, 8 Exch. 30. Compare *Sloman v. Railroad*, 67 N. Y., 208.

MONEY.—Except small amounts necessary for travelling expenses. *Merrill v. Grinnell*, 30 N. Y. 594; *Grant v. Newton*, 1 E. D. Smith (N. Y.), 95; *Whitmore v. Steamer Caroline*, 20 Mo. 513; *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69; *Dunlap v. International Steamboat Co.*, 98 Mass. 371; *Dibble v. Brown*, 12 Ga. 217; *Davis v. Michigan, etc., R. Co.*, 22 Ill. 278; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85; s. c., 24 Am. Dec. 129; *Hickox v. Naugatuck R. Co.*, 31 Conn. 281; *Hutchings v. Western, etc., R. Co.*, 25 Ga. 61; *Phelps v. London, etc., R. Co.*, 19 C. B. (N. S.) 321; *Butcher v. London, etc., R. Co.*, 16 C. B. 13; *Illinois, etc., R. Co. v. Copeland*, 24 Ill. 362; *Cincinnati, etc., R. Co. v. Marcus*, 38 Ill. 219; *Weed v. Saratoga, etc., R. Co.*, 19 Wend. (N. Y.) 534; *Bomar v. Maxwell*, 9 Humph. (Tenn.) 620; s. c., 51 Am. Dec. 682; *Doyle v. Kiser*, 6 Ind. 242; *First Nat. Bank v. Marietta, etc., R. Co.*, 20 Ohio St. 259; s. c., 5 Am. Rep. 655.

Money carried for purpose of purchasing clothes at place of destination, not baggage. *Hickox v. Naugatuck R. Co.*, 31 Conn. 281.

Some cases go so far as to hold that even a small sum to meet current travelling expenses is not baggage. *Davis v. Michigan, etc., R. Co.*, 22 Ill. 278; *Grant v. Newton*, 1 E. D. Smith (N. Y.), 95.

CHILD'S ROCKING HORSE.—*Hudson v. Midland R. Co.*, 36 L. T. R. (Q. B.) 213.

CLOTH for a dress intended for a third person. *Dexter v. Syracuse, etc., R. Co.*, 42 N. Y. 326; s. c., 1 Am. Rep. 527.

PRESENTS.—*The Ionic*, 5 Blatch. (U. S.) 538; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225.

TOYS.—*Hudson v. Midland, etc., R. Co.*, 10 Best & S. 504; s. c., L. R. Q. B. 366.

SACQUE, MUFF, AND NAPKIN RING carried in a trunk. *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510.

BEDDING.—*Connolly v. Warren*, 106

may deposit the baggage in a safe place and be thereafter liable as warehouseman only.<sup>1</sup>

As regards liability for loss, injury or delay of baggage, see CARRIER; INNKEEPER.

Mass. 146; s. c., 8 Am. Rep. 300; *Macraw v. Great Western R. Co.*, L. R. 6 Q. B. 612; Texas, etc., R. Co. *v. Ferguson*, 9 Am. & Eng. R. R. Cas. 395. But see *Hirschsohn v. Hamburg American Packet Co.*, 2 Jones & Sp. (N. Y.) 521; *Ouimit v. Henshaw*, 35 Vt. 605.

Six pairs of sheets, six pairs of blankets, and six pairs of quilts carried in a trunk by one who is leaving Canada and travelling to London, where he expects to provide himself with a home, are not baggage. *Macraw v. Great Western R. Co.*, L. R. 6 Q. B. 612. Compare *Hirschsohn v. Hamburg Am. Packet Co.*, 2 Jones & Sp. (N. Y.) 521; *Ouimit v. Henshaw*, 35 Vt. 605.

MEDICINES, HANDCUFFS, AND LOCKS worth about \$20. *Bomar v. Maxwell*, 9 Humph. (Tenn.) 620; s. c., 51 Am. Dec. 682.

ENGRAVINGS.—*Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225.

PENCIL SKETCHES of an artist. *Mytton v. Midland Ry. Co.*, 28 L. J. Exch. 385. See also *Mauritz v. N. Y.*, etc., R. Co., 21 Am. & Eng. R. R. Cas. 286.

PAPERS OF VALUE.—*Thomas v. Great Western R. Co.*, 14 Upp. Can. Q. B. 389; *Phelps v. London*, etc., R. Co., 19 C. B. 321.

DEEDS AND DOCUMENTS required as evidence in a trial. *Phelps v. London*, etc., Ry. Co., 19 C. B. 321.

MASONIC REGALIA.—*Nevins v. Bay State S. Co.*, 4 Bosw. (N. Y.) 225.

MASQUERADE COSTUMES for use by others at a ball. *Mich. South. R. Co. v. Oehm*, 56 Ill. 293.

PROPERTY OF OTHER PERSONS.—Ordinarily a passenger cannot include in his baggage the effects of other persons. If he does so, a railroad company will not be responsible for loss or injury. *First National Bank v. Marietta*, etc., R. Co., 20 Ohio St. 260; s. c., 5 Am. Rep. 655; *Weed v. Saratoga*, etc., R. Co., 19 Wend. 534; *Dexter v. Syracuse*, etc., R. Co., 42 N. Y. 326; s. c., 1 Am. Rep. 527; *Chicago*, etc., R. Co. *v. Boyce*, 73 Ill. 510; s. c., 24 Am. Rep. 268; *Mississippi*, etc., R. Co. *v. Kennedy*, 41 Miss. 671; *Dunlap v. International Steamboat Co.*, 98 Mass.

371; *Becker v. Great Eastern R. Co.*, L. R. 5 Q. B. 241.

But members of the same family travelling together may carry each other's effects. *Dexter v. Syracuse*, etc., R. Co., 42 N. Y. 326; s. c., 1 Am. Rep. 527; *Curtis v. Delaware*, etc., R. Co., 74 N. Y. 116.

Practice.—It is a question for the jury to determine what articles of property, as to quantity and value, contained in a passenger's trunk or valise, may be deemed baggage (subject to the power of the court to correct any abuse), and it is improper for the judge to designate by name what articles may be included in the term "baggage" of a traveller. *Brock v. Gale*, 14 Fla. 523; s. c., 14 Am. Rep. 356. See *Ouimit v. Henshaw*, 35 Vt. 604.

Question, whether thirty-nine English sovereigns were baggage, left to jury. *Fairfax v. New York Central R. Co.*, 73 N. Y. 167.

What is a reasonable amount of baggage is for the jury. *Kansas City*, etc., R. Co. *v. Morrison*, 23 Am. & Eng. R. R. Cas. 481.

1. *Mattison v. New York*, etc., R. Co., 57 N. Y. 552; *Chicago*, etc., R. Co. *v. Fairclough*, 52 Ill. 106; *Burnell v. New York*, etc., R. Co., 45 N. Y. 184; *Bartholomew v. St. Louis*, etc., R. Co., 53 Ill. 227; *Mote v. Chicago*, etc., R. Co., 27 Iowa, 22; *Ross v. Missouri*, etc., R. Co., 4 Mo. App. 583; *Dinninny v. New York*, etc., R. Co., 49 N. Y. 546; *Roth v. Buffalo R. Co.*, 34 N. Y. 548; *Chicago*, etc., R. Co. *v. Boyce*, 73 Ill. 510; s. c., 24 Am. Rep. 268; *Holdridge v. Utica*, etc., R. Co., 56 Barb. (N. Y.) 194; *Louisville*, etc., R. Co. *v. Mahan*, 8 Bush (Ky.), 184; *Jones v. Norwich Trans. Co.*, 50 Barb. (N. Y.) 193; *Penton v. Grand Trunk R. Co.*, 26 Upp. Can. (Q. B.) 367; *Pascheider v. Great Western R. Co.*, L. R. 3 Exch. Div. 153. See CARRIER.

But until the goods are stowed in a place of safety the carrier remains liable. *Mote v. Chicago*, etc., R. Co., 26 Iowa, 22; *Bartholomew v. St. Louis*, etc., R. Co., 53 Ill. 227; *Chicago*, etc., R. Co. *v. Fairclough*, 52 Ill. 106; *Mattison v. New York*, etc., R. Co., 57 N. Y. 522. See CARRIER.





# INDEX.

- "A" not always a singular term, 1.  
 A railroad leading to M., 1 n. [1 n.  
 A room that is improved and suitable,  
 A sea, 1 n.  
 A year's rent, 1 n.  
 Abandonment, 1-6.  
     Acknowledgment by deserted wife, 169.  
     Adverse possession, 295.  
     Alien wife, 463.  
     Application for land, 6.  
     Child, 3.  
     Condemning land, proceedings for, 4.  
     Contract, 6.  
     Definition, 1, 2.  
     Divests title, 2 n.  
     Domicile, 6.  
     Easement, 6.  
     Fixtures, 6.  
     Gift, not an, 2 n.  
     Homestead, 6.  
     Insurance, 3.  
     Intent, 1 n.  
     Invention, 6.  
     Land, 4.  
     Land warrant, 6.  
     Mine, 6.  
     Office, 3.  
     Partial, 5 n.  
     Real property, 2.  
     Rights, 3.  
     Taxes, payment of, not evidence, 2 n.  
     Torts, for, 3.  
     Vessel, 2 n.  
     Wife, 3.  
     Wild animals, 6.  
 Abatement, 6-15.  
     Animals, dangerous or diseased, 8.  
     At law; practice, 12.  
     Bill of revivor, 14.  
     Bridge, obstructing navigation, 8.  
     Contempt; abatement in chancery does  
         not discharge, 13 n.  
     Corporation; abatement suit not  
         abated by death of member, 13 n.  
     Criminal actions, pleas in, 11.  
     Definition of, 6.  
     Disabilities, pleas to, 9, 10.  
     Duplicitv in plea, 11.  
     Duplicitv; plea to writ divisible, 11.  
     Dwelling-houses dangerous to public  
         health, 7, 8.  
 Abatement—*Continued.*  
     Eaves, overhanging, 8.  
     Equity, practice in, 13.  
     Freehold, of, 14.  
     Grand jury, plea to objections to, 11.  
     Highways, obstructions in, 7.  
     Judgment, 11.  
     Jurisdiction, plea to, 11.  
     Legacies, 12.  
     Lis pendens, 10.  
     Manner of abating, 8. [14 n.  
     Marriage of female does not abate suit,  
     Mill-dam, 8.  
     Misnomer, plea to, 10, 11.  
     Navigable waters, obstructions in, 7.  
     Noxious manufactory, 7, 8.  
     Nuisances, of, 7.  
     Overhanging trees, 8 n.  
     Pardon, plea to, 11.  
     Plea in, 9-11.  
     Pleas, requisites of, 11.  
     Practice; in equity, 13.  
     Practice; at law, 13.  
     Revenue law, 14.  
     Who may abate, 6.  
     Writ, plea to, 10.  
 Abbreviations, 15-21.  
     Affidavits, 15.  
     Ambiguity caused by, 545 n.  
     Assessments, 16.  
     Attorney's bill, 15.  
     Ballots, 15.  
     Bills and notes, 18.  
     C. O. D., 17.  
     Deeds, 15.  
     Evidence to explain, 17.  
     Explanation of, 15.  
     F. O. B. (Free on board), 18.  
     I O U, 17.  
     Judgment, 18.  
     Mechanic's lien; account, 17.  
     Misnomer, 20.  
     Name, 15, 18, 19, 20.  
     Pleadings, 19.  
     Protest of note, 17.  
     Residence, 20.  
     Return of service, 20.  
     Stock contract, 17.  
     Tax-deed, 17.  
     Wills, 20.  
 Abdicate, 21.

- Abduction, 21-25.  
 At common law, 22 *n*.  
 Chaste character, 25 *n*.  
 Evidence, 26 *n*.  
 Fraud in taking, 24.  
 Girls under sixteen, 22-25.  
 Legal charge, in, 22 *n*.  
 "Taking out of possession," 23.  
 What is, 21, 23 *n*.  
 What is not, 22 *n*.  
 Abetting. *See* Accessory, 61.  
 Abettor. *See* Accessory, 61.  
 Abeyance, 26, 27.  
 Abide, 27.  
 Abide the judgment of the court, 270 *n*.  
 Abide by an award, 27 *n*.  
 Abide the decision, 27 *n*.  
 Ability, 28.  
 Able, 28.  
 Able bodied, 28.  
 Abortion, 28-32.  
   Accessories, 30 *n*., 68 *n*.  
   Common law, at, 28.  
   Death of child, 31.  
   Definition, 28.  
   Evidence, 31.  
   Intention, 29.  
   Murder, when, 29 *n*.  
   Noxious thing, 29.  
   Pregnant, 30.  
   Quick with child, 30.  
 About, 32.  
   Charter-party, 34.  
   Contract, 33.  
   Deed, 32.  
 Abscond, 34.  
 Absence, 35-43.  
   Civil law, 41 *n*.  
   Definition, 35.  
   Governor, of, 36 *n*.  
   Hearing of, 41.  
   Inquiries, 41.  
   Judge, of, 36 *n*. [38 *n*.  
   Marriage, presumption of innocence,  
   Presumption; continuance of life, 40.  
   Presumption of death, 37. [38 *n*.  
   Presumption of innocence; marriage,  
   Presumption of survivorship, 42.  
   Survivorship, 42.  
 Absented, 44.  
 Absentee, 44.  
 Absolute, 44.  
 Absolute inheritable title, 44 *n*.  
 Absolute interest, 45. [45 *n*.  
 Absolute purchase of any pew in church,  
 Absolute right, 45 *n*.  
 Absolute total loss, 45 *n*., 185 *n*.  
 Absolutely, 45.  
 Absolutely entitled, 45 *n*.  
 Absolutely incompatible, 45 *n*.  
 Absolutely vested, 45 *n*.  
 Abstract, 45.  
 Abstract of title, 46-49.  
   Annuities, 48.  
 Abstract of title—*Continued*.  
   Arrangement, 46.  
   Attachments, 48.  
   Bail bonds, 48.  
   Curtesy, 48.  
   Decedent's debts, 48.  
   Dedication to public use, 48.  
   Deeds; how stated, 47.  
   Deeds of trust, 48.  
   Definition, 46.  
   Dower, 48.  
   Easements, 48.  
   Execution sales, 47 *n*.  
   Executions, 48.  
   Incumbrances, 48.  
   Judgments, 48.  
   Judicial sales, 47.  
   Lease, 48.  
   Legacies, 48.  
   Liability of examiners, 48.  
   Liens, 48.  
   Lis pendens, 48.  
   Mechanic's liens, 48.  
   Miscellaneous liens, 48.  
   Mortgages, 48.  
   Official bonds, 48.  
   Patents, 47.  
   Powers, 47.  
   Recognizances, 48.  
   Special assessments, 48.  
   Tax sales, 48.  
   Taxes, 48.  
   Title by descent, 48.  
   Trustee's expenses, 48.  
   Vendor's lien, 48.  
   Vendor not bound to furnish, 46.  
   What should contain, 46.  
   Wills, 47.  
 Abuse and misuse, 49.  
   Children, 49.  
   Corporate privileges, 49.  
   Discretion, 49 *n*.  
   Legal process, 49.  
   Women, 49.  
 Abut, abutting, 49.  
 Abutment, 50.  
 Accept, 50.  
 Accept and receive, 50 *n*.  
 Acceptance, what is, 50 *n*.  
 Accepted, 50.  
   What constitutes, 50 *n*.  
 Access (husband and wife), 50.  
 Accession, 50-61.  
   Accident, 56.  
   Accounts, 60.  
   Act of God, 56.  
   Admixture, 52.  
   Animals, 51 *n*., 59 *n*.  
   Boards made from trees, 59 *n*.  
   Buildings, 61.  
   Confusion of goods, 54 *et seq*.  
   Cord-wood, 58 *n*.  
   Corn made into whiskey, 58 *n*.  
   Crops, 51 *n*., 60 *n*.

Accession—*Continued.*

Crops on land held adversely, 52 *n.*  
 Damages, 59 *n.*  
 Definition, 50.  
 Dividends, 51 *n.*  
 Execution, 58 *n.*  
 Fire-wood cut from trees, 59 *n.*  
 Grain, 56 *n.*  
 Hides made into leather, 58 *n.*  
 Ice, 51 *n.*  
 Innocent possession, 52.  
 Labor upon materials, 52, 53.  
 Logs, 56 *n.*  
 Machinery, 56 *n.*  
 Mortgage, 59 *n.*  
 Mortgaged goods, 57 *n.*, 58.  
 Plants, 51 *n.*, 60 *n.*  
 Posts, 58 *n.*  
 Railroad ties, 56 *n.*, 59 *n.*  
 Rails, 58 *n.*  
 Replevin, 58 *n.*  
 Sale is not, 51 *n.*  
 Shingles, 58 *n.*  
 Slaves, 51 *n.*  
 Staves, 58 *n.*  
 Timber, 58 *n.*  
 Trees, 51 *n.*  
 Trees into charcoal, 58 *n.*  
 Trespassers, 52 *n.*  
 Trust funds, 60.  
 Vis major, 56.  
 Wilful trespasser, 53.  
 Wrongful possession, 52.  
 Accessory, 61-82.  
 Abortion, 30 *n.*, 68 *n.*  
 Admiralty, 62 *n.*  
 Affray, 319.  
 After the fact, 72.  
 Aider and abettor, 62-65.  
 Arson, 74 *n.*  
 Arson, innocent agent, 65 *n.*  
 Attachment, wrongful, 63 *n.*  
 Before the fact, 67.  
 Before the fact, as principals, 71.  
 Bigamy, 64 *n.*  
 Children, 62 *n.*  
 Common purpose, 66.  
 Conspiracy, 62 *n.*  
 Constructive presence, 70.  
 Conviction of principal, 72.  
 Countermanding the crime, 67 *n.*  
 Crime instigated different from that committed, 69.  
 Crime probable consequence of that suggested, 69.  
 Crime suggested committed in another way, 69.  
 Definition, 61.  
 Degree of incitement, 68 *n.*  
 Duress, 62 *n.*  
 Garner, 62 *n.*  
 Husband and wife, 64 *n.*  
 Husband, to rape of wife, 71 *n.*  
 Innocent agent, 65.

Accessory—*Continued.*

Insane person, 65 *n.*  
 Instigation countermanded, 69.  
 Instigator, 67.  
 Intent, 64.  
 Intoxicating liquor, 62 *n.*, 63 *n.*  
 Knowledge of proposed crime, 68.  
 Larceny, 62 *n.*  
 Misdemeanors; all principals, 63 *n.*, 72.  
 Postmaster's false returns, 64 *n.*  
 Presence and participation, 63.  
 Rape, 64 *n.*  
 Rape, husband accessory to, 71 *n.*  
 Statutory crimes not expressly mentioned, 64 *n.*  
 Stolen goods; innocent custodian, 65 *n.*  
 Third person, through medium of, 67 *n.*  
 Trespass, 63 *n.*

## Accident, 82-86.

Agent not liable for, 370, 372 *n.*  
 Animals, 84.  
 Confusion of goods, 56.  
 Dangerous goods, 85.  
 Definition, 82.  
 Equity, 85.  
 Extent of jurisdiction, 85.  
 Fires, 84, 86.  
 Horses, 84.  
 Ice, 85.  
 Inevitable, 175 *n.*  
 Injuries to the person, 83 *et seq.*  
 Insufficient assets, 86 *n.*  
 Negotiable instruments, 85.  
 Railroad, 84.  
 Sidewalk, 85.  
 Snow, 85.  
 Sparks, fire caused by, 84.  
 Steam boiler, 84.  
 Steam whistle, 84.  
 Test of liability, 82.  
 Water, 83.  
 Wild animals, 84.

## Accident insurance, 87-93.

Accidents, what are, 87-90.  
 Accidents, what are not, 89.  
 Arbitration, 93.  
 Blood-vessel, rupture of, 88 *n.*  
 Change of occupation, 92*b.*  
 Carrier; traveller must comply with  
 Damages, 93. [rules, 92*a.*  
 Definition, 87.  
 Drowning, 88 *n.*  
 Fits, 88.  
 Hernia, 88 *n.*  
 Highwaymen, attacked by, 89 *n.*  
 Insurable interest, 93.  
 Limiting liability, 91.  
 Notice to company, 92*d.*  
 Peritonitis, 89.  
 Poison, 92*a.*  
 Policy, the, 87.  
 Proximate cause, 90.  
 Railroad accident, 88 *n.*  
 Recovery over, by company, 93.

Accident insurance—*Continued.*

- Remote cause, 90.
- Rupture, 88 *n.*, 89 *n.*
- Spine, injury to, 88 *n.*
- Suicide, 92*b*.
- Sunstroke, 89 *n.*
- Total disability, 92*e*. [*veyance*," 92*a*.  
" Travelling by public or private con-
- Accommodating terms, 94.
- Accomplice. *See* Accessory.
- Accord and satisfaction, 94-107.
- Additional security, 101.
- Advantageous to creditors, 96.
- Assumpsit, 888.
- Composition of debts, 100 *n.*
- Definition, 94.
- False imprisonment, 95 *n.*
- Fraud, 106.
- Injuries to persons, 98 *n.*
- Joint creditors, 106.
- Joint makers of note, 106.
- Joint obligors, 103.
- Joint tort-feasors, 105.
- Marriage, promotion of, 96 *n.*
- Misrepresentations, 106.
- Must be legal, 96.
- New consideration, 99.
- Note for note, 103.
- Note of third person, 101.
- Note, payment by, 102.
- Part payment, 97, 100.
- Payment by note, 102.
- Payment in property, 99.
- Seduction, 99 *n.*
- Stockholder, release of, 104 *n.*
- Stockholder, withdrawal of, 96 *n.*
- Stranger cannot make, 97.
- Tender not accepted, 95.
- When set aside, 107.
- According, 107. [stated, 108-128.
- Account. *See* Account render; Account
- Agent must keep, 383.
- Agent's power to examine, 367.
- Confusion of goods, 60.
- Definition, 108.
- Open accounts, 109.
- Settled accounts, 109.
- Account render, 128-135.
- Arbitration, 131.
- Auditors, 131.
- Defence, 131.
- Definition, 128.
- Error, 133.
- Execution, 133.
- Final judgment, 133.
- History, 128.
- Judgment *quod computet*, 131.
- Legacy, 130 *n.*
- On what demand account lies, 130.
- Process, 131.
- United States, in, 133.
- When account lies, 129.
- Account stated, 110-128. [114.
- Acknowledgment must be unqualified,

Account stated—*Continued.*

- Acquiescence, 115.
- Admissions, 115.
- Agent, 126 *n.*
- Appraisal, 116 *n.*
- Assumpsit, 884.
- Award not evidence of, 116 *n.*
- Balance, 124.
- Banks, 111 *n.*, 117 *n.*, 124 *n.*, 127 *n.*
- Bills and notes, 120.
- Corporation, 116 *n.*
- Definition, 110.
- Duress, 119.
- Equitable claims, 123.
- Executor, 112.
- Falsifying, 128.
- Fraud, 123, 125.
- How stated, 113.
- Husband and wife, 117 *n.*
- I O U, 120 *n.*
- Illegal, 123.
- Infants, 111 *n.*
- Insane persons, 111 *n.*
- Interest, 124.
- Letter, by, 121 *n.*
- Mail, by, 121 *n.*
- Mistake, 125.
- New promise, 123.
- Opening the account, 125.
- Parent and child, 118 *n.*
- Parties not merchants, 124. [127 *n.*
- Pass book, 111 *n.*, 117 *n.*, 118 *n.*, 124 *n.*,
- Persons not concluded, 111 *n.*
- Pleadings, 127 *n.*
- Principles, 110.
- Public accounts, 112.
- Reasonable time, 121.
- Set-off, 122.
- Silence, when an admission, 116-119.
- Surcharging, 128.
- Third parties, 122.
- To whom stated, 122.
- What amounts to, 113 *n. et seq.*
- What does not amount to, 115 *n. et seq.*
- When cannot be opened, 126 *n.*
- Accountable, 135.
- Accountable receipt, 135.
- Accretion, 136-142.
- Definition, 136.
- Filum aquæ, 140 *n.*, 141 *n.*
- Highways, 138 *n.*
- In whom title vests, 136.
- Islands, 138.
- Must be slow, 137.
- Reliction, 137.
- Rivers and streams, 137.
- Seaweed, 140.
- Stranded property, 141.
- Wharves, 136 *n.*
- Accrue, 142.
- Accrue and occur distinguished, 142 *n.*
- Accrued, 142.
- Accruing, 142.
- Accruing or owing, 142 *n.*

Accumulated surplus, 142.  
 Accuse, accused, 143.  
 Accustomed, 143.  
 Accustomed way, 143 *n.*  
 Acknowledgment of deeds, 143-170.  
   Abandonment of wife, 169.  
   Agent, by, 170.  
   Ambiguity, 156.  
   Assignment for creditors, 859.  
   Attorney, by, 170.  
   *Bona-fide* purchaser, 158.  
   By order of court, 170.  
   Certificate of, 147 *et seq.*  
   Clerical errors, 152.  
   Conclusiveness of certificate, 147 *et seq.*  
   Construction of certificate, 156.  
   Corporation, 159.  
   Correction of certificate, 149 *et seq.*  
   Date, mistake in, 153.  
   Death, presumption of, 169, 170.  
   Defective certificate, *bona-fide* purchaser, 158.  
   Definition, 143.  
   Description of property, officer cannot  
   Divorce, 169. [change, 509 *n.*  
   "Does not wish to retract," 168.  
   Dower, 169.  
   Duress, 168.  
   Equity will not correct, 165.  
   Equivalent words, 168 *n.*, 169 *n.*  
   Evidence not admissible to prove essential fact, 151.  
   Examination of wife, 165.  
   Explanation to wife, 167.  
   Fraud, 160.  
   Identity of party, 154.  
   Impeachment of, 158, 160, 161 *n.*  
   In another State, 147 *n.*  
   Infants, 161 *n.*  
   Interpreter, 166 *n.*, 168 *n.*  
   Legacy, 170.  
   *Mandamus* to correct, 149. [et seq.  
   Married women. See Wife, *infra*, 163  
   Mistake, 150 *et seq.*  
   Name of grantor, 155.  
   Negligence, 155.  
   Of party must appear, 156.  
   Official character of person taking in  
   another State; how shown, 147 *n.*  
   Omission of words, 149 *et seq.*, 168 *n.*,  
   Presumption of death, 169, 170. [169 *n.*  
   Presumption of validity, 150 *n.*  
   Redundant words, 152.  
   Seal, 157.  
   Signature of officer, 156.  
   Subsequent acknowledgment, 163.  
   Validating statutes, 161.  
   Voluntary appearance of wife, 169 *n.*  
   Want of; color of title, 287 *n.*  
   Who may take, 144.  
   Who may not take, 145-6.  
   Wife, 163 *et seq.* [165.  
   Wife's, cannot be corrected in equity,  
   Wife's, cannot be aided by parol proof,  
   Wife cannot impeach, 161 *n.* [165.

Acknowledgment of deeds—*Continued.*  
   Wife "does not wish to retract," 168.  
   Wife; duress, 168.  
   Wife, examination of, 165.  
   Wife, must be explained to, 167.  
   Wife; subsequent acknowledgment, 163.  
   Wife; voluntary appearance, 169 *n.*  
   Wife willingly executes, 168.  
   Witness may be substituted for defective certificate, 153.  
   Witness; proof by subscribing, 163.  
   Words, omission of, 149 *et seq.*, 168 *n.*,  
   Words, redundant, 152. [169 *n.*  
   Words, vital, 152.  
 Acquainted, 170.  
 Acquiesced, 171.  
 Acquired, 171.  
 Acquittal, 171.  
 Acquittance, 171.  
 Acquitted, 172.  
 Across, 172.  
 Act, 172.  
 Act done (in lease), 173 *n.*  
 Act in all my business, 173 *n.*  
 Act in his official capacity, 173 *n.*  
 Act of Congress, 173 *n.*  
 Act of God, 173-178.  
   Confusion of goods, 56.  
   Dangers of the sea, 176 *n.*  
   Definition, 174.  
   Drought, 175.  
   Fires, 176 *n.*  
   Floods, 174-177.  
   From what duties excused, 173.  
   Frost, 175-177 *n.*  
   Gale, 175-177.  
   Inevitable accident, 175 *n.* [174.  
   Loss must result from a natural cause,  
   Natural cause must be the immediate,  
   Negligence, 176. [175.  
   Sickness, 175.  
   Storms, 174-177.  
   Wind, 175-177.  
 Act of insolvency, 178.  
 Act, or intention (insurance policy), 173 *n.*  
 Acting as attorney, 178. [der, 128.  
 Action on account. See Account ren-  
 Action originally commenced, 717 *n.*  
 Actions, 178-184 *h.*  
   Account, 128.  
   Admiralty, 201.  
   Agency; ratification by suit, 439.  
   Alien may bring, 462.  
   Alien wife, by, 463.  
   Appearance, 182.  
   Arbitration discontinues, 184g.  
   Assault, for, 783.  
   Assent to discontinue, 184g.  
   Assignment, 827.  
   Assumpsit, 882.  
   Attorneys, appearance by, 148.  
   Bills and notes, 184a.  
   Commencement, 184.  
   Consent, 181.

Actions—*Continued.*

Consolidation, 184*a*.  
 Cumulation, 184*c*.  
 Damages, 179.  
 Definition, 178.  
 Demand, when required, 181.  
 Demand, when not required, 182.  
 Discontinuance, 184*g*.  
 Fraud in discontinuance, 184*g*.  
 Joinder, 184*b*.  
 Legality, 180.  
 Local, 184*f*.  
 Motive, 179.  
 Nudum pactum, 181.  
 Patents, 184*a*.  
 Right must be complete, 180.  
 Splitting of, 184*c*.  
 Statutory remedies, 184*c*.  
 Terms of discontinuance, 184*g*.  
 Time of discontinuance, 184*g*.  
 Transitory, 184*f*.  
 When maintainable, 179.  
 Wrongdoer, 180.  
 Actual, 184*g*. [guished, 184*g*.  
 Actual and constructive fraud distin-  
 Actual and continued change of posses-  
 Actual cash payment, 185 *n*. [sion, 184*h*.  
 Actual cash value, 185 *n*.  
 Actual control, care, or management, 187*n*.  
 Actual cost, 185 *n*.  
 Actual damages, 187 *n*.  
 Actual delivery, 184*h*.  
 Actual determination, 186 *n*.  
 Actual market value, 186 *n*.  
 Actual military service, 186 *n*.  
 Actual notice, 184*h*.  
 Actual occupation, 186 *n*.  
 Actual ouster, 186 *n*.  
 Actual possession, 184*g*.  
 Actual residence, 186 *n*.  
 Actual seizure, 187 *n*.  
 Actual settler, 186 *n*.  
 Actual total loss, 185 *n*.  
 Actually employed, 187 *n*.  
 Actually occupied, 187 *n*.  
 Actually sold, 186 *n*.  
 Addition, additional, 187.  
 Addition erected to a building, 187 *n*.  
 Address of letters, 188.  
 Adequate, 189.  
 Adequate cause, 189 *n*.  
 Adequate crossing, 189 *n*.  
 Ad filum aquæ, 189.  
 Adhering, 190.  
 Adjacent, 190.  
 Adjoining, 190 *n*., 191.  
 Adjourn, adjournment, 192.  
 Adjournment (arbitration), 709.  
 Adjudged, 192.  
 Administration, 193. [istrator.  
 Administrator. *See* Executor and admin-  
 Admiralty, 193-204.  
 Action *in personam*, 202.  
 Action *in rem*, 201.

Admiralty—*Continued.*

Action pending, 203.  
 Affidavit, proctor may make, 308 *n*.  
 Appraisement, 635.  
 Bridges, jurisdiction over, 196.  
 Conspiracy to plunder wreck, 62 *n*.  
 Contracts not maritime, 198.  
 Contracts within jurisdiction, 197.  
 Courts having jurisdiction, 200.  
 Decree, 203.  
 Evidence, 203. [196.  
 Foreign waters; admiralty jurisdiction,  
 History of, 193.  
 Internal commerce; jurisdiction, 195.  
 Joinder of actions, 202.  
 Jurisdiction, exclusive, 200.  
 Jurisdiction of colonial courts, 194.  
 Jurisdiction of U. S. courts, 194.  
 Jurisdiction over bridges, 196.  
 Jurisdiction over contracts, 197-9.  
 Jurisdiction over foreign waters, 196.  
 Jurisdiction over internal commerce,  
 Jurisdiction over torts, 195-199. [195.  
 Jurisdiction over what persons, 196.  
 Jurisdiction over what vessels, 196.  
 Jurisdiction over what waters, 194.  
 Jurisdiction, scope of, 197.  
 Maritime lien, 200.  
 Partnership accounts, 198.  
 Pleadings, 203.  
 Prize causes, 200.  
 Procedure in, 201.  
 Restraint of lower courts, 204.  
 Set-off and recoupment, 203.  
 Torts as affected by place, jurisdiction  
 over, 195.  
 Torts within jurisdiction, 199.  
 Trial, 203.  
 Admixture, accession, 52.  
 Adoption of children, 204.  
 Definition, 204.  
 Descent, 205.  
 Inheritance, 205-6.  
 Services, 207.  
 Status, 205.  
 Adult, 207.  
 Adulteration of food, 207-210.  
 Adultery, when not a matter of divorce,  
 At common law, 209. [209-216.  
 Cohabitation, 211 *n*.  
 Consent not essential, 213.  
 Evidence, 214.  
 Former conviction, 216.  
 Ignorance of marriage no excuse, 210 *n*.  
 Living in, 212.  
 Marriage, proof of, 214.  
 Practice, 216.  
 Religious or social usage, 213.  
 Solicitation to commit, 213.  
 Who may commit, 210 *n*., 211.  
 Advancements, 216-224.  
 Annuity, 217.  
 By parol; adverse possession, 221 *n*.  
 Definition, 216.

Advancements—*Continued.*

- Donor divests himself of title, 223.
- Gift, 217-223.
- Illegitimate children, 221 *n.*
- Interest, 222.
- Lapse of time, 224.
- Life insurance, 217.
- Not part of estate, 223.
- Of what may consist, 217.
- Presumptions as to, 218.
- Statutes and their construction, 220.
- When value computed, 222.
- Advances, 224.
- Adverse interest; agency, 372.
- Adverse possession, 225-305.
  - Abandonment, 266 *n.*, 295 [287 *n.*
  - Acknowledgment of deed, absence of,
  - Action for rent received, 295 *n.*
  - Actual, must be, 252.
  - Actual occupation, 186 *n.*
  - Actual ouster, 186 *n.*
  - Actual possession defined, 254 *et seq.*
  - Actual residence, 186 *n.*
  - Administrator, 242 *n.*
  - Administrator's sale, 277 *n.*
  - Agent, 244.
  - Agent, deed by, assumed, 277 *n.*
  - Agent, fraud of, 245 *n.*
  - Agent, possession by, 256 *n.*
  - Ambiguous descriptions, 291.
  - Ancient deed, 277 *n.*
  - Assessment lease, 240 *n.*
  - Assignment of homestead, 278 *n.*
  - Assumpsit, 883 *n.*
  - Attorney and client, 245 *n.*
  - Bequest, 277 *n.*
  - Betterments, 294.
  - Boundaries, 248.
  - Breach of peace, 227 *n.*
  - Burying-ground, 257 *n.*
  - Character of land regulates, 255, 263.
  - Claim of title, 292.
  - Color of title, 276-292.
  - Color of title, without, 292.
  - Computation of time, 267 *n.*
  - Condemnation of land, void, 278 *n.*
  - Conflicting titles, 289.
  - Constructive possession, 228 *n.*, 262.
  - Constructive trusts, 242.
  - Continuous, must be, 265.
  - Conveyance by co-tenant, 234.
  - Corporations cannot tack, 271 *n.*
  - Co-tenants, 232.
  - Crops on, belong to holder, 52 *n.*
  - Cultivation, 259.
  - Curtesy, 229 *n.*, 237 *n.*
  - Dedication, 226 *n.*
  - Deed by sheriff, 237 *n.*
  - Deed, invalid, 285.
  - Deed, lost, 283.
  - Deed not recorded, 283.
  - Deed of one out of possession, 278 *n.*
  - Defective title, 285-291.
  - Definition, 225.

Adverse Possession—*Continued.*

- Descent, 277 *n.*
- Dower, 237 *n.*
- Easements, 297.
- Effect, 301.
- Entry of legal owner, 274.
- Essentials, 228.
- Estoppel, 253 *n.*
- Evidence, 303.
- Exclusive, 228 *n.*, 261.
- Executory contract, 229.
- Executory contract as against third party, 232. [278 *n.*
- Executory contract not color of title,
- Executory contract; presumption of payment, 232 *n.*
- Executory contract; vendee paying purchase-money, 230.
- Extent of possession, 290.
- Fences, 248, 257 *n.*, 259-261.
- Fraud, 233 *n.*, 292.
- Fraud not presumed, 279.
- Gift, 280.
- Good faith, 277.
- Government, title in, 267 *n.*
- Grant, 300 *n.*
- Grant, conflicting, 288 *n.*, 289.
- Grantor and grantee, 247.
- Grass, cutting of, 258 *n.*
- Guardian's deed, 277 *n.*
- Higher title, recognition of, 229.
- Highways, 297.
- Hostile, 228, 264 *n.*
- Husband and wife, 250, 257 *n.*, 268 *n.*, 270 *n.*, 277 *n.*, 278 *n.*, 287 *n.*
- Husband's curtesy, 229 *n.*
- Improvements, 294.
- Inclosures (*see* Fences, *infra*), 259 *et seq.*
- Infant, deed of, 286 *n.*
- Intent, 227, 263 *n.*, 286.
- Interference of title, 288.
- Interruption, 240 *n.*, 271.
- Invalid title, 285, 291.
- Judicial sale, 247 *n.*
- Landlord and tenant, 238.
- Lease for life, 237 *n.*
- Legal owner, entry of, 274.
- Life estate, 237, 277 *n.*, 278 *n.*
- Lost deed, 283.
- May not hold adversely to all, 276.
- Millpond, 255 *n.*
- Millpond, bottom of, 251.
- Mines, 296.
- Mistake, 281-2.
- Mortgagor and mortgagee, 245.
- Municipal corporations, 300.
- Notice, 235 *n.*, 240 *n.*, 264.
- Notorious, 261.
- Notorious, what is, 228 *n.*
- Occasional use not sufficient, 258.
- Open, definition of, 228 *n.*
- Ouster, 232, 233.
- Parent and child, 252 *n.*, 282 *n.*
- Parol, advancement by, 281 *n.*



**Adverse Possession—Continued.**

Parol agreement, 278 *n.*, 279.  
 Parol agreement; possession, 293 *n.*  
 Parol sale, 236 *n.*  
 Partition, 233 *n.*, 278 *n.*  
 Payment of taxes, 284.  
*Pendente-litæ* purchaser, 247.  
 Permissive entry, 251.  
 Pre-emption claim, 278 *n.*  
 Presumption of payment under execu-  
 Public lands, 298-9. [tory contract, 232 *n.*  
 Purchase by adverse holder, 275.  
 Purchase-money; executory contract,  
 Purchaser from trustee, 244. [230, 230 *n.*  
 Quarry, 296 *n.*  
 Railroad, 290 *n.*  
 Railroad in street, 298 *n.*  
 Remainder-man, 237.  
 Rent received, action for, 295 *n.*  
 Resulting trusts, 243.  
 Right of way, 297.  
 Seal, deed without, 277 *n.*  
 Secret, must not be, 228, 262 *n.*, 263 *n.*  
 Secret trust, 242 *n.*, 252 *n.*, 254 *n.*, 292 *n.*  
 Sheriff's deed, 237 *n.*  
 Sidewalk, 258 *n.*  
 Street, 297. [290 *n.*  
 Street, extent of railroad's possession,  
 Sub-purchaser may acquire, 230 *n.*  
 Subservient land claimed under de-  
 fective title, 291.  
 Sub-tenant, 240 *n.*  
 Superior title, offer to buy, 272.  
 Survey, record of, 378 *n.*  
 Tacking, 269.  
 Tacking, fraud in, 292 *n.*  
 Tax certificate, 278 *n.*  
 Tax deed, 284.  
 Tax, payment of, 261, 284.  
 Tax title; purchase by tenant, 240 *n.*  
 Tenant cannot interrupt, 240 *n.*  
 Tenant by sufferance, 240 *n.*  
 Tenants in common, 232.  
 Time, computation of, 267 *n.*  
 Title, conflicting, 289.  
 Title, interference of, 288.  
 Tortious, when, 279 *n.*  
 Trees; occasional cutting, 258 *n.*  
 Trusts, 240.  
 Two seisons cannot exist, 262 *n.*  
 User, 226.  
 Vendor and vendee, 247.  
 Visible, must be, 261.  
 Void bond for title, 277 *n.*  
 Void decree, 277 *n.*  
 Void judgment, 278 *n.*  
 Void patent, 277 *n.*  
 Void statute, 278 *n.*  
 Waters, 296.  
 Water, flowing land with, 257 *n.*  
 Water, use of, 258 *n.*  
 Wife's acknowledgment, want of, 287 *n.*  
 Wild land, 263.  
 Will, 277 *n.*, 287 *n.*

**Adverse Possession—Continued.**

Without color of title, 292.  
 Wood-pile does not give, 258 *n.*  
**Advertisements**, 306.  
 Appeal, notice of, 622 *n.*  
 Public sales, 306 *n.*  
**Advice**, 307.  
 Aider and abettor, 64.  
 Affected, 307.  
**Affidavits**, 307-315.  
 Abbreviations in, 15.  
 Agent may make, 308.  
 Amendment, 314.  
 Arrest, 721.  
 Attachment, 901.  
 Attorney, 308, 309.  
 Authentication, 312.  
 Certain in substance, 312.  
 Convict cannot make, 308.  
 Corporations; who should make, 308 *n.*  
 Definition, 307.  
 Erasures, 314.  
 Evidence, as, 314.  
 Husband and wife, 308 *n.*  
 Infant cannot make, 308.  
 Insane person cannot make, 308.  
 Interlineations, 314.  
 Jurat, 311.  
 Language, immaterial in what, 314  
 Notaries; power to take, 310.  
 Perjury, 310.  
 Requisites, 310.  
 Scandalous matter, 314.  
 Seal to jurat, 312.  
 Signature, 311.  
 Stale, 315.  
 Sufficiency, 312.  
 Title, 310.  
 Use of, 314.  
 Venue, 311.  
 Who cannot make, 308.  
 Who may make, 307.  
 Who may take, 309.  
**Affinity**, 315.  
**Affirmance**, 315.  
**Affray**, 315-319.  
 Accessories, 319.  
 Definition, 315.  
 Prevention of, 316 *n.*  
 Public place, what is, 318 *n.*  
 What is, 317.  
**Afore**, 319.  
**Aforesaid**, 319.  
**Aforethought**, 321.  
**Afoul**, 321.  
**After**, 321.  
 After conviction, 322 *n.*  
 After judgment, 322 *n.*  
 After the date, 323 *n.*  
 After the fact, accessory, 72.  
 After the fact committed, 322 *n.*  
 After the passing or passage, 324 *n.*  
 After the payment, 323 *n.*  
 After verdict, 322 *n.*

After work, 323 *n*.  
 Afternoon, 324.  
 Afterward, afterwards, 324.  
 Against, 325.  
 Against her will, 325 *n*.  
 Against law, 326 *n*.  
 Against the form of the statute, 325 *n*.  
 Against the peace of the State, 325 *n*.  
 Age, 326-330.  
   Computation of, 327.  
   Criminal law, 327.  
   Definition, 326.  
   Evidence of, 327 *n*.  
   False pretences, 329.  
   Nuisance, 330.  
 Agency (see Authority), 331-448.  
   Account of receipts and disbursements,  
     Account stated, 126 *n*. [382.  
   Accounts, agent must keep, 383. [367.  
   Accounts, agent's power to examine,  
     Accounts; sub-agent to agent, 395.  
   Accidents; agent not liable, 370, 372 *n*.  
   Acknowledgment of deeds, 170.  
   Advances by agent; indemnification,  
     Adverse interest, 335, 372. [399.  
   Adverse possession, 244.  
   Adverse possession; fraud of agent,  
     Affidavits, 308. [245 *n*.  
   Agency must exist, 415.  
   Agent acting in own name, 402.  
   Agent cannot act for both parties, 380.  
   Agent contracting in own name, 415,  
     416. [376.  
   Agent may buy direct from principal,  
   Agent must add his name to signature,  
     393.  
   Agent to buy may not buy for himself,  
   Agent's right of suit, 429. [378.  
   Aliens, 333, 334, 335 *n*.  
   Alteration of instruments, 497 *et seq*.  
   Ambiguous authority, 351.  
   Ambiguous contract, 409.  
   Ambiguous instruments; signature, 391.  
   Appeal; neglect to file power, 622 *n*.  
   Appointment, 336.  
     By corporations, 338.  
     By direct instructions, 343.  
     By implication, 340-342.  
     By parol, 339.  
     Form of, 336.  
     Limited by usage, 347.  
     Must be distinct, 344.  
     Parties bound by implication, 345.  
     Under seal, 337.  
   Arbitration, 652, 673.  
   As held out to the world, 353.  
   Assignment for creditors, 859.  
   Attorney, 378 *n*.  
   Authority, agent exceeding, 415.  
   Authority, cannot delegate, 368.  
   Authority, duty to observe terms of,  
     Authority to fill in blanks, 337. [369.  
   Bank; certifying checks, 341 *n*.  
   Bank; liability for failure, 385 *n*.

## Agency—Continued.

Bank; notice to directors, 422.  
 Bankruptcy revokes agency, 448.  
 Bill of lading; fraud of agent, 412 *n*.  
 Bills and notes, 362.  
 Bills and notes; agent's possession im-  
   plies power to collect, 341 *n*.  
 Bills and notes; indorsement, 342 *n*.  
 Bills and notes; signature by agent, 388.  
 Blanks, power to fill, 337.  
 Business, power to conduct, 363.  
 C. O. D., 350 *n*.  
 Carrier, power to ship by, 361.  
 Chattel mortgage; mortgagee an agent,  
   340 *n*.—*contra*, 346 *n*.  
 Checks, certifying, 341 *n*.  
 Classes of agents, 347.  
 Collections, 355-360.  
 Collusion to defraud, 423.  
 Color of title, 277 *n*.  
 Commissions. *See* Payment, *infra*.  
 Compensation. *See* Payment, *infra*.  
 Compensation of sub-agent, 395.  
 Confusion of goods, 61 *n*.  
 Consent of both principals, 381.  
 Consideration; power irrevocable, 446.  
 Contract effective in agent's name, 406.  
 Contract for sale of land, 338, 343 *n*.  
 Contract, power to perform, 367.  
 Contract, principal may sue on, 423.  
 Control, agent in, 407.  
 Conveyance, power to make, 360.  
 Corporate seal to explain signature, 390.  
 Corporation agent, how appointed, 338.  
 Corporation; malicious act of agent,  
   412 *n*.  
 Corporation; notice to agent, 421-2.  
 Corporation, officers of, 373.  
 Corporation, ratification by, 339, *n*.,  
   432 *n*., 438 *n*.  
 Corporation; *ultra vires*, 431 *n*.  
 Corporations, 334, 336 *n*., 341 *n*., 345 *n*.  
 Credit, agent pledging his own, 403.  
 Credit, agent's power to obtain, 366.  
 Credit given to agent, 416.  
 Credit, sales on, 360.  
 Coupled with an interest, 336 *n*.  
 Death revokes power, 446.  
 Deceit of agent, 417, 418.  
 Declarations of agent, 351.  
 Dedication, 361.  
 Deed by assumed agent, 277 *n*.  
 Deed on record, knowledge not pre-  
   sumed, 433 *n*.  
 Deed, power to execute, 360.  
 Deed, ratification of, 436 *n*., 437 *n*.  
 Deed; "sell" in power authorizes con-  
   veyance, 346 *n*. [386.  
 Deed, signing, by agent, 337 *n*., 338,  
   *Del credere* commission, 396.  
 Demand by principal, 383.  
 Direct instructions, 343.  
 Disabilities, 334.  
 Disavowal, 434, 439, 442.

*Agency—Continued.*

Drunkards, 334.  
 Duress, 405 *n.*  
 Duties of agents, 368-384.  
   To perform duties undertaken, 368.  
   To act in name of principal, 368.  
   To act in person, 368.  
   To observe terms of authority, 369.  
   Power of substitution, 369.  
   To obey instructions, 369.  
   To conform to usage, 371.  
   To use ordinary skill, 371.  
   To use ordinary diligence, 371.  
   To make full disclosure of adverse interest, 372.  
 Same rule as to officers of corporations, 373.  
 Fiduciary relations, 375.  
 Purchasing agent may not buy his own property, 375.  
 Selling agent cannot buy himself, 375.  
 But may buy direct from principal, 376. [*self*, 378.]  
 Agent to buy may not buy for him-  
 All profits belong to principal, 379.  
 Cannot act for both parties, 380.  
 Except by consent, 381.  
 After termination of agency, 382.  
 Must render full accounts, 382.  
 And keep regular accounts, 383.  
 Demand necessary, 383.  
 Interest on accounts, 384.  
 To keep goods of principal separate from his own, 384.  
 Duties of principal to agent, 396-400.  
 Compensation of agent, 396.  
 Salary or commission, 396.  
*Del credere* commission, 396.  
 May be fixed by jury, 397.  
 After termination of agency, 397.  
 For illegal services, 397.  
 When not entitled to, 397.  
 Agency prematurely ended, 399.  
 Agent indemnified for expenses, 399.  
 Emergencies, 370, 371.  
 Entire act; ratification, 434.  
 Equitable title, 338.  
 Equities, 425.  
 Equivocal character of agent, 427.  
 Error of judgment, 351 *n.*, 398 *n.*  
 Escrow, 352 *n.*  
 Executor cannot buy trust land, 376 *n.*  
 Existence of principal, 432.  
 Express Co., collections by, 430 *n.*  
 Facts must be distinct, 344.  
 Feme covert, 334.  
 Fiduciary relations, 375.  
 Foreign principal, 404.  
 Forgery, 342 *n.*, 352 *n.*  
 Forgery, ratification of, 431 *n.*, 432 *n.*  
 Form of ratification, 435.  
 Former employment, 342.  
 Fraud, 423, 425.  
 Fraud; agent's liability, 407.

*Agency—Continued.*

Fraud; principal's liability, 417, 418.  
 Fraud; principal may follow property, 427.  
 Fraud; subscriptions to stock, 412 *n.*  
 General and special agents, 348-368.  
 Universal agents, 349.  
 How principal bound, 350, 351.  
 Instances:  
   Power to sell; to collect, 355.  
   Power to collect, 357.  
   Power to sell; to warrant, 358.  
   Agent to sell may rescind sale, 359.  
   Power to sell; miscellaneous restrictions, 359. [362.]  
   Miscellaneous powers; restrictions, 362.  
   Power to sell or issue negotiable paper, 362.  
   Power to conduct business, 363.  
   Power to employ, 364.  
   Power to provide surgical aid, 364.  
   Power to manage property, 365.  
   Power to control real estate, 366.  
   Power to use principal's credit, 366.  
   Power to loan and borrow, 366.  
   Power to mortgage, 366.  
   Power to settle, 367.  
   Power to perform contracts, 367.  
 Gift to agent, 378 *n.*  
 Goods must be kept separate, 384.  
 Husband and wife, 334 *n.*, 335 *n.*, 343 *n.*, 344 *n.*, 345 *n.*, 352 *n.*, 426 *n.*  
 Idiot cannot act, 334.  
 Illegal acts, 370.  
 Illegal act; innocent agent, 400.  
 Illegal act of public agents, 431 *n.*  
 Illegal sale: principal may follow property, 427.  
 Illegal services, 397.  
 Immoral act, 370.  
 Implication, by, 340, 345.  
 Implied ratification, 437.  
 Implied revocation, 444.  
 Indorsement of note, 342 *n.*  
 Infant may be agent, 333, 334.  
 Innkeeper's clerk, 342 *n.*  
 Innocent agent not accessory, 65.  
 Insane persons, 334.  
 Insanity revokes agency, 448.  
 Instructions, 343, 369.  
 Instruments under seal; signature, 385.  
 Intent as to signature, 387.  
 Intent in ratification, 438.  
 Interest, 384. [446.]  
 Interest in subject-matter irrevocable, 445.  
 Interest, power coupled with, 445.  
 Intoxicating liquor, 412 *n.*  
 Irrevocable power may be revoked, 445.  
 Irrevocable when conferred for a con-  
 joint agents, 335. [sideration, 446.]  
 Joint principals, 334.  
 Knowledge of all facts, 432.  
 Knowledge of extrinsic facts, 353.  
 Land, power to sell, 360.

## Agency—Continued.

Landlord and tenant, 345 *n.* [-408.  
 Liabilities of agent to third parties, 401.  
 Acting in name of principal, 401.  
 Acting in own name, 402.  
 Pledge of own credit, 403.  
 Public officers, 404.  
 Foreign principals, 404.  
 Mispaid money, 405.  
 Contract only effective in agent's  
 Negligence, 406. [name, 406.  
 Misfeasance, 407.  
 Control of work, 407.  
 Fraud and malice, 407.  
 Torts of employees, 408. [410-419.  
 Liability of principal to third parties,  
 All acts of agent, 410. [415.  
 Existence of agency must be proved,  
 When agent exceeds authority, 415.  
 When agent contracts in his own  
 name, 415.  
 Exclusive credit given to agent, 416.  
 Fraud and deceit, 417, 418.  
 Negligence, 419.  
 Lien of agent, 428.  
 Limitation, termination by, 443.  
 Loans, 366.  
 Lobbyist, 370 *n.*  
 Lunacy revokes agency, 447.  
 Lunatic cannot act, 334.  
 Malice, 407.  
 Marriage, revocation by, 448.  
 Married woman may be agent, 333, 334.  
 Miscellaneous powers, 362.  
 Misfeasance, 407.  
 Mispaid money, 405, 427.  
 Mistake, money paid by, 405, 427.  
 Money of principal, 384.  
 Mortgage, 357 *n.*, 360, 366.  
 Mortgage sale, 376 *n.*, 377 *n.*  
 Naked power revocable, 445.  
 Name, agent acting in own, 402.  
 Name, agent must add his, to signature,  
 393. [431.  
 Name of principal, act must be done in,  
 Name of principal in instrument signed  
 by agent, 389.  
 Negligence, 352 *n.*, 371, 406, 411 *n.*,  
 413 *n.*, 414 *n.*, 419.  
 Negotiable paper. *See* Bills and notes,  
*infra*, 362.  
 Notice to agent, 419-423.  
 In case of corporations, 421.  
 Scope of employment, 421.  
 To whom notice must be given for a  
 corporation, 422.  
 When notice must have been re-  
 ceived, 422.  
 Where agent colludes with third  
 party, 423. [442.  
 Notice of another agent of principal,  
 Notice; revocation, 448.  
 Nuisance, 438 *n.*  
 Official. *See* Public Agents, *infra*.

## Agency—Continued.

Ordinary diligence, 371.  
 Parent and child, 335 *n.*, 340 *n.*, 345 *n.*  
 Parol appointment, 339.  
 Parties bound by implication, 345.  
 Partnership, 338. [432 *n.*  
 Partnership, ratification by new firm,  
 Partnership, revocation by dissolution,  
 Payment of agent, 396. [448.  
 Payment agency prematurely ended,  
 399.  
 Payment; error of judgment, 398 *n.*  
 Payment; illegal services, 397, 400.  
 Payment of sub-agent, 395.  
 Payment; termination of agency, 397.  
 Payment; unfaithful agent, 397.  
 Payment; when for the jury, 397.  
 Physician, employment of, 353, 364.  
 Possession of goods, 356.  
 Power to borrow, 366.  
 Power to collect, 355-360.  
 Power as to contract, 367.  
 Power to employ, 364.  
 Power to examine accounts, 367.  
 Power to loan, 366.  
 Power to manage property, 365, 366.  
 Power to mortgage, 366.  
 Power to obtain credit, 366.  
 Power to sell, 355-360.  
 Power to settle, 367.  
 Power to ship, 361.  
 Power of substitution, 369.  
 Power as to suits, 367.  
 Presumption as to signature, 391.  
 Priest not agent for bishop, 344 *n.*  
 Principal, who may be, 333. [431.  
 Principal, act must be done in name of,  
 Principal, how bound, 350, 351.  
 Principal, liability of, 410.  
 Principal must exist, 432. [facts, 432.  
 Principal must have knowledge of all  
 Principal must be capable of ratifying,  
 Private debts of agent, 382 *n.* [433.  
 Profits, 379.  
 Public agent, 352 *n.*, 355. [424 *n.*  
 Public agent; fraud; liability on bond,  
 Public agent; illegal collections, 405 *n.*  
 Public agent; ratification, 433 *n.*, 434.  
 Public agent; ratification of illegal acts,  
 Public agent; sub-agent, 395. [431 *n.*  
 Public officers not liable as agents, 404.  
 Purchasing agent, 375.  
 Railroad agent, 361. [company, 373 *n.*  
 Railroad agent cannot contract with  
 Railroad agent; liability of company,  
 411 *n.*, 413 *n.*, 414 *n.*  
 Ratification, 429, 443.  
 Same effect as original authority, 429.  
 Voidable acts, 430.  
 Act must be done in name of princi-  
 pal, 431.  
 Principal must be in existence, 432.  
 Knowledge of all facts, 432.  
 Capable of ratifying, 433.

## Agency—Continued.

Disavowal; subsequent ratification, [434.  
 Acts of public officers can be ratified, [434.  
 Torts, 434.  
 Cannot be retracted, 434.  
 Cannot be in part of transaction, 434.  
 After termination of agency, 435.  
 Form of ratification, 435.  
 Must refer to precise act, 436.  
 May be implied, 437.  
 Clear intention must be shown, 438.  
 Implied from form of action, 439.  
 Acts not promptly disavowed are ratified, 439. [441.  
 Principal must have full knowledge, [441.  
 Acts must have been done under appointment, 442. [442.  
 Slight evidence of, sometimes sufficient, 442.  
 Party relying on, must have been prejudiced, 443.  
 Real estate, power to manage, 365-6.  
 Real estate, sale of, 338.  
 Reasonable skill, 371.  
 Receipt, 352 n.  
 Receipts and disbursements, 382.  
 Revocation. *See* Termination, 443, 448.  
 Rights of agent against principal, 428.  
 Right to lien, 428.  
 Does not impair right to sue, 429.  
 Rights of agents against third parties, 408. [name, 408.  
 Can sue when acting in principal's Not when acting in his own name, 409. [tracted, 409.  
 How when it is doubtful who can sue when he has an interest, 410.  
 Rights of principals against third parties, 423, 428.  
 May sue on contracts of agents 423.  
 Right is modified by representations of agent, 425.  
 Subject to equities where agent has contracted in his own name, 425.  
 May recover money mispaid by agent, 427.  
 May follow property, 427.  
 May sue for torts, 428.  
 Salary of agent, 396.  
 Sales, 355-360.  
 Scope of employment, 341.  
 Seal, appointment under, revoked by parol, 444.  
 Seal; contract for sale of land, 338 n.  
 Seal, signing instruments under, 385.  
 Seal, when ratification must be under, Seal, when under, 337. [436.  
 Secret instructions, 354.  
 Selling agent, 375.  
 Servants, power to employ, 380.  
 Set-off, 384 n., 425-6.  
 Settle, agent's power to, 367.  
 Sheriff's sale, 376 n.  
 Shipping; power of agent, 362.  
 Signatures of agents, 385-393.

## Agency—Continued.

Instruments under seal, 385.  
 In name of principal, 386.  
 Intention appearing in instrument, Intention not appearing, 387. [387.  
 Bills and notes, 388.  
 Name of principal appearing, 389.  
 Corporate seal, 390.  
 Negotiable paper, 390.  
 Ambiguous instruments, 391.  
 Credit of parties whose names appear, 391.  
 Simple contracts, 392.  
 Agent must sign his name, 393.  
 Silence of principal; ratification, 440.  
 Simple contract; signature, 392.  
 Special agents, 349, 368.  
 Sub-agents, 394-5.  
 Acts of sub-agents, 394.  
 Public agents not liable, 395.  
 Account to immediate principal, 395.  
 Compensation, 395.  
 Revocation of power, 447, 448.  
 Substitution, power of, 369.  
 Suit, agents' right of, 429.  
 Suit, power as to, 367.  
 Suit; principal against third party, 423.  
 Suit, ratification by, 439.  
 Suit by third party, 416.  
 Suit, when agent can bring, 409, 410.  
 Suit, when agent cannot bring, 408.  
 Taxes, 340 n.  
 Tax-list made by agent, 369 n.  
 Tax title, 378 n.  
 Telegraph agents, 361.  
 Termination of agency, 443-448.  
 By agreement, 443.  
 By act of principal, 444.  
 Under seal revoked by parol, 444.  
 Implied revocation, 444.  
 By act of agent, 445.  
 Naked power, 445.  
 Coupled with an interest, 445.  
 Interest in subject-matter, 446.  
 When conferred for a consideration, Death of principal, 446. [446.  
 When revocation by death takes effect, 447.  
 Insanity of principal, 447.  
 Insanity of agent, 448.  
 Bankruptcy, 448.  
 Marriage, 448.  
 Dissolution of partnership, 448.  
 War, 448.  
 Sub-agent, 447, 448. [448.  
 After revocation, but before notice, Third parties, agent's liability, 401.  
 Title, defective, 374 n.  
 Tort, principal's right of action, 428.  
 Tort, when cannot be ratified, 434.  
 Torts of employee, 408.  
 Trustee, fraud of agent of, 408 n.  
 Trustee; speculation, 379 n.  
 Termination of agency, 443-448.

Agency—*Continued.*

Termination; irrevocable power re-  
voked, 445.  
Termination; purchase by agent, 382.  
Termination; ratification, 435.  
Ultra vires, 431 *n.*  
Unauthorized, 336 *n.*  
Unauthorized act, 439.  
Unauthorized act; ratification, 429-443.  
Universal agents, 349.  
Usage, 354, 371, 390.  
Usual course of business, 347.  
Usurious loan, 435 *n.*  
Usury, 419 *n.*  
Voidable act, 430.  
Volunteer, 442.  
War does not revoke, 448.  
Warranty, 358.  
Who may be agents, 334.  
    Adverse interests, 335.  
    Joint agents, 335.  
Who may be principal, 333.  
    Infants, married women, aliens, 333.  
    Lunatics, idiots, drunkards, 334.  
    Corporations, 334.  
    Joint principals, 334.  
Aggregate, 449.  
Aggregate payments, 449 *n.*  
Aggrieved, 449.  
Aggrieved person, 450.  
Agister, 451.  
Agister. *See* animals, 571.  
Agreeable, 451.  
Agreeably, 451.  
Agreed, 451.  
Agrees, 452.  
Agricultural employment, 452 *n.*  
Agriculture, 452.  
Aid, 452.  
Aid or comfort, 453 *n.*  
Aider and abettor, 62, 65, 453.  
Attachment, wrongful, 63 *n.*  
    Bigamy, 64 *n.*  
    Husband and wife, 64 *n.*  
    Intent, 63 *n.*, 64.  
    Intoxicating liquors, 63 *n.*  
    Lapse of time immaterial, 63 *n.*  
    Misdemeanors, 63 *n.*  
    Presence and participation, 63.  
    Postmaster's false returns, 64 *n.*  
    Rape, 64 *n.*  
    Refusing information, 63 *n.*  
    Statutory crimes not expressly men-  
    tioned, 64 *n.*  
Trespass, 63 *n.*  
Air-tight, 454.  
Alarm, 454.  
Alcalde, 454.  
Aleatory, 454.  
Alibi, 454-456.  
Alien, 456-466.  
    Abandonment of wife, 463.  
    Action by alien wife, 463.  
    Action, may bring, 462.

Alien—*Continued.*

Administrator, may be, 463.  
Agent, may be, 334, 335 *n.*  
Army, may enlist, 463.  
Attorney, cannot practise as, 464.  
Bankrupt law, 463 *n.*  
Bequest, may take by, 460.  
Chinese, 457 *n.*  
Copyright, 462.  
Corporation, may be a corporator, 463.  
Crime, may be tried for, 463.  
Definition, 456.  
Devise, may take by, 458, 460.  
Dower, 461 *n.*  
Enemy, alien, 465.  
Executor, may be, 463.  
Friend, alien, 458.  
Intestate without heirs, 460-462.  
Jury, 464.  
Mining claim, 460 *n.*, 463 *n.*  
Patent, 462.  
Poor laws, 464.  
Public office, 464.  
Real estate, 458.  
Shipmaster, 464.  
Statute of distributions, 460.  
Taxed, may be, 464.  
Tenant by curtesy, 464.  
Tort, may prosecute, 462-3.  
Trade-mark, 462.  
Treaty, rights secured by, 465.  
Trustee, 463.  
Trusts, 463.  
Vote, cannot, 464.  
Alienate, 466.  
Alienated, 466.  
Alienation, 466.  
Alimony, 467, 486.  
    Amount of, *pendente lite*, 476.  
    Amount of permanent, 480.  
    Costs, 486.  
    Cruelty, 470.  
    Definition, 467.  
    Desertion, 470.  
    Diminishing permanent, 481.  
    Dividing property, 484.  
    Enforcing decree, 482.  
    Faculties of husband, 485.  
    Grounds for, 470-1.  
    Increasing permanent, 481.  
    Jurisdiction, 468.  
    Pendente lite, 472-477.  
    Permanent, 478-482.  
    Restoration of property, 485.  
    Security for, 483.  
    Sources of the law, 469.  
    Termination of, 484.  
    When *pendente lite* ceases, 477.  
    Wife's means of, 485.  
    Wife must show rectitude, 470.  
Aliunde, 486.  
All, 486.  
"All." *See* "Any," 611.  
All and every my property, 488 *n.*

- All business, whatever kind, in dispute between the parties, 661 *n.*  
 All causes of action, 661 *n.*  
 All demands, 489 *n.*, 661 *n.*  
 All faults, 489 *n.*  
 All fours, 489 *n.*  
 All future erections or additions, 188 *n.*  
 All goods and things of every kind and sort whatever, 488 *n.*  
 All his estate, 488 *n.*  
 All I am possessed of, 488 *n.*  
 All I am worth, 488 *n.*  
 All matters in dispute, 489 *n.*  
 All my accounts, 489 *n.*  
 All my estate, 487 *n.*, 488 *n.*  
 All my estate whatsoever, 448 *n.*  
 All my furniture and other household effects, 489 *n.*  
 All my landed estate, 488 *n.*  
 All my lands, 488 *n.*  
 All my notes, 489 *n.*  
 All my personal estate, 488 *n.*  
 All my plantation, 488 *n.* [489 *n.*  
 All my property of every description, 488 *n.*  
 All my real and personal property, 488 *n.*  
 All my real estate, 488 *n.*  
 All my real property, 488 *n.*  
 All my temporal estate, 488 *n.*  
 All other articles perishable in their own nature, 776 *n.*  
 All rights that had accrued, 142 *n.*  
 All the estate both real and personal, 488 *n.* [488 *n.*  
 All the money, 489 *n.*  
 All the rest and residue, 489 *n.*  
 All unsettled accounts, 661 *n.*  
 Allegiance, 490.  
 Allocatur, 490.  
 Allodial, 490.  
 Allonge, 491.  
 Allot, 492 *n.*  
 Allotment, 491.  
 Allotment of dower, 492 *n.*  
 Allotment of shares, 492.  
 Allotment-note, 492.  
 "Allotted," in treaty, 492 *n.*  
 Allow, 492.  
 Allow or permit, 492 *n.*  
 Allow to give, 493 *n.*  
 Allowance, 493.  
 "Allowances" of a soldier, 493 *n.*  
 "Allowed and recorded" verdict, 493 *n.*  
 Allowing all people to pass and repass, 136-142. [493 *n.*  
 Alluvion, 136-142.  
 Almanac, 494.  
 Alms, 495.  
 Along, 495.  
 Along a river, 495 *n.*  
 Along a wall, 495 *n.*  
 Along the bank, 495 *n.*  
 Along the high-water mark, 495 *n.*  
 Along the river, 496 *n.*  
 Along the route, 496 *n.*  
 Along the shore, 496 *n.*  
 Along the street, 496 *n.*  
 Already, 496.  
 Already accrued, 496 *n.*  
 Already incurred, 496 *n.*  
 Also, 496.  
 Alter, 496.  
 Alter or amend, 496 *n.*  
 Alteration, 497 *n.*  
 Alteration of instruments, 497-523.  
   Acknowledgments, 509 *n.*  
   Affidavits, 514.  
   Apparent, not, 515.  
   Bank bills, 523 *n.*  
   Blank, filling up, 515-520.  
   Blank in material part, 517.  
   Blank, negotiable instruments delivered in, 516. [519.  
   *Bona-fide* holder protected, 515, 517-  
   Bonds, blanks in, 520.  
   Burden of proof, 512.  
   Change of parties, 506.  
   Changing character of instrument, 507.  
   Common-law rule, 513.  
   Consent, 503.  
   Consideration, 509. [520.  
   Consideration, recovery on original, 510.  
   Deed; altered by third party, 505.  
   Deed; blanks cannot be filled, 519.  
   Deed; filling blanks, 519.  
   Deed, material alteration of, 502.  
   Definition, 497.  
   Description of property, 509.  
   Erasure of words, 501.  
   Fraudulent intent, 501, 520.  
   Immaterial alterations, 498-501.  
   Implied ratification, 522.  
   Insertion of words, 499.  
   Interest, 509.  
   Interlineations, 499.  
   Law and fact, 512.  
   Material alterations, 502-515.  
   Material or not, 512-515.  
   Material part, 505.  
   Memoranda, 511.  
   Merger, 521.  
   Negotiable instruments, 514.  
   Negligence, 515.  
   Obscure, 515.  
   Payee, original, estopped, 518.  
   Payment, place of, 508.  
   Payment, time of, 508.  
   Place of payment, 508.  
   Presumptions, 512.  
   Principal, alteration of, 508.  
   Ratification, 521. [520.  
   Recovery on original consideration, 504.  
   Restoration of alteration, 504.  
   Rights of parties, 511.  
   Rights of third parties, 520.  
   Seal, adding, 508 *n.*  
   Seal, defacing, 505 *n.*, 508 *n.*  
   Signature in blank, 519 *n.* [519.  
   Stipulations, additional, not allowed,  
   Surety discharged, 512 *n.*

Alteration of instruments—*Continued.*

Third party, act of, 505.  
 Third parties, rights of, 520.  
 Time of payment, 508.  
 Unchanged meaning, 498.  
 Wills, 522.  
 Words, 498, 499, 501.  
 Altering, 523.  
 Altering bank bills, 523 *n.*  
 Altering highways, 523 *n.*  
 Always, 523.  
 Amalgamate, amalgamation, 523.  
 Ambassador, 524.  
 Arrest, 727.  
 Ambiguity, 525–545.  
 Abbreviations, 15, 545 *n.*  
 Acknowledgments, 156.  
 Adverse possession, 291.  
 Agency, 351, 391, 409.  
 Agent's contract, 409.  
 Authority, 1038.  
 Bills and notes, 529 *et seq.*  
 Clerical errors, 543 *n.*  
 Contracts, 541.  
 Conveyances, 538.  
 Deeds, 538 *et seq.*  
 Definition, 525.  
 Evidence to remove latent, 532.  
 Extrinsic evidence, 529, 532.  
*Factum*, upon the, 527 *n.*  
 Insurance policy, 545 *n.*  
 Latent, 530 *et seq.*  
 Mistake not an ambiguity, 533.  
 Negotiable instruments, 529 *et seq.*  
 Patent, 527–529.  
 Signature by agent, 391.  
 Technical words, 543 *n.*  
 Wills, interpretation of, 526, 535.  
 Amendment, 546–555.  
 Answer, 610.  
 Clerical errors, 550.  
 Costs, 555.  
 Criminal law, 548 *n.*  
 Dates, 551.  
 Defects cured by verdict, 555.  
 Definition, 546.  
 General principles, 547. [554.  
 Judgment may be made certain after,  
*Laches*, party guilty of, estopped, 554.  
 Modern rule, 546.  
 Names of parties, 550.  
 New cause of action, 548–9.  
 New defence may be added, 550.  
 Pleadings, 552.  
 Practice, 555.  
 Process, of, 552.  
 Unfair, not allowed, 548.  
 Record, of the, 553.  
 Time within which, can be made, 553.  
 Verdict cures defects, 553.  
 Amercement, 555.  
 Amicable, 556.  
 Amicable action, 556 *n.*  
 Amicable compounders, 556 *n.*

Amicable lawsuit, 556 *n.*  
 Amicus curiæ, 556.  
 Amnesty, 556.  
 Among, 556.  
 Among valuable papers, 557 *n.*  
 Amotion, 557–562.  
 By-laws, breach of, 560 *n.*  
 Causes for expulsion, 559. [by, 558.  
 Charter, power of expulsion conferred  
 Commercial societies, 560 *n.*, 561 *n.*  
 Definition, 557.  
 Equitable relief, 562 *n.*  
 Illegal expulsion, remedy for, 562.  
 Indictable offences, 557.  
 Limitations on right of expulsion, 559.  
 Mandamus, 562 *n.*  
 Medical societies, 560 *n.*  
 Mode of expulsion, 561.  
 Non-user does not forfeit rights, 562 *n.*  
 Provisions of charter, etc., must be  
 observed, 562.  
 Religious societies, 560 *n.*  
 Right of expulsion, 557.  
 Social clubs, 560 *n.*, 561 *n.*  
 What court will consider, 563 *n.*  
 Who has power to expel, 561.  
 Amount, 563.  
 Amount in controversy, 563.  
 Amusement, 564.  
 Analogous, 564.  
 Ancestor, 564.  
 Anchor, 564.  
 Anchor watch, 564 *n.*  
 Anchorage, 565 *n.*  
 Ancient documents, 565–9.  
 Authentication, 565.  
 Color of title, 277 *n.*  
 Custody, 567–9.  
 Definition, 565.  
 Handwriting, 568.  
 Ownership, 568.  
 Possession, 567.  
 Seal, 566 *n.*  
 Witnesses, 566.  
 And, 569.  
 And elsewhere, 570 *n.*  
 And in addition to that, 570 *n.*  
 And so forth, 570 *n.*  
 Animals (*see also* Accession), 571–591.  
 Abandonment of wild animals, 6.  
 Abandonment for tort, 3.  
 Abatement of dangerous or diseased, 8.  
 Accession, 51 *n.*, 59 *n.*  
 Accident, 84.  
 Action for recovery, 573.  
 Agister, 589.  
 Bailments, 589.  
 Bees, 571 *n.*, 582 *n.*  
 Conversion, 574 *n.*  
 Cruelty to, 575.  
 Diseased cattle, 585.  
 Dogs, injuries by, 584.  
 Dogs, license of, 586 *n.*  
 Domestic, 572.



**Animals—Continued.**

Fish, 571 n., 572 n.  
 Impounding, 588.  
 Increase of, 572 n.  
 Injuries by, 578-580, 582, 584.  
 Injuries to, 574.  
 Larceny of, 573 n.  
 Liability for trespass, 580.  
 Oysters, 571 n.  
 Pigeon-shooting, 576 n.  
 Prevention of trespass, 580.  
 Runaway, 587.  
 Sheep; injuries by dogs, 584.  
 Stray, 587.  
 Tame, 572 n.  
 Tax on dogs, 573 n.  
 Trespass, 575 n., 576, 578-580.  
 Vicious, 581, 580.  
 Wild, 571.  
 Wild, injuries by, 582.  
 Annexed, annexation, 590.  
 Annexed to the freehold, 591 n.  
 Announced, 591.  
 Annually appoint, 631 n.  
 Annuities; abstract of title, 48.  
 Annuity, advancement as, 217.  
 Answer, 599-610.  
   Amendment, 610.  
   Confidential communications, 601.  
   Corporation, 610 n.  
   Defences, 605.  
   Demurrable, not, 606.  
   Discovery, 600.  
   Discovery, how compelled, 601.  
   Documents, 602.  
   Evidence for defendant, 609. [603-5.  
   Exception for insufficient discovery,  
   Form of, 607.  
   Fivolous, 600.  
   Husband and wife, 609.  
   Impertinence, 603.  
   Infants, 608.  
   Information and belief, 605.  
   Insufficient discovery, 604-5.  
   Interrogatories, 602.  
   Lunatics, 608.  
   Married women, 608.  
   Oath, 607.  
   Plea overruled by answer, 607.  
   Plea, support of, 606.  
   Positive knowledge, 605.  
   Pro confesso, 602.  
   Scandalous matter, 603.  
   Sham, 600.  
   Signature, 608.  
 Antichresis, 610.  
 Any, 611.  
 Any addition of building, 188 n.  
 Any article, 775 n.  
 Any creditor, 612 n.  
 Any other article or thing, 775 n.  
 Any person or persons, 612 n.  
 Any suit, 612 n.  
 Any thing, 612 n.

Apart, 612.  
 Apart from her husband, 612 n.  
 Apartment, 612.  
 Apartments, 612 n.  
 Arson, 764 n.  
 Apex, 613.  
 Apparatus, 614.  
 Apparent, 615.  
 Apparent ownership, 613 n.  
 Apparent danger, 615 n.  
 Apparent easements, 615 n.  
 Apparent good order, 616 n.  
 Apparent intention, 615 n.  
 Apparent possession, 615 n.  
 Apparent signs, 615 n.  
 Apparent violation of rule of court, 616.  
 Appeal, 616-629.  
   Agent's neglect to file power, 622 n.  
   Amount, 619 n.  
   Arbitration discontinues, 663 n.  
   By whom taken, 619 n.  
   Civil, 616.  
   Criminal, 628.  
   Derivation, 616.  
   Dismissal, 627.  
   Effect of, 623.  
   Final decree, what constitutes, 617 n.  
   Interest to increase amount, 620 n.  
   Judgments, 627.  
   Notice, 622.  
   Parliamentary practice, 629.  
   Practice, 626.  
   Publication of notice, 622 n.  
   Record, 623.  
   Refusal of an application, 631 n.  
   Set-off in amount on appeal, 620 n.  
   Time, 621.  
   Waiver, 622.  
   What is open, 624.  
   When it lies, 617.  
   When it will not lie, 618 n.  
 Appellate, 629.  
 Appellate and supervisory power, 629 n.  
 Appellate court, 629 n.  
 Appendage, 629.  
 Appendant, 630. [guished, 630 n.  
 Appendant and appurtenant distin-  
 Appertaining, 630.  
 Applicable, 631.  
 Application, 631.  
 Application for continuance, 631 n.  
 Application for insurance policy, 631 n.  
 Application for land, abandonment of, 6.  
 Applied, 631.  
 Applied for, 631 n.  
 Apply, 631.  
 Apply to the use, 631 n.  
 Appoint, 631.  
 Appointment, 631.  
   Agent, 336.  
   Assets, 632.  
   Definition, 631.  
   Exclusive, 633.  
   Executing, manner of, 632.

**Appointment—Continued.**

Illusory, 633.  
 Manner of executing, 632.  
 Office, 631.  
 Power, under a, 632.  
 Under a power, 632.  
**Apportionment, 633-635.**  
 Definition, 633.  
 Liabilities, 633.  
 Rights, 633.  
 Use of the term, 633.  
**Appraisal; account stated, 116 n.**  
**Appraise, appraisers, 634.**  
**Appraisement, 634-6.**  
 Admiralty, 635.  
 Arbitration, 635.  
 Commission of, 634.  
 Decedents' estates, 634.  
 Dutiable goods, 635.  
 Eminent domain, 635.  
 Executions, 635.  
 Kinds of, 634.  
 Leases, 635.  
 Revenue laws, 635.  
 Taxation, 635.  
**Appraised value, 634 n.**  
**Appraiser, 634 n.**  
**Apprehend, 636.**  
**Apprentices, 636.**  
**Appropriate, appropriation, 639.**  
**Approve, approver, approvement, 640.**  
**Approved, 641 n.**  
**Appurtenance, 641.**  
**Appurtenant, 644, 645. [guished, 630 n.]**  
**Appurtenant and appendant distin-**  
**Apt time, 645.**  
**Arbitrarily, 645.**  
**Arbitration, 646-716.**  
 "Abide by an award," 27 n.  
 Absence of party, 682 n., 685.  
 Account render, 131. [116 n.  
 Account stated, award not evidence of,  
 Actions, discontinues, 184g.  
 Adjournments, 682-709.  
 "Adjudicate and settle all matters ex-  
 isting between the parties," 661 n.  
 Administrators, 653. [679-682.  
 Arbitrators; admission of evidence,  
 Adverse opinion of arbitrator, 673.  
 Agents of both parties, 652, 673.  
 "All business whatever kind in dis-  
 pute between parties," 661 n.  
 "All causes of action," 661 n.  
 "All demands," 489 n., 661 n.  
 "All matters in dispute," 489 n., 659.  
 All parties must be present, 685.  
 "All unsettled accounts," 661 n.  
 Alternative, award in, 698.  
 Amicable compounders, 556 n.  
 Amount, certainty as to, 700.  
 Appointment of umpire, 690.  
 Appraisement, 635.  
 Arbitrators, 670-677. [677.  
 Arbitrators cannot delegate powers,  
 Arbitrators; compensation, 686.

**Arbitration—Continued.**

Arbitrators must act together, 683.  
 Arbitrators, oath of, 674.  
 Arbitrators, power of, 675-9.  
 Arbitrators; procedure, 679-686.  
 Arbitrators as witnesses, 691.  
 Assumpsit, 885.  
 Attendance of witnesses, 679.  
 Attorneys, 664 n.  
 Attorney, submission by, 652 n.  
 Authority, duration of, 688.  
 Authority, excess of, 676.  
 Award, the, 647, 692-716.  
 Award ends authority, 689.  
 Award must be entire, 703.  
 Award must be final and certain, 695.  
 Award must be mutual, 701.  
 Award must be possible, 704.  
 Award, publication of, 704.  
 Bankrupts, 648.  
 Boundary line, 660 n., 699.  
 Case suspended, 662.  
 Common law, 647.  
 Compensation of arbitrators, 686.  
 Condition precedent, 668.  
 Conditional submission, 661.  
 Control of subject-matter essential, 648.  
 Corporations, 649.  
 Costs, 687.  
 Counsel, 683.  
 Criminal proceedings, 658.  
 Death revokes, 666 n.  
 Definition, 647.  
 Delivery of award, 705.  
 Disqualification of arbitrator, 672-3.  
 Duration of authority, 688.  
 Duress, 648.  
 Effect of award, 711-715.  
 Merger, 712.  
 Matter not submitted, 712.  
 Real estate, 713.  
 Inadequate award, 714.  
 Strangers, 714.  
 Ratification, 714.  
 Executors, etc., 715.  
 Effect of revocation, 666.  
 Enforcement of award, 715.  
 Errors, release of, 663.  
 Evidence, ruling as to, 679-683.  
 Excluded, what is, 661.  
 Executors and administrators, 653, 715.  
 Fees of arbitrators, 688.  
 Form of award, 692-3.  
 Form of revocation, 665.  
 Form of submission, 656.  
 Fraud of arbitrators, 707.  
 Fraud of party, 708.  
 General submission, 660.  
 Guardians, 654.  
 Hearing, notice of, 685.  
 Husband and wife, 649.  
 Idiots, 671.  
 Illegal matters, 658.  
 Impeachment of award, 706-711.  
 Fraud, partiality, etc. 707.

Arbitration—*Continued.*

Fraud by parties, 708.  
 Irregularity, 708.  
 Oath of arbitrator, 709.  
 Adjournments, 709.  
 Evidence, 709.  
 Irregularity in form, 709.  
 Mistakes of fact, 709.  
 Must be apparent, 710.  
 Award part good, 710.  
 Power of court, 711.  
 Implied revocation, 665.  
 Inadequate award, 714.  
 Infants, 648, 6-1.  
 Insane persons, 671.  
 Insurance, 669 *n.*, 671 *n.*  
 Intent of parties, 655.  
 Interest, arbitrator cannot have, 672.  
 Irregularity in form, 709.  
 Irregularity in proceedings, 708.  
 Judge in case *pendente lite*, 674 *n.*  
 Lunatics, 671.  
 Marriage revokes, 665 *n.*  
 Married women, 671.  
 Meetings, notice of, 686.  
 Merger, 712.  
 Ministerial acts, 701.  
 Ministerial acts may be delegated, 678.  
 Mistakes of fact, 709.  
 Municipal corporations, 649.  
 Notice of hearing, 685.  
 Notice of meetings, 686.  
 Notice of revocation, 665.  
 Notice, waiver of, 686.  
 Oath, 674, 678, 709.  
 Objection to arbitrator, 673.  
 Omissions in award, 694.  
 Overseers of the poor, 654.  
 Parol submission, 655 *n.*, 657.  
 Parties to, 648-654.  
     Control, 648.  
     Infants, 648.  
     Bankrupts, 648.  
     Husband and wife, 649.  
     Corporations, 649.  
     Partners, 650.  
     Agents, 652.  
     Executors and Administrators, 653.  
     Guardians, 654.  
     Overseers of the poor, 654.  
 Partnership, 650.  
*Pendente lite*; submission of cases, 661.  
 Persons, certainty as to, 699.  
 Power of arbitrators, 675-9.  
     Judges of law and facts, 675.  
     Restricted power, 675.  
     Waiver, 675.  
     Questions of pure law, 676.  
     Matters of fact, 676.  
     Excess of authority, 676.  
     Presumption, 677.  
     May not be delegated, 677.  
     Ministerial acts, 678.  
     The oath of witnesses, 678.

Arbitration—*Continued.*

Attendance of witnesses, 679.  
 Public matters, rule in, 684.  
 Public officers, 649, 654.  
 Public officers as arbitrators, 674 *n.*  
 Publication of award, 704.  
 Ratification of the award, 714.  
 Real estate, 659, 698, 713.  
 Reopening the case, 681.  
 Restricted power of arbitrators, 675.  
 Revocation, 664-6.  
     Form of, 665.  
     Implied, 665.  
     Effect on parties, 666.  
     Binding on both parties, 666.  
 Seal, under, 655.  
 Specific performance, 667.  
 Strangers to the award, 714. [698.  
 Subject-matter; award must be certain,  
 Subject-matter of award, 693.  
 Submissions, 654-664.  
     Under statutes, 654.  
     Intent of parties, 655.  
     Common law, 655.  
     Form of, 656.  
     Simultaneous, 657.  
     When may be made, 658.  
     What may be submitted, 658.  
     Matter of doubt, 658.  
     Real estate, 659.  
     General submission, 660.  
     What matter excluded, 661.  
     Conditional submission, 661.  
     Cases *pendente lite*, 661.  
     Cases suspended, 662.  
     What is submitted, 663.  
     Release of errors, 663.  
     Matters not included, 712.  
     Part withdrawn, 695.  
 Suit is suspended, 662.  
 Swearing witnesses, 678.  
 Time, certainty as to, 699.  
 Third arbitrator, 689.  
 Umpire, 689.  
 Umpire must sign award, 691.  
 Waiver, 675.  
 Waiver of notice, 686.  
 What is submitted, 663.  
 Who may be parties, 648-654.  
 Witnesses, arbitrators as, 691.  
 Witnesses, attendance of, 679.  
 Witnesses, evidence of, 680.  
 Witnesses, oath of, 678.  
 Ardent spirits, 716.  
 Are charged, 716.  
 Argument, 716.  
 Arise, 717.  
 Arise out of the same transaction, 717 *n.*  
 Arising, 717 *n.*  
 Arising during the course of the trial,  
 Arm, armed, 717. [717 *n.*  
 Arm of the sea, 718.  
 Arms, 718.  
 Army; alien may enlist, 463.

- Army; allowances of a soldier, 493 *n.*  
 Assault, 796 *n.*  
   Deserters, arrest of, 744 *n.*  
   Officer on waiting orders not absent, [35 *n.*  
 Aromatic, 719.  
 Arraignment, 719.  
 Arrangement, 719.  
 Arrears, 719.  
 Arrears of rent, 719 *n.*  
 Arrears of taxes, 719 *n.*  
 Arrest, civil and criminal, 719-758.  
   Affidavit, 721.  
   Ambassadors, 727.  
   Assault in making, 792-3.  
   Assisting an officer, 744.  
   Attorneys, 948 *n.*  
   Authority cannot be delegated, 744.  
   Authority, notice of officer's, 739.  
   Bond, 721.  
   Breach of the peace, 734-743.  
   Breaking doors, 722, 746.  
   Civil cases, 719.  
   Contempt, 730.  
   Costs, 722 *n.*  
   Cruelty to animals, 737 *n.*  
   Debt, prohibited for, 720 *n.*  
   *De facto* officer, 755 *n.*  
   Deserters, 744 *n.*  
   Discharge from illegal arrest, 728.  
   Drunken persons, 736 *n.*  
   Entering houses, 737 *n.*  
   Execution of process, 722.  
   Final process, 720, 721.  
   Force in effecting, 745.  
   Foreign ministers, 727.  
   Fresh pursuit, 738.  
   Fugitive from another State, 734 *n.*  
   Homicide in effecting, 745, 751-7.  
   Houses, entering, 737 *n.*  
   How made, 730 *et seq.*  
   Hue and cry, 748.  
   Illegal, 750.  
   Illegal, discharge from, 728.  
   Illegal; waiver, 728.  
   Information upon, 734 *n.*  
   Insane persons, 739.  
   Interval of time, 737 *n.*  
   Jurisdiction, 754.  
   Law determining the right, 721.  
   Manner of making, 745.  
   Married women, 727.  
   Mesne process, 720. [743.  
   Misdemeanor; without warrant, 734-  
   Municipal ordinances, 735 *n.*  
   Notice of officer's authority, 739.  
   Obstructing arrest, 758.  
   Officer *de facto*, 755 *n.*  
   Ordinances, arrest for violating, 736 *n.*  
   Passenger on railway, 751 *n.*  
   Private person, by, 740-43.  
   Private person assisting officer, 744.  
   Private person; breaking doors, 749 *n.*  
   Privilege from, 724.  
   Process; how obtained, 721.  
   Arrest—*Continued.*  
     Railway passenger, 751.  
     Resisting, 755.  
     Second arrest, 729.  
     Showing warrant, 740.  
     Time of, 723.  
     Time, interval of, 737 *n.*  
     Verbal order of magistrate, 738 *n.*  
     Waiver, 728.  
     Warrant, exhibiting, 740.  
     Warrant; officer entitled to possession,  
     Warrant, without a, 732. [793 *n.*  
     What constitutes, 730.  
     What is not, 732 *n.*  
 Arrival, 758.  
 Arrival at port, 758 *n.* [758 *n.*  
 Arrival within the limits of the U. S.,  
 Arrive and enter, 758 *n.*  
 Arson, 758-774.  
   Accessories, 65 *n.*, 774 *n.*  
   Any part of house may be burned, 760.  
   Apartments, 764 *n.*  
   Attempt to commit, 759 *n.*, 774 *n.*  
   Barn, 763 *n.*-766 *n.*  
   Barrel-house, 763 *n.*  
   Burning must be charged, 759 *n.*  
   Church, 763 *n.*  
   Common law, 758.  
   Communicating fires, 762.  
   Corn-crib, 763 *n.*  
   Corpus delicti, 759 *n.*, 774.  
   Cotton-house, 763 *n.*  
   Curtilage, 768.  
   Dwelling-house must be occupied, 769.  
   Gin-house, 763 *n.*  
   Grist-mill, 763 *n.*  
   House must be completed, 769.  
   House, setting fire to goods in, 759 *n.*  
   House; what it includes, 764.  
   Innocent agent, 65 *n.*  
   Intent, 773.  
   Malicious and wilful, 771-3.  
   Out-buildings, 765.  
   Own property, 761-3.  
   Possession; how described, 769.  
   Property set fire to, 761.  
   Public buildings, 771 *n.*  
   Saw-mill, 763 *n.*  
   School-house, 763 *n.*, 766 *n.*  
   "Set fire" construed, 760.  
   Setting fire, 759.  
   Setting fire to goods in a house, 759.  
   Stable, 763 *n.*  
   Stack of hay, 766 *n.*  
   Storehouse, 763 *n.*  
   Sugar house, 764 *n.*  
   Warehouse, 763 *n.*  
 Art, 775.  
 Article, articles, 775.  
 Article forwarded, 775 *n.*  
 Article of food, 776 *n.*  
 Article of manufacture, 775 *n.*  
 Article, or part of an article, 775 *n.*  
 Articles and necessities, 776 *n.*

Articles, goods or things, 776 *n*.  
 Articles of comfort and support, 776 *n*.  
 Articles of glass, 776 *n*. [776 *n*.]  
 Articles of gold and silver manufacture,  
 Articles or objects, 775 *n*.  
 Artificer, 776.  
 As, 777.  
 As aforesaid, 319 *n*., 777 *n*.  
 As far as possible, 778 *n*.  
 As follows, 777 *n*.  
 As for, 777 *n*.  
 As soon after as practicable, 777 *n*.  
 As soon as possible, 777 *n*.  
 As the crow flies, 777 *n*.  
 Assault, assault and battery, 778-822.  
   Abbreviations in plea, 20.  
   Ability must concur with intent, 790.  
   Abuse of a woman, 49.  
   Abusive words, 803 *n*.  
   Accessories, 818.  
   Aggravated, 782.  
   Army, by officer of, 796.  
   Arrest, 733 *n*., 792-3.  
   Attempt to rape, 805-6.  
   Battery, 783.  
   Bodily harm, 812.  
   By intermediate means, 812 *n*.  
   Child, chastisement of, 794.  
   Child, defence of, 799.  
   Child, exposure of, 783.  
   Civil action, 783.  
   Consent, 784, 805.  
   Constructive, 805 *n*.  
   Contributory negligence, 784.  
   Corporations, 809.  
   Damages, 803, 819.  
   Dangerous weapon, 813-818.  
   Deadly weapon, 813-818.  
   Defence of husband or wife, 799.  
   Defence of other persons, 799.  
   Defence of person or property, 796.  
   Definition, 778-9.  
   Disfiguring, 812 *n*.  
   Drugs, administering, 804.  
   Evidence, 803, 819.  
   Exposure to weather, 783.  
   False imprisonment, 808.  
   Firearms, 814.  
   Fraud, 805.  
   Frolicking, 808.  
   Gestures, threatening, 801, 803.  
   Husband and wife, 796 *n*., 800.  
   Husband or wife, defence of, 799.  
   Immediate, need not be, 791.  
   Imprisonment, unlawful, 808.  
   Indecent, 804, 806. [fraternities, 781 *n*.]  
   Injuries inflicted during ceremonies of  
   In loco parentis, 796 *n*.  
   Intent, 786-790.  
   Intent to kill, 818.  
   Intoxication, 789 *n*.  
   Jailer, by, 794.  
   Judge, of a, 780 *n*.  
   Lawful chastisement, 794.

## Assault—Continued..

Lawful force, 792.  
 Loaded weapon, 814.  
 Mayhem, 812 *n*.  
 Mutual combat, 807.  
 Officer, by an, 792-3.  
 Official persons, on, 786.  
 Parent and child, 794.  
 Person, defence of, 796.  
 Persons, defence of other, 799. [805.  
 Physician exposing person of patient,  
 Pregnant women, 821 *n*.  
 Prevention of unlawful acts, 800.  
 Prisoner, on, 794.  
 Prize fight, 807.  
 Property, defence of, 796.  
 Property, retaking, 798 *n*.  
 Provocation, 803.  
 Public officers, on, 786.  
 Railway servants, 809, 810 *n*.  
 Rape, attempt to, 805-6.  
 Retaking property, 798 *n*.  
 Schoolmaster, by, 794.  
 Schoolmaster; indecent assault, 804.  
 Scuffling, 808.  
 Self-defence, 796.  
 Servant, 796 *n*., 783 *n*.  
 Servant; defence of master, 799.  
 Several persons, on, 790. [789 *n*.]  
 Shooting one with intent to kill another,  
 Striking distance, 791.  
 Third person, on, 789.  
 Threatening gestures, 801, 803.  
 Threats, 801, 819.  
 Trespassers, 798.  
 Unlawful acts, prevention of, 800.  
 Unloaded fire-arms, 815 *n*.  
 Vigilance committee, 782 *n*.  
 What is; instances, 780 *n*.  
 What is not; instances, 782 *n*.  
 Whipping another's child, 822 *n*.  
 Wife, assault by, 800.  
 Wife, chastisement of, 796 *n*.  
 Wife, defence of, 799.  
 With violence, 811.  
 Without violence to person, 810, 811.  
 Words, threatening, 801.  
 Words of provocation, 803.  
 Words may qualify, 802.  
 Wounding, 812.  
 Assemble, 822.  
 Assembled, 823 *n*.  
 Assembly, 823.  
 Assent, 823.  
 Assent in writing, 824 *n*.  
 Assessments, 824.  
   Abbreviations to designate land, 16.  
   Abstract of title, 48.  
   Footways, lots abutting on, 49, *n*. 7.  
 Assessment lease; adverse possession,  
 Assets, 824. [240 *n*.]  
   Appointment, 632.  
   Common law, 824.  
   Equitable, 825.

**Assets—Continued.**

Legal, 5.  
 Marsaling, 826.  
 Order of liability, 826.  
 Order of priority of debts, 826.  
 What are, 825.  
**Assignments, 826, 844.**  
 Actions, 827, 832.  
 Agency, 829.  
 Assault and battery, 832.  
 Causes of action, 827, 832.  
 Damages, 833.  
 Defamation, 832.  
 Definitive, 826.  
 Effect, 842.  
 Estoppel, 843.  
 Expectancies, 830.  
 False imprisonment, 832.  
 Form of, 834 *et seq.*  
 Fraud, 832-3.  
 Future earnings, 828-834.  
 Future interests, 830.  
 Malicious prosecution, 832.  
 Money to become due, 831.  
 Negotiable instruments, 836-7.  
 Notice, 840.  
 Partial, 833.  
 Personal services, 832.  
 Salary of public officers, 829.  
 Secret trusts, 843.  
 Torts, 832.  
 Wages, 828 *et seq.*  
 What constitutes, 834 *et seq.*  
 What is, 827, 834. [880.  
**Assignments for benefit of creditors, 845-**  
 Accounts of assignee, 877.  
 Acknowledgment of, 859.  
 Agent, by, 859.  
 Assignee; rights, duties, etc., 874.  
 Assignee, who may be, 850 *et seq.*  
 Assignments direct to creditors, 846 *n.*  
 Attachment, 899.  
 Contemplated insolvency, 850.  
 Corporations, 846.  
 Creditors; rights and powers, 878.  
 Death of assignee, 878.  
 Definition, 845.  
 Description of property, 865.  
 Duties of assignee, 874-8.  
 Effect of assignment, 871-4.  
 Formal requisites, 855-860.  
 Fraud, 869-7.  
 General assignments, 845 *n.*  
 Goods in transit, 854.  
 How made, 855-860.  
 Infants, 846 *n.*  
 Insolvency, 850.  
 Liabilities not incurred, 866.  
 Losses in business, 864.  
 Partial assignments, 845 *n.*  
 Partnership, 847 *et seq.*  
 Payment of claims, 868.  
 Personal property, 852 *n.*  
 Personal property of partnership, 847.

**Assignments—Continued.**

Powers of assignee, 874-8.  
 Preferences, 860-863.  
 Real estate, 852 *n.*  
 Real estate of partnership, 850.  
 Reservations, 863.  
 Responsibilities of assignee, 874-8.  
 Rights and powers of creditors, 878.  
 Rights of assignee, 874-8.  
 Sale, 876.  
 Sale of property, 867.  
 Schedule, 857.  
 Special assignments, 846 *n.*  
 Special powers, 863.  
 Stipulations, 863.  
 Subsequently acquired property, 854 *n.*  
 Sufficiency of schedules, 857 *n.*  
 Time, 867.  
 Trusts, 864.  
 What passes by assignment, 852.  
 Who may assign, 846.  
**Assize, assizes, 881.**  
**Associate, associates, 881 *n.***  
**Association, 881.**  
 Amotion, 557-562.  
**Assumpsit, 882-890.**  
 Accord and satisfaction, 888.  
 Account stated, 884.  
 Action, where will not lie, 887.  
 Adverse possession, 883 *n.*  
 Arbitration and award, 885.  
 Attorneys, 886 *n.*  
 Bailees, 886 *n.*  
 Bills and notes, 885.  
 Bill of exchange, 885.  
 Carriers, 886 *n.*  
 Charter-party, 885.  
 Common counts, 882.  
 Consideration, that has failed, 887 *n.*  
 Corporations, 887 *n.*  
 Duress, 883 *n.*, 887 *n.*  
 Erroneous judgment, 886 *n.*  
 Execution, 887 *n.*  
 Foreign judgment, 885, 887 *n.*  
 Forms of the action, 882.  
 Fraudulent misrepresentations, 887 *n.*  
 History, 882.  
 Indebitatus assumpsit, 882.  
 Illegal, void or rescinded contract, 877 *n.*  
 Innkeepers, 886 *n.*  
 Insimul computassent, 884.  
 Insurance, 885.  
 Invalid specialty, 887 *n.*  
 Landlord and tenant, 883 *n.*  
 Legacy and distributive share, 885, 888.  
 Liability assumpsit, 885.  
 Marriage, 885.  
 Merger, 888.  
 Mistake of fact, 887 *n.*  
 Mutual promises, 885.  
 Negotiable instruments, 885.  
 New agreement or consideration, 888.  
 Partners, 884 *n.*  
 Party wall, 885.

*Assumpsit—Continued.*

- Pleading, 889.
- Quantum meruit, 884.
- Rent, 888 *n.*
- Requisites, 886.
- Security of higher nature, 887.
- Special assumpsits, 885.
- Surgeons, 886 *n.*
- Tort; when waived, 888.
- Verdict and judgment, 890.
- Wharfingers, 886 *n.*
- At, 890 *et seq.*
- “At and from” a port, 891 *n.*
- At an office or banking-house, 893.
- At his death, 892.
- “At” in a bill of exchange, 893.
- At, in, or near, 892.
- At large, 891 *n.*
- At law, 892.
- At least, 892.
- At merchant's risk, 892.
- At once, 892.
- At or near, 892.
- At or upon, 892.
- At sea, 893.
- At that time, 893.
- At the dwelling-house, 890, *n.* 893.
- At the end of one year, 893.
- At the pit's mouth, 893.
- At the terminus, 890 *n.*
- At the trial, 892.
- At the warehouse, 893.
- At their death, 892.
- At this date, 893.
- Attachment, 894-936. *See* Absence, 35 *n.*
- Abscond, 34 *n.*
- Abseonding debtors, 897.
- Abstract of title, 48.
- Advertisement, 934.
- Affidavit, 901.
- Against whom may issue, 896.
- Aider and abettor, 63 *n.*
- Aider in wrongful, liable, 63 *n.*
- Amendments, 920.
- Assignee, property in hands of, 899.
- Attempt, 936.
- Bail bonds, 923.
- Bonds, 905.
- Bonds to dissolve, 923.
- Character of debt, 896.
- Claim before due, 898.
- Concealment, 897.
- Corporations, 898.
- Damages, 896, 908.
- Debtor removing property, 899.
- Defects taken advantage of, 896.
- Delivery bonds, 925.
- Dissolution, 931 *et seq.*
- Execution of writ, 918.
- Exemptions, 914.
- Fraud, 899, 926 *et seq.*
- Fraudulent, 926 *et seq.*
- In whose favor process will lie, 894.
- Issuing writ, 909.

*Attempt—Continued.*

- Liability of officer, 929.
- Non-residence, 897.
- Notice, 934.
- Officer, liability of, 929.
- Property affected, 930.
- Property subject to, 911.
- Release of sureties, 923 *n.*
- Return of writ, 918, 921.
- Rights affected, 930.
- Simultaneous, 926 *et seq.*
- Successive, 926 *et seq.*
- Tort, will not lie for, 895.
- Unliquidated damages, 896.
- Attorney and client, 942-973.
- Acknowledgment by, 170.
- Acting as, 178.
- Admission, 943. [quire, 245 *n.*
- Adverse possession, when may ac-
- Adverse title, 960 *n.*
- Affidavits, 308 *n.*, 309.
- Agency, 348.
- Alien cannot be, 464.
- Answer, 601.
- Appearance, 952.
- Appearance in actions, 184.
- Arbitration, 652 *n.*, 664 *n.*, 683.
- Arrest, 725, 948 *n.*
- Assignment to prisoner, 943 *n.*
- Assumpsit, 886.
- Authority, cannot delegate his, 369 *n.*
- Bail, 950.
- Confidential communications, 601.
- Definition, 942.
- Disabilities, 948.
- Disbarment, 946 *n.*
- Duration of authority, 958.
- Duties, 945.
- Duties and dealings, 958.
- Express contract, 969.
- Illegal services, 964.
- Liabilities, 945.
- Liability of client to attorney, 963.
- Liability to client, 961.
- Liability to third parties, 951.
- Liens, 969 *et seq.*
- Oath, 943 *n.*
- Powers implied by retainer, 954.
- Privileges, 948.
- Purchase of client's property, 959 *n.*
- Purchase of land by, after consultation,
- Retainer, 952. [378 *n.*
- Statements to jury, 948-9.
- Subpoena, 949 *n.*
- Summary jurisdiction, 944.
- Suspension, 946 *n.*
- Witness, as, 945 *n.*, 949 *n.*
- Attorney-general, 974.
- Powers, 974 *n.*
- Duties, 974 *n.*-976.
- Legislative power over, 974 *n.*
- Auctions and auctioneers, 977-1003.
- Agent of purchaser, 984.
- Agreements not to bid, 997.

Auctions—*Continued.*

Authority, 979.  
 Bids, 989 *et seq.*  
 Bids may be retracted, 998.  
 Bonds, 978.  
 Cannot buy, 981.  
 Care of property, 980.  
 Catalogue, 986.  
 Collections, 981.  
 Compensation, 982.  
 Competition, 989.  
 Completion of contract, 1000.  
 Conditions of sale, 984, 985.  
 Definition, 977.  
 Delegation of authority, 980.  
 Deposit, 998.  
 Descriptions, 987.  
 Improper bids, 997.  
 Instructions, 979.  
 Liability for receipts, 980.  
 Liabilities of principal, 983.  
 License, 978.  
 Manner of bidding, 998.  
 Memorandum of sale, 1001 *et seq.*  
 Negligence, 980.  
 Particulars of sale, 986.  
 Powers, 981.  
 Principal's title, 981.  
 Puffers, 989.  
 Relation to seller, 979.  
 Revocation of authority, 979.  
 Signature, 1002.  
 Statute of frauds, 1000.  
 Termination of power, 982.  
 Unconditional sales, 989.  
 Audita querela, 1003.  
 Against the State, 1004 *n.*  
 Amendment, 1005 *n.*  
 Cases where writ will not lie, 1007.  
 Concurrent remedies, 1009.  
 Costs, 1005 *n.*  
 Definition, 1003.  
 Estoppel, 1008 *n.*  
 Evidence, 1004.  
 Executions, 1006.  
 Filing the process, 1004 *n.*  
 Grounds for the action, 1005.  
 Judgment, 1005-1007.  
 Lunatic, 1007.  
 Nature of proceeding, 1003.  
 Parties, 1004.  
 Pleadings, 1004.  
 Substitutes for writ, 1008.  
 Suits, 1007 *n.*  
 Surety, 1007 *n.*  
 Verification of writ, 1004 *n.*  
 Auditing; examine, settle and allow ac-  
 Auditors, 1009-1020. [counts, 492 *n.*  
 Account render, 131.  
 Action by majority, 1011.  
 Adjoinments, 1013.  
 Amendments, 1013.  
 Appointment, 1010.  
 Auditor may testify, 1017.

Auditors—*Continued.*

Compensation, 1020.  
 Confirmation of report, 1016.  
 Correction of report, 1016.  
 Death of party, 1018.  
 Definition, 1009.  
 Estoppel, 1013.  
 Evidence, 1012, 1016, 1017.  
 Exceptions to report, 1015.  
 Impeaching report, 1018.  
 Notice of meeting, 1011.  
 Qualification, 1010.  
 Recommitment, 1019.  
 Report, 1014.  
 Report as evidence, 1016.  
 What cases may be referred, 1011.  
 What matters examined, 1012.  
 Witnesses, 1012.  
 Authentication, 1020-1024.  
 Affidavits, 312.  
 Ancient documents, 565.  
 Book of foreign laws, 1022.  
 Definition, 1020.  
 Foreign, 1021.  
 Judge's certificate, 1023.  
 Judicial records, 1022.  
 Justice of peace, 1024.  
 Modes of, 1020.  
 Non-judicial records, 1024.  
 Private documents, 1024.  
 Protest, 1024.  
 Public documents or records, 1020.  
 Statutes, 1022.  
 Authority, 1025-  
 Actual authority, 1030.  
 Admissions, 1029.  
 Agent to borrow, 1037.  
 Agent to buy, 1037.  
 Agent to collect, 1036.  
 Agent to loan, 1037.  
 Agent to manage real estate, 1037.  
 Agent to sell, 1035.  
 Agent to sue, 1037.  
 Ambiguity in instructions, 1038.  
 Construction, 1037.  
 Custom, 1029.  
 Declarations, 1032.  
 Definition, 1025.  
 Determination, 1026.  
 Emergency, 1030.  
 Express, 1027.  
 General, 1032.  
 How conferred, 1025.  
 Implied, 1028, 1033.  
 Revocation, 1026.  
 Special, 1032.  
 Substitution, 1030.  
 Usage, 1029.  
*Autre fois convict*; abatement plea in, 11.  
*Autre fois acquit*; abatement plea in,  
 Available, 1038. [11.  
 Available for adjudication, 1038.  
 Available capital, 1039.  
 Available means, 1039.



- Avails, 1939.  
 Avocation, 1039.  
 Avulsion, 136-142.  
 Back, 1039.  
 Bad, 1040.  
 Badge, 1041.  
 Baggage, 1042-1045.  
   What is, 1043.  
   What is not, 1044.  
 Bail-bonds; abstract of title, 48.  
   Attachment, 923.  
 Bail, attorney cannot become, 950.  
 Bailment; animals, 589.  
   Assumpsit, 886 n.  
 Ballots; abbreviations, 15.  
 Bank; account stated, 111 n., 117 n. *et seq.*, 124 n., 127 n.  
   Agent's liability for failure of, 385 n.  
   Cashier is general agent, 349 n.  
   Cashier, when agent for third person, 342 n.  
   Certifying checks, 341.  
   Notice to directors, 422.  
 Bank bills; altering, 523 n.  
 Bankruptcy; abatement, suit in, 14 n.  
   Agency revoked by, 448.  
   Arbitration, 648.  
 Barn; arson, 763 n.-766 n.  
 Barrel-house; arson, 577 n.  
 Battery, 783.  
 Bees, 571 n., 582 n.  
 Before the argument, 716 n.  
 Before the fact, accessory, 66.  
 Begging for alms, 495 n.  
 Beneficial societies; amotion, 557-562.  
 Bequest; adopted child, 205, 206.  
   Alien may take by, 460.  
   "All," construction of, 487 n. *et seq.*  
   Gives color of title, 277 n.  
 Betterments; adverse possession, 294.  
 Bigamy; accessory, 64 n.  
 Bill of exchange; assumpsit, 885.  
 Bill of lading; "apparent good order,"  
   Fraud of agent, 412 n. [616 n.  
 Bill of revivor; abatement, effect in, 14.  
 Bill of sale, alteration of, 511 n.  
   Apparent possession, 615 n.  
 Bills and notes *See* Accord and satisfaction, 101 *et seq.*  
   Abbreviations in, 18.  
   Account stated, 120.  
   Actions, 184a. [to collect, 341 n.  
   Agent's possession of, implies power  
   Agent's powers, 362.  
   Alteration of, 497 *et seq.*  
   Ambiguity, 525-545.  
   Assumpsit, 885. [issue, 339 n.  
   Corporations; authority of agents to  
   Indorsement by agent, 342 n.  
   Payment to one not having, 341 n.  
   Signature by agent, 388. [504 n.  
   Signature torn from, but replaced,  
 Births; abstract of title, 46.  
 Bishop, priest not agent for, 344 n. [520.  
 Blanks; alteration of instruments, 515-
- Blanks in sealed instruments, 337.  
 Ambiguity, 527 *et seq.*  
 Blood-vessel, rupture of, 88 n.  
 Boards; accession, 59 n. [517-519.  
 Bona-fide alteration of instruments, 515.  
 Bona fide purchaser; acknowledgment of  
 deeds, 158.  
 Bonds, alteration of, 497 *et seq.*  
   Arrest, 721.  
   Attachment, 905, 923.  
   Blanks in, 520.  
 Book-keeper cannot bind employer for  
 debt of third person, 344 n.  
 Boundaries; adverse possession, 248.  
   "Along," construction of, 495 n. [227 n.  
 Arbitration, 660 n., 699.  
 Breach of peace; adverse possession,  
   Arrest, 734-743.  
 Breaking doors; arrest, 722, 746, 749 n.  
 Bridge, abutment a part of, 50.  
   Admiralty jurisdiction, 196.  
   Obstructing navigation, 8.  
 Brokers, 347, 349 n.  
 Brought up as aforesaid, 319 n.  
 Building; accession, 57 n., 61.  
 Building, altering, repairing, or orna-  
 menting, 523 n.  
 Building association; accord and satis-  
 faction; withdrawal of stockholder, 96 n.  
 Burglary. *See* Age, 328 n. [257 n.  
 Burying-ground; adverse possession,  
 C. O. D.; definition, 17.  
 Delivery without payment, 350 n.  
 Carrier; act of God, 173 *et seq.*  
   Agent's power to select, 361.  
   Assumpsit, 886 n.  
   Delivery to, 50 n.  
 Cases arising in a justice's court, 717 n.  
 Cases arising under treaties, 717 n.  
 Cashier; general agent, 349 n.  
   When agent for third person, 342 n.  
 Cattle. *See* Animals, 571.  
   Diseased, 585. [crued, 142 n.  
 Cause of action shall, or shall have ac-  
 Cause of action shall have arisen, 717 n.  
 Cemetery; adverse possession, 257 n.  
 Certificate of acknowledgment, 147 *et seq.*  
*Cestui que trust*; adverse possession, 240.  
 Charcoal; accession; confusion of goods,  
 Charge and accuse, 143 n. [58 n.  
 Charity, soliciting, 495 n.  
 Charter-party; "about to sail," 34.  
   Assumpsit, 885. [25 n.  
 Chaste character presumed in abduction,  
 Chattel mortgage; accession, 59 n., 60 n.  
   Animals, increase of, 59 n.  
   Confusion of goods, 59 n.  
   Crops, 60 n.  
   Plants, 60 n.  
 Stock of goods, mortgagee an agent to  
 sell, 340 n., *contra*, 346 n.  
 Checks, certifying, 341 n.  
 Children, abuse of, 49.  
   Accessory, when not, 62 n., 65 n.

- Children, assault on, 783, 784 *n.*, 822 *n.*  
 Defence of; assault, 799.  
 Chinese aliens, 457 *n.*  
 Choose equivalent to appoint, 631 *n.*  
 Church; arson, 763 *n.* [deeds, 152.  
 Clerical errors; acknowledgment of  
 Ambiguity, 543.  
 Amendment of, in practice, 550.  
 Clerk, 342 *n.*, 348.  
 Clubs; amotion, 560 *n.*, 561 *n.*  
 Coercion, accomplices of, 62 *n.*  
 Cohabit, 211 *n.*  
 Collections by agents, 355-360.  
 Collusion by agent to defraud, 423.  
 Color of title; adverse possession, 276-  
 Commercial travellers, 347. [292.  
 Commission agents, 347.  
 Common purpose; accessory, 66.  
 Composition of debts; accord and satis-  
 faction, 100 *n.* [sion, 267 *n.*  
 Computation of time; adverse posses-  
 Concealed weapons, 718, 735 *n.*  
 Concealment of felony to be committed;  
 accessory, 67 *n.* [601.  
 Confidential communications; attorney,  
 Confusion of goods, 54-61.  
 Accident, 56.  
 Accounts, 60.  
 Act of God, 56.  
 Agent, 61 *n.*  
 Boards from trees, 59 *n.*  
 By act of innocent party, 55.  
 By act of stranger, 57.  
 Cord-wood, 58 *n.*  
 Corn into whiskey, 58 *n.*  
 Damages, 59 *n.*  
 Execution, 58 *n.*  
 Factor, 61 *n.*  
 Fire-wood, 59 *n.*  
 Fraud, 57 *n.*  
 Grain, 56 *n.*  
 Hides into leather, 58 *n.*  
 Logs, 56 *n.*  
 Lumber made into shingles, 58 *n.*  
 Machinery, 56 *n.*  
 Mortgaged goods, 57 *n.*, 58, 59 *n.*  
 Partnership, 60 *n.*  
 Posts, 58 *n.*  
 Railroad ties, 56 *n.*, 59 *n.*  
 Rails, 58 *n.*  
 Replevin, 58 *n.*  
 Staves, 58 *n.*  
 Timber, 58 *n.*  
 Trees into charcoal, 58 *n.*  
 Trustee's accounts, 60.  
 Vis major, 56.  
 Wilfully made, 57. [727.  
 Congress; member exempt from arrest,  
 Consent; aider and abettor, 64.  
 Alterations of instruments, 503.  
 Assault, 784, 805.  
 Consolidation; amalgamation, 523.  
 Conspiracy; accomplices, 62 *n.* [242.  
 Constructive trusts; adverse possession,  
 Counsel may take acknowledgments, 144.  
 Contagious diseases; abatement of in-  
 fected houses, 7 *n.*  
 Contempt, abatement does not discharge,  
 Contiguous, 190 *n.*, 191. [13, *n.* 5.  
 Contract, abandonment of, 6.  
 Abbreviations in, 16, 17, 18.  
 "About," in quantity, 33.  
 Admiralty jurisdiction, 197-199.  
 Agent's power to perform, 367.  
 Ambiguity in, 541.  
 Executory, 229.  
 Sale of land; agency, 338, 343 *n.*  
 Contributory negligence; assault, 784.  
 Conversion; animals, 574 *n.*  
 Conveyance; abstract of title, 46.  
 Ambiguity in, 538 *et seq.*  
 By agents, 360.  
 By co-tenant, 234.  
 By remainder-man, 237 *n.*  
 Convict cannot make affidavits, 308.  
 Convicted as aforesaid, 319 *n.*  
 Conviction of principal, evidence of, ad-  
 missible, 72.  
 Co-parceners; adverse possession, 235 *n.*  
 Copyright; alien, 462. [er, 55 *n.*  
 Cord-wood; accession; labor of trespass-  
 Confusion of goods, 58 *n.*  
 Corn; accession; making into spirits, 54 *n.*  
 Confusion of goods, 58 *n.*  
 Corn-crib; arson, 763 *n.*  
 Corporations. *See* Stockholder.  
 Abatement, 13 *n.* [leges 49.  
 Abuse or misuse of corporate privi-  
 Account stated, 116 *n.*  
 Acknowledgment of deeds, 159.  
 Adverse possession, 271 *n.*  
 Affidavits, 308 *n.*  
 Agents of, 334, 336 *n.*, 338, 339 *n.*,  
 341 *n.*, 345 *n.*, 412 *n.*, 421, 422, 432 *n.*,  
 Alien may be corporator, 463. [438 *n.*  
 Allotment of stock, 492.  
 Answer, cannot swear to, 610 *n.*  
 Arbitration, 649.  
 Assault, 809.  
 Assignment for creditors, 846.  
 Assumpsit, 887 *n.*  
 Attachment, 898.  
 Expulsion of members, 557-562. [373.  
 Officers cannot deal with themselves,  
 Ultra vires, 431 *n.*  
 Costs; alimony, 486.  
 Arbitration cases, 687.  
 Arrest for, 722 *n.*  
 Costs that have accrued, 142 *n.*  
 Co-tenants; adverse possession, 232.  
 Cotton-house; arson, 763 *n.*  
 Countermanding felony; accessory, 67 *n.*  
 County aforesaid, 319 *n.*, 320 *n.*  
 Court, acknowledgment by order of, 170.  
 Court-martial; absence of accused, 44 *n.*  
 Coverture; plea in abatement, 10.  
 Credit, agent's power as regards, 360, 366  
 Crime. *See* Age, 327.

- Crimes not felony at common law, 743 n.  
 Crops; accession, 51, 52 n., 60 n.  
 Trespasser cannot acquire, 52 n.  
 Cruelty to animals, 575.  
 Arrest, 737 n.  
 Cultivation; adverse possession, 259.  
 Curtesy; abstract of title, 48.  
 Adverse possession, 229 n., 237 n.  
 Curtilage, 768.  
 Customs; appraisement, 635.  
 Dam. *See* Mill-pond.  
 Abatement, 8.  
 Accident, 83. [examiners, 48.  
 Damages; abstract of title; negligence of  
 Accession, 59 n.  
 Actions, 179.  
 Assault, 819.  
 Assignment, 833.  
 Attachment, 908.  
 Confusion of goods, 59 n.  
 Dangerous weapons, appearing with,  
 constitute an affray, 318.  
 Assault, 813 *et seq.*  
 Date; acknowledgment, 153.  
 Alteration of instruments, 510.  
 Amendment of, in practice, 551.  
 Deadly weapon; assault, 813 *et seq.*  
 Death. *See* Absence, 35.  
 Agency revoked by, 446, 447.  
 Arbitration, revokes, 666 n.  
 Debt, arrest for, 720 n.  
 Decedent's debts; abstract of title, 48.  
 Deceit, agent's, 417, 418.  
 Dedication; abstract of title, 48.  
 Adverse possession, 226 n.  
 Agents, by, 361.  
 Deeds. *See* Ancient Documents, 565.  
 Abbreviations in, 16.  
 Abstract of title, 46, 47.  
 "About," in quantity, 32.  
 Acknowledgment of, 143-170.  
 Acknowledgment; color of title, 287 n.  
 Adverse possession invalid, 285.  
 Adverse possession lost, 283.  
 Adverse possession not recorded, 283.  
 Adverse possession, sheriff's, 237 n.  
 Adverse possession, tax deed, 284.  
 Agency; equitable title, 338.  
 Agency; knowledge of recording not  
 presumed, 433 n.  
 Agency, power to execute, 360.  
 Agency; ratification, 436 n., 437 n.  
 Agency; "sell" in power, 346 n.  
 Agency; signature, 337, 338, 386.  
 "Along;" construction of, 495 n.  
 Alteration of, 497 *et seq.*  
 Altered by third party, 505.  
 Ambiguity in, 538 *et seq.*  
 Appurtenance, 642.  
 Blanks, 519.  
 Color of title, 276 *et seq.*  
 Deed of trust; abstract of title, 48.  
 Alienation of homestead, 467 n.  
 Definitions. *See* Words and Phrases.  
 Depositions. *See* Affidavits, 307.  
 Descent; abstract of title, 46, 48.  
 Adopted child, 205, 206.  
 Color of title, 277 n.  
 Deserters; arrest without warrant, 744 n.  
 Designate equivalent to appoint, 631 n.  
 Detective; accessory, when not, 65.  
 Devise; adopted child, 205, 206.  
 Alien may take by, 458, 460.  
 "All," construction of, 487 n. *et seq.*  
 Appurtenance, 643 n.  
 Disabilities. *See* Age, 326.  
 Abatement, plea in, 9, 10.  
 Agency, 334.  
 Discretion, abuse of, 49 n.  
 Dismissed agreed, 451 n.  
 Distribute. *See* Appropriate, 639.  
 Disturbance of meetings, 823 n.  
 Dividends, accession of, 51 n.  
 Divorce. *See* Alimony, 467.  
 Abandonment, what is, 3 n.  
 Acknowledgment by divorced woman,  
 Allowance to wife, 493 n. [169.  
 Dogs. *See* Animals, 571.  
 Injuries by, 584.  
 License of, 586 n.  
 Domicile, abandonment of, 6.  
 Dower; abstract of title, 48. [169.  
 Acknowledgment, omission to insert,  
 Adverse possession, 237 n.  
 Alien, 461 n.  
 Allotment of, 492 n.  
 Drought, loss by, 175.  
 Drugs; administering, an assault, 804.  
 Adulteration of, 207.  
 Drummers, 347.  
 Drunkard, agent cannot be an, 334.  
 Arrest of, 736 n.  
 Assault, 789 n. [45 n.  
 Due absolutely and not on a contingency,  
 Duress, accomplices under, 62 n.  
 Account stated, 119.  
 Acknowledgment of wife, 168.  
 Agent's payment under, 405 n.  
 Arbitration, 648.  
 Assumpsit, 883 n., 887 n.  
 Duties arising on goods imported, 717 n.  
 Dwelling-houses, abatement of filthy, 7,  
 8.  
 Each, "any" construed as, 611 n.  
 Easement, abandonment of, 6.  
 Abstract of title, 48.  
 Adverse possession, 297.  
 Apparent, 615 n.  
 Eaves, abatement of overhanging, 8.  
 Either synonymous with "any," 611 n.  
 Election; alien cannot vote, 464.  
 Eminent domain; abandonment of pro-  
 Appraisal, 635. [ceedings, 4.  
 Void proceedings; color of title, 278 n.  
 Encouragement; aider and abettor, 64.  
 Engaged in agriculture, 452 n.  
 Equitable title, agent may give, 338.  
 Erection, alteration, or repair, 497 n.

- Escheat; aliens, 456.  
 Escrow; agency, 352 *n.*  
 Estoppel; adverse possession, 253 *n.*  
 "Every." See "Any," 611. [492 *n.*  
 Examine, settle, and allow accounts,  
 Examiners of title, liability of, 48.  
 Exclusive, meaning of; adverse possession, 228 *n.*  
 Execution; abstract of title, 47.  
   Apparent possession, 615 *n.*  
   Appraisalment, 635.  
   Assumpsit, 887 *n.*  
   Confusion of goods, 58 *n.* [stated, 112.  
 Executor and administrator; account  
   Adverse possession, 242, 277 *n.*  
   Alien may be, 463.  
   Allowance of accounts, 494 *n.*  
   Appraisalment, 634.  
   Arbitration, 653, 715.  
   Cannot buy trust land, 376 *n.*  
   Sale; color of title, 277 *n.* [229.  
 Executory contract; adverse possession,  
 Exemptions; abstract of title, 47.  
 Expenses; appertaining, 630 *n.*  
 Expenses of administration, 193 *n.*  
 Expulsion; amotion, 557. [430 *n.*  
 Express company; agent's collections,  
 Extrinsic evidence; ambiguity, 529 *et seq.*  
 F. O. B. means "free on board," 18.  
 Factors, 347, 349 *n.*  
   Confusion of goods, 61 *n.*  
 False imprisonment, action for; accord  
   Assault, 808. [and satisfaction, 95 *n.*  
 False pretences; children, 329.  
 Farmer is not a tradesman, artificer,  
   workman, etc., 776 *n.*  
 Felony, crimes not, at common law, 743.  
*Feme covert*, agent may be, 334. [259-261.  
 Fences; adverse possession, 248, 257 *n.*,  
 Fiduciary relations; agency, 375.  
*Filum aquæ*, 139, 140 *n.*, 141 *n.*  
 Fines; amercement, 555.  
 Fire-arms: assault, 814.  
 Fires; accident, 84, 86.  
   Act of God, 176 *n.*  
 Fire-wood; accession, 59 *n.*  
 Fish, 571 *n.*, 572 *n.*  
 Fits, accident caused by, 88 *n.*  
 Fixture, abandonment of, 6.  
   Accession, 51.  
 Flood, loss by a, 174, 177.  
 Food, adulteration of, 207-210.  
 Foreign judgment; assumpsit, 885, 887 *n.*  
 Foreign minister; ambassador, 524.  
   Arrest, 727.  
 Forgery; agency, 352 *n.*, 431 *n.*, 432 *n.*  
   Agent may state draft is good, 342 *n.*  
 Fornication, 210. [ceremonies, 781 *n.*  
 Fraternities; injuries inflicted during  
 Fraud; abduction, 24.  
   Accord and satisfaction, 106.  
   Account stated, 123, 125.  
   Acknowledgment of deeds, 160.  
 + Actions, discontinuance of, 184*g.*
- Fraud—*Continued.*  
   Actual and constructive distinguished,  
   Adverse possession, 233 *n.*, 292. [184*g.*  
   Agent's, affects rights of principal, 425.  
   Agent's; collusion, 423.  
   Agent's liability, 407.  
   Agent's; liability of principal, 417-418.  
   Agent's, will not give color of title,  
   245 *n.*  
   Alterations of instruments, 501, 520.  
   Arbitration, 707, 708.  
   Assault, indecent, 805.  
   Assignments for creditors, 869.  
   Assumpsit, 887 *n.*  
   Attachment, 899, 926 *et seq.*  
   Confusion of goods, 57 *n.*  
   Principal may follow property illegally  
   sold by agent, 427.  
 Freehold, abatement of, 14.  
 Freight as agreed, 451 *n.*  
 From any of the places aforesaid, 320 *n.*  
 From the day and year aforesaid, 320 *n.*  
 Frost, loss by, 175, 177 *n.*  
 Gale, loss by, 175, 177. [614 *n.*  
 Game-cock not apparatus for gaming,  
 Gaming, game-cocks not apparatus for,  
 Gambling; accomplices, 62 *n.* [614 *n.*  
 Gift; abandonment, 2 *n.*  
   Advancements, 217, 223.  
   Adverse possession, 280.  
   Agent, to, 378 *n.*  
 Gin-house; arson, 763 *n.*  
 Giving a false alarm, 454 *n.*  
 Good faith; adverse possession, 277.  
 Governor, absence of, 36 *n.*  
 Grain, confusion of, 56 *n.* [sion, 232 *n.*  
 Grandchild, *laches* of; adverse posses-  
 Grant; adverse possession, 288 *n.*, 289.  
 Grantor and grantee; adverse possession,  
 247. [possession, 258 *n.*  
 Grass, cutting, does not give adverse  
 Grist-mill; arson, 763 *n.*  
 Guardian; arbitration, 654.  
   Deed; color of title, 277 *n.*  
 Gun; assault, 814.  
 Handwriting; ancient documents, 568.  
 Hernia; accident insurance, 88 *n.*  
 Her part aforesaid, 320 *n.*  
 Hides; accession, 58 *n.*  
 Highways; abatement of obstructions, 7.  
   Accretion, 138 *n.*  
   Adverse possession, 297.  
   Alteration of, 496 *n.*, 497 *n.*, 523 *n.*  
   Homestead, abandonment of, 6.  
   Assignment not color of title, 278 *n.*  
   Deed of trust is alienation, 467 *n.*  
 Homicide; abortion, 29 *n.*  
 Accessory, 61, 65, 66, 67 *n.*, 68 *n.*,  
   69 *n.*, 70 *n.*, 71 *n.*  
 Apparent danger, 615 *n.*  
 Apparent intention, 615 *n.*  
 Children, 327.  
 Horses. See Animals, 571.  
 Accident, 84.

Hotel. *See* Innkeepers.

House; arson, 764.

Entering to arrest, 737 *n.* [wife, 3.

Husband and wife; abandonment of

Accessory, 64 *n.*, 71 *n.*

Account stated, 117 *n.*

Acknowledgment by wife, 163 *et seq.*

Acknowledgment, wife cannot im-

peach, 161 *n.* [257 *n.*, 270 *n.*, 278 *n.*

Adverse possession, 229 *n.*, 237 *n.*, 250,

Affidavits, 308 *n.*

Affinity, 315.

[426 *n.*

Agency, 343 *n.*, 344 *n.*, 345 *n.*, 352 *n.*,

Husband may be wife's agent, 335 *n.*

Aider and abettor, 64 *n.*

Agency; revocation by marriage,

Alien, 456. [334 *n.*, 335 *n.*, 448.

Alimony, 467.

Answer by, 609.

Arbitration, 649.

Assault, 796 *n.*, 799, 800.

Defence of, 799.

[71 *n.*

Rape of wife, husband accessory to,

I O U; account stated, 17, 120 *n.*

Valid acknowledgment of debt, 17.

I give all in Suffolk, 489 *n.*

I give all to my mother, 488 *n.*

Ice; accession, 51 *n.*

Idiot. *See* Insane person; Lunacy.

Agent cannot be an, 334.

Arbitration, 671.

Illegal act, agent not required to do, 370.

Illegitimate children; advancements,

Impounding animals, 588. [221 *n.*

Improvements; adverse possession, 294.

"In." *See* "At," 890.

In all cases, 486 *n.*, 489 *n.*

In pursuance of the act, 173 *n.*

Incitement, degree of; accessory, 68 *n.*

Inclosures. *See* Adverse possession.

Incumbrances; abstract of title, 46, 48.

Indictable offence; amotion, 560 *n.*

Indictment, "apartment" in, 612 *n.*

Inevitable accident, 175 *n.*

Infamous crime; affidavit, convict can-

not make, 308.

Infancy, infants. *See* Adoption of chil-

dren, 205; Children; age, 326.

Abatement, plea in, 10.

Account stated, 111 *n.*

Affidavit, 308.

Agency, 334.

Answer by infant, 608.

Arbitration, 648, 671.

Assignments for creditors, 846 *n.*

Deed of; color of title, 286 *n.*

Power of attorney, 334 *n.*

Sale of infant's property, 45 *n.*

Inheritance; adopted child, 205 *n.*

Injuries by animals, 578-580, 582, 584.

Injuries to animals, 574.

Injuries to person; accident, 82 *et seq.*

Accord and satisfaction, 98 *n.*

Injuries to property; accident, 82 *et seq.*

Innkeepers; assumpsit, 886 *n.*

Clerk agent for, 342 *n.*

Innocent agent, accessory, is not, 65.

Insane persons. *See* Idiot; Lunacy.

Abatement, plea in, 9.

Accessory, 65 *n.*

Account stated, 111 *n.*

Affidavits, 308.

Agency, 334, 448.

Arbitration, 671.

Arrest, 739.

Instigation; countermanded, 69.

Crime different from one committed, 69.

Instigator accessory at common law, 67.

Instructions, agent's duty to obey, 369.

Insurance; "A sea," meaning of, 1 *n.*

Abandonment, 3.

Agency to procure, 343 *n.*

Alienation of the property, 466 *n.*

Ambiguity in policy, 545 *n.*

Application for policy, 631 *n.*

Arbitration, 669 *n.*, 671 *n.*

"Arrival in port," 758 *n.*

Assumpsit, 885.

"At and from a port," 891 *n.*

"On all or either," in policy, 487 *n.*

*See* Accident Insurance, 87.

Intent, abandon, to, 1 *n.*

Abortion, 29.

Adverse possession, 226, 263 *n.*, 286.

Agency, ratification of, 438.

Aider and abettor, 63 *n.*, 64.

Apparent intention, 615 *n.*

Arbitration, 655.

Arson, 773.

Assault, 786-790.

Persons detecting crime, 65.

Signature by agent, 387.

Interest; account stated, 124.

Advancements, 222.

Agent liable for, 384.

Alteration of instruments, 509.

Appeal; to increase amount, 620 *n.*

Compound; account stated, 111 *n.*

Interpreter. acknowledgment, taking

through, 166 *n.*, 168 *n.*

Interrogatories; answer, 602.

Interruption of possession; adverse pos-

sition. *See* "At," 890. [session, 271.

Intoxicating liquors. *See* Drunkards,

Accessory, 62 *n.*, 63 *n.* [328 *n.*

Agent, sale by, 412 *n.*

"Appendage" to a saloon, 630 *n.*

Arrest of drunkards, 736 *n.*

Assault by drunkard, 789 *n.*

Children, 328 *n.* [violation of law, 64 *n.*

Husband may be accessory to wife's

Person detecting sale, 65 *n.*

Is accused, 143 *n.*

Islands; accretion, 138.

"It" equivalent to "as," 778.

It is agreed, 452 *n.*

It is mutually agreed, 452 *n.*

Jail; arson, 759 *n.*, 765 *n.*

Jeopardy; abatement, plea in, 11.  
 Judge, absence of, 36 *n.*  
 Assault on, 780 *n.*  
 Judgment, abbreviations in, 18.  
 Appeal, 627.  
 Void, not color of title, 278 *n.*  
 Judicial act, 173 *n.*  
 Judicial proceedings; abstract of title, 46.  
 Judicial sale; abstract of title, 47.  
 Adverse possession, 247 *n.*  
 Color of title, 276 *n.* [11.  
 Jurisdiction, want of; plea in abatement,  
 Juror; arrest, 725.  
 Jury; alien, 464. [68.  
 Knowledge of intended crime; accessory,  
 Land-warrant; abandonment, 6.  
 Landlord and tenant; "a year's rent," 1 *n.*  
 Adverse possession, 238.  
 Assumpsit, 883 *n.*, 888 *n.*  
 Tenant not agent, 345 *n.*  
 Larceny; accessories, 62 *n.*  
 Children, 328 *n.*  
 Dogs, 573 *n.*  
 Lawful chastisement, 794.  
 Lease; abstract of title, 48.  
 "Apartments," 612 *n.*  
 Appraisal, 635.  
 Life; adverse possession, 237 *n.*  
 Leather; accession, 58 *n.*  
 Legacy, abatement of, 12.  
 Abstract of title, 48.  
 Account render, 130 *n.*  
 Acknowledgment of release, 170.  
 Assumpsit, 885, 888. [727.  
 Legislature; member exempt from arrest,  
 Letters; account stated, 121.  
 Address of, 188.  
 Antichresis, 611 *n.*  
 Lien; abstract of title, 46, 48.  
 Agent's, 428.  
 Attorney's, 969 *et seq.*  
 Life estate, adverse possession, 237.  
 Deed; color of title, 277 *n.*  
 Sale; color of title, 277 *n.*  
 Life insurance; advancement, 217.  
 Lightning-rod, 523 *n.*  
 Limitations; account stated, 123.  
*Lis pendens*; abatement, plea in, 10.  
 Abstract of title, 48.  
 Living apart, 612 *n.*  
 Loaded arms, 718 *n.*  
 Loan, agent's power, 366.  
 Lobbyist, agent as, 370 *n.*  
 Logs; confusion of, 56 *n.*  
 Lunacy. *See* Idiot; Insane person.  
 Agency, 334, 447.  
 Answer by, 608.  
 Arbitration, 671.  
 Lying at anchor, 565 *n.*  
 Machinery; confusion of goods, 56 *n.*  
 Magistrate, arrest on verbal order of,  
 Majority. *See* Age, 326. [738 *n.*  
 Malice; agent's liability, 407.  
 Malice aforethought, 321 *n.*

*Mandamus*; amotion, 562 *n.*  
 Manslaughter. *See* Homicide.  
 Maritime lien; admiralty jurisdiction, 200.  
 Marriage; abatement, 14 *n.* [38 *n.*  
 Absence; presumption of innocence,  
 Abstract of title, 46.  
 Agency; revocation, 448.  
 Arbitration, revoked by, 665 *n.*  
 Assumpsit, 885.  
 Promotion of, 96 *n.*  
 Married woman, agent may be, 334.  
 Answer, 608.  
 Arbitration, 671.  
 Arrest, 727.  
 Mass meeting, 823 *n.* [636.  
 Master and servant. *See* Apprentices,  
 Mayhem, 812 *n.*  
 Mechanic's lien. *See* Lien.  
 Abbreviations in account, 17.  
 Abstract of title, 48.  
 Accession of materials, 52.  
 "Erection, alteration, or repair," 497 *n.*  
 Medical societies; amotion, 560 *n.*  
 Mercantile agencies, 348.  
 Merchant, 777 *n.*  
 Merger; alteration of instruments, 521.  
 Military courts; absence of defendant,  
 44 *n.* [255 *n.*  
 Millpond, adverse possession, 251, *n.*  
 Mine, abandonment, 6.  
 Adverse possession, 296.  
 Alien may hold, 460 *n.*, 463 *n.*  
 Apex of, 613.  
 Ministerial act, 173 *n.* [63 *n.*, 72.  
 Misdemeanors; aiders and abettors,  
 Misnomer, abbreviations, 20.  
 Plea in abatement, 10.  
 Mistake; accession, 53 *n.*  
 Account stated, 125.  
 Acknowledgment, 150 *et seq.*  
 Adverse possession, 248, 281-2.  
 Agency, 372 *n.*, 427.  
 Alteration of instruments, 498 *et seq.*  
 Ambiguity, 533.  
 Assumpsit, 887 *n.*  
 Misuse, abuse and, 49.  
 Mortgage. *See* Chattel mortgage.  
 Abstract of title, 46, 48.  
 Accession, 59 *n.*, 60 *n.*  
 Adverse possession, 245.  
 Agency, 357 *n.*, 366, 376 *n.*, 377 *n.*  
 Alienation of property, 466-7 *n.*  
 Alteration of instruments, 497 *et seq.*  
 By donor, void, 281 *n.*  
 Confusion of goods, 57 *n.*, 58.  
 Mortmain, alienation in, 467 *n.*  
 Municipal corporations; adverse posses-  
 sion, 557-562. [sion, 300.  
 Arbitrations, 649.  
 Municipal ordinances, arrest, 735 *n.*  
 Murder. *See* Homicide.  
 Mutilation of instruments, *n.*  
 Name, abbreviations, 15, 17, 19, 20.  
 Alteration of instruments, 497 *et seq.*

- Name, amendment of in practice, 550.  
 Navigable rivers, what are, 139 *n.*  
 Navigable waters; abatement of obstructions, 7.  
 "Near." See "At," 890. [tions, 7  
 Necessary apparatus, 615 *n.*  
 Necessary appendages, 629 *n.*  
 Negligence; accident, 82.  
   Acknowledgments, 155 *n.*  
   Act of God, 176.  
   Agency, liability of principal, 419.  
   Agency; principal's negligence, 35 *n.*  
   Agent, of, 371, 406, 411 *n.*, 413 *n.*  
   Alteration of instruments, 515. [414 *n.*  
   Assault, 784.  
   Liability of examiners of title, 48.  
   Notary, 155 *n.* [struments, 514.  
 Negotiable instruments; alteration of in-  
   Ambiguity, 529 *et seq.*  
   Blank, delivered in, 516.  
 New promise; account stated, 123.  
 Notary; abbreviations in protest, 17.  
   Affidavits, power to take, 310.  
   Negligence, 155 *n.*  
   Protest, address of, 188 *n.*  
 Notice; adverse possession, 235 *n.*, 264.  
   Advertisements, 306.  
   Agency, 419, 423, 442, 448.  
   Appeals, 622.  
   Arbitration, revocation of, 665.  
   Arrest, 739.  
   Assignment, 840.  
   Attachment, 934.  
 Noxious trades, abatement, 7, 8.  
 Noxious thing, abortion, 29.  
 Nuisances, abatement, 6-8.  
   Actions, 179 *n.*  
   Agency; ratification, 438 *n.*  
   Child, not liable for, 330.  
 Oath; answer, 607.  
   Attorney's, 943 *n.*  
   Arbitration, 674, 678, 709.  
 Occur and accrue distinguished, 142 *n.*  
 Office; abandonment, 3.  
   Appointment to, 631.  
 Official bonds, abstract of title, 48.  
 Oleomargarine. See Adulteration of food.  
 On all or either, 487 *n.*  
 On application, 631 *n.*  
 "Or" used interchangeably with "and,"  
 Other valuable article, 776 *n.* [569.  
 Otherwise acquired, 171 *n.*  
 Ouster; adverse possession, 232, 233.  
 Overseers of poor; arbitration, 654.  
 Owning or accruing, 142 *n.*  
 Oysters, 571 *n.*  
 Pardon; abatement, 11.  
 Parent and child, abandonment of child,  
   Account stated, 118 *n.* [3.  
   Advancements, 216 *et seq.*  
   Adverse possession, 252 *n.*, 282 *n.*  
   Agency, 335 *n.*, 340 *n.*, 345 *n.*  
   Alien, 456.  
   Chastisement, 794. [279, 293.  
 Parol agreement; adverse possession,
- Parol sale; adverse possession, 236 *n.*  
 Partition; adverse possession, 233 *n.*  
   Color of title, 278 *n.*  
 Partnership; admiralty jurisdiction, 198.  
   Agency, 338, 432 *n.*, 448.  
   Arbitration, 650.  
   Assignment for creditors, 847 *et seq.*  
   Assumpsit, 884 *n.*  
   Confusion of goods, 60 *n.*  
   Partner cannot pay private debt with  
     partnership funds, 382 *n.*  
 Party aggrieved, 450 *n.*  
 Party wall; *Assumpsit*, 885.  
 Pass-book; account stated, 111 *n.*, 117 *n.*,  
   118 *n.*, 124 *n.*, 127 *n.*  
 Passing the act, 173 *n.*  
 Patents; abandonment, 6.  
   Abstract of title, 46, 47.  
   Actions, 184 *a.*  
   Alien may have, 462.  
   "Art," 775 *n.*  
 Paving-stone; accession, 59 *n.* [100.  
 Payment, part; accord and satisfaction,  
   Presumption of, under executory con-  
     tract, 232 *n.*  
*Pendente-lite* purchaser; adverse posses-  
 Perils of the sea, 176 *n.* [sion, 247.  
 Peritonitis; accident insurance, 89 *n.*  
 Perjury; affidavits, 310.  
   Children, 328 *n.*  
 Permissive entry; adverse possession,  
   Personally acquainted with, 171 *n.* [251.  
 Physician and surgeon; accident, 83 *n.*  
   Agent's power to employ, 353 *n.*, 365.  
   Assault, 805.  
   Assumpsit, 886 *n.*  
 Pigeon-shooting, 576 *n.*  
 Plans; abstract of title, 47.  
 Plants; accession, 51 *n.*, 60 *n.*  
 Pleadings; abbreviations, 19.  
 Pledge. See Antichresis, 610.  
 Poison; accident insurance, 92*a.*  
 Political meeting, 823.  
 Poor laws; aliens, 464.  
 Popular assembly, 823 *n.*  
 Possession; accession, 52.  
 Postmaster; false returns, 64 *n.*  
 Power, appointment under, 632.  
 Power of attorney. See Agency.  
 Powers; abstract of title, 47.  
 Pre-emption; claim not color of title,  
   Pregnant; abortion, 30. [278 *n.*  
 Pregnant women, assault on, 821 *n.*  
 Presence; accessory, 63, 68 *n.*  
   Constructive, 64, 68 *n.*, 70.  
 Presumption; payment under execu-  
   tory contract, 232 *n.*  
 Presumption of death, 37-43.  
   Acknowledgment, 169. [ship, 37-43.  
 Presumption of life, death, and survivor-  
   Priest not agent for his bishop, 344 *n.*  
 Prison. See Jail.  
   "Apartment" of a, 613 *n.*  
 Prisoner; assault by jailer, 794.

Private person, arrest by, 740-743.  
 Assisting in arrest, 744.  
 Breaking doors to arrest, 749 *n*.  
 Privilege; plea in abatement, 10.  
 Prize causes; admiralty jurisdiction, 200.  
 Prize fight; accessories, 68 *n*.  
 Assault, 807.  
 Process, abuse of, 49.  
 Promissory notes. *See* Bills and notes.  
 Prostitution, 25 *n*.  
 Protest; address of letters, 188.  
 Public accounts; account stated, 112.  
 Public act, 173 *n*. [363 *n*., 433 *n*., 434.  
 Public agents. *See* Public officers, 348.  
 Public buildings; arson, 771.  
 Public lands; adverse possession, 298-9.  
 Public meetings, disturbance of, 823 *n*.  
 Public office, alien cannot hold, 464.  
 Public officers, absence of, 36 *n*.  
 Agents as, 395, 404.  
 Arbitration, 649, 654, 674.  
 Assault on, 786.  
 Assignment of salary, 829.  
 Fraud, liability on bond, 424 *n*.  
 Illegal collections, 405 *n*.  
 Ratification of illegal acts, 431 *n*.  
 Public place; what is, 318 *n*.  
 Public sales, 306 *n*.  
 Puffers; auctions, 989.  
 Purposes aforesaid, 320 *n*.  
 Quarry; adverse possession, 296 *n*.  
 Quick with child, abortion, in, 30.  
 Railroad; a railroad leading to M., what is, 1 *n*.  
 Abandonment of proceedings to condemn land, 4.  
 Accession, 59 *n*.  
 Accident from use of road, 84.  
 Adequate crossing, 189 *n*.  
 Adverse possession, 290 *n*.  
 Agents, powers of, 361, 373 *n*.  
 Agent's act, liability for, 411 *n*., 413 *n*..  
 Appendages, 630 *n*. [414 *n*.  
 Appertaining to, 630 *n*.  
 Arrest of passenger, 751.  
 Assault by servants, 809, 810 *n*.  
 Injuries to persons; accord and satisfaction, 98 *n*.  
 Rails; accession of materials, 53 *n*.  
 Station agent cannot contract with company, 373 *n*.  
 Ties; confusion of goods, 56 *n*.  
 Rails, accession, 58 *n*.  
 Rape; aider and abettor, 64 *n*, 71.  
 Attempt is assault, 805, 806.  
 Children, 328 *n*.  
 Husband may be accessory to, 71.  
 Real estate. *See* Adverse possession.  
 Abandonment, 2, 4.  
 Abstract of title, 46.  
 Abutting, 49, *n*. 7.  
 Accession, 51, 60, *n*. 61.  
 Agent cannot take advantage of defect in title, 374 *n*.

## Real estate—Continued.

Agent's contract for sale, 343 *n*.  
 Agent's power to manage, 365-6.  
 Agent's power to sell, 338, 346 *n*., 360.  
 Alien may hold, 458.  
 Alienation, what is, 466-7 *n*.  
 Appertaining; lands, 630 *n*.  
 Appurtenance, 641.  
 Arbitration, 659, 698, 713.  
 Assignment for creditors, 850, 852.  
 Boundary line, arbitration of, 699.  
 Reasonable time; account stated, 121.  
 Receipt, agent, by, 352 *n*.  
 Receipt and acquittance, 172 *n*.  
 Recognizances; abstract of title, 48.  
 Referees. *See* Auditors, 1009.  
 Refusal of an application, 631 *n*.  
 Refusing information; aider and abettor, Reliction, 136-142. [63 *n*.  
 Religious societies; amotion, 560 *n*.  
 Disturbance of, 823 *n*.  
 Remainder-man; adverse possession, 237.  
 Rent; action for rent received, 295 *n*.  
 Appropriation of, not an ouster, 235 *n*.  
 Replevin; confusion of goods, 58 *n*.  
 Residence, abbreviations in stating, 20.  
 Resignation, refusing to act is not, 21.  
 Resulting trusts; adverse possession, 243.  
 Retaking property; assault, 798 *n*.  
 Return of service, abbreviations in, 20.  
 Revenue law, abatement in, 14.  
 Appraisement, 635. [239.  
 Reversioner; adverse possession, 238.  
 Rights; abandonment, 3.  
 Absolute, 45 *n*.  
 Apportionment of, 633.  
 Right of way; adverse possession, 297.  
 Riot; unlawful assembly, 823 *n*.  
 Riparian rights; appurtenance, 644 *n*.  
 Rivers; accretion, 137.  
 Rupture, 88 *n*., 89 *n*.  
 Salary and allowance, 494 *n*.  
 Sales, agent, by, 355-360.  
 What constitutes an acceptance, 50 *n*.  
 Saloon, appendage to, 630 *n*.  
 Saw-mill; arson, 763 *n*.  
 School, disturbance of, 823 *n*.  
 School-house; arson, 763 *n*., 766 *n*.  
 Schoolmaster, assault by, 794, 804.  
 Seal; affidavits to jurat, 312.  
 Agency under, 337. [by parol, 444.  
 Agency, appointment under, revoked  
 Agency of corporation, 390.  
 Agent's contract for sale of land, 338 *n*.  
 Agents signing instruments under, 385 *et seq*. [under, 436.  
 Agency, when ratification must be  
 Alteration of instruments, adding a seal is, 508 *n*; defacing one is, 508 *n*.  
 Ancient documents, 566 *n*.  
 Arbitration, 650 *n*., 655.  
 Certificate of acknowledgment, 157.  
 Defacement, 505 *n*., 508 *n*.  
 Seaweed; accretion, 140.



- Secret instructions; agency, 354.  
 Secret trusts; adverse possession, 242 *n.*,  
     252 *n.*, 254 *n.*, 292.  
 Seduction; accord and satisfaction, 99 *n.*  
 "Select" equivalent to "appoint," 631 *n.*  
 Self-defence; apparent danger, 615 *n.*  
     Assault, 796.  
 Servants; agent's power to employ, 364.  
     Assault by neglect, 783.  
     Assault, 796.  
     Defence of master, 799.  
 Set-off; account stated, 122.  
     Admiralty practice, 203.  
     Agency, 384 *n.*, 425-7.  
     Appeal, in amount of, 620 *n.*  
 Sheep; injuries by dogs, 584.  
 Sheriff's deed; adverse possession, 237 *n.*  
 Sheriff's sale; agent cannot buy principal's property, 376 *n.*  
 Shingles; accession of materials, 53 *n.*  
     Confusion of goods, 58 *n.*  
 Shipping; abandonment of vessel, 2 *n.*  
     Agent's power of, 362.  
     Alien cannot be master, 464.  
     Allotment note, 492.  
     Appurtenances, 644 *n.*  
     "Arrival at port," 758 *n.*  
     "At and from a port," 891 *n.*  
     Ship's husband, 348.  
     Ship masters, 348.  
     "Voyage or voyages aforesaid," 320 *n.*  
 Sickness; act of God, 175.  
 Sidewalk; adverse possession, 258 *n.*  
 Signature; affidavit, 311.  
     Answer, 608.  
     Auctioneer's, 1002.  
     Blank, in, 519 *n.*  
     By agent, 385-393.  
     Certificate of acknowledgment, 156.  
     Torn from note, but replaced, 504 *n.*  
 Sketches; abstract of title, 47.  
 Slaves; accession, 51 *n.*  
 So as aforesaid, 320 *n.*  
 Social clubs; amotion, 560 *n.*, 561 *n.*  
 Societies; amotion, 560 *n.*, 561 *n.*  
     Assault during ceremonies, 781 *n.*  
     "Some," *See* "any," 611.  
 Spine, injury to, 88 *n.*  
 Spoilation, 497 *n.*  
 Stable; arson, 763 *n.*  
 Stack of hay; arson, 766 *n.*  
 Statute; validating acknowledgments, 161  
     Void, color of title, 278 *n.*  
 Statute of distributions, alien may take  
 Staves; accession, 58 *n.* [by, 460.  
 Steam boiler; explosion, 84.  
 Steam whistle; accident caused by, 84.  
 Stockholder; accord and satisfaction, 96 *n.*  
     Release of, 104 *n.*  
 Stolen goods; innocent custodian, 65 *n.*  
 Store-house; arson, 763 *n.*  
 Sugar-house; arson, 764 *n.*  
 Storm, loss by, 174, 177.  
 Stranded property; accretion, 141.  
 Streets; adverse possession, 297.  
     Power to "open, alter, abolish, etc.,"  
         496 *n.*  
     Railroad; adverse possession, 298 *n.*  
 Sub-agent, 394-5.  
 Subpoena, attorney's, 949 *n.*  
 Sub-purchaser; executing contract, 230 *n.*  
 Subscription to stock; agent, power of,  
     361.  
 Substitution, agent's power of, 369.  
 Sub-tenant; adverse possession, 240 *n.*  
 Succession; abstract of title, 46.  
 Suffer any act, 173 *n.*  
 Suicide, 92 *b.*  
 Suits at law, agent's powers as to, 367.  
 Summary application, 631 *n.*  
 Sunstroke; Accident insurance, 89 *n.*  
 Supervising power, 629 *n.*  
 Surety; alteration of instruments, 512 *n.*  
 Survey; record of, not color of title, 278 *n.*  
 Survivorship, presumption of; absence,  
     Sworn appraisers, 634 *n.* [42.  
 Taking, adverse possession, 269.  
 Tax certificate, not color of title, 278 *n.*  
 Tax deed, abbreviations in, 17.  
     Adverse possession, 284.  
     "Applied for," 631 *n.*  
 Tax sale, abstract of title, 48.  
 Tax title, adverse possession, 240 *n.*  
     Agent cannot acquire, 378 *n.*  
 Taxes, abandonment, 2 *n.*  
     Abstract of title, 48.  
     Adverse possession, 234 *n.*, 261, 284.  
     Aliens, 464.  
     Appraisement, 635.  
     Arrears, 719 *n.*  
     Dogs, 573 *n.*  
     List made by agent, 369 *n.*  
     Agent to pay, 340 *n.*  
 Telegraphs, agents, power of, 361.  
 Tenant by courtesy, aliens, 464. [240 *n.*  
 Tenant by sufferance, adverse possession,  
 Tenants in common, adverse possession,  
 Tender, accord and satisfaction, 95. [232.  
     "That," when "as" is equivalent to,  
         There afterwards, 324 *n.* [778.  
     Threat to accuse, 143 *n.*  
 Timber, accession, 58 *n.*  
 Time, after, 321.  
     Afternoon, 324.  
     Afterward, afterwards, 324.  
     Appeal, 621.  
     Apt time, 645.  
     Arbitration cases, 699.  
     Arrest, 723, 737 *n.*  
     Computation of adverse possession,  
         Time aforesaid, 320 *n.* [267 *n.*  
 Title, abstract of, 46  
     Recognition of higher, destroys adverse  
     To use an art, 775 *n.* [possession, 229.  
 Torts, abandonment for, 3.  
     Accord and satisfaction, 105.  
     Agent's, when cannot be ratified, 434.  
     Employe's agent's liability, 408.

## Torts—Continued.

- Agency, principal right of action, 428.
- Alien may prosecute for, 462-3.
- Assumpsit*, 888.
- Attachment will not lie for, 895.
- Jurisdiction of admiralty, 195.
- Trade mark, alien may have, 462.
- Trees, abatement of overhanging, 8 *n.*
  - Accession, 51 *n.*, 52 *n.*
  - Occasional cutting, does not give adverse possession, 258 *n.* [sion, 52 *n.*
  - Trespasser cannot acquire by access.
- Trespass, aider and abettor, 63 *n.*
  - Animals, 575 *n.*, 576, 578-580.
  - Children, 327.
  - Liability for animals, 580.
  - Accession, acquires no title, 53.
  - Accession, cannot claim by, 52 *n.*
  - Assault on, 798.
- Trusts, *see* Secret Trust; Resulting Trust, adverse possession, 241.
- Trustee, abstract of title, expenses of, 48.
- Alien can create, 463.
- Alien may be, 463.
- Confusion of money, 60.
- Fraud of agent of, 408.
- Ultra Vires*, corporations, 431 *n.*
- Umpire, arbitration, 689-691.
- Unlawful assembly, 823.
- Usage, agency, 354, 368, 371.
- Signature by agent, 390.
- User, adverse, 226.
- Usury, agent taking, 419 *n.*
  - Loan by agent, ratification, 435 *n.*
- Vendor and vendee, adverse possession.
- Vendor's lien, abstract of title, 48. [247.
- Vessels, accession of materials, 52 *n.*
  - Mortgage of, covers new sails, 59 *n.*
- Vigilance committee, assault, 782 *n.*
- Vis major*, confusion of goods by, 56.
- Vote, alien cannot, 464.
- Voter, exempt from arrest, 727.
- Voyage or voyages, aforesaid, 320 *n.*
- Wagers; *assumpsit*, 885.
- Wages; assignment, 828.
- War; agency not revoked by, 448.
- Warehouse; arson, 763 *n.*
- Warrant, arrest, 793 *n.*
- Warranty; agent by, 358.
- Waters. *See* Millpond.
  - Accident, 83.
  - Act of God, 174 *et seq.*
  - Adverse possession, 257 *n.*, 296.
  - Arm of the sea, 718.
  - Use of, does create prescription, 258 *n.*
- Wharfingers; *assumpsit*, 886.
- Wharfs; accretion, 136 *n.*
- Whatsoever else I have in the world, 488 *n.*
- When and so soon as she shall marry as aforesaid, 320 *n.*
- When not already done, 496 *n.*
- Where the cause of action arose, 717 *n.*
- Whiskey; confusion of goods, 58 *n.*
- Whole amount of capital stock, 563.
- Widow; cannot claim adversely under husband's executing contract, 229 *n.*
- Wild animals; abandonment, 6.
- Accident, 84.
- Wild land; adverse possession, 263.
- Wills, abbreviations in, 20.
- Abstract of title, 46, 47.
- Adopted child, 205-206.
- "All," construction of, 487 *et seq.*
- Alteration of, 497 *et seq.*, 522.
- Gives color of title, 277 *n.*
- Informal, color of title, 287 *n.*
- Interpretation of, 526, 535.
- Wind, loss by, 175, 177.
- "Within." *See* "At," 890.
- Witness; acknowledgment; proof by subscribing, 163.
- Ancient documents, 566.
- Arbitration, 679, 691.
- Arrest, exempt from, 724.
- Attorney as, 945 *n.*, 949 *n.*
- Defective certificate, 153.
- Wood-pile; adverse possession, 258 *n.*
- Words and phrases.
  - A.
    - A material alteration, 497 *n.*
    - A railroad leading to M, 1 *n.*
    - A room that is improved and suitable, A sea, 1 *n.* [1 *n.*
    - A year's rent, 1 *n.*
  - Abandoned, 2.
  - Abdicate, 21.
  - Abide, 27.
  - Abide by an award, 27 *n.*
  - Abide the decision, 27 *n.*
  - Abide the judgment of the court, 27 *n.*
  - Ability, 28.
  - Able, 28.
  - Able-bodied, 28.
  - About, 32.
  - Abscond, 34.
  - Absented, 44.
  - Absentee, 44.
  - Absolute, 44.
  - Absolute interest, 45. [church, 45 *n.*
  - Absolute purchase of any pew in
  - Absolute total loss, 45 *n.*, 185 *n.*
  - Absolutely, 45.
  - Absolutely entitled, 45 *n.*
  - Absolutely incompatible, 45 *n.*
  - Absolutely vested, 45.
  - Abstract, 45.
  - Abuse and misuse, 49.
  - Accept and receive, 50 *n.*
  - Accommodating terms, 94.
  - According, 107.
  - Account, 108.
  - Accountable, 135.
  - Accountable receipt, 135.
  - Accrue, 142.
  - Accrue and occur distinguished, 142 *n.*
  - Accrued, 142.
  - Accruing, 142.
  - Accruing or owing, 142 *n.*

Words and phrases—*Continued.*

Accumulated surplus, 142.  
 Accuse, accused, 143.  
 Accustomed, 143.  
 Accustomed way, 143 *n.*  
 Acquainted, 170.  
 Acquiesced, 171.  
 Acquired, 171.  
 Acquittal, 171.  
 Acquittance, 171.  
 Acquitted, 172.  
 Across, 172.  
 Act, 172. [173 *n.*  
 Act, or intention (insurance policy),  
 Act done (in lease), 173 *n.*  
 Act in all my business, 173 *n.*  
 Act in his official capacity, 173 *n.*  
 Act of Congress, 173 *n.*  
 Act of insolvency, 178.  
 Acting as attorney, 178.  
 Actions originally commenced, 717 *n.*  
 Actual, 184 *g.*  
 Actual and constructive fraud, 184 *g.*  
 Actual and continued change of possession, 184 *n.*  
 Actual cash payment, 185 *n.*  
 Actual cash value, 185 *n.* [187 *n.*  
 Actual control, care, or management,  
 Actual cash, 185 *n.*  
 Actual damages, 187 *n.*  
 Actual delivery, 184 *h.*  
 Actual determination, 186 *n.*  
 Actual market value, 186 *n.*  
 Actual military service, 186 *n.*  
 Actual notice, 184 *h.*  
 Actual occupation, 186 *n.*  
 Actual ouster, 186 *n.*  
 Actual possession, 184 *g.*  
 Actual residence, 186 *n.*  
 Actual seizure, 187 *n.*  
 Actual settler, 186 *n.*  
 Actual total loss, 185 *n.*  
 Actually employed, 187 *n.*  
 Actually occupied, 187 *n.*  
 Actually sold, 186 *n.*  
 Addition, additional, 187.  
 Addition, erected to a building, 187 *n.*  
 Adequate, 189.  
 Adequate cause, 189 *n.*  
 Adequate crossing, 189 *n.*  
 Adhering, 190.  
 Adjacent, 190.  
 Adjoining, 190 *n.*, 191.  
 Adjourn, adjournment, 192.  
 Adjudged, 192.  
 Adjudicate and settle all matters existing between the parties, 661 *n.*  
 Administration, 193.  
 Advances, 224.  
 Advice, 307.  
 Affected, 307.  
 Afore, 319.  
 Aforesaid, 319.  
 Aforethought, 321.

Words and phrases—*Continued.*

Afoul, 321.  
 After, 321.  
 After conviction, 322 *n.*  
 After judgment, 322 *n.*  
 After the date, 323 *n.*  
 After the fact committed, 322 *n.*  
 After the passing or passage, 324 *n.*  
 After the payment, 323 *n.*  
 After verdict, 322 *n.*  
 Afternoon, 324.  
 Afterward, afterwards, 324.  
 Afterwork, 323 *n.*  
 Against, 325.  
 Against her will, 325 *n.*  
 Against law, 326 *n.*  
 Against the form of the statute, 325 *n.*  
 Against the peace of the State, 325 *n.*  
 Aggregate, 449.  
 Aggregate payments, 449 *n.*  
 Aggrieved, 449.  
 Aggrieved person, 450.  
 Agister, 451.  
 Agreeable, 451.  
 Agreeably, 451.  
 Agreed, 451.  
 Agrees, 452.  
 Agriculture, 452.  
 Agricultural employment, 452 *n.*  
 Aid, 452.  
 Aid and abet, 454 *n.*  
 Aid or comfort, 453 *n.*  
 Air-tight, 454.  
 Alarm, 454.  
 Aleatory, 454.  
 Alienate, 466.  
 Alienated, 466.  
 Alienation, 466.  
 All, 486.  
 All. *See* Any, 611.  
 All and every my property, 488 *n.*  
 All business, whatever kind in dispute between parties, 661 *n.*  
 All causes of action, 661 *n.*  
 All demands, 489 *n.*, 661 *n.*  
 All faults, 489 *n.*  
 All fours, 489 *n.* [188 *n.*  
 All future erections and additions,  
 All goods and things of every kind and sort whatever, 488 *n.*  
 All his estate, 488 *n.*  
 All I am possessed of, 488 *n.*  
 All I am worth, 488 *n.*  
 All matters in dispute, 489 *n.*  
 All my accounts, 489 *n.*  
 All my estate, 487 *n.*, 488 *n.*  
 All my estate whatsoever, 488 *n.*  
 All my furniture and other household effects, 489 *n.*  
 All my landed estate, 488 *n.*  
 All my lands, 488 *n.*  
 All my notes, 489 *n.*  
 All my personal estate, 488 *n.*  
 All my plantation, 488 *n.*

Words and phrases—*Continued.*

All my property of every description,  
 All my real estate, 488 *n.* [489 *n.*  
 All my real and personal property,  
 All my real property, 488 *n.* [488 *n.*  
 All my temporal estate, 488 *n.*  
 All other articles perishable in their  
 nature, 776 *n.*  
 All rights that had accrued, 142 *n.*  
 All the estate, both real and personal,  
 All the money, 489 *n.* [488 *n.*  
 All the rest and residue, 489 *n.*  
 All unsettled accounts, 661 *n.*  
 Allot, 492 *n.*  
 "Allotted" in Indian treaty, 492 *n.*  
 Allow, 492.  
 Allow or permit, 492 *n.*  
 Allow to give, 493 *n.*  
 Allowance, 493.  
 Allowed and recorded, 493 *n.* [493 *n.*  
 Allowing all people to pass and repass,  
 Alms, 495.  
 Along, 495.  
 Along a river, 495 *n.*  
 Along a wall, 495 *n.*  
 Along the bank, 495 *n.*  
 Along the high-water mark, 495 *n.*  
 Along the river, 496 *n.*  
 Along the route, 496 *n.*  
 Along the shore, 496 *n.*  
 Along the street, 496 *n.*  
 Already, 496.  
 Already accrued, 496 *n.*  
 Already incurred, 496 *n.*  
 Also, 496.  
 Alter, 496.  
 Alter or amend, 496 *n.*  
 Alteration, 497 *n.*  
 Alteration of a road, 497 *n.*  
 Altering, 523.  
 Altering highways, 523 *n.*  
 Always, 523.  
 Amalgamate, amalgamation, 523.  
 Amercement, 555.  
 Amicable, 556.  
 Amicable action, 556 *n.*  
 Amicable compounders, 556 *n.*  
 Amicable lawsuit, 556 *n.*  
 Amicus curiæ, 556.  
 Among, 556.  
 Among valuable papers, 557 *n.*  
 Amount, 563.  
 Amount in controversy, 563.  
 Amusement, 564.  
 Analogous, 564.  
 Ancestor, 564.  
 Anchor, 564.  
 Anchor watch, 564 *n.*  
 Anchorage, 565 *n.*  
 And, 569.  
 And elsewhere, 570 *n.*  
 And, in addition to that, 570 *n.*  
 And so forth, 570 *n.*  
 Annexed, annexation, 590.

Words and phrases—*Continued.*

Annexed to the freehold, 591 *n.*  
 Announced, 591.  
 Annually appoint, 631 *n.*  
 Any, 611.  
 Any addition of building, 188 *n.*  
 Any article, 775 *n.*  
 Any creditor, 612 *n.*  
 Any other article or thing, 775 *n.*  
 Any person or persons, 612 *n.*  
 Any suit, 612 *n.*  
 Any thing, 612 *n.*  
 Apart, 612.  
 Apart from her husband, 612 *n.*  
 Apartment, 612.  
 Apex, 613.  
 Apparatus, 614.  
 Apparent, 615.  
 Apparent danger, 615 *n.*  
 Apparent easements, 615 *n.*  
 Apparent good order, 616 *n.*  
 Apparent intention, 615 *n.*  
 Apparent ownership, 615 *n.*  
 Apparent possession, 615 *n.*  
 Apparent signs, 615 *n.* [616 *n.*  
 Apparent violation of rule of court,  
 Appellate and supervisory power,  
 Appellate court, 629 *n.* [629 *n.*  
 Appellate jurisdiction, 629 *n.*  
 Appendage, 629.  
 Appendant, 630 *n.*  
 Appendant and Appurtenant distin-  
 Appertaining, 630. [guished, 630 *n.*  
 Applicable, 631.  
 Application, 631.  
 Application for continuance, 631 *n.*  
 Application for insurance policy, 631 *n.*  
 Applied, 631.  
 Applied for, 631 *n.*  
 Apply, 631.  
 Apply to the use, 631 *n.*  
 Appoint, 631.  
 Appraise, Appraisers, 634.  
 Appraised value, 634 *n.* [640.  
 Approve, Approver, Approvement,  
 Approved, 641 *n.*  
 Appurtenance, 641.  
 Appurtenant, 644.  
 Appurtenant and appendant distin-  
 Arbitrarily, 645. [guished, 630 *n.*  
 Ardent spirits, 716.  
 Are charged, 716.  
 Arise, 717.  
 Arise out of the same transaction,  
 Arising, 717 *n.* [717.  
 Arising during the course of the trial,  
 Arm, Armed, 717.  
 Aromatic, 719.  
 Arraignment, 719.  
 Arrangement, 719.  
 Arrears, 719.  
 Arrears of rent, 719 *n.*  
 Arrears of taxes, 719.  
 Arrival, 758.

Words and phrases—*Continued.*

Arrival at port, 758 *n.* [758 *n.*  
 Arrival within the limits of the U. S.,  
 Arrive and enter, 758 *n.*  
 Art, 775.  
 Article, Articles, 775.  
 Article forwarded, 775 *n.*  
 Article of food, 776 *n.*  
 Article of manufacture, 775 *n.*  
 Article or part of an article, 775 *n.*  
 Articles and necessities, 776 *n.*  
 Articles, goods or things, 776 *n.*  
 Articles of comfort and support, 776 *n.*  
 Articles of glass, 776 *n.* [776 *n.*  
 Articles of gold and silver manufacture,  
 Articles or objects, 775 *n.*  
 Artificer, 776.  
 As, 777.  
 As aforesaid, 319 *n.*, 777 *n.*  
 As far as possible, 778 *n.*  
 As follows, 777 *n.*  
 As for, 777 *n.*  
 As soon after as practicable, 777 *n.*  
 As soon as possible, 777 *n.*  
 As the crow flies, 777 *n.*  
 Assemble, 822.  
 Assembled, 823 *n.*  
 Assembly, 823.  
 Assent, 823.  
 Assize, Assizes, 881.  
 Associate, Associates, 881 *n.*  
 Association, 881.  
 At, 890 *et seq.*  
 At in a bill of exchange, 893.  
 At an office or banking house, 893.  
 At and from a port, 891 *n.*  
 At his death, 892.  
 At, in or near, 892.  
 At large, 891 *n.*  
 At law, 892.  
 At least, 892.  
 At merchant's risk, 893.  
 At once, 892.  
 At or near, 892.  
 At or upon, 892.  
 At sea, 893.  
 At that time, 893.  
 At the dwelling-house, 890 *n.*, 893.  
 At the end of one year, 893.  
 At the pit's mouth, 893.  
 At the terminus, 890 *n.*  
 At the trial, 892.  
 At the warehouse, 893.  
 At their death, 892.  
 At this date, 893.  
 Available, 1038.  
 Available capital, 1038.  
 Available for adjudication, 1038.  
 Available means, 1039.  
 Avails, 1039.  
 Avocation, 1039.  
 Back, 1040.  
 Bad, 1038.  
 Badge, 1041.

Words and phrases—*Continued.*

Before the argument, 716 *n.*  
 Brought up as aforesaid, 319 *n.*  
 Building, altering, repairing, or ornamenting, 523 *n.*  
 Cabin and other allowances, 493 *n.*  
 Cases arising in a justice's court, 717 *n.*  
 Cases arising under treaties, 717.  
 Cause of action shall accrue or shall have accrued, 142 *n.* [717 *n.*  
 Cause of action shall have arisen.  
 Charge and accuse, 143 *n.*  
 Child, 205 *n.*  
 Choose, equivalent to appoint, 631 *n.*  
 Cohabit, 211 *n.*  
 Contiguous, 190 *n.*, 191.  
 Convicted as aforesaid, 319 *n.*  
 Costs that have accrued, 142 *n.*  
 County aforesaid, 319 *n.*, 320 *n.*  
 Dangerous weapon, 816.  
 Dangers of the sea, 176 *n.*  
 Deadly weapon, 816. [631 *n.*  
 Designate, equivalent to appoint,  
 Desirable, 812 *n.*  
 Dismissed agreed, 451 *n.*  
 Distribute, 640.  
 Done, when not already, 496 *n.*  
 Due absolutely and not on a contingency, 45 *n.* [717 *n.*  
 Duties arising on goods imported,  
 Each, any construed s 611 *n.*  
 Either, 611 *n.*  
 Engaged in agriculture, 452 *n.*  
 Erection, alteration, or repair, 497 *n.*  
 Every. *See* Any, 611. [492 *n.*  
 Examine, settle and allow account,  
 Exclusive possession, 228 *n.*  
 Expenses appertaining to, 630 *n.*  
 Expenses of administration, 193 *n.*  
 Farmer, 776 *n.*  
 Forty days shall be allowed, 492 *n.*  
 Freight as agreed, 451 *n.*  
 From any of the places aforesaid, 320 *n.*  
 From the day and year aforesaid,  
 Giving a false alarm, 454 *n.* [320 *n.*  
 Her part aforesaid, 320 *n.*  
 I give all in Suffolk, 489 *n.*  
 I give all to my mother, 488 *n.*  
 "In." *See* "At," 890.  
 In all cases, 486 *n.*, 489 *n.*  
 In pursuance of the act, 173 *n.*  
 "Into." *See* "At," 890.  
 Is accused, 143 *n.*  
 It, 778.  
 It is agreed, 452 *n.*  
 It is mutually agreed, 452 *n.*  
 Judicial act, 173 *n.*  
 Living apart, 612 *n.*  
 Loaded arms, 718 *n.*  
 Lying at anchor, 565 *n.*  
 Malice aforethought, 321 *n.*  
 Material alteration, 497 *n.*  
 Merchant, 777 *n.*  
 Ministerial act, 173 *n.*

Words and phrases—*Continued.*

Mutilation or Spoliation, 497 *n.*  
 Navigable rivers, 139 *n.*  
 Near. *See* At, 890.  
 Necessary apparatus, 615 *n.*  
 Necessary appendages, 629 *n.*  
 "Nominate," equivalent to "appoint,"  
 Notorious possession, 228 *n.* [631 *n.*  
 "Occur" and "accrue" distinguished,  
 On all or either, 487 *n.* [142 *n.*  
 On application, 631 *n.*  
 Open possession, 228 *n.*  
 Or, 569.  
 Ornamenting, 523 *n.*  
 Other valuable articles, 776 *n.*  
 Otherwise acquired, 171 *n.*  
 Owing or accruing, 142 *n.*  
 Party aggrieved, 450 *n.*  
 Passing the act, 173 *n.*  
 Perils of the sea, 176 *n.*  
 Personally acquainted with, 171 *n.*  
 Public act, 173 *n.*  
 Public place, 318 *n.*  
 Purposes aforesaid, 320 *n.*  
 Railroad with its appendages, 630 *n.*  
 Receipt and acquittance, 172 *n.*  
 Refusal of an application, 631 *n.*  
 Repair, erection, or alteration, 497 *n.*

Words and phrases—*Continued.*

Repairing, 523 *n.*  
 Salary and allowance, 494 *n.*  
 "Select," equivalent to "appoint,"  
 Set fire, 760 *n.* [631 *n.*  
 So as aforesaid, 320 *n.*  
 "Some." *See* "Any," 611.  
 Suffer any act, 173 *n.*  
 Summary application, 631 *n.*  
 Supervisory power, 629 *n.*  
 Sworn appraisers, 634 *n.*  
 Taking out of the possession, 23.  
 That, 778.  
 There afterwards, 324 *n.*  
 Threat of accusation, 143 *n.*  
 Threat to accuse, 143 *n.*  
 Time aforesaid, 320 *n.*  
 To use an art, 775. [veyance, 92 *a.*  
 Travelling by public or private con-  
 Unlawful assembly, 823 *n.*  
 Voyage or voyages aforesaid, 320 *n.*  
 Whatsoever else I have in the world,  
 488 *n.* [aforesaid, 320 *n.*  
 When and so soon as she shall marry  
 When not already done, 496 *n.*  
 Where the cause of action arose, 717 *n.*  
 Whole amount of capital stock, 563.  
 "Within. *See* "At," 890.

Ex. G. A. A.

